

From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family

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The wrongful death statutes enacted in most states during the mid-nineteenth century have long represented a classic moment in the narrative of American legal history. Historians have not observed, however, that American wrongful death statutes amended the English act on which they were modeled to introduce a gender asymmetry peculiar to the United States. Led by New York, most American jurisdictions limited wrongful death actions to "the widow and next of kin" of the decedent, categories that did not include husbands of deceased wives. Thus, a wife could bring a wrongful death action for the death of her husband, but a husband could not bring a wrongful death action on his own behalf for the death of his wife.

The wrongful death statutes represent a heretofore unrecognized conjuncture of the beginnings of the modern law of torts with the nineteenth-century legal reconstruction of the family. The statutes moved accident litigation away from an eighteenth-century model of masters suing for loss of the services of a servant, slave, wife, or child, toward the now more familiar model of suits for loss of wages and support. Moreover, the gender asymmetry of the statutes embodied and reproduced a new nineteenth-century conception of the family in which men worked as free laborers and women were

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confined to relatively narrow domestic roles, removed from the market and dependent for their support on the wages of their husbands. Indeed, the statutes anticipated by over half a century the American welfare state's two-track approach to support for wage-earning men and dependent women.

Lawyers and historians have only recently begun to outline the ways in which law and the state have shaped the character of the modern family. The coverture system of the common law, of course, has long been a feature of histories of law and the family.¹ But a new and growing literature indicates that the law remained a pervasive force in the construction of the family even as American jurisdictions abandoned the coverture rules. Indeed, in myriad ways, American law contributed to the construction of a family wage system organized around the principle of male wage earners and dependent wives and children.

Scholars of the nineteenth century have focused on the ways in which family law and related rules of property, contract, tort, and crime gave shape to the structure of family life. Some have shown how courts limited the radical potential of the mid-nineteenth-century married women's property and earnings statutes (e.g., Basch 1982; Chused 1983; Siegel 1994a, 1994b; Stanley 1998), and demonstrated that courts sometimes protected a husband's right to physically chastise his wife long after the right had been formally abolished (Siegel 1996; see also Hartog 2000, 109–10). Others have described the reproduction of female dependency and male authority in nineteenth-century common law marriage doctrine (Dubler 1998, 2000; see also Grossberg 1985). In the law of torts, we have learned that the tort of seduction reflected and constructed female subordination to a male head of household by making available to fathers property rights in female household members that were unavailable to the women themselves (VanderVelde 1996; Larson 1993). Similarly, legal restrictions on abortion in the mid- and late-nineteenth century introduced new limitations on women's autonomy (Siegel 1992; Grossberg 1985; Reagan 1997). And where once it seemed that the rise of companionate marriage might have given married women more control over property, now it appears that even the equitable separate estate, which provided married women power over financial resources, often placed sharp limits on women's discretionary authority (Lebsock 1984; Salmon 1986). In sum, the legal status regime of the family changed dramatically over the course of the nineteenth century, but family

1. For a classic example, see Holdsworth (1923, 520–33). Interestingly, one thrust of the new literature is to complicate received wisdom about the coverture regime, in part by showing the extent to which married women carved out significant (if necessarily limited) room for resistance and agency within their marriages. See Hartog 1993, 2000.

law remained fundamentally a regime of status, though one that was often less readily apparent than the coverture system that preceded it.²

Recent scholarship on the legal construction of the family in the twentieth century has concentrated not just on family law per se, but also on the development of legal institutions for the compensation of dependence and disability. To be sure, a number of scholars have followed the story of nineteenth-century family law into the twentieth century (e.g., Cott 1998; Dubler 2000; Hartog 2000; Nelson 1996). Yet others have begun to look at the structure of the compensation systems that emerged in full force around the turn of the twentieth century. Accident litigation and accident insurance programs, for example, reproduced and reshaped gender and family roles in the face of new technologies that threatened traditional gender identities (Welke 1994; Witt forthcoming b; Zelizer 1985; see also Schlanger 1998). Moreover, a number of scholars have shown that early-twentieth-century American welfare state programs were organized around the norm of a “family wage” system based on female dependency and male wage earners. Indeed, an outpouring of recent scholarship argues that early welfare state programs such as the workmen’s compensation statutes and, later, the Social Security Act inscribed the family wage system into law by providing workingmen with claims of right on the state, while providing mothers with discretionary aid programs such as mothers’ pension statutes that reinforced dependency (see, e.g., Gordon 1993; Fineman 1995; Kessler-Harris 1995; Mink 1995; Nelson 1990; Pateman 1989; see also Skocpol 1992). The disparity between entitlements in workmen’s compensation and discretionary aid in mothers’ pensions thus put in place—to use Barbara Nelson’s phrase—a “two-channel” welfare state that continues to this day to make very different judgments about the social value of women’s and men’s work (Nelson 1990).

This essay pursues the legal construction of the family wage system of female dependency and male wage earning back into the mid-nineteenth-century law of compensation for disability and dependency. In particular, the essay takes a fresh look at the mid-nineteenth-century wrongful death statutes—long viewed as classic set pieces in the drama of American legal history (see Friedman 1985; Malone 1965a)—and describes heretofore unnoticed links between a famous moment in the early history of the law of torts and the making of the nineteenth-century family.

In the eighteenth-century common law, personal injury and wrongful death litigation were exceedingly uncommon. To the extent such litigation existed at all, it was typically characterized by the early-modern action for

2. Reva Siegel (1996) identifies this dynamic of maintaining status regimes over time as “preservation through transformation.” See also Minow 1985 (describing nineteenth-century family law as an arena in which “women with opportunities to become rights-bearing individuals often resisted the supposed historical trajectory toward individual rights by reinterpreting their roles as family members with ongoing connections and obligations”).

loss of services, brought by the male head of household to recover damages for injuries to his wife, children, or servants. In the 1840s and 50s, however, American wrongful death statutes ushered in a paradigm shift in the common law of accidents. The wrongful death statutes transformed personal injury litigation in three critical ways. First, and most obviously, they opened up a new cause of action in tort in those jurisdictions that had refused to recognize actions for wrongful death at common law. As we shall see, many American states allowed plaintiffs to sue for wrongful death even before the enactment of the wrongful death statutes. In this sense, the new statutory cause of action for wrongful death was not as dramatic a development in American law as it might seem. Nonetheless, the wrongful death statutes clarified a complicated doctrinal problem in many jurisdictions and opened the door to new torts claims in others.

Second, and more important for our purposes, the wrongful death statutes ushered in a recognizably modern approach to personal injury litigation. The statutes provided not for the early-modern action by male heads of households for loss of services, but rather for a new action by dependent wives and their families for loss of support.

Third, and finally, by authorizing actions for loss of support rather than actions for loss of services, mid-nineteenth-century legislatures gave legal sanction to a new free labor model of the family. The critical feature of the wrongful death statutes—a feature wholly unrecognized in the existing torts literature—is that the statutes limited the protections of tort law to families organized around male wage earners. Actions arising out of injuries to female wage earners and their families, by contrast, faced serious obstacles. The majority of American wrongful death statutes restricted the statutory cause of action exclusively to widows and next of kin, usually dependent children. Husbands, as we shall see, lacked standing in these states to sue under the statutes for damages arising out of the death of their wives, and often the death of their children as well. Moreover, after the enactment of wrongful death statutes, those state courts that had recognized common law wrongful death actions quickly abolished the common law action so as to avoid problems of double recovery. The enactment of the wrongful death statutes thus left many widowers entirely without a remedy for the wrongful death of their wives and children. As a result, in many jurisdictions the statutes not only initiated a new model of personal injury litigation, but also precluded resort by the male head of household to the traditional action for loss of services. Indeed, even in the minority of jurisdictions in which husbands had statutory standing, wrongful death legislation made it exceedingly difficult to bring actions for the death of a married woman. The statutes limited recovery to pecuniary damages. But because women's work was usually unpaid, husbands seeking to recover damages for the deaths of

their wives faced a host of legal challenges in establishing the quantum of their losses.³

The wrongful death statutes thus reproduced a still-emerging model of the free labor family. In place of an eighteenth-century model of household production in which men and women shared overlapping duties, early- and mid-nineteenth-century Americans developed a new ideal of middle-class family life that sharply distinguished between men's and women's work. In turn, the nineteenth-century reconceptualization of work gave rise to new ideal types for gender roles: Manliness vested in the workingman's capacity to preserve the tranquility of the separate domestic sphere by means of work outside the home. Womanliness, by contrast, was characterized by domestic work and the inculcation of republican virtues in children.

None of these changes were inevitable. Wage laborers, male and female, contested the emergence of the new wage labor economy in a variety of ways. Similarly, early factory owners experimented with alternatives to male wage labor such as the family labor system or the almost exclusive use of female mill hands so as to allow the male workforce to remain in agricultural work.⁴ The law's asymmetrical construction of wrongful death liability rules in the 1840s thus intervened in a moment of multiple possibilities for the shape of the family and economic production.

Ultimately, then, this essay argues that the two-tiered gender structure that scholars have identified in the twentieth-century American welfare state has its roots in the nineteenth-century beginnings of the American law of torts. Part 1 of the essay describes the *ancien regime* of actions by heads of households for loss of services and the early modern household economy in which it was based. Part 2 turns to the early- and mid-nineteenth-century transformation of economic and family life, and in particular the separation of free wage labor from the household. Part 3 then describes the history of the wrongful death statutes and lays out the argument for the claim that the histories of torts and the modern family are interwoven in generally unappreciated ways.

In the conclusion, I suggest further that this story has important implications for our understanding of both the history of tort law and the ways in which law has given shape to the structure of American family life. In particular, I hope to persuade the reader that the structure of the modern family gave shape to the basic contours of American tort law, and in turn, that tort law has played a significant role in the construction of foundational ideas about gender and the family.

3. Malone's classic article (1965a) noted the gender asymmetry of the wrongful death statutes in a footnote, but only in passing (1074 n.153).

4. This point and others made here in the introduction are elaborated with citations in parts 1 and 2 below.

I. PERSONAL INJURY LAW AND THE HOUSEHOLD IN THE EIGHTEENTH CENTURY

A. The Action for Loss of Services

Historians have only recently come to understand that personal injury litigation was virtually unknown prior to the nineteenth century. To be sure, there are a smattering of old common law cases on liability for accidental injury to persons.⁵ Many of these cases have become the chestnuts of standard histories of tort law (see, e.g., Holmes 1881; Gregory 1951) and are readily familiar to first-year law students (e.g., Epstein 2000). Yet such cases are more remarkable for their uniqueness in the early case law, and for their anticipation of the issues that preoccupy modern torts lawyers, than for their representativeness of the pre-nineteenth-century law of accidents.

Eighteenth-century common law lawyers and judges had little occasion to discuss legal actions by the victims of accidental personal injury. William Blackstone's monumental four-volume treatise on the English common law, for example, published between 1765 and 1769, was largely concerned with the technicalities of the law of real property. Blackstone's treatment of "private wrongs," as close as he came to our modern concept of torts, was cursory and wholly unconcerned with the substantive law of torts that would come to preoccupy twentieth-century lawyers.⁶

Indeed, Robert Rabin has argued persuasively that before the mid-nineteenth century, the law of injury to the person was generally a regime of no liability or, at most, a regime characterized by pockets of liability based on the status relationship of the parties (Rabin 1981; see also Schwartz 1981, 1989). Similarly, A. W. B. Simpson and Richard Epstein have described early common law work-accident cases not as limiting liability for employers, but rather as first steps toward the rise of tort law as a compensation mechanism (Simpson 1996; Epstein 1982). It thus appears that the well-known mid-nineteenth-century cases in the United States and in England—cases such as *Priestley v. Fowler*⁷ and *Farwell v. Boston & Worcester Rail Road*⁸—represent the first wave of tort suits by employees against employers in common law history. Indeed, even as late as the 1870s, remarkably few personal injury suits were filed in American courts. In New York

5. These include *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) (shooting mishap); *Dickenson v. Watson*, 84 Eng. Rep. 1218 (K.B. 1682) (same); *Gibbons v. Pepper*, 91 Eng. Rep. 922 (K.B. 1695) (highway accident); cf. *Scott v. Shepherd*, 96 Eng. Rep. 525 (1773) (action brought against defendant for intentional but causally remote injury where defendant threw explosive squib into a market and it was passed among several intervening hands before injuring the plaintiff).

6. See especially volume two of Blackstone's *Commentaries on the Laws of England* (1765–69) (4 vols.).

7. 150 Eng. Rep. 1030 (Ex. 1837).

8. 45 Mass. (4 Met.) 49 (1842).

City, for example, Randolph Bergstrom's survey of the state court docket finds almost no personal injury litigation at all in 1870, but sharp increases over the next 40 years (Bergstrom 1992, 20). Similarly, Robert Silverman (1981) has found spectacular increases in the number of personal injury suit filings only in the late-nineteenth century.

There was, however, an important category of eighteenth- and early-nineteenth-century cases that arose out of personal injuries. Personal injuries, after all, caused damages not just to the immediate victim of bodily harm, but also to anyone who possessed rights in the life and services of the victim. Thus, when eighteenth-century common lawyers dealt with actions for damages from personal injury, they were likely to be concerned with actions by masters for the loss of services caused by an injury to a member of the master's household.

The action for loss of services had its roots in the fourteenth- and fifteenth-century common law. In the years following the devastation of the Black Death in the 1340s, England experienced severe labor shortages. Accordingly, Parliament and the King's courts developed a battery of mechanisms for protecting masters' rights in the services of their servants (Jones 1958, 40–45; Steinfeld 1991). Masters had a common law action for the wrongful retainer of a servant by another master. Similarly, they had an action against any third party who procured a servant to quit during the term of his service. For our purposes, the most important aspect of masters' rights in the service of their servants was the right to an action in trespass *per quod servitium amisit* against third parties who intentionally injured a servant and thereby caused the master to lose the servant's services. At the end of the medieval period, it was unclear whether this cause of action extended to negligently inflicted injuries as well as intentionally inflicted injuries (Jones 1958, 44–45). In 1614, however, King's Bench held that the cause of action against those intentionally injuring a servant to the detriment of the master also applied to instances of the negligent injuring of a servant.⁹

Late into the eighteenth century, the action for loss of services remained the paradigmatic common law personal injury case. Though Blackstone, as we have seen, had very little to say about what we would think of today as the substantive law of torts, he explained that "every man" has a "property" right "in the service of his domestics" (Blackstone 1765–69, 1:*429). Thus, a "master may bring an action against any man for beating or maiming his servant" to recover damages for the "loss of his service."¹⁰ A similar property right existed between a head of household and his wife; just

9. This was the case of *Everard v. Hopkins*, 2 Bulstrode 332 (K.B. 1614).

10. The action for loss of services because of personal injury to a servant was closely tied to the tort of enticement, in which a third party could be sued for luring away the servants of a master (see Blackstone 1765, 1:*429).

as the “seduction” of a man’s wife created a cause of action by the husband against the seducer, so injury to a wife gave rise to an action in the name of the husband for loss of consortium—an action of trespass *per quod consortium amisit* (Blackstone 1765–69, 1:*443).

Similarly, Tapping Reeve, the leading American authority on the law of domestic relations at the turn of the nineteenth century and author of *The Law of Baron and Femme*, observed that in the event of injury to a wife “the husband may bring an action in his own name, to recover damages which he sustained, by reason of the battery” (1816, 63). By the same token, a father possessed a cause of action “when his minor child is beaten” and the father “has lost the services of that child, or has been put to expense by means thereof” (Reeve 1816, 201).¹¹

If husbands, fathers, and masters had a cause of action in the injury of their wives, children, and servants, however, the latter had no cause of action in injuries to the former. Blackstone noted that in cases of injury to domestic relations, only “the wrong done to the superior of the parties related” was cognizable at common law. The “loss of the inferior by such injuries” was “totally unregarded.” The rationale was simple:

the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. . . . And so, the servant whose master is disabled . . . suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure. (Blackstone 1765–69, 3:*142–43)

Husbands, fathers, and masters, then, possessed a right to damages for loss of services in the event of injury to a member of the household. But the inferior members of the household possessed no parallel right of action for loss of support in the event of injury to the head of the household.

B. Loss of Services and the Early-Modern Model of Household Production

The asymmetry of the action for loss of services reflected and reaffirmed the power of patriarchal heads of household in early modern England

11. Indeed, looking back into the history of personal injury litigation, one mid-nineteenth-century court observed that “numerous instances are to be found in the common law books of actions by masters for personal injuries to servants.” *Hall v. Nashville & Chattanooga R.R.*, 1 Thompson Tenn. Cases 204, 205 (Tenn. 1859).

and its American colonies. In this sense, the asymmetry of the action for loss of services was characteristic of the coverture regime that established male authority in the household over wives, servants, and children. Indeed in a household economy, wives, servants, and children possessed closely intertwined and often overlapping roles.¹² Husbands expected wives and children to render service to the household, and they acquired a familial authority and governance over even those household servants not related by blood.

This household structure remained the central mode of economic life in the United States into the early nineteenth century. In Oneida, New York, for example, Mary Ryan has shown that between 1780 and 1820 “the household was the principal, almost solitary, place of production within the township” (1981, 25). Down the road in Rochester, Paul Johnson found that artisanal production was a household affair into the 1820s. “Work, leisure, and domestic life were acted out in the same place and by the same people,” and “relations between masters and men transferred without a break from the workshop to the fireside.” Indeed, the word “family” itself, “with all that it implied, stretched to include co-resident employees” (Johnson 1978, 43–46). Similarly, in Lynn, Massachusetts, shoe production as late as the years leading up to the Civil War took place within a family economy in which the household—made up of a man and his wife, children, journeymen workers, and apprentices—formed in Alan Dawley’s words the “basic unit of production” (Dawley 1976, 17–18; see also Faler 1981, 22–27). In rural Massachusetts, production took place under the direct control of households into the 1820s (Clark 1990); servants (indentured and otherwise) were “treated as part of their masters’ families” (Prude 1983, 13). Household production may have been somewhat less prevalent in the most heavily urban areas of the North; by 1800 it appears that few journeymen craftsmen in New York City lived with their employers.¹³ Still, in the North as a whole, household production persisted well into the nineteenth century as the dominant mode of economic activity. And in the South, of course, the household model of production dominated throughout the antebellum period (Bardaglio 1995; Fox-Genovese 1988; McCurry 1995; Stevenson 1996). Indeed, in the South, masters brought actions for loss of services to recover damages for injuries to their slaves up until emancipation (Morris 1996, 147–58; Tushnet 1981; Finkelman 1987; Note 1986).

12. Thus Blackstone called the relations of husband and wife, master and servant, and parent and child the “three great relations in private life” (Blackstone 1765–69, 1:*422).

13. Sean Wilentz (1984) contends that few artisans lived with their employers at the close of the eighteenth century. Even in New York City, however, the distinction between wage and domestic labor was blurred by a household model of production in which wages were often paid in the form of room and board (see Blackmar 1989, 51–60).

In the household economy, in which individual personalities were subordinated to the collective unit, there was little room for litigation over personal injuries—or torts of any kind, for that matter—unless the injury resulted from the collision of one household with another. In the nineteenth and twentieth centuries, work was the activity most likely to be associated with litigated accidents. Moreover, in the aggregate, work accidents were the most costly accidents in terms of economic loss (Hensler et al. 1991, 28, 105; Hoffman 1915). In the household economy of the turn of the nineteenth century, however, work accidents would have led to legal actions not between employer and employee, but rather between the head of the household and its members. Yet as Max Weber observed, the household economy implied a “household communism,” a “solidarity in dealing with the outside and consumption of every day goods within” (Weber 1978, 1:359). In cases of injuries occurring within the scope of household production there was thus little point in litigating. And in any event, common law intra-familial tort immunities barred most such actions (see McCurdy 1930). Moreover, in cases between households, the action for loss of services to the household defended the household’s interests. The male head functioned as the representative of the household to the outside world, representing the interests of wives, children, and servants in personal injury cases.¹⁴

II. THE TRANSFORMATION OF THE HOUSEHOLD AND THE BEGINNINGS OF MODERN TORT LAW

A. From Household Production to Wage Labor

In theory, the eighteenth-century organization of production, like early-modern political thought (see Pateman 1988), centered around patriarchal heads of household. In practice, however, the household economies of the eighteenth century effectively blurred the boundaries between men’s and women’s work. Husbands’ and wives’ labor in and around the home frequently overlapped. White women, for example, often participated in petty home manufacturing alongside men.¹⁵ Moreover, especially in the

14. Though this representation model describes the formal Blackstonian law of personal injury, work by historians such as Cornelia Dayton (1995) indicates that women often participated in legal forums in the seventeenth and eighteenth centuries, though apparently not in personal injury cases.

15. Thus, for example, Benjamin Franklin noted in his autobiography that his wife assisted “cheerfully in my business, folding and stitching pamphlets, tending shop, purchasing old linen rags for the papermakers, etc., etc.” (Franklin 1962, 80). Claudia Goldin’s reconstruction of married women’s participation in their husbands’ trades in Philadelphia reveals women acting as “turner, tallow chandler, shoemaker, pewterer, cooper, tinsmith, glass engraver, sieve maker, and ironmonger” (1990, 47–48); see also Blewett 1988, 3–19 (describ-

American colonies, white women developed informal networks of exchange that brought them into public life (see, e.g., Dayton 1995; Ulrich 1982).

The eighteenth-century world of overlapping spheres of men's and women's work was, of course, hardly a golden age for women.¹⁶ Colonial governments resisted female landownership, even for unmarried women (Kessler-Harris 1982, 11–12). And women who became too economically independent frequently found themselves the objects of community attack. Women of independent economic status in New England, for example, were disproportionately subject to witchcraft accusation (Karlsen 1987). Nonetheless, it remains the case that the rigid distinctions between women's work and men's labor that would characterize nineteenth-century ideas about gender and work were considerably less apparent in the eighteenth-century colonies.

In the 1820s and 1830s, however, the shape of economic life in the North underwent a critical shift. Where eighteenth-century production had been organized around a family or household model, new mills and factory production, especially in New England and New York, separated production from the sphere of domestic life (Clark 1990; Johnson 1978; Prude 1983). The handicraft workshops along the Erie Canal, for example, were less and less likely to be physically located within the household property of the shopkeeper. Accordingly, the journeymen and laborers who worked in the shops moved out of their employers' homes and into working-class neighborhoods of their own (Johnson 1978, 43). In Western Massachusetts along the Connecticut River valley, writes Christopher Clark (1990, 141), "most households abandoned textile production" between 1815 and 1830. And in Philadelphia, new "centralized workshops" replaced smaller, household-based textile manufacturing (Shelton 1986, 26–53).

B. Female Domesticity and Manly Free Labor in the Wage Economy

The reorganization of work in the early nineteenth century had important implications for the structure of family life and gender roles. Where work in the eighteenth century had involved rough-and-ready overlap between men's and women's work, the segregation of the home from economic production sharply differentiated white men's wage labor from middle-class white women's unpaid domestic work (Boydston 1990; Ryan 1981). The result, in the now-classic phrase, was a separate-spheres system

ing the "different yet interlocking endeavors" of men and women in eighteenth-century shoe-making families).

16. For a discussion of the "golden age" myth, see Fox and Hesse-Biber 1984, 15–16. Blewett (1988, 3–19) emphasizes the construction of the sexual division of labor from within the overlapping work of men and women in the eighteenth century.

in which Americans came to define gender roles in opposition to one another. The role of white men was reconceived as that of the workingman who worked outside the home to provide support for dependent women and children (Foner 1970, 11–39). The role of white women, on the other hand, was reconceptualized as centered around exclusively domestic chores and child rearing (see, e.g., Welter 1966; Sklar 1973). In the process, many women found nineteenth-century gender roles increasingly circumscribed by the bounds of the domestic sphere.¹⁷ Where once women had been expected to engage in networks of exchange and handicraft production, now women were to be set aside from the vagaries of commerce and the market as the tranquil sources of the independent republican virtues that they were to inculcate in their children (Kerber 1980; Lewis 1987; Ashworth 1992, 195–98; Stanley 1996).

The transformation of women's roles was much clearer in its ideal type than in practice, of course.¹⁸ Much of the best recent scholarship on nineteenth-century America has sought to show that the categories of separate-spheres ideology often failed to characterize the life experiences of American women (e.g., Kerber 1988). Black women's lives only rarely resembled the ideal of nineteenth-century domesticity. As slaves in both North and South, black women were actively involved in the processes of agricultural production.¹⁹ And after emancipation, black women worked for wages as domestics and laundresses in the urban South and as agricultural laborers in rural areas (Hunter 1997, 21–73). Similarly, many working-class white women, including many who were married, were compelled by circumstance to find paid work outside the home, domestic ideologies to the contrary notwithstanding (see, e.g., Pleck 1979). In New York City during the first half of the nineteenth century, for example, single women living on their own, adult daughters still living with their parents, and women supporting children and heading households of their own often worked in industries

17. The classic work here is Cott 1977; see also Dayton 1995; Ulrich 1982, 1990. It should be noted that this did not always redound to the detriment of particular women. Christopher Clark (1990, 139–50), for example, persuasively argues that in Western Massachusetts the end of household production was in large part the result of women's efforts to reduce their mounting workload. Gerda Lerner's article "The Lady and the Mill Girl" (1969) famously argues that the new nineteenth-century economy limited the autonomy of middle-class women ("ladies") but created room for new assertions of freedom by many unmarried working class women ("mill girls").

18. On ideal types as tools of social interpretation, see Weber 1978, 1:20 ("[I]t is probably seldom if ever that a real phenomenon can be found which corresponds exactly to one of these ideally constructed pure types.").

19. One central goal of former slaves in the first years of Reconstruction, however, was the removal of women from agricultural work and the establishment of independent households (see Litwack 1979; Edwards 1997).

such as the clothing trade and domestic service (Stansell 1982, 105–29, 155–68).²⁰

Indeed, the broad sweep of change in economic and family life obscures the fact that in the shift away from household economies, Americans experimented with a number of alternative models for the organization of families and economic activity. The separate-spheres ideology that emerged as a dominant ideal by the middle of the nineteenth century, in other words, was hardly inevitable or overdetermined. Early industrial entrepreneurs, for example, mediated between the household approach to economic production, on the one hand, and the wage-labor approach, on the other, by hiring households rather than individual wage earners. Mill owners like Samuel Slater in Rhode Island and John Price Crozer of southeastern Pennsylvania engaged entire families and provided housing for them (Prude 1983, 43, 87; Wallace 1978). Other mill owners adopted an approach that involved hiring unmarried female mill hands rather than male workers. Such mill owners, in places like Lowell and Waltham, Massachusetts, sought to recreate the forms of the household economy by standing in the place of their mill hands' fathers or male heads of household (Murphy 1992, 20; Dalzell 1987, 115–29; Dublin 1979, 75–77).

Many working men and women also advanced alternatives to the emerging model of wage earning and family structure by contesting the new wage economy. Journeymen workers sought to form collective associations and early trades unions to maintain the independence of their households against the increasing prevalence of wage labor (Wilentz 1984; Rock 1979; Laurie 1980; Montgomery 1993). Female mill hands contested their employers' assertions of quasi-parental authority (Murphy 1992; Dublin 1979; Blewett 1988). Freedwomen and freedmen claimed rights to independence and property ownership as against the resumption of agricultural work on plantation-owners' land (Saville 1994; Foner 1983). And women working in domestic settings began to assert that their unpaid labor in the household gave them claims on the wages of their husbands (Siegel 1994a).

Yet despite the presence of these alternative visions for family and economic life, the now-familiar story of the white middle-class nineteenth-century family is that ultimately the separate-spheres or "family wage" system of wage-earning men and dependent women became the dominant model in American life.²¹ Male wage earning became the predominant model for work outside the household (Montgomery 1967), and married women's participation in the paid labor force, despite ups and downs, did not increase

20. As Stansell observes, social circumstances often compelled such women into wage labor. But many found in wage labor a liberating autonomy from the control of patriarchal households (1982, 125–29).

21. See, e.g., Stanley 1996. This hardly means that late-nineteenth-century Americans ceased to call for and advocate alternative structures for economic and home life. For one radically collective alternative, see Gilman 1898.

significantly until World War II (Goldin 1990, 11–13; Kessler-Harris 1982). What is less familiar, however, is the way in which early American personal injury law embodied and reproduced the shift from household economies to separate spheres. It is to the connections between the emergence of tort law and the transformation of the family that we now turn.

C. Wage Labor Production and the Rise of Personal Injury Litigation

As the structure of economic life changed, the trickle of personal injury cases became a steady stream. In 1837, the English Court of Exchequer decided the first common law employers' liability case, *Priestley v. Fowler*.²² The *Priestley* case founded the much-reviled doctrines of assumption of risk and common employment (more commonly known in the United States as the fellow-servant rule) that sharply limited employers' liability for the injuries of their employees.²³ But as A. W. B. Simpson has recently pointed out, the case also anticipated the beginnings of a new function for the law of noncontractual wrongs: the compensation of the victims of accidental injury. As Simpson observes, and as Richard Epstein noted 20 years ago, the fact that *Priestley* is the first known common law action by an employee against his employer for personal injuries arising out of the employment relation suggests that before the 1830s the common law recognized no such action at all (Simpson 1996, 100–1, 113–29; Epstein 1982).

In the same year as the *Priestley* decision in the Court of Exchequer, employers' liability litigation arrived in the United States. A Massachusetts railway employee, Gilham Barnes, brought an action against his employer for injuries suffered because of a faulty wheel in the case of *Barnes v. Boston & Worcester Railroad*; in part because of a favorable initial ruling, Barnes recovered \$3,000 in an arbitration proceeding.²⁴ In 1841, the South Carolina Supreme Court decided a similar railroad employee action in *Murray v. South Carolina R.R.*,²⁵ which followed the doctrines established in *Priestley*. Finally, in 1842, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court set the American law of employers' liability firmly in place with his widely influential opinion in the case of *Farwell v. Boston & Worcester Railroad*, cementing the doctrines of assumption of risk and fellow servant.²⁶

The singular feature of the new personal injury litigation was that it no longer took the form of the eighteenth-century action for loss of services. In

22. 150 Eng. Rep. 1030 (Exch. 1837).

23. See *Priestley*, 150 Eng. Rep. at 1032–33.

24. *Barnes* is an unreported decision. We know of *Barnes* thanks to Christopher Tomlins's prodigious research efforts (see Tomlins 1993, 301–3, 331–33, 341–47).

25. 26 S.C.L. (1 McMul.) 385 (1841).

26. See *Farwell*, 45 Mass. (4 Met.) 49, 56–57 (1842).

Priestley, Barnes, Murray, and Farwell, wage earners with households of their own, independent of the firm for which they worked, brought actions to recover for injuries to themselves—lost earning power, medical costs, and pain and suffering.²⁷ The emerging wage system and the new structure of domestic life were at the heart of this new form of tort litigation. The free wage laborer distinguished himself from the domestic household laborer of times past and the unfree laborer of the American South by virtue of his capacity to support an independent domestic sphere of his own (Stanley 1998). The free laborer incapacitated by injury thus needed some means to maintain the stream of wages in order to support his household. The tort suit offered one mechanism for compensating the loss of wages.

III. THE WRONGFUL DEATH STATUTES: THE BEGINNINGS OF MODERN TORT LAW AND THE CONSTRUCTION OF THE NINETEENTH-CENTURY FAMILY

A. The Common Law Action for Wrongful Death

Because of the relatively primitive state of medical care, a far higher proportion of accidents ended in death in the mid-nineteenth century than today, or even than in the late nineteenth century. In the 1880s, germ theory revolutionized the practice of medicine and dramatically improved a serious accident victim's chances of living. But until then, accidents were much more likely to involve death than they are today (Rosenberg 1987, 122–65; Rosen 1983; King 1991, 171–81).

Death cases, however, faced special obstacles at common law, where a cause of action in trespass expired with its holder's death. The early common law treated all homicides as felonies, and since the property of a felon was forfeited to the Crown, there was usually little point in a civil action to recover damages (Malone 1965a, 1052–62). By the eighteenth century, Blackstone wrote that because homicide was a public wrong, the private action against a victim's killer was "swallowed up" in the criminal action against him (Blackstone 1765–69, 4:*6). And in the leading case of *Baker v. Bolton*, Lord Ellenborough drew on both these strands in the common law to hold that "in a Civil Court, the death of a human being could not be complained of as an injury."²⁸

Early American cases, by contrast, often allowed common law actions for wrongful death (Malone 1965a, 1062–67). Some early American courts

27. The *Priestley* case presents an interesting transitional case. It was brought by the 19-year-old victim's father, but apparently only because of the victim's minority. Loss of services was not at issue (Simpson 1996).

28. See *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808).

appear not to have been aware of the English rule at all. Thus, in New York the state's highest court allowed an action for wrongful death in 1838 without even discussing the contrary English authority.²⁹ Other courts expressly disowned the English rule. In *Plummer v. Webb*, for example, the Federal District Court for the District of Maine criticized the English approach, ruling that the death of an injury victim might extinguish the claim of the decedent's estate for damages (the survival action), but that it did not extinguish the claim of a third party with an interest in the services of the decedent, such as a master or a father (the wrongful death action).³⁰ The Supreme Court of Georgia agreed and allowed common law actions for wrongful death by third parties with an interest in the life of the decedent, but only in cases of deaths not arising out of a felony homicide.³¹ Similarly, the Supreme Court of Connecticut allowed a broad class of common law wrongful death claims by limiting the English rule to cases of murder.³²

For our purposes, however, the difference between the English and the American rules is less important than the fact that all the reported, early common law wrongful death suits were actions for loss of services. In other words, what is remarkable about early actions to recover damages for wrongful death is that whether or not such actions were allowed, and regardless of who won such cases, they all revolved around masters, husbands, or fathers suing to recover damages for loss of the services of a servant, wife, or minor child. Thus, in 1607 the Court of the Exchequer held in the case of *Higgins v. Butcher* that a husband could not recover for loss of services arising out of an assault on his wife causing her death.³³ And in *Baker v. Bolton*, decided in 1808, Lord Ellenborough followed *Higgins* to hold that a husband could not recover from a third party for services lost as a result of the death of his wife in a carriage accident.³⁴

Early American cases allowing wrongful death suits also featured male heads of households suing for damages for loss of the services of a household member. Thus, in *Cross v. Guthery*, decided in Connecticut in 1794, a husband sued for services lost as a result of the incompetent and fatal amputation of his wife's breast.³⁵ In *Plummer v. Webb*, a father sued the master of a

29. See *Ford v. Monroe*, 20 Wend. 210, 211 (N.Y. 1838).

30. See *Plummer v. Webb*, 19 F. Cas. 894, 896 (D. Maine 1825) (holding that death of plaintiff's minor son did not extinguish the claim of a party with an interest in the services of the son but denying the father's claim on the ground that in this case the services of the son belonged to the master to whom the father had released the right to the son's services); see also *Cutting v. Seabury*, 6 F. Cas. 1083, 1085 (D. Mass. 1860) (declining to follow *Baker v. Bolton*); *The Sea Gull*, 21 F. Cas. 909, 910 (D. Md. 1865) (same); *Lynch v. Davis*, 12 How. Pr. 323, 325 (Sup. Ct. Rensselaer Cty. 1855) (suggesting that there was a common law action for wrongful death).

31. See *Shields v. Yonge*, 15 Ga. 349 (1854).

32. See *Cross v. Guthery*, 2 Root 90, 91 (Conn. 1794).

33. 80 Eng. Rep. 61, Yelv. 89 (1607); see also Holdsworth (1916, 432).

34. 170 Eng. Rep. 1033 (K.B. 1808).

35. 2 Root 90, 90 (Conn. 1794).

vessel for loss of the services of his son;³⁶ in *Ford v. Monroe*, a father sued for loss of the services of his ten-year-old son as the result of a carriage accident;³⁷ in *Shields v. Yonge*, a father brought an action for loss of the services of his minor son as a result of a fatal railroad accident;³⁸ and in *Lynch v. Davis*, as in *Cross v. Guthery*, a husband brought an action against a physician for the death of his wife by reason of the physician's negligent care.³⁹

B. The Early Wrongful Death Statutes: Massachusetts, England, and New York

Although most American jurisdictions allowed wrongful death actions, some courts chose to follow the English rule.⁴⁰ And by midcentury, the question of whether there was a common law action for wrongful death became hotly contested and heavily litigated even in jurisdictions allowing such actions.⁴¹ Such uncertainty as to the law of wrongful death prompted legislators to take action, especially in light of the increased frequency of accidents in the early industrial economy.⁴² Thus, beginning in 1840 American state legislatures enacted wrongful death statutes to allow recovery in the event of an accident victim's death. In enacting the wrongful death statutes, however, American legislatures inverted the traditional structure of common law personal injury litigation. Where earlier common law wrongful death cases had been about loss of services, the new wrongful death statutes aimed not to restore services lost by the head of household, but rather to support widows and minor children dependent on the earnings of a deceased husband or father.

Massachusetts enacted the first wrongful death statute in 1840, creating a quasi-criminal remedy in cases of passengers killed on common carriers, including railroads, steamboats, and stage coaches. "An Act Concerning Passenger Carriers" provided that in the event of deaths to passengers resulting from the "negligence or carelessness" of common carriers, or the "gross negligence or carelessness of their servants or agents," such common carriers

36. 19 F. Cas. 891, 891 (C.C.D. Me. 1827).

37. 20 Wend. 210, 210 (N.Y. 1838).

38. 15 Ga. 649 (Ga. 1854).

39. 12 How. Pr. 323, 323–24 (N.Y. Sup. Ct., Rensselaer Cty. 1855).

40. See, e.g., *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848); *Eden v. Lexington & F.R.R.*, 53 Ky. (14 B. Mon.) 204 (1853); *Worley v. Cincinnati H. & D.R.R.*, 1 Handy 481 (Oh. Super. Ct. 1855); *Green v. Hudson River R.R.*, 28 Barb. 9, 15–21 (N.Y. Sup. Ct. 1859), *aff'd*, 2 Abb. App. Dec. 277 (N.Y. 1866); *Hall v. Nashville & Chattanooga R.R.*, 1 Thompson Tenn. Cas. 204, 208–9 (Tenn. 1859); *Long v. Morrison*, 14 Ind. 595 (1860); *Hyatt v. Adams*, 16 Mich. 180, 191–200 (1867).

41. See, e.g., *Plummer v. Webb*, 19 F. Cas. 894, 896 (D. Maine 1825); *Shields v. Yonge*, 15 Ga. 349 (1854).

42. Shearman and Redfield (1869, § 291 at 333) traced the wrongful death statutes to the increased frequency of fatal accidents in the 1840s and 1850s; see also *Needham v. Grand Trunk Ry.*, 38 Vt. 294 (1865).

would be "liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment." Moreover, the act further provided that such fines were exclusively "for the benefit of his [the deceased's] widow and heirs."⁴³

Six years later in England, Parliament enacted a wrongful death statute known as Lord Campbell's Act. The statute authorized actions for wrongful death where the death of a person was "caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action." Such actions, the statute further provided, "shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused," and were to be brought "by and in the name of the executor or administrator of the person deceased."⁴⁴

New York's statute, enacted quickly on the heels of Lord Campbell's Act, redirected American wrongful death legislation away from the Massachusetts quasi-criminal approach toward the private tort action approach embodied in the English act. Indeed, New York copied the model of Lord Campbell's Act virtually word for word.⁴⁵ Actions for "wrongful act,

43. An Act Concerning Passenger Carriers, 1840 Mass. Acts chap. 80, at 224.

44. (1846) 9 & 10 Vict., chap. 93, §§ 1-2 (Eng.). The full text of the English act was as follows:

§ 1. Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person, who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

§ 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties, in such shares as the jury, by their verdict, shall find and direct.

45. An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default, 1847 N.Y. Laws chap. 450, § 1, at 575. The full text of the act was as follows:

§ 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

§ 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to

neglect, or default” under the New York statute were private actions in tort, brought by the “personal representative” of the deceased (usually the executor of his estate), rather than public proceedings as in Massachusetts. Moreover, unlike the Massachusetts statute of 1840, New York’s wrongful death act provided that all injuries resulting in death—not merely passenger deaths—were actionable on any grounds that would have been available to the victim “if death had not ensued.”⁴⁶

But legislators in New York made one striking amendment to the English wrongful death statute.⁴⁷ Lord Campbell’s Act had provided for “such damages as [the jury] may think proportioned to the injury,” payable, as we have seen, to the “wife, husband, parent, and child” of the deceased.⁴⁸ The New York legislation, by contrast, dropped husbands from the list of potential beneficiaries of damages in wrongful death actions. Damages were limited to the “*pecuniary injury* resulting from such death to the *wife and next of kin*” of the deceased person. Moreover, such damages were “for the exclusive benefit of the *widow and next of kin*.”⁴⁹

It is difficult to tell precisely why New York legislators chose to amend the text of the English act to exclude husbands from bringing statutory actions and to limit damages to pecuniary injuries. The legislative history is exceedingly sparse, and it contains no reference to the decision (see, e.g., Legislature of New York, 1847c, 1847b, 1847a). There is one clue in the legislative history, however. On 10 December 1847, the New York State Assembly struck from the draft legislation a provision “giving creditors of the deceased, the benefit of the act” (see Legislature of New York 1847b). The design of the statute, then, was to support families after the death of a provider. If widowers—and, by extension, deceased wives—were nowhere to be found in the statute, it was because the New York legislature was writing into law the new mid-nineteenth-century ideology of dependent women and wage-earning men.

the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: provided that every such action shall be commenced within two years after the death of such deceased person.

§ 3. This act shall take effect immediately.

46. 1847 N.Y. Laws chap. 450, § 1, at 575–76.

47. There were two additional minor amendments. First, rather than jury apportionment of damages among the statutorily authorized beneficiaries “in such shares as [they], by their verdict, shall find and direct,” the New York statute required distribution to the statutorily authorized beneficiaries “in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate” (1847 N.Y. Laws, chap. 450, § 2, at 576). Second, the New York statute made explicit that it applied to defendant corporations as well as to defendant natural persons (see 1847 N.Y. Laws chap. 450, § 1, at 575).

48. (1846) 9 & 10 Vict., chap. 93, § 2 (Eng.).

49. 1847 N.Y. Laws chap. 450, § 2, at 576 (emphases added).

C. The Spread of American Wrongful Death Statutes and the Preclusion of Widower Suits for the Wrongful Death of Their Wives

By 1869, 29 of the 37 states had enacted wrongful death statutes (Shearman and Redfield 1869, 335–44).⁵⁰ Northern states were far more likely than Southern states to enact wrongful death statutes. Six of the eight states without wrongful death statutes in 1869 were Southern or border states: Arkansas, Delaware, Florida, South Carolina, Virginia, and West Virginia. Among Northern and Western states, only Nebraska and Nevada lacked wrongful death legislation. The New England states of Connecticut, Maine, New Hampshire, and Rhode Island followed Massachusetts and limited their statutes to the wrongful death of passengers on common carriers.⁵¹ A few other states limited their statutes to railroad or common carrier accidents but extended protection to persons other than passengers.⁵² Most, however, followed New York's approach and enacted generalized wrongful death statutes applying to deaths from any source.⁵³

Moreover, the majority of wrongful death statutes followed New York's lead and excised the word "husband" from statutory provisions modeled on Lord Campbell's Act, thus limiting the payment of benefits in death actions to the widow and next of kin of the deceased.⁵⁴ Widows and next of kin

50. I distinguish here between wrongful death statutes that gave family members negligence claims for the pecuniary damages they suffered as a result of the death of a husband or father, on the one hand, and the survival statutes that allowed the decedent's own claims for damages to survive her death. On the survival statutes—a wide array of which were enacted by states beginning in the early years of the nineteenth century—see Malone 1965b.

51. See 1853 Conn. Pub. Acts chap. 74 § 8, at 135; 1855 Maine Acts, chap. 161 § 1, at 160; 1840 Mass. Acts, chap. 80, at 224; 1850 N.H. Laws, chap. 953, § 7, at 928; 1855 R.I. Acts 13 § 8, at 15.

52. See Ind. Rev. Stat. 1852, chap. 88, § 3, at 426; 1859–60 Tex. Gen. Laws, chap. 35, at 32–33.

53. See, e.g., Ala. Code §§ 1938–39 (1852); Cal. Gen. Stat. 1862, chap. 330, § 1, at 447; 1853 Ill. Gen. Laws 97; 1859 Kan. Gen. Laws chap. 1, at 2; 1848 Mich. Acts, no. 38 § 2, at 31; Minn. Gen. Stat. chap. 77 § 2, at 545–46 (1866); Miss. Rev. Code § 48, at 486 (1857); Mo. Gen. Stat. chap. 51, at 647–48 (1856); 1848 N.J. Acts 151 § 2; 1854–55 N.C. Pub. Laws chap. 39, at 97–98; 1850–51 Ohio Laws 117; Or. Code § 367, at 97 (1862); 1851–52 Tenn. Acts chap. 17, at 23; 1849 Vt. Acts no. 8 §§ 2–3, at 7; 1857 Wis. Gen. Acts chap. 71, at 85; see also Shearman and Redfield 1869, 335–44.

54. Thirteen states followed the English rather than the New York statute and designated husband as possible beneficiaries: Connecticut, see 1853 Conn. Pub. Acts, chap. 74 § 8, at 135 (husbands included); Georgia, see 1849–50 Ga. Acts 272; Indiana, see Ind. Rev. Stat. 1852, chap. 88 § 3, at 426 (husbands); Iowa, see Iowa Rev. Code chap. 161 §§ 4110–11, at 705 (1860) (no limitation to widow and next of kin); Maryland, see 1852 Md. Laws, chap. 299, at 37; Mississippi, see Miss. Rev. Code § 48, at 486 (1857) (husbands); Missouri, see Mo. Gen. Stat., chap. 51, at 647–48 (1856) (husbands); Oregon, see Or. Code 1862, § 367, at 97 (no limitation to widow and next of kin); Pennsylvania, see 1855 Pa. Laws no. 323, at 309 (husbands); Rhode Island, see 1855 R.I. Acts 13 § 8, at 15; Texas, see 1859–60 Tex. Gen. Laws chap. 35, at 32–33 (husbands); Wisconsin, see 1857 Wis. Gen. Acts ch. 71, at 85 (husbands). Kentucky enacted two wrongful death statutes, one general statute that did not restrict actions to widows and next of kin (see 1854 Ky. Laws, chap. 964, at 175), and one

were exclusive beneficiaries under the general wrongful death statutes of Alabama, California, Illinois, Kansas, Louisiana, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Tennessee, and Vermont.⁵⁵ Likewise, the specifically targeted wrongful death statutes of Maine, Massachusetts, and New Hampshire limited the class of beneficiaries to widows, dependent children, and next of kin.⁵⁶ In all, by 1869 16 of the 29 states with wrongful death legislation limited recovery to widows and next of kin. And in the next decade and a half, Arkansas, Montana, Nebraska, and Oklahoma followed suit, enacting statutes that precluded wrongful death actions by widowers on their own behalf.⁵⁷

1. *Statutory Exclusion of Husbands' Suits for the Death of their Wives*

By restricting benefits to "widow and next of kin," the majority of American wrongful death statutes barred actions by husbands to recover damages for the death of their wives.⁵⁸ The term "next of kin" was (and is) a term of art in the law of intestate distributions. Husbands were not "next of kin" at common law; indeed, neither spouse was "next of kin" to the other for intestacy purposes.⁵⁹ Thus, widowers lacked standing under the statutes

statute for dueling that limited actions for wrongful death by dueling to widows and minor children of the deceased (see 1 Ky. Rev. Stat., chap. 31 § 1, at 429 [1860]).

55. See Ala. Code §§ 1938–39 (1852); 1862 Cal. Stat., chap. 330 § 3, at 447–48 (1862); 1853 Ill. Gen. Laws 97; 1859 Kan. Gen. Laws, chap. 1, at 2; 1855 La. Acts no. 223, at 270–71 (limiting recovery to "the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them"); 1848 Mich. Acts no. 38 § 2, at 31; Minn. Rev. Stat. chap. 77 § 2, at 546 (1866); 1848 N.J. Acts 151 § 2; 1847 N.Y. Laws, chap. 450, § 2, at 576; 1854–55 N.C. Pub. Laws, chap. 39, at 97–98; 1850–51 Ohio Laws 117; 1851–52 Tenn. Acts chap. 17, at 23; 1849 Vt. Acts no. 8 §§ 2–3, at 7.

56. See 1855 Maine Acts chap. 161 § 1, at 160; 1840 Mass. Acts chap. 80, at 224; 1850 N.H. Laws chap. 953, § 7, at 928. Interestingly, Canadian wrongful death statutes retained the English act's reference to husbands. See New Brunswick Consolidated Stat., chap. 86 §§ 1–7 (1890); Nova Scotia Revised Stat., chap. 116, at 884 (1890); Ontario Rev. Stat., chap. 135 (1887).

57. See 1883 Ark. Acts, act 53, at 75–76; 1871–72 Mont. Laws, chap. 61, at 561; Neb. Gen. Stat., chap. 15, at 272–73 (1873) (enacted 25 Feb. 1873); Ok. Stat., chap. 70, art. 4 §§ 4336, 4338 (1890).

58. As Francis B. Tiffany wrote (1893, § 80, 114–15): "[U]nless the deceased left surviving some one of the persons entitled to the benefit of the action, no cause of action accrues."

59. See *Townsend v. Radcliffe*, 44 Ill. 446, 450 (1867) ("[A husband] cannot claim to be next of kin to his wife, for in no sense is he such, nor is the wife next of kin to the husband."); *Dickins v. New York Cent. R.R.*, 23 N.Y. 158, 159–60 (N.Y. 1861) ("Husband and wife, as such, are not of kin to each other in a legal sense, and the husband cannot take under a settlement limited to the next of kin of his wife."); *Warren v. Englehart*, 13 N.W. 401, 13 Neb. 283 (Neb. 1887) (husband not next of kin for purposes of wrongful death act); *Lucas v. New York Cent. R.R.*, 21 Barb. 245, 247 (N.Y. Sup. Ct., Monroe Cty. 1855) ("The husband is not next of kin to the wife, nor she to him. . . . If there is neither wife nor next of kin, there can be no such pecuniary damages to be recovered, as the act contemplates."); see also Thompson 1886, 2:1276–77 (same); Hawkins 1885.

to sue for loss of services in the event of their wives' deaths.⁶⁰ In New Jersey, the Supreme Court ruled that the state's wrongful death statute, unlike Lord Campbell's Act, gave a cause of action "in favor of the widow, but not in favor of the husband."⁶¹ In Georgia, the Supreme Court concluded that "if the General Assembly had intended to have altered the common law so as to give to the husband a right of action to recover damages for the homicide of his wife, they would have so declared when providing for the particular class of persons specified in the [Act]."⁶² Likewise, the Federal Circuit Court of Appeals for the Eighth Circuit observed that "a widower is not one of the beneficiaries of the statute, and it is a fatal error to allow a recovery of damages for losses he sustains by the death of his wife."⁶³ Indeed, some courts held that fathers lacked standing under the statutes to bring actions for the death of a minor child. In Massachusetts, for example, courts held that no statutory remedy existed for deaths of persons leaving "neither widow nor children."⁶⁴

A widower could bring an action under the statutes as the administrator of his wife's estate, on behalf of her next of kin.⁶⁵ Damages in these cases were distributed to the next of kin and remedied not injuries to the husband for loss of services but rather pecuniary injuries to next of kin.⁶⁶ But here again, actions for the deaths of married women faced significant obstacles. In particular, until the enactment of married women's earning statutes, mar-

60. See *Lucas v. N.Y. Central R.R.*, 21 Barb. 245, 246-47 (N.Y. Sup. Ct., Monroe Cty. 1855); *Worley v. Cincinnati Hamilton & Dayton R.R.*, 1 Handy 481, 490-91 (Ohio Super. Ct., Cincinnati 1855); *Dickins v. N.Y. Central R.R.*, 23 N.Y. 158 (1861); *Kramer v. San Francisco Market Street R.R.*, 25 Cal. 434 (1864); *Georgia Railroad & Banking Co. v. Wynn*, 42 Ga. 331 (1871); *Grosso v. Delaware, Lackawanna & Western R.R.*, 13 A. 233, 235-36, 50 N.J.L. 317, 320-23 (1888); *Shearman and Redfield* (1869, § 297, at 346); *Thompson* (1886, 2:1227). But see *Trafford v. Adams Express*, 76 Tenn. (8 Lea) 96 (1881) (holding that the term "widow" in the Tennessee statute embraced widowers as well as widows); *Steel v. Kurtz*, 28 Oh. St. 191 (Oh. 1875) (husband is next of kin for purposes of wrongful death statute in Ohio).

61. *Grosso v. Delaware Lackawanna & Western R.R.*, 13 A. 233, 236, 50 N.J.L. 317, 323 (N.J. 1888).

62. *Georgia R.R. & Banking Co. v. Wynn*, 42 Ga. 331, 333 (1871).

63. *Western Union Tel. v. McGill*, 57 F. 699, 703 (8th Cir. 1893). By the same token, fathers were held to be unable under the statutes to sue for the loss of services from the deaths of their children.

64. See *Commonwealth v. Boston & Albany R.R.*, 121 Mass. 36, 38 (1876). See, e.g., *Hackett v. Louisville & St. Louis & Texas Pacific Ry.*, 24 S.W. 871, 872, 95 Ky. 236, 238 (Ky. 1894) ("[A]ppellant as father, is the only heir of the child, and he sues as administrator of the child, which is, in effect, suing as administrator, for himself as heir. But according to the rule . . . the appellant is not one of the heirs that are entitled to recover under the statute, the children and widow of the deceased being the only persons that are entitled to recover."). Illinois courts adopted a broad reading of their "next of kin" provision to allow actions by a father for damages resulting from the death of a son (see *City of Chicago v. Major*, 18 Ill. 349 [1857]). New York flirted with a similar reading (see *Oldfield v. N.Y. & Harlem R.R.*, 14 N.Y. 310 [1856]; *Quin v. Moore*, 15 N.Y. 432 [1857]; *Keller v. N.Y. Central R.R.*, 24 How. Pr. 172, 175 [N.Y. 1861]), but quickly abandoned it in *Dickins*, 23 N.Y. at 159-60.

65. See, e.g., *Green v. Hudson River R.R.*, 16 How. Pr. 263, 264-65 (N.Y. Sup. Ct. Oneida Cty. 1858); *Dickins v. New York Cent. R.R.*, 23 N.Y. 158, 160 (N.Y. 1861).

66. See *Green*, 16 How. Pr. at 264-65.

ried women's earnings belonged to their husbands. The only way the statutory beneficiary next of kin such as the deceased woman's children would benefit from these earnings, as the New York courts observed, would be through inheritance from their father. Such damages, however, were "too remote" to be within the meaning of the statute.⁶⁷

Consider, for example, the case of Angeline Tilley, killed in a railroad collision on her way to New York City. Angeline lived in Grafton, New York, in Rensselaer County with her husband, William (a carpenter), and their five children, ranging in age from 8-year-old Laura to 22-year-old and recently married Elizabeth Ann. As William took pains to make clear at the trial of the wrongful death action he brought after her death, Angeline had led a virtuous domestic life. She had "attended to her family duties, superintended the household affairs, nursed her children, made their clothing, educated them, and instructed the daughters in domestic affairs." Starting in the Spring of 1857, however, in addition to the care of her domestic affairs, Angeline started a "shirt and bosom making business." Angeline regularly traveled from Grafton to New York, made contracts with design houses in the city, and received materials from them to sew the shirts. Back in Grafton, she apparently employed over a dozen employees, making between 70 and 80 dozen shirts per month on 15 sewing machines before personally delivering them back to the city. But Angeline's January 1860 trip to New York ended in disaster when a train operated by the Hudson River Railroad Company crashed into the rear of the train on which she was riding, "bruising, wounding and injuring" her "so that in consequence of such bruises, wounds and injury . . . she remained and continued in great pain and suffering for about seven days, and then died."⁶⁸

If William Tilley had been killed on the railroad, the Tilley family might well have recovered under New York's wrongful death statute. Angeline, as William's widow, would have been within the class of exclusive beneficiaries designated by the act, and she would have been able to recover pecuniary damages from the death, including the loss of support from William's lost carpentry income. But when Angeline died, of course, she left no widow, only a widower. As widower, William was not within the class of exclusive beneficiaries under the New York statute, and thus he could not bring an action on his own behalf. Instead, William brought an action on behalf of Angeline's next of kin, their five children, to recover the damages to their interest in the earnings from Angeline's shirt-making business. But even here the statute precluded recovery. For under the law of husband and wife, Angeline's earnings became the property of her husband immediately upon being realized. "[T]he only way in which the children could be benefitted by them," observed the court, "would be by succeeding to them

67. *Tilley v. Hudson River R.R.*, 24 N.Y. 471, 474 (N.Y. Sup. Ct. 1862).

68. See *Tilley*, 24 N.Y. at 471-72.

as the next of kin of their father, in the event of his continuing to own them, of their surviving him, and of his dying intestate." Such damages to the children were simply too remote and contingent to come within "the meaning of the statute."⁶⁹

In response to the statutory limits on wrongful death actions, some husbands and fathers sought to frame their claims not as statutory actions but rather as common law wrongful death actions.⁷⁰ But not only did the wrongful death statutes exclude husbands as beneficiaries in many instances, they also led to the abolition of the common law action for wrongful death upon which widowers had been able to rely in some jurisdictions prior to the enactment of the statutes. Courts interpreted the omission of husbands from the statutes not as recognition that the husband's cause of action in the death of his wife existed at common law, but rather as evidence of "a legislative intent to provide redress for those who, in general, had been dependent upon the deceased."⁷¹ Moreover, as Wex Malone observed long ago in his classic article on the origins of the wrongful death statutes, the coexistence of common law and statutory wrongful death actions threatened to create complicated problems of double recovery (Malone 1965a). Accordingly, courts simply abandoned the common law action for wrongful death in favor of the statutory action.⁷²

By abolishing the common law action for wrongful death in favor of the statutory action states whose statutory actions did not authorize recovery to husbands and fathers eliminated altogether husbands' ability to recover for the wrongful death of their wives and children. In New York, for example, courts reversed themselves⁷³ and ruled that husbands had no common law action for recovering damages such as loss of services for the death of their wives.⁷⁴ Thus, when Charles Green, for example, brought suit against the Hudson River Railroad in 1858 for his wife's death, his common

69. See *Tilley*, 24 N.Y. at 474. The court remanded the *Tilley* case for a new trial, holding that although damages to sentiment, affections, and companionship were not available under the statute, the case could proceed on a theory that Angelina's death had deprived the children of "nurture, and of intellectual and moral and physical training, and of such instruction as can only proceed from a mother." As we shall see below, however, most courts—including courts in New York—ruled that in such cases only nominal damages were available.

70. See, e.g., *Hyatt v. Adams*, 16 Mich. 180, 184 (1867) (observing in the case of a husband suing a physician for medical malpractice causing the death of his wife that the husband's "action is not brought under the statute, but at common law"); *Green v. Hudson River R.R.*, 28 Barb. 9, 15–21 (N.Y. Sup. Ct. 1859), *aff'd*, 2 Abb. App. Dec. 277 (N.Y. 1866).

71. *Grosso v. Delaware Lackawanna & Western R.R.*, 13 A. 233, 236, 50 N.J.L. 317, 323 (N.J. 1888); see also *Georgia R.R. & Banking Co. v. Wynn*, 42 Ga. 331, 333 (1871).

72. In the words of one nineteenth-century treatise writer, "later American cases" unambiguously "yield[ed] to the authority of *Baker v. Bolton*" (Tiffany 1893, § 11, at 12).

73. See *Ford v. Monroe*, 20 Wend. 210, 210 (N.Y. 1838) (upholding common law wrongful death action brought by father of deceased child).

74. See *Lucas v. New York Cent. R.R.*, 21 Barb. 245 (N.Y. Sup. Ct., Monroe Cty. 1855); *Green v. Hudson River R.R.*, 28 Barb. 9, 21–22 (N.Y. Sup. Ct., Oneida Cty. 1858).

law claim for loss of services was rejected,⁷⁵ and he was compelled to go forward only on a statutory claim in which he sought damages for his mother-in-law as his wife's next of kin.⁷⁶ Similarly, when the Tennessee courts ruled in 1859 that there was no common law action for wrongful death in Tennessee, they held that the father of a deceased son could have no remedy at all; the father had no common law action because the death of his son extinguished his common law claim for loss of services, and he had no statutory action because he was not "the widow or next of kin" of his son and thus had no standing under the statute to bring a claim.⁷⁷

2. Further Impediments to Recovery for Women's Deaths: Damages under the Wrongful Death Statutes

Even in those jurisdictions whose wrongful death statutes ostensibly authorized recovery of damages by husbands for their wives' wrongful deaths, statutory damages provisions posed additional obstacles to recovery in the event a wife died. American wrongful death statutes limited damages exclusively to pecuniary injuries. Indeed, the paradigmatic ground for recovery under the statutes was "the injury to a widow for the loss of her husband's care, protection, support, and assistance" (Tiffany 1893, § 153 at 178). Financial dependence on the decedent was not necessary in all jurisdictions to sustain an action under the statutes.⁷⁸ But absent such financial dependence, only nominal damages were available to the plaintiffs.⁷⁹ Loss of support, therefore, was the standard measure of damages under the statutes.⁸⁰

75. See *Green v. Hudson River R.R. Co.*, 28 Barb. 9, 21–22 (N.Y. Sup. Ct., Oneida Cty. 1858).

76. See *Green v. Hudson River R.R.*, 16 How. Pr. 263, 264–65 (N.Y. Sup. Ct., Oneida Cty. 1858).

77. See *Hall v. Nashville & Chattanooga R.R.*, 1 Thompson Tenn. Cas. 204, 208–9 (Tenn. 1859) ("[T]his alteration in our law can be of no service to the plaintiff, since he is not the personal representative of his deceased son"); see also *Eden v. Lexington & Frankfort R.R.*, 53 Ky. 204 (1853) (holding that absent a statutory action a husband had no remedy for pecuniary injuries resulting from the death of his wife).

78. See *City of Chicago v. Major*, 18 Ill. 349 (1857); *Oldfield v. N.Y. & Harlem R.R.*, 14 N.Y. 310 (1856); *Quin v. Moore*, 15 N.Y. 432 (1857); *Keller v. N.Y. Central R.R.*, 24 How. Pr. 172, 175 (N.Y. 1861); Shearman and Redfield (1869, § 299 at 347). But see *Hurst v. Detroit City Ry.*, 48 N.W. 44, 46–47, 84 Mich. 539, 545–48 (Mich. 1891) (holding nominal damages unavailable under the Michigan wrongful death statute).

79. See *City of Chicago v. Major*, 18 Ill. 349 (1857); *Oldfield v. N.Y. & Harlem R.R.*, 14 N.Y. 310 (1856); *Quin v. Moore*, 15 N.Y. 432 (1857); *Keller v. N.Y. Central R.R.*, 24 How. Pr. 172, 175 (N.Y. 1861); see also Shearman and Redfield 1869, § 299 at 347.

80. For cases on this point, see *Pennsylvania R.R. v. Ogier*, 35 Penn. St. 60, 72 (Pa. 1860) (limiting damages to "what the plaintiff has lost in a pecuniary point of view, by the death of her husband, namely a reasonable support and subsistence for herself"); *Needham v. Grand Trunk Ry.*, 38 Vt. 294 (1865); *Chicago & Alton R.R. v. Shannon*, 43 Ill. 338 (1867). The loss-of-support rationale was also embodied in the statutory limitations on damages to \$5,000. See, e.g., 1849 N.Y. Laws 388, § 1. But see *Goodsell v. Hartford & New Haven R.R.*, 33 Conn. 51 (Conn. 1865) (allowing damages for deceased's pain and suffering on the ground

In a world in which married women did little paid work, however, the pecuniary damage rule placed sharp limits on the recovery that might be had for the death of a wife and mother. In states allowing recovery by husbands, damages were available for the pecuniary injury of loss of domestic services due to the death of a wife (Tiffany 1893, § 163 at 194). But establishing the value of lost domestic services was substantially more difficult than proving and measuring the value of lost earnings outside the home.⁸¹

For one thing, cases brought in the event of a wife's death did not benefit from the presumptions of pecuniary loss that courts developed in applying the statutes. The law of wrongful death presumed pecuniary damages from the withdrawal of support by a deceased husband to his widow and children.⁸² Widows were thus not required to show the current wages of a deceased husband, or establish his life expectancy prior to his death, in order to support an award of damages under the statute. Evidence of the decedent's age, habits, health, and employment adequately supported damage awards of the statutory maximum.⁸³ By contrast, actions arising out of women's deaths—or indeed, in any case involving an unconventional support arrangement in which there was no legal obligation of support—courts required specific tabulations of the wages, earnings, and contributions of the decedent.⁸⁴

In addition, simply measuring the quantum of damages from the death of a wife was exceedingly difficult. Defendants argued that husbands suffered

that if the question of damages "turn[s] on the extent of [the plaintiffs'] dependence on [the deceased]," the courts would be required to inquire into "unseemly" issues such as "his interest and generosity . . . the amount of his earnings, the probable length of his life, [and] his character and conduct"; *Keller v. N.Y. Central R.R.*, 17 How. Pr. 102, 104–5 (N.Y. Sup. Ct. 1858), *aff'd*, 24 How. Pr. 172, 175 (N.Y. 1861), *implicitly overruled by Dickins v. N.Y. Central R.R.*, 23 N.Y. 158 (1861). In Illinois, the phrase "next of kin" in the wrongful death statute included all those dependent on the deceased, without regard to "degrees of consanguinity" (*Chicago & Alton R.R. v. Shannon*, 43 Ill. at 345); see also Thompson (1886, 2:1277); *Quincy Coal v. Hood*, 77 Ill. 68 (1875).

81. This remains true for tort actions today: estimates of pecuniary damages caused by injuries to women continue to be plagued by difficulties caused by women's lower earning potential and domestic, unpaid work. See, e.g., *Feldman v. Allegheny Airlines*, 524 F.2d 384, 388–89 (2d Cir. 1975) (reversing and remanding for recalculation of damages a trial court's award of lost earning capacity that had valued lost years of raising children as equal to lost years of wage earning on a theory of opportunity costs); see also Chamallas 1998, 480–89. On similar problems in measuring the value of children's lives, see Zelizer 1985.

82. See *Armour v. Czischki*, 59 Ill. App. 17, 20 (Ill. App. 1895) (noting presumption of statutory injury for minor children in deaths of their parents, for parents in the deaths of their minor children, and for widows in the deaths of their husbands); see also *Murdock v. Brown*, 16 Mo. App. 548 (Mo. App. 1885) (presumption of pecuniary damages in actions by widows); *Dickens v. N.Y. Cent. R.R.*, 1 Abb. Dec. 504 (N.Y. 1864) (same).

83. See *Baltimore & Ohio R.R. v. State*, 24 Md. 271, 280 (1866).

84. See, e.g., *Armour*, 59 Ill. at 22 (reducing jury award to single unmarried woman's parents from \$4,140 to \$1,500); *Hodnett v. Boston & Albany R.R.*, 30 N.E. 224, 156 Mass. 86, 87 (Mass. 1892) (affirming trial-court-directed verdict of insufficient evidence of dependency where sister-in-law of decedent testified that decedent supported her on grounds that "there was nothing to show what her earnings or expenses of living were, or that she was in fact dependent upon his wages for support").

no pecuniary injury at all from the death of a wife who worked inside the home.⁸⁵ And though courts rejected this extreme view, they conceded, as one Michigan judge observed, that the “value of the services rendered” by women’s domestic work was not “susceptible of measurement in dollars and cents.”⁸⁶ Thus claimants in cases involving the death of a wife needed to show more than merely “that the wife was frugal, industrious, useful, and attentive to her household duties” in order to support a jury finding of “actual pecuniary loss.” By the same token, it was “not enough to prove the marriage, age, and death, and then turn a jury loose upon the field for speculation or prejudice.” Instead, the “services must be proven, and the value shown.”⁸⁷ And while the cost of male decedents’ living expenses was rarely, if ever, discussed as a deduction from damage awards to claimant widows, the measure of damages for husbands was “the pecuniary value of the wife’s services, less the cost of properly and suitably maintaining her.”⁸⁸

3. *Writing the Family Wage into Law*

In interpreting and applying the wrongful death statutes, American courts readily recognized the widow- and child-support aims of legislatures. Where once the paradigmatic theory of recovery for personal injury had been the property interest of a head of household in the services of his wife, children, and servants, now, one court observed, the wrongful death statutes recognized that “the widow . . . and next of kin . . . have a pecuniary interest

85. See, e.g., *Delaware, Lackawanna & Western R.R. v. Jones*, 18 A. 330, 331, 128 Pa. St. 308, 314–15 (Pa. 1889) (rejecting the argument where plaintiff husband had shown that his deceased wife had been a healthy woman of 66 years of age and “ordinarily industrious and useful”).

86. *Nelson v. Lake Shore & Mich. S. Ry.*, 62 N.W. 993, 996, 104 Mich. 582, 591 (Mich. 1895) (opinion of McGrath, C.J.).

87. *Nelson*, 62 N.W. at 994–95. Testimony from the *Nelson* case indicates that the damages-measurement problem could be exceedingly difficult even when the deceased wife earned income. Annie Nelson took in boarders and lodgers prior to her death in a railroad accident. Profits from the business went to the defrayal of her family’s domestic expenses, but because Annie handled the domestic chores herself, neither her husband nor her children had any idea of the income Annie generated from the boarders. Her husband testified:

She never turned over to me a dollar in cash. She did not furnish me with clothing nor pocket money. I think she did once or twice buy a pair of pants for me. Whatever she turned over to me was trifling. I cannot form any estimate of what she used for the benefit of the children in getting clothes. I cannot give any idea of how much of the [\$100 in monthly revenue from the boarders] was profit over and above the cost of feeding and caring for boarders and lodgers, I had not the least idea in regard to that. I do not think I could give you any idea what the contribution was that my wife made for my support and that of my children over and above the expense of the household. I have no idea what the expenses of the household were. I cannot say how much clothing she furnished to the children. She never got any for me to amount to anything. I could give no idea of the value of the goods she furnished the children. I could give no idea of her net earnings. (*Nelson*, 62 N.W. at 994)

88. *Gulf Colorado & Santa Fe Ry. v. Southwick*, 30 S.W. 592, 593 (Tex. Civ. App. 1895).

in the life of the person killed."⁸⁹ The Illinois Supreme Court explained that in place of a theory of loss of services, damages to widows and children under the statutes were designed to compensate those who had been "receiving from [the deceased] pecuniary assistance."⁹⁰ Similarly, the New Jersey Supreme Court noted that the omission of husbands from the statutes indicated "a legislative intent to provide redress for those who, in general, had been dependent upon the deceased."⁹¹ According to the New York Court of Appeals, the legislature had been "mainly influenced by the evident justice of compelling the wrongdoer to compensate families dependent in a greater or lesser degree for support on the life of the deceased."⁹² And in Vermont, the Supreme Court explained that the state's wrongful death statute had been enacted in "view of the numerous deaths resulting from wrongful acts and neglects" and because of "the consequent deprivation suffered by the wife and children or other relatives, of their natural support and protection."⁹³

But the goal of assisting dependent widows alone offers an inadequate explanation for the wrongful death statutes' asymmetrical structure. Preserving the language of Lord Campbell's Act ("widows *and* husbands"), after all, would have fulfilled such a goal just as well. Moreover, an approach that allowed a husband to recover his wife's lost earnings would have had the additional benefit of aiding those families for which women's earnings were an important component of the family income. American legislatures and courts thus appear to have created significant obstacles to the recovery of deceased women's lost earnings not merely because legislators assumed that women were the most likely claimants under the statutes, but because they had very specific ideas about the proper structure of the nineteenth-century family. Married women, the legislature appeared to believe, ought not to have earnings at all. Most important, even where married women did have earnings, manly and upstanding men ought not to have been dependent on them.

89. *Quincy Coal v. Hood*, 77 Ill. 68, 71 (1875); see also *Quin v. Moore*, 15 N.Y. 432, 435 (1857) ("The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed.")

90. *Chicago & Alton R.R. v. Shannon*, 43 Ill. 338 (1867).

91. *Grosso v. Delaware Lackawanna & Western R.R.*, 13 A. 233, 236, 50 N.J.L. 317, 323 (N.J. 1888).

92. *Quin v. Moore*, 15 N.Y. 432, 434 (1857).

93. See *Needham v. Grand Trunk Ry.*, 38 Vt. 294 (1865). The wrongful death statutes were not the only legislative changes indicating the centrality of support for dependent wives and children as the newly dominant theory of damages in personal injury cases. Dram shop acts provided recompense for injury to means of support in consequence of intoxication. The Ohio statute, for example, provided for damages to persons "in person or property or means of support by any intoxicated person in consequence of the intoxication" against the person or persons selling the intoxicants that caused the damages. See 1870 Ohio Laws 101. On the similar New York statute, see *Death Under the Civil Damage Act (1879)* (citing, *inter alia*, *Smith v. Reynolds*, 8 Hun. 128 [N.Y. Sup. Ct. 1876]; *Volans v. Owen*, 74 N.Y. 526 [1878]).

The Federal Circuit Court of Appeals for the Eighth Circuit captured this when it explained that in enacting wrongful death statute, the Kansas legislature believed “that the husband is, *and ought to be*, the provider for and supporter of the family.” In the court’s view, the legislature “considered . . . that the burden of supporting and providing for the family is seldom cast upon the wife; that, where it is, the husband is sometimes unworthy to share in the damages for her death.”⁹⁴ Statutory recoveries in death cases were thus limited to widows and children not only because widows and children were more likely to be dependent on husbands’ earnings, but because legislatures believed that widows and children ought to be dependent. Families not organized along these lines were likely characterized by “unworthy” husbands, and they were unprotected by the wrongful death statutes, which inscribed into law a family wage system in which men worked outside the home to provide support for dependent women and children.

This is not to say, of course, that actions by husbands and fathers for loss of services fell out of the common law entirely around the middle of the nineteenth century. Fathers, husbands, and mothers continued to bring such cases.⁹⁵ Late in the nineteenth century, some jurisdictions slowly began to amend their wrongful death statutes to add husbands as authorized beneficiaries. As early as 1870, for example, New York reversed itself and authorized damages to husbands for the wrongful death of a wife,⁹⁶ though other jurisdictions continued to develop asymmetrical wrongful death schemes late into the century.⁹⁷ Moreover, in the twentieth century, many obstacles to actions for the wrongful death of children and married women have been lifted. Pecuniary damages limitations have been lifted in some states and expanded by judicial construction in others (see Zelizer 1985). To be sure, economic damages in cases involving fatal injuries to women remain less readily calculable than in similar cases involving fatal injuries to men (see Chamallas 1998). Yet husbands and parents face few special obstacles in bringing such cases (see Harper, James, and Gray 1986, 2:535–62).

94. *Western Union Tel. v. McGill*, 57 F. 699, 703 (8th Cir. 1893).

95. See, e.g., *McGovern v. New York Central & Hudson River R.R.*, 67 N.Y. 417 (1876) (action for damages, including loss of services, for wrongful death of eight-year-old son); *Green v. Hudson River R.R.*, 28 Barb. 9 (N.Y. Sup. Ct., Oneida Cty 1858); *Hall v. Nashville & Chattanooga R.R.*, 1 Thompson Tenn. Cases 204, 205 (Tenn. 1859); *Long v. Morrison*, 14 Ind. 595 (1860); *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865); *Hyatt v. Adams*, 16 Mich. 180 (1867); *Covington Street Ry. v. Packer*, 72 Ky. (9 Bush) 455 (1872); *Drew v. Milwaukee & St. Paul R.R.*, 7 F. Cas. 1071 (C.C.D. Minn. 1873); *Sullivan v. Union Pacific R.R.*, 23 F. Cas. 368 (C.C.D. Neb. 1874); *Sherman v. Johnson*, 2 A. 707 (Vt. 1886).

96. See 1870 N.Y. Laws, chap. 78, at 215–16 (amending the 1847 Act to read: “And the amount recovered in every such action shall be for the exclusive benefit of *the husband* or widow and next of kin of such deceased person.”) (emphasis added); see also 1886–87 Ga. Acts, no. 588, at 43–44 (amending Georgia wrongful death statute to provide that the “husband may recover for the homicide of his wife”).

97. See 1883 Ark. Acts, act 53, at 75–76; 1871–72 Mont. Laws chap. 61, at 561; Neb. Gen. Stat. chap. 15, at 272–73 (1873) (enacted 25 Feb. 1873); Ok. Stat. chap. 70, art. 4 §§ 4336, 4338 (1890).

What is clear, however, is that under the American wrongful death statutes, the action for loss of support replaced the action for loss of services as the paradigmatic wrongful death case. Indeed, the statutes both reflected and helped to usher in a new wage-earning free labor economic order in place of the household economies of the late eighteenth and early nineteenth century.

IV. CONCLUSION

This essay has shown that the wrongful death statutes inverted the gender asymmetry of the common law of personal injury. The eighteenth-century action for loss of services limited actions to masters who had a "property interest," in Blackstone's words, in the service of their subordinate household members. Members of the household—having no property interest in the support of the master—had no reciprocal cause of action in the wrongful injuries or death of the head of household. The American wrongful death statutes, by contrast, recognized (as the Illinois Supreme Court observed) a "pecuniary interest" of dependent members of the household in the support offered by the male wage earner.⁹⁸ But now the asymmetry ran in the opposite direction. It was the male head of household who had no reciprocal cause of action, or at best only nominal rights, in the death of his wife and children.

In one sense, of course, this new asymmetry was of a piece with the hoary nineteenth-century movement from status to contract. Masters no longer owned feudal property rights in the services of their subordinate household members. But the asymmetry of the wrongful death statutes also had implications for the construction of a new gender status regime. When men went out into public life, as workers or as passengers or in any number of capacities, they carried with them what was in effect a life insurance policy in the form of their dependents' cause of action under the wrongful death statutes. Married women going out into a nineteenth-century world fraught with new industrial and mechanical perils, on the other hand, bore no such insurance policy. By and large, the wrongful death statutes simply did not apply to them.

Of course, the insurance policy that men carried with them was a remarkably poor one. In Massachusetts, for example, the wrongful death statute enacted in 1840 did not apply to deaths from workplace injuries until 1887.⁹⁹ And elsewhere the law of torts was an exceedingly expensive and

98. *Quincy Coal v. Hood*, 77 Ill. 68, 71 (1875); see also *Quin v. Moore*, 15 N.Y. 432, 435 (1857) ("The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed.").

99. See *Palfrey v. Portland, Saco & Portsmouth R.R.*, 86 Mass. 55 (1862) (no cause of action for wrongful death arising out of a work accident).

erratic source of compensation for widows and dependent children. Even today, tort law is still a remarkably poor compensation mechanism for the victims of accidental injuries. In the 1980s and 1990s, fewer than 10% of all accidental injury victims in the United States recovered damages through the tort system, and such damages constituted only 7% of all payments to accidental injury victims (Hensler et al. 1991, 107–8). Moreover, administrative costs in the tort system amounted to more than half the total tort compensation paid (Kakalik and Pace 1986, vii). And in the nineteenth century, tort law appears to have been still worse at compensating accidental injury victims. Studies of trial court filings at the close of the nineteenth century indicate that fewer than 10% of all claims filed resulted in final judgments entered on behalf of the plaintiff (Friedman and Russell 1990, 299, 295, 310; Friedman 1987, 355). Jury verdicts may have been predominantly in favor of plaintiffs,¹⁰⁰ but most cases dropped out of the courts long before they got to juries because of neglect to prosecute, dismissals, summary judgment orders, and directed verdicts.¹⁰¹ And when we turn from the trial court filings to the records of accident-causing enterprises themselves, the ineffectiveness of tort law as a mechanism for compensation becomes quite clear: Thomas Russell's study of the claims department of Oakland Traction, a California street railway company, shows that only 15% (581 of 3,843) passengers injured while riding between 1902 and 1906 received any compensation from the company. The lucky few who did obtain compensation usually received tiny sums (Russell 2000, 1999).¹⁰²

At the very least, the framing of the wrongful death statutes reflected the ways in which American lawmakers—and especially Northern lawmakers—conceived the relative economic roles of men and women in the 1840s and 1850s. A number of Southern states enacted wrongful death legislation in the mid-nineteenth-century, and a slight majority of Southern statutes allowed recovery by husbands.¹⁰³ Yet the South was most remarka-

100. See, e.g., Friedman and Russell (1990, 309) (of 38 cases tried before and decided by a jury in Alameda County between 1900 and 1910, 25 resulted in jury verdicts for the plaintiff as opposed to 13 jury verdicts for the defendant); see also Karsten (1997, 99) (calculating that in all available trial court studies, plaintiffs won in 71% of cases resolved by jury verdicts).

101. Friedman and Russell (1990, 307) document that over 80% of cases filed in Alameda County between 1900 and 1910 never went to trial.

102. The most common claim amount paid was between \$10 and \$25. Moreover, in the 35 deaths involving Oakland Traction Company accidents between 1896 and 1906, the company paid an average of \$127 in each case—less than \$6,000 in total—to settle claims by victims' families and to cover medical costs and funeral arrangements. In 20 of the deaths, Russell finds no payment to the family of the victim at all, and in no case did the family receive more than \$300. See Russell 2000, 1999. On the cooperative accident insurance associations to which many working-class Americans turned for more reliable compensation, see Witt forthcoming b.

103. Allowing actions by husbands on their own behalf: Georgia, see 1849–50 Ga. Acts 272; Kentucky, see 1854 Ky. Laws chap. 964, at 175; Maryland, see 1852 Md. Laws chap. 299, at 37; Mississippi, see Miss. Rev. Code § 48, at 486 (1857); Missouri, see Mo. Rev. Stat. chap. 51, at 647–48 (1856); Texas, see 1859–60 Tex. Gen. Laws chap. 35, at 32–33. Barring actions

ble for the number of states without wrongful death legislation of any kind, and for the relatively small number of cases in those states with statutes.¹⁰⁴ In the North, however, the wrongful death statutes serve as a register for the mid-nineteenth-century ideology of gender. Even those statutes that authorized husbands as statutory beneficiaries made abundantly clear that the primary aim of the statutes was the support of dependent widows and children. In this sense, the wrongful death statutes offer additional data on the nineteenth-century revolution in ideas about domesticity and women's roles.

Yet we might also say that the wrongful death statutes did more than merely reflect the assumptions of legislators and judges. They also created a legal structure that nurtured and reproduced the very conception of gender roles that they represented.¹⁰⁵ Early-nineteenth-century Americans experimented with a number of alternative approaches to the structure of family and economic life. But the wrongful death statutes made it that much less likely that the alternatives would succeed. And in this sense, the wrongful death statutes represent a significant early moment in the legal construction and reproduction of the family wage system. Indeed, properly understood, the statutes formed the beginnings of what historians of the twentieth-century politics are only now coming to understand as the "two-channel" American state that to this day systematically undervalues women's work in both tort recoveries¹⁰⁶ and entitlement programs.¹⁰⁷

In particular, the statutes can be said to have had a twofold constitutive role on the shape of economic and family life. First, the liability-rule

by husbands on their own behalf: Alabama, see Ala. Code §§ 1938–39 (1852); Louisiana, see 1855 La. Acts no. 223, at 270–71; North Carolina, see 1854–55 N.C. Pub. Laws chap. 39, at 97–98; and Tennessee, see 1851–52 Tenn. Acts chap. 17, at 23.

104. Southern and border states without wrongful death legislation in 1869 were Arkansas, Delaware, Florida, South Carolina, Virginia, and West Virginia.

105. Here I draw on the ever-growing literature begat by Robert Gordon's essay on the constitutive aspects of law in historical interpretation. See Gordon 1984. An all-too-rarely cited model of such interpretation (he calls it "law-mindedness") is John Phillip Reid's *Law for the Elephant* (1980).

106. On the undervaluation of damages arising out of injuries to women in contemporary tort law, see *Feldman v. Allegheny Airlines*, 524 F.2d 384, 388–89 (2d Cir. 1975) (holding as a matter of Connecticut law that a female decedent's estate was not entitled to recover the opportunity cost of lost future earning capacity during years in which the decedent would have raised children instead of earning a salary); see also Chamallas (1998, 480–89) (describing the gap between men's and women's tort recoveries and discussing the various ways in which the gender of the victim enters into the calculation of lost future earnings).

107. See Nelson 1990. It is worth mentioning that placing a dollar value on domestic labor that is performed without pay is exceedingly difficult for entitlement programs to do. The differences between entitlements aimed at wage earners and those aimed at unpaid domestic workers (i.e., mothers) may thus be explained at least partly by the very real difficulties of valuation that the designers of welfare programs face. Nonetheless, the state's inability to reliably measure the market value of domestic services has reproduced the social asymmetries of men's and women's work that created the difficulties of measurement in the first place. Moreover, regardless of the difficulties, it also seems right that the state could arrive at workable measures of the value of women's work through, for example, opportunity cost calculations.

scheme created additional incentives for families to organize themselves around a male wage-earning breadwinner.¹⁰⁸ Historians of gender in employment have long studied the gender gap that continues to characterize pay scales to this day (e.g., Goldin 1990, 58–118). The different treatment of men and women under the wrongful death statutes exacerbated the pay scale differential by providing men with tort law protections that women lacked.

Second, and more subtly, it is plausible to think that the statutes gave shape not just to the structure of incentives within which families realized existing preferences for family organization, but also to basic norms of family organization themselves. In part, this may have been the result of feedback effects from the asymmetrical liability-rule schema; if disparate liability rules for men and women made some families more likely to send men out into the world than women, such families' decisions doubtlessly influenced their neighbors' choices of how to organize families. But it is also likely that statutes had additional norm-shaping effects. Antonio Gramsci, the great early-twentieth-century Italian theorist of ideology, argued that the power of a particular way of articulating claims lies in its capacity to give shape to the terms in which people understand the character of even the most fundamental features of their lives (Gramsci 1971). In just this fashion, the form of the wrongful death actions encouraged the families of deceased men to adopt—for purposes of litigation at least—the normative vision of the statutes in order to assert their claims. As they still do today, mid-nineteenth-century widows and dependent children framed wrongful death claims as actions for loss of the support that upstanding men owed to their families. The suits they brought told and retold the story of female dependence and male wage earning. And in the process, the law of wrongful death worked itself into the mid-nineteenth-century redefinition of the most basic categories of family life.

REFERENCES

- Ashworth, John. 1992. The Relationship Between Capitalism and Humanitarianism. In *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation*, ed. Thomas Bender. Berkeley and Los Angeles: University of California Press.
- Bardaglio, Peter W. 1995. *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Chapel Hill: University of North Carolina Press.

108. For an analytically analogous argument about the role of tort liability in creating incentive effects toward particular modes of social life, see Witt 1998 (arguing that the expansion of employers' tort liability for workplace accidents in the late nineteenth century and the subsequent enactment of workmen's compensation statutes in the early twentieth century reflected and reproduced the development of new managerial strategies for employer control in the workplace).

- Basch, Norma. 1982. *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York*. Ithaca, N.Y.: Cornell University Press.
- Bergstrom, Randolph E. 1992. *Courting Danger: Injury and Law in New York City, 1870-1910*. Ithaca, N.Y.: Cornell University Press.
- Blackmar, Elizabeth. 1989. *Manhattan For Rent, 1785-1850*. Ithaca, N.Y.: Cornell University Press.
- Blackstone, William. 1765-69. *Commentaries on the Laws of England*. 4 vols. Oxford: Clarendon Press.
- Blewett, Mary H. 1988. *Men, Women, and Work: Class, Gender, and Protest in the New England Shoe Industry, 1780-1910*. Urbana: University of Illinois Press.
- Boydston, Jeanne. 1990. *Home and Work: Housework, Wages, and the Ideology of Labor in the Early American Republic*. New York: Oxford University Press.
- Chamallas, Martha. 1998. The Architecture of Bias: Deep Structures in Tort Law. *University of Pennsylvania Law Review* 146:463-531.
- Chused, Richard. 1983. Married Women's Property Law: 1800-1850. *Georgetown Law Journal* 71:1359-425.
- Clark, Christopher. 1990. *The Roots of Rural Capitalism: Western Massachusetts, 1780-1860*. Ithaca, N.Y.: Cornell University Press.
- Cott, Nancy F. 1977. *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835*. New Haven, Conn.: Yale University Press.
- . 1998. Marriage and Women's Citizenship in the United States, 1830-1934. *American Historical Review* 103:1440-74.
- Cott, Nancy F., and Elizabeth H. Pleck, eds. 1979. *A Heritage of Her Own: Toward a New Social History of American Women*. New York: Simon and Schuster.
- Dalzell, Robert F. Jr. 1987. *Enterprising Elite: The Boston Associates and the World They Made*. Cambridge: Harvard University Press.
- Dawley, Alan. 1976. *Class and Community: The Industrial Revolution in Lynn*. Cambridge: Harvard University Press.
- Dayton, Cornelia Hughes. 1995. *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789*. Chapel Hill: University of North Carolina Press.
- Death Under the Civil Damage Act. 1879. *Albany Law Journal* 20:204-5.
- Dubler, Ariela R. 1998. Governing Through Contract: Common Law Marriage in the Nineteenth Century. *Yale Law Journal* 107:1885-920.
- . Forthcoming. *Wifely Behavior: A Legal History of Acting Married*. *Columbia Law Review*.
- Dublin, Thomas. 1979. *Women at Work: The Transformation of Work and Community in Lowell, Massachusetts, 1826-1860*. New York: Columbia University Press.
- Edwards, Laura F. 1997. *Gendered Strife and Confusion: The Political Culture of Reconstruction*. Urbana: University of Illinois Press.
- Epstein, Richard A. 1982. The Historical Origins and Economic Structure of Workers' Compensation Law. *Georgia Law Review* 16:775-819.
- . 2000. *Cases and Materials on Torts*. 7th ed. Gaithersburg, Md.: Aspen Law and Business.
- Faler, Paul G. 1981. *Mechanics and Manufacturers in the Early Industrial Revolution: Lynn, Massachusetts 1780-1860*. Albany: State University of New York Press.
- Fineman, Martha L. A. 1995. Masking Dependency: The Political Role of Family Rhetoric. *Virginia Law Review* 81:2181-215.
- Finkelman, Paul. 1987. Slaves as Fellow Servants: Ideology, Law, and Industrialization. *American Journal of Legal History* 31:269-305.
- Foner, Eric. 1970. *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*. New York: Oxford University Press.

- . 1983. *Nothing But Freedom: Emancipation and Its Legacy*. Baton Rouge: Louisiana State University Press.
- Fox, Mary Frank, and Sharlene Hesse-Biber. 1984. *Women at Work*. Palo Alto, Calif.: Mayfield Publishing.
- Fox-Genovese, Elizabeth. 1988. *Within the Plantation Household: Black and White Women of the Old South*. Chapel Hill: University of North Carolina Press.
- Franklin, Benjamin. 1962. *The Autobiography of Benjamin Franklin*. New York: Macmillan.
- Friedman, Lawrence M. 1985. *A History of American Law*. 2d ed. New York: Simon and Schuster.
- . 1987. Civil Wrongs: Personal Injury Law in the Late 19th Century. *American Bar Foundation Research Journal* 1987:351–78.
- Friedman, Lawrence M., and Thomas D. Russell. 1990. More Civil Wrongs: Personal Injury Litigation, 1901–1910. *American Journal of Legal History* 34:295–314.
- Gilman, Charlotte Perkins. 1898. *Women and Economics: A Study of the Economic Relation Between Women and Men*. Boston: Small, Maynard.
- Goldin, Claudia. 1990. *Understanding the Gender Gap: An Economic History of American Women*. New York: Oxford University Press.
- Gordon, Linda. 1993. *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890–1935*. New York: Free Press.
- Gordon, Robert W. 1984. Critical Legal Histories. *Stanford Law Review* 36:57–125.
- Gramsci, Antonio. 1971. *Selections from the Prison Notebooks*, ed. Quinton Hoare and Geoffrey Nowell Smith. New York: International Publishers.
- Gregory, Charles O. 1915. Trespass to Negligence to Absolute Liability. *Virginia Law Review* 37:359–97.
- Grossberg, Michael. 1985. *Governing the Hearth: Law and the Family in the Nineteenth Century*. Chapel Hill: University of North Carolina Press.
- Harper, Fowler V., Fleming James Jr., and Oscar S. Gray. 1986. *The Law of Torts*. 2d ed. Boston: Little, Brown.
- Hartog, Hendrik. 1993. Abigail Bailey's Coverture: Law in a Married Woman's Consciousness. In *Law and Everyday Life*, ed. Austin and Thomas R. Kearns. Ann Arbor: University of Michigan Press.
- . 2000. *Man and Wife in America: A History*. Cambridge: Harvard University Press.
- Hawkins, Francis Vaughan. 1885. *Concise Treatise on the Construction of Wills*. 2d Am. ed. Philadelphia: T. and J. W. Johnson.
- Hensler, Deborah R., et al. 1991. *Compensation for Accidental Injuries in the United States*. Santa Monica, Calif.: Rand Institute for Civil Justice.
- Hoffman, Frederick. 1915. Industrial Accident Statistics. *United States Bureau of Labor Statistics Bulletin* 157:17–210.
- Holdsworth, W. S. 1916. The Origins of the Rule in *Baker v. Bolton*. *Law Quarterly Review* 32:431–37.
- . 1923. *A History of English Law*. Vol. 3. London: Methuen.
- Holmes, Oliver Wendell Jr. 1881. *The Common Law*. Boston: Little, Brown.
- Hunter, Tera. 1997. *To 'Joy My Freedom: Southern Black Women's Lives and Labors after the Civil War*. Cambridge: Harvard University Press.
- Johnson, Paul E. 1978. *A Shopkeeper's Millennium: Society and Revivals in Rochester, New York, 1815–1837*. New York: Hill and Wang.
- Jones, Gareth H. 1958. Per Quod Servitium Amisit. *Law Quarterly Review* 74:39–58.
- Kakalik, James S., and Nicholas M. Pace. 1986. *Costs and Compensation Paid in Tort Litigation*. Santa Monica, Calif.: Rand Institute for Civil Justice.

- Karlsen, Carol F. 1987. *The Devil in the Shape of a Woman: Witchcraft in Colonial New England*. New York: Norton.
- Karsten, Peter. 1997 *Head Versus Heart: Judge-Made Law in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.
- Kerber, Linda. 1980. *Women of the Republic: Intellect and Ideology in Revolutionary America*. Chapel Hill: Institute of Early American History and Culture.
- . 1988. Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History. *Journal of American History* 75:9–39.
- Kessler-Harris, Alice. 1982. *Out to Work: A History of Wage-Earning Women in the United States*. New York: Oxford University Press.
- . 1995. Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939. In *U.S. History as Women's History: New Feminist Essays*, ed. Linda Kerber et al. Chapel Hill: University of North Carolina Press.
- King, Lester S. 1991. *Transformations in American Medicine: From Benjamin Rush to William Osler*. Baltimore, Md.: Johns Hopkins University Press.
- Larson, Jane E. 1993. "Women Understand So Little, They Call My Good Nature Deceit": A Feminist Rethinking of Seduction. *Columbia Law Review* 93:374–472.
- Laurie, Bruce. 1980. *Working People of Philadelphia, 1800–1850*. Philadelphia: Temple University Press.
- Lebsock, Suzanne. 1984. *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784–1860*. New York: Norton.
- Legislature of New York. 1847a. *Albany Argus*, 5 December, p. 2.
- . 1847b. *Albany Argus*, 11 December, p. 2.
- . 1847c. *Albany Argus*, 12 December, p. 2.
- Lerner, Gerda. 1969. The Lady and The Mill Girl: Changes in the Status of Women in the Age of Jackson, 1800–1840. In Cott and Pleck 1979.
- Lewis, Jan. 1987. The Republican Wife: Virtue and Seduction in the Early Republic. *William and Mary Quarterly* 44:689–721.
- Litwack, Leon F. 1979. *Been in the Storm So Long: The Aftermath of Slavery*. New York: Knopf.
- Malone, Wex S. 1965a. The Genesis of Wrongful Death. *Stanford Law Review* 17:1043–76.
- . 1965b. American Fatal Accident Statutes—Part I: The Legislative Birth Pains. *Duke Law Journal* 1965:673–719.
- McCurdy, William E. 1930. Torts Between Persons in Domestic Relation. *Harvard Law Review* 43:1030–82.
- McCurry, Stephanie. 1995. *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country*. New York: Oxford University Press.
- Mink, Gwendolyn. 1995. *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942*. Ithaca, N.Y.: Cornell University Press.
- Minow, Martha. 1985. Forming Under Everything that Grows: Toward a History of Family Law. *Wisconsin Law Review* 1985:819–98.
- Montgomery, David. 1967. *Beyond Equality: Labor and the Radical Republicans, 1862–1872*. New York: Knopf.
- . 1993. *Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century*. New York: Cambridge University Press.
- Morris, Thomas D. 1996. *Southern Slavery and the Law, 1619–1860*. Chapel Hill: University of North Carolina Press.

- Murphy, Teresa Anne. 1992. *Ten Hours' Labor: Religion, Reform, and Gender in Early New England*. Ithaca, N.Y.: Cornell University Press.
- Nelson, Barbara J. 1990. The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid. In *Women, The State, and Welfare*, ed. Linda Gordon. Madison: University of Wisconsin Press.
- Nelson, William E. 1996. Patriarchy or Equality: Family Values or Individuality. *St. John's Law Review* 70:435–538.
- Note. 1986. Slavery and the Fellow Servant Rule: An Antebellum Dilemma. *New York University Law Review* 61:1112–48.
- Pateman, Carol. 1988. *The Sexual Contract*. Stanford, Calif.: Stanford University Press.
- . 1989. The Patriarchal Welfare State. In *The Disorder of Women: Democracy, Feminism and Political Theory*, ed. Carol Pateman. Cambridge: Polity.
- Pleck, Elizabeth H. 1979. *A Mothers' Wages: Income Earning Among Married Italian and Black Women, 1896–1911*. In Cott and Pleck 1979.
- Prude, Jonathan. 1983. *The Coming of Industrial Order: Town and Factory Life in Rural Massachusetts, 1810–1860*. New York: Cambridge University Press.
- Rabin, Robert L. 1981. The Historical Development of the Fault Principle: A Reinterpretation. *Georgia Law Review* 15: 925–61.
- Reagan, Leslie J. 1997. *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973*. Berkeley and Los Angeles: University of California Press.
- Reeve, Tapping. 1816. *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*. New Haven, Conn.: Oliver Steele.
- Reid, John Phillip. 1980. *Law for the Elephant: Property and Social Behavior on the Overland Trail*. San Marino, Calif.: Henry E. Huntington Library.
- Rock, Howard B. 1979. *Artisans of the New Republic: The Tradesmen of New York City in the Age of Jefferson*. New York: New York University Press.
- Rosen, George. 1983. *The Structure of American Medical Practice 1875–1941*, ed. Charles E. Rosenberg. Philadelphia: University of Pennsylvania Press.
- Rosenberg, Charles E. 1987. *The Care of Strangers: The Rise of America's Hospital System*. New York: Basic Books.
- Russell, Thomas D. 1999. Solace and Recompense in Turn-of-the-Century Streetcar Deaths. Paper presented at the Law and Society Association Annual Meeting, 28 May 1999. <http://ccwf.cc.utexas.edu/~russell>.
- . 2000. Blood on the Tracks: Turn of the Century Streetcar Injuries, Claims, and Litigation in Alameda County, California. <http://ccwf.cc.utexas.edu/~russell/pubs/bott.html>.
- Ryan, Mary P. 1981. *Cradle of the Middle Class: The Family in Oneida County, New York, 1790–1865*. New York: Cambridge University Press.
- Salmon, Marylynn. 1986. *Women and the Law of Property in Early America*. Chapel Hill: University of North Carolina Press.
- Saville, Julie. 1994. *The Work of Reconstruction: From Slave to Wage Laborer in South Carolina, 1860–1870*. New York: Cambridge University Press.
- Schlanger, Margo. 1998. Injured Women Before Common Law Courts, 1860–1930. *Harvard Women's Law Journal* 21:79–140.
- Schwartz, Gary T. 1981. Tort Law and the Economy in the Nineteenth Century: A Reappraisal. *Yale Law Journal* 90:1717–75.
- . 1989. The Character of Early American Tort Law. *UCLA Law Review* 36:641–718.
- Shearman, Thomas G., and Amasa A. Redfield. 1869. *A Treatise on the Law of Negligence*. New York: Baker, Voorhis.

- Shelton, Cynthia J. 1986. *The Mills of Manayunk: Industrialization and Social Conflict in the Philadelphia Region, 1787-1837*. Baltimore, Md.: Johns Hopkins University Press.
- Siegel, Reva B. 1992. Reasoning from the Body. *Stanford Law Review* 44:261-381.
- . 1994a. Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor. *Yale Law Journal* 103:1073-217.
- . 1994b. The Modernization of Marital Status Law: Adjudicating Women's Rights to Earnings, 1860-1930. *Georgetown Law Journal* 82:2127-211.
- . 1996. The Rule of Love. *Yale Law Journal* 105:2117-207.
- Silverman, Robert A. 1981. *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880-1900*. Princeton, N.J.: Princeton University Press.
- Simpson, A. W. B. 1996. *Leading Cases in the Common Law*. Oxford: Clarendon Press.
- Sklar, Kathryn Kish. 1973. *Catherine Beecher: A Study in American Domesticity*. New Haven, Conn.: Yale University Press.
- Skocpol, Theda. 1992. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge: Belknap Press of Harvard University Press.
- Stanley, Amy Dru. 1996. Home Life and the Morality of the Market. In *The Market Revolution in America: Social, Political, and Religious Expressions, 1800-1880*, ed. Melvyn Stokes and Stephen Conway. Charlottesville: University Press of Virginia.
- . 1998. *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Emancipation*. New York: Cambridge University Press.
- Stansell, Christine. 1982. *City of Women: Sex and Class in New York 1789-1860*. New York: Knopf.
- Steinfeld, Robert J. 1991. *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870*. Chapel Hill: University of North Carolina Press.
- Stevenson, Brenda E. 1996. *Life in Black and White: Family and Community in the Slave South*. New York: Oxford University Press.
- Thompson, Seymour D. 1886. *The Law of Negligence in Relations Not Resting in Contract*. San Francisco: Bancroft-Whitney.
- Tiffany, Francis B. 1893. *Death By Wrongful Act: A Treatise on the Law Peculiar to Actions for Injuries Resulting in Death*. St. Paul, Minn.: West.
- Tomlins, Christopher L. 1993. *Law, Labor, and Ideology in the Early American Republic*. New York: Cambridge University Press.
- Tushnet, Mark V. 1981. *The American Law of Slavery: Considerations of Humanity and Interest*. Princeton, N.J.: Princeton University Press.
- Ulrich, Laurel Thatcher. 1982. *Good Wives: Image and Reality in the Lives of Women in Northern New England, 1650-1750*. New York: Knopf.
- . 1990. *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785-1812*. New York: Knopf.
- Vandervelde, Lea. 1996. The Legal Ways of Seduction. *Stanford Law Review* 48:817-901.
- Wallace, Anthony F.C. 1978. *Rockdale: The Growth of an American Village in the Early Industrial Revolution*. New York: Knopf.
- Weber, Max. 1978. *Economy and Society*, ed. Guenther Roth and Claus Wittich. Berkeley and Los Angeles: University of California Press.
- Welke, Barbara Y. 1994. Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920. *Law and Social Inquiry* 19:369-403.
- Welter, Barbara. 1966. The Cult of True Womanhood, 1820-1860. *American Quarterly* 17:151-74.
- Wilentz, Sean. 1984. *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850*. New York: Oxford University Press.

- Witt, John Fabian. 1998. The Transformation of Work and the Law of Workplace Accidents, 1842–1910. *Yale Law Journal* 107:1417–502.
- . Forthcoming a. Rethinking the Nineteenth-Century Employment Contract, Again. *Law and History Review*.
- . Forthcoming b. Toward a New History of American Accident Law—The Case of the Cooperative First-Party Insurance Movement. *Harvard Law Review*.
- Zelizer, Viviana A. 1985. *Pricing the Priceless Child: The Changing Social Value of Children*. New York: Basic Books.