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Civil Rights Reform in Historical Perspective

Regulating Marital Violence

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In the nineteenth century, and again in the twentieth century, the American feminist movement has attempted to reform the law of marriage so as to secure for wives equality with their husbands. In each century, the movement's efforts have produced significant changes in the law structuring marriage. The status of married women has improved, but wives still have not attained equality with their husbands—if we measure equality as the dignitary and material "goods" associated with the wealth wives control, or the work they perform, or the degree of physical security they enjoy. The legal system continues to play an important role in perpetuating these status differences, although, over time, the role that law plays in enforcing status relations has become increasingly less visible.

As this essay will show, efforts to reform a status regime do bring about change—but not always the kind of change advocates seek. When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend. Thus, civil rights reform can breathe "new life" into a body of status law by pressuring elites to translate it into a more contemporary, and less controversial, social idiom. I call this kind of change in the rules and rhetoric of a status regime "preservation through transformation," and I illustrate this modernization dynamic in a case study of domestic assault law as it evolved in rule structure and rationale from a law of marital prerogative to a law of marital privacy.

The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or "chastisement" as long as he did not inflict permanent injury on her. During the nineteenth century, an era of feminist agitation for reform of marriage law, courts in England and in

the United States declared that a husband no longer had the right to chastise his wife. Yet for a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery. Although authorities denied that a husband had the right to beat his wife, they rarely intervened in cases of marital violence; a husband who assaulted his wife was granted various formal and informal immunities from prosecution in order to protect the privacy of the family and to promote domestic harmony.

As the nineteenth-century feminist movement protested a husband's marital prerogatives, it helped bring about the repudiation of chastisement doctrine; but in so doing, the movement also precipitated changes in the regulation of marital violence that "modernized" this body of status law. Instead of reasoning about marriage in the older, hierarchy-based norms of the common law, lawmakers began to justify the regulation of domestic violence in the language of privacy and love associated with companionate marriage in the industrial era. Once translated from an antiquated to a more contemporary gender idiom, the state's justification for treating wife beating differently from other kinds of assault seemed reasonable in ways the law of chastisement did not.

As the evolution of domestic violence law illustrates, political opposition to a status regime may bring about changes that incrementally improve the welfare of subordinated groups. With the demise of chastisement law, the situation of married women improved—certainly, in dignitary terms, and perhaps materially as well. At the same time, the story of chastisement's demise suggests that there is a price for the dignitary and material gains that civil rights reform may bring. If a reform movement is at all successful in advancing its justice claims, it will bring pressure to bear on lawmakers to rationalize status-enforcing state action in new and less socially controversial terms. This process of adaptation can actually revitalize a body of status law, *enhancing* its capacity to legitimate social inequalities that remain among status-differentiated groups. Examined from this perspective, the reform of chastisement doctrine can teach us much about the dilemmas confronting movements for social justice in America today.

Reforming Spousal Assault Law: From Prerogative to Privacy

The Right of Chastisement and Its Critics

Until the late nineteenth century, Anglo-American common law structured marriage to give a husband superiority over his wife in all aspects of the relationship. By law, a husband acquired rights to his wife's person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system. According to the doctrine of marital unity, a wife's legal identity "merged" with her husband's, so that she was unable to file suit without his participation, whether to enforce contracts or to seek damages in tort. The husband was in turn responsible for his wife's

conduct—liable, under certain circumstances, for her contracts, torts, and even some crimes.[1]

As master of the household, a husband could command his wife's obedience and subject her to corporal punishment or "chastisement" if she defied his authority. In his treatise on the English common law, William Blackstone explained that a husband could "give his wife moderate correction,"

> [f]or, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife.[2]

As Blackstone suggested, the right to give corporal punishment was subject to legal and customary limits. The master of the household might chastise his wife (or children or servants), but he could not inflict permanent injury on them without risking indictment for assault and battery.

Blackstone's *Commentaries* played an important role in shaping American legal culture;[3] and early American law treatises described chastisement as one of the husband's marital prerogatives.[4] Records of chastisement law in America are scant, however. The practice of wife beating was more frequently addressed in popular culture than in published judicial decisions of the era. Yet cases in a number of states, particularly in the southern and mid-Atlantic region, recognized a husband's prerogative to chastise his wife.[5]

By the middle of the nineteenth century, a variety of political and economic forces had begun to erode the common law of marital status in which the right of chastisement was situated.[6] Two of the most powerful reform movements of nineteenth-century America, the movements against slavery ("abolition") and alcohol ("temperance"), gave rise to the first organized movement for women's rights. Although membership in this new reform movement was relatively small, it was well connected to social elites both within and without government. In 1848, when the "woman's rights" movement held its first convention, it denounced the law of marriage in a formal "Declaration of Sentiments":

> He has made her, if married, in the eye of the law, civilly dead.
> He has taken from her all right in property, even to the wages she earns.
> . . . *In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.*[7]

By mid-century, legislatures in a number of states had begun to enact statutes that modified the common law of marital status; these first statutes typically allowed wives to hold property in their own names. Passage of the married women's property acts inaugurated a gradual process of reform that continues to the present day. At no point was there a categorical repudiation of the doctrine of marital unity; rather, with feminists continually protesting the law of marital status, legislatures and courts modified the common law in piecemeal fashion, giving wives the right

to hold property in marriage, the right to their earnings, and the rudiments of legal agency: the right to file suit in their own names and to claim contract and tort damages.[8]

During this period, the right of chastisement was subject to two kinds of criticism. Criticism of the prerogative began indirectly. As the temperance movement protested the social evils of alcohol, it drew public attention to the violence that drunken husbands so often inflicted on their families. The movement's conventions, newspapers, poems, songs, and novels featured vivid accounts of women and children who had been impoverished, terrorized, maimed, and killed by drunken men.[9] Temperance protest was simultaneously radical and conservative in tenor. Condemning alcohol provided reformers an outlet for criticizing the social conditions of family life, in the name of protecting the sanctity of family life. Initially, at least, temperance activists preached one remedy for the family violence they so graphically depicted: prohibiting the sale of alcohol.

The woman's rights movement differed from the temperance movement, both in its diagnosis of family violence and in the social remedies it proposed. As woman's rights advocates attacked the hierarchical structure of marriage, they challenged the husband's authority over his wife, which the prerogative to chastise practically and symbolically embodied. The woman's rights movement thus broke with the temperance movement by depicting wife beating as a symptom of fundamental defects in the structure of marriage itself. The movement's 1848 "Declaration of Sentiments" identified chastisement as part of a political system of male dominance, an analysis that feminists continued to elaborate in the ensuing decades.

For woman's rights advocates, a structural diagnosis of male violence against women dictated a structural remedy. In the 1870s, one of the movement's newspapers argued that domestic violence exposed the "fiction of Woman's protection by man" and thus demonstrated "the necessity that women should have increased power, social, civil, legal, political and ecclesiastical, in order to protect themselves."[10] "These horrors," another writer contended, "result inevitably from the subjection and disfranchisement of women, just as similar outrages used to result from the subjection and disfranchisement of negroes. Equal Rights and Impartial Suffrage are the only radical cure for these barbarities."[11] But some in the movement proposed more immediate remedies. Beginning in the 1850s, a vocal minority in the temperance and woman's rights movement argued that wives should be allowed to divorce drunken, violent husbands.[12]

Formal Repudiation of the Right of Chastisement

The American legal system did respond to these criticisms of chastisement law—but it did so in complex ways. Decades of protest by temperance and woman's rights advocates, combined with shifting attitudes toward corporal punishment and changing gender mores, worked to discredit the law of chastisement. By the 1870s, there was no judge or treatise writer in the United States who would defend the right of chastisement. Thus, when wife beaters were charged with assault and battery, judges refused to entertain the claim that a husband had a legal right to strike his wife. Instead judges pronounced chastisement a "quaint" or "barbaric" rem-

nant of the past and allowed the criminal prosecution to proceed. As an Alabama court explained in 1871: "The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law."[13] In several states, legislatures enacted statutes specifically prohibiting wife beating; three states even revived corporal punishment for the crime, providing that wife beaters could be sentenced to the whipping post.[14]

Thus the law governing wife beating began to change. But if lawmakers and jurists unanimously repudiated the law of chastisement, they did not adopt legal rules that would necessarily constrain wife beating.

For example, during the late nineteenth century, the legal system remained largely unresponsive to feminist demands for reforms that might assist battered wives in protecting themselves. Feminist efforts to secure for the battered wife the right to separate from her husband, or to divorce him, were largely unsuccessful: reform proposals of this sort were disparaged as threatening the sanctity of marriage and family. In this period, states did begin to grant divorce on grounds of cruelty, but the standards for securing such a divorce were quite difficult to satisfy. Typically, a battered wife was required to prove that her husband acted with "extreme" and "repeated" cruelty.[15] Moreover, the evidence required to prove "extreme cruelty" varied by class, on the assumption that violence was a common, and normal, part of life among the married poor.[16] At the same time, a husband could defeat his wife's divorce petition either by showing that she misbehaved in some way that "provoked" his violence or by showing that she delayed petitioning for divorce and so forgave and "condoned" his violence.[17] In short, the law of divorce still assumed that a wife was obliged to endure various kinds of violence as a normal—and sometimes deserved—part of married life.

Just as marriage law changed to allow divorce on grounds of cruelty while continuing to tolerate significant amounts of violence in the marital relationship, so the criminal law also changed to prohibit chastisement while continuing to allow much violence in marriage to go unchecked. Here, too, class played an important role in discourses about marital violence. In the closing decades of the nineteenth century, commentators regularly depicted wife beating as the practice of lawless or unruly men of the "dangerous" classes. More particularly, they demonized the wife beater as a racial "other," whom authorities needed to control in order to secure social stability. Statistics on arrests and convictions for wife beating during this era demonstrate that criminal assault law was enforced against wife beaters only sporadically and then most often against African Americans and immigrant ethnic groups.[18]

The reforms of the 1870s did not mark the beginning of more fundamental change. Instead, for the ensuing century, the American legal system continued to tolerate violence in marriage as it did not in other relationships. As we will see, it was possible for lawmakers and jurists to condone wife beating even as they condemned the chastisement prerogative because lawmakers and jurists had begun to reason about the regulation of marital violence in a new conceptual framework.

Regulating Domestic Violence in an Era of Companionate Marriage

In the world of Blackstone's *Commentaries*, marriage was a hierarchical relationship in which a husband ruled over his wife and other members of the household. Yet by the nineteenth century, this authority-based conception of marriage had begun to lose its persuasive power—a development that clearly contributed to the demise of the chastisement prerogative. For example, treatise author James Schouler observed in 1870 that there was a tension between the hierarchical premises of chastisement doctrine and contemporary conceptions of marriage: "In a ruder state of society the husband frequently maintained his authority by force. . . . *But [in recent times] the wife has been regarded more as the companion of her husband*; and this right of chastisement may be regarded as exceedingly questionable at the present day. *The rule of love has superseded the rule of force*."[19] The shift in popular understandings of marriage that Schouler's treatise registers had important consequences for the way in which jurists reasoned about a husband's marital authority. Nineteenth-century jurists did not deny that a husband had authority over his wife; instead, as Schouler's treatise illustrates, they insisted that a husband rule his household by love rather than by force. This mingling of authority and affect-based conceptions of marriage shaped the body of marital status law that emerged in the wake of chastisement's demise.

As jurists began to reason about domestic violence within the discourse of companionate marriage, they developed a new framework for analyzing the regulation of wife beating. Judges who would no longer defend the husband's right to inflict corporal punishment on his wife began instead to emphasize that the law should promote *domestic harmony* between husband and wife and protect the *privacy* of the marriage relationship.

THE DISCOURSE OF AFFECTIVE PRIVACY IN DOMESTIC ASSAULT LAW

The discourse of affective privacy, a new mode of reasoning about the regulation of marital violence, made its earliest appearance in American case law as a *justification* for the right of chastisement. For example, when North Carolina upheld the right of chastisement in *State v. Black*,[20] the court justified the prerogative on two grounds: the husband's authority over his wife ("[a] husband is responsible for the acts of his wife, and he is required to govern his household") and the need to shield domestic conflicts from public scrutiny ("the law will not invade the domestic forum or go behind the curtain").[21] In *Black*, the traditional hierarchy-based rationale for chastisement law was intermingled with new rationales couched in the discourse of affective privacy: "public exhibition in the court-house of such quarrels and fights between man and wife widens the breach, makes reconciliation almost impossible, and encourages insubordination."[22]

Such arguments began to play an even more prominent role in the regulation of marital violence when North Carolina repudiated the doctrine of chastisement in the 1868 case of *State v. Rhodes*.[23] In *Rhodes*, the North Carolina Supreme Court declined to enforce an assault and battery charge against a man who assaulted his

wife. The court repudiated the chastisement prerogative but then granted the wife beater immunity from criminal prosecution, justifying this new immunity policy in the rhetoric of affective privacy:

> [H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modelled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive; and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.[24]

As the court summed up the new doctrine six years later in a much-quoted opinion: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, *it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive*."[25] Thus, North Carolina courts abrogated a husband's prerogative to chastise his wife but supplanted it with an immunity from prosecution that coincided with the scope of the former prerogative. The law of chastisement was thus translated into a body of doctrine that comported with the logic of companionate marriage.

The concern for privacy that appears in these North Carolina cases does not seem to have played a significant role in the development of criminal law in the late nineteenth century—perhaps because criminal prosecution of wife beaters during this era was focused on controlling men of the "lower classes," men whose privacy needs elites scarcely recognized, much less sought to protect. But privacy-based reasoning about domestic violence did shape the development of private law in the late nineteenth century, playing a key role in the law of intentional torts as it emerged from reform by the married women's property acts. It was in the law of torts that privacy-based reasoning about marital violence flourished before returning to shape the criminal law during the early twentieth century.

PRIVACY IN THE EMERGING LAW OF INTERSPOUSAL TORT IMMUNITY

While it was clear by the second half of the nineteenth century that wife beating was a crime, it was not at all clear that this same conduct constituted a tort. A criminal prosecution for wife beating was brought against a husband by the state, whereas a tort claim was prosecuted by the married woman herself. Could a battered wife bring suit against her husband in order to vindicate her own injuries without depending on the state to intervene and protect her? The question was startling to those versed in common-law understandings of marriage. The same body of common law that vested a husband with the prerogative to chastise his wife also denied a married woman the right to file suit without her husband's

consent and joinder.[26] Interspousal litigation violated fundamental precepts of the doctrine of marital unity.

But if the prospect of a wife's suing her husband contravened the most basic common-law concepts of marriage, it was also an inevitable outgrowth of common-law reform in the mid-nineteenth century—a period when the doctrine of marital unity was undergoing statutory modification under the pressure of feminist advocacy. Courts asked to determine whether wife beating was a tort had to interpret the marriage reform legislation whose enactment the woman's rights movement had advocated. Among the many rights these laws gave married women was the right to file suit without their husbands' joinder and the right to collect tort damages for injuries to their persons and property. Under these reform statutes, could a wife now bring a tort suit against a husband who assaulted her and collect money damages? The question presented women as agents of their own vindication in a dual sense: a plaintiff sought redress for her injury without relying on the state to protect her, and she did so under the authority of legislation enacted in response to feminist advocacy.

The law of torts differed from the criminal law in one other respect relevant to our analysis of the development of modern domestic assault law. A wife was likely to bring a suit for money damages against a husband who assaulted her only in circumstances in which there were assets to redistribute within the family. Thus, as jurists would surely recognize, it was married men of the middle and upper classes who might face tort claims for wife beating—precisely those men who were unlikely to face criminal prosecution for wife beating during the late nineteenth century.

With these gender- and class-salient features to recommend it, the new tort claim was not well received. Regardless of whether a husband beat, choked, stabbed, or shot his wife, all courts that heard such tort claims initially rejected them. (This doctrine of "interspousal tort immunity" survived well into the twentieth century and still remains law in a number of states today.)[27]

The Supreme Court of Maine was one of the first to synthesize the "domestic harmony" and "privacy" rationales in a tort case decided in 1877. In *Abbott v. Abbott*, a woman sued her ex-husband in tort, alleging that he violently assaulted her. The Maine court ruled that the plaintiff could not recover tort damages from her ex-husband. The court acknowledged that "there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now undoubtedly, the law of England and of all the American states that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever."[28] Yet, after repudiating the right of chastisement, the court declared that a husband was immune from tort liability for assaulting his wife. To support this view, the court quoted an opinion of the North Carolina Supreme Court explaining why a husband should be immune from criminal prosecution for beating his wife : " '[I]t is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.' "[29] Asserting that a tort remedy was not "desirable" as a wife could seek relief in the criminal courts, or seek a divorce on grounds of cruelty, the court observed that "[i]t would be a poor policy for the law to grant the remedy asked for in this case," for "[t]he private matters of

the whole period of married existence might be exposed by suits'' and ''this would add a new method by which estates could be plundered.''[30]

When the U.S. Supreme Court construed the District of Columbia's married woman's property act in 1910, it invoked both a ''privacy'' and a ''domestic harmony'' rationale for interspousal tort immunity.[31] The Court asserted that Congress had not intended to give spouses the capacity to sue each other;[32] it then observed that allowing intramarital suits would ''open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel'' and questioned whether ''the exercise of such jurisdisction would be promotive of the public welfare and domestic harmony.''[33] By the early twentieth century, numerous state supreme courts had barred wives from suing their husbands for intentional torts typically on the grounds that ''the tranquility of family relations'' would be ''disturbed by dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, *matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten.*''[34]

It is important to observe that courts developed the doctrine of interspousal tort immunity in response to the *reform* of the common law. As the common law was slowly modified by statute and judicial decision, courts had to explain anomalies in the law of marital status that simply did not exist before. At common law, a wife lacked capacity to sue anyone without her husband's joinder, so her inability to sue her husband was hardly in need of explanation. But once a married woman was granted the right to sue in tort for injuries to property or person, courts had to decide whether she could sue her husband and, if not, to explain why not. All courts that faced the claim initially ruled against it, with some explaining the emergent law of interspousal tort immunity by invoking the doctrine of marital unity. But because the doctrine of unity was itself under attack, courts sought *new* grounds on which to justify the immunity bar. ''Privacy'' supplied grounds on which to justify interspousal tort immunity—grounds that were seemingly independent of the increasingly discredited language of marital hierarchy. And so the discourse of marital status began to shift from the rhetoric of ''marital unity'' to the rhetoric of ''privacy'' and ''domestic harmony.''

Thus, judges seeking to explain the modified structure of marital status law increasingly drew upon gender concepts of the industrial era to explain the law of marriage in more contemporary and socially credible terms. Rather than represent marriage in the biblical discourse of ''one flesh,'' as a relation that ''merged'' wife with husband, courts instead discussed marriage as it was understood in nineteenth-century America: as a companionate relationship based on an affective bond that flourished best in a sphere separate from civil society. Some judges even went so far as to depict the marriage relation as situated in a home with heavily curtained windows: thus, a court would not hear a wife's suit for damages against a husband who battered her because public policy counseled that ''it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.''[35] With this shift to privacy talk, a husband's marital prerogatives could be preserved in new juridical form—as legal immunities.

Once courts ceased to rely on the rhetoric of marital unity and began to discuss

marriage in the language of privacy and affect, they no longer had to explain the law of marriage as enforcing relations of hierarchy. Instead, courts could explain the law of marriage as preserving relations of *altruism*. If a wife suffered a beating at the hands of her husband, "it is better to . . . leave the parties to forget and forgive."[36] As the North Carolina Supreme Court observed: "[The law] drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of public prosecution. It presumes that acts of wrong committed in passsion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory."[37] In short, it was no longer necessary to justify a husband's acts of abuse as the lawful prerogatives of a master. Rather, the state granted a husband immunity to abuse his wife in order to foster the altruistic ethos of the private realm. In this way, laws that protected relations of domination could be justified as promoting relations of love. The regulation of marital violence was thus translated into the language of companionate marriage prevailing during the industrial era.

PRIVACY IN THE CRIMINAL LAW OF DOMESTIC ASSAULT

By the beginning of the twentieth century, this new mode of reasoning about marital violence traveled from tort law to criminal law and found institutional expression in the criminal justice system. During this period, cities began to establish special domestic relations courts staffed by social workers to handle complaints of marital violence; by 1920 most major cities had such courts. The family court system sought to decriminalize marital violence. The underlying theory of this special court system, a New York City judge explained, was that "domestic trouble cases are not criminal in a legal sense."[38] Rather than arrest or punish those who assaulted their partners, the judge and social workers urged couples to reconcile, providing informal or formal counseling designed to preserve the relationship whenever possible. Battered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship and rebuild it rather than attempt to separate or divorce. The police adjusted their arrest procedures to accord with the new philosophy of the domestic relations courts, channeling family violence cases out of the criminal justice system and into counseling whenever possible. In this institutional framework, physical assault was not viewed as criminal conduct; instead, it was viewed as an expression of emotions that needed to be adjusted and rechanneled into marriage.

Regulation of marital violence continued in this "therapeutic" framework for much of the twentieth century. There was no formal immunity rule as in tort law, but the criminal justice system developed a set of informal procedures for handling marital violence—which it justified in the discourse of affective privacy. In the 1960s, for example, the training bulletin of the International Association of Chiefs of Police offered the following instructions for handling "family disturbances":

> For the most part these disputes are personal matters requiring no direct police action. However, an inquiry into the facts must be made to satisfy the originating complaint. . . . Once inside the home, the officer's sole purpose is to *preserve the peace . . . [a]ttempt to soothe feelings, pacify parties* . . . [s]uggest parties refer their problem to a church or a community agency. . . . In dealing with family disputes *the power of arrest should be exercised as a last resort. The officer should never create a police problem when there is only a family problem existing.*[39]

Until the last decade, this set of instructions was quite typical of police procedure in American cities. For example, in California, the Oakland Police Department's 1975 "Training Bulletin on Techniques of Dispute Intervention" asserted that "*[t]he police role in a dispute situation is more often that of a mediator and peacemaker than enforcer of law*. . . . Normally, officers should adhere to the policy that that arrests shall be avoided . . . but when one of the parties demands arrest, you should . . . encourage the parties to reason with each other."[40]

It was not until the late 1970s that the contemporary women's rights movement mounted an effective challenge to this regime. Today, after numerous protest activities and lawsuits, there are shelters for battered women and their children, new arrest procedures for police departments across the country, and even federal legislation making gender-motivated assaults a civil rights violation.[41] Yet as the U.S. surgeon general recently found, battering of women by husbands, ex-husbands, and lovers remains the single largest cause of injury to women in the United States today.[42]

Notwithstanding profound changes in the laws and mores of marriage since the turn of the century, Americans still reason about marital violence in terms of privacy. O. J. Simpson invoked this tradition in 1989 when he shouted at police who had responded to his wife's call for help: "The police have been out here eight times before, and now you're going to arrest me for this? *This is a family matter.* Why do you want to make a big deal out of it when we can handle it?"[43] The chief justice of the United States invoked this discourse of the private when he objected to provisions in the new Violence against Women Act[44] that create a federal cause of action for gender-motivated violence. The bill's "broad definition of criminal conduct is so open-ended, and the new private right of action so sweeping," Chief Justice William H. Rehnquist complained, "that the legislation *could involve the federal courts in a whole host of domestic relations disputes.*"[45]

Civil Rights Reform and the Modernization of Status Discourse

In this essay I have attempted to demonstrate that some kinds of privacy talk are properly understood as modern expressions of the putatively discredited doctrine of marital unity. There is no necessary connection here, only a historically contingent one. But the connection is terribly important to observe for just that reason. Status talk is mutable and remarkably adaptable: it will evolve as the rule structure of a status regime evolves. In the ensuing sections I reflect briefly on the signifi-

cance of this observation for our understanding of civil rights reform, both historical and contemporary.

Historical Perspectives

Status regimes are not static but dynamic—revitalized from time to time as they are reshaped by diverse political forces and draw on evolving social mores. For example, in the decades after the Civil War, a regime of racial status built on the law of chattel slavery evolved in rule structure and rhetoric into the form of American apartheid known as ''Jim Crow.'' The law of de jure segregation differed from chattel slavery in its constitutive rules (so that former slaves were subject to a different set of labor codes and restrictions on their civil liberties); it is less commonly observed that the law of de jure segregation also differed from chattel slavery, at least in part, in the rhetorics employed to justify its constitutive rules. During the aptly named ''Reconstruction'' era, overtly hierarchy-based justifications offered for chattel slavery began to give way to justifications for apartheid that drew upon racial discourses of the private. Thus, in *Plessy v. Ferguson*, the Supreme Court upheld racial segregation under the Fourteenth Amendment by reasoning that racial equality did not require ''an enforced commingling of the two races'':[46]

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.[47]

The racial discourse of the private that the Court invoked in *Plessy* differed from the discourses of affective privacy employed to rationalize elements of marital status law during the same period but functioned in strikingly similar ways: to explain laws enforcing status privileges, once justified in overtly hierarchy-based discourses, with reference to other, less contested, social values.

There were significant differences in the rules and rhetoric that were employed to enforce racial status relations under chattel slavery and under Jim Crow. Yet it plainly would be wrong to overlook the elements of continuity between regimes. During Reconstruction, the legal system still played a significant role in maintaining the differences in material and dignitary privilege that constituted ''the two races,'' although it now did so by means of a new cluster of rules and rhetorics. In short, Jim Crow was a successor to chattel slavery that enforced the status relations we call ''race'' by somewhat less formalized means. I call this dynamic of preservation through transformation in the structure of a status regime ''deformalization'' or ''modernization.''

Modernization of a status regime occurs when a legal system enforces social stratification by means that change over time. One commonly recognized way that law enforces social stratification is by according groups hierarchically differentiated

entitlements and obligations. In antebellum America, the law of slavery and marriage enforced race and gender hierarchy by such overt means. But by the Reconstruction era, the law of race and gender status had begun, slowly, to evolve, in diverse ways eschewing the overtly hierarchical forms of the antebellum period. In this era, the legal system continued to draw distinctions on the basis of race and gender, but it now began to emphasize formal equality of entitlements in relationships once explicitly organized as relationships of mastery and subordination and to repudiate openly caste-based justifications for such group-based distinctions as the law continued to enforce. While the American legal system continued to distribute social goods and privileges in ways that favored whites and males, it now began self-consciously to disavow its role in doing so. The new interest in rule equality and the energy devoted to explaining law without recourse to overtly caste-based justifications mark an important shift in the mode of regulating race and gender relations, a deformalization and concomitant modernization of status law.

Civil rights agitation plays a significant role in precipitating the modernization of status regimes. Abolitionist protest (and a civil war) contributed to the modernization of racial-status law during the Reconstruction era, just as the woman's rights protest contributed to the modernization of gender-status law during this same period. If successful, protest of this sort will draw the legitimacy of a status regime into question and so bring pressure to bear on lawmakers and other legal elites to cede status privileges. In such circumstances, legal elites may begin to cede status privileges, but they will also defend them. They will initially defend privileges within the traditional rhetoric of the status regime—but because the traditional rhetoric of the status regime is now socially contested, they will begin to search for "new reasons" to justify those status privileges they choose to defend. As reform of the common-law marital-status rules illustrates, this process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric—with the result that, over time, status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom. In short, civil rights reform is an important engine of social change. Yet civil rights reform does not simply abolish a status regime; in important respects, it modernizes the rules and rhetoric through which status relations are enforced and justified.

The dynamic of preservation through transformation that I am describing need not arise through the conspiratorial or malevolent motivations of the legal elites directing reform. Indeed, we can posit for purposes of argument that the legal elites who implement these changes in the constitutive rules and rhetoric of a status regime are acting in "good faith." For example, I assume that the judges who repudiated marital chastisement, yet developed the interspousal tort immunity doctrine to constrain interpretation of the married women's property acts, did not snicker in the robing room in gleeful appreciation of their interpretive sophistry. They could well have harbored the good-faith conviction that privacy and domestic harmony were important social values that required protection as they superintended the marriage relation through a period of turbulent legal transformation. Thus, as judges contemplated the question of whether the reform statutes granting married women a tort claim for injury to their persons and property should be

construed to enable wives to sue their husbands, judges could well have decided, in all sincerity, that considerations of "public policy" warranted interpreting the statutes to bar the claim.

Yet it also seems clear that, as educated, propertied men, judges reasoned about this question within certain legal traditions and from a certain social position that predisposed them to certain legal conclusions. Judges who initially adopted the tort immunity rule openly embraced it as preserving elements of the doctrine of marital unity; only as the doctrine of marital unity was progressively discredited did courts come to rely exclusively on justifications couched in the discourse of affective privacy. Moreover, given the social position from which judges reasoned about "public policy," they were far more likely to appreciate the benefits of the tort immunity rule (to propertied husbands) than to register its costs (to battered wives)—a phenomenon Paul Brest has elegantly dubbed "selective sympathy and indifference."[48] Of course, we can assume that at least some of these judges had the critical faculties to discern, and thus to correct for, the biases to which their deliberative processes were subject. Sometimes, however, critical oblivion is bliss, especially when it is interest-convergent.

Does this inquiry into the modernization of status regimes turn out to be a story about stasis after all? Is Jim Crow slavery by another name and the network of formal and informal immunities for wife beating that emerged during Reconstruction the functional equivalent of chastisement? As I indicated at the outset of this discussion, I believe that the dynamic I am describing can fairly be called one of preservation through transformation or characterized in any way that indicates that elements of continuity *and* change are at stake in the process. A body of status law is modernized when its rules and rhetoric are reformed, and yet the law continues to distribute material and dignitary privileges in ways that maintain the distinctions constituting the regime (e.g., "race" or "gender") in relatively continuous terms. Modernization of a status regime may nonetheless bring about perceptible, even significant, changes in status relations. For example, we can posit that African Americans were "better off" under a regime of Jim Crow than a regime of chattel slavery, certainly in terms of dignitary values and possibly in terms of their material welfare as well. Similarly, we can posit that married women were "better off" under a regime of formal and informal immunities for wife beating, certainly in terms of dignitary values and possibly in terms of their material welfare as well.

There is, however, one way in which members of each group were indisputably worse off: in their capacity to achieve further, welfare-enhancing reform of the status regime in which they were subordinated. By the mid-nineteenth century, slavery and marital-status law (chastisement, in particular) were socially contested and substantially discredited practices. They lacked legitimacy in the eyes of many. But once racial-status law and marital-status law were reformed in the Reconstruction era, each status regime gained substantially in legitimacy. As each regime was translated from contested rules and rhetorics into more contemporary rules and rhetorics, each was again "naturalized" as just and reasonable, in significant part because each was now formally and substantively distinguishable from its contested predecessor: each could be justified in terms of social values that were distinct from

the orthodox, hierarchy-based norms that characterized its predecessor (slavery, marriage) as a regime of mastery. Considered from this perspective, we can see that civil rights reform may alleviate certain dignitary or material aspects of the inequalities that subordinated groups suffer; *but we can also see that civil rights reform may enhance the legal system's capacity to legitimate residual social inequalities among status-differentiated groups.*

Of course, struggle persists, and oftentimes subordinated groups can exploit the semantic instability of status discourses for their own resistance purposes. After many decades, the rhetoric of separate but equal was turned against Jim Crow, and the discourse of privacy developed a constitutional life that would have startled the nineteenth-century judiciary. It might seem that such developments would tend ultimately to destabilize regimes of race and gender status. Yet the dynamic runs in both directions. Protest or resistance discourses are semantically unstable as well, with the result that rhetorics employed by recent civil rights movements to challenge laws enforcing race-and gender-status relationships are now being turned to *status-preserving* ends. As the recent life of the color-blindness trope illustrates, civil rights rhetoric can supply "legitimate," "nondiscriminatory" reasons for opposing affirmative action and other group-conscious initiatives intended to remedy racial and gender inequalities. This change in the political valence of civil rights discourse—a phenomenon Jack Balkin calls "ideological drift"[49]—occurs as those who oppose current efforts to rectify race and gender stratification seek to justify their opposition in terms that can be differentiated from a naked interest in preserving race and gender stratification. Although many justifications might suffice for these purposes, claiming fidelity to principles of equality would seem to provide an unimpeachable reason for opposing group-conscious efforts to rectify race and gender stratification. The language of color-blindness can now be appropriated for these purposes, because the rule structure of contemporary race- and gender-status law has changed in response to demands for color-and sex-blindness that have been advanced by the civil rights movement over the last several decades, and government rarely employs race-and gender-conscious regulation any more, except for the purpose of alleviating social stratification. Under such circumstances, old protest discourses (such as color-blindness) are especially susceptible to capture, "drift," or co-optation, as they justify adherence to the status quo in terms that are especially difficult to impugn. As I observed at the outset of this discussion, status talk is mutable and remarkably adaptable and will evolve as the rule structure of a status regime evolves.[50]

Contemporary Perspectives

To what extent is the legal system responsible for the continuing race and gender stratification of American society? Today it is commonplace to distinguish between de jure and de facto discrimination—and to attribute some aspects of race and gender stratification to state action and others to "social" factors that might reflect "the continuing effects of past discrimination." Largely unarticulated in such accounts of de jure and de facto discrimination is any theory about what kinds of state action are discriminatory, or status enforcing. Most often it is tacitly assumed

that race- or gender-specific state action is status enforcing, whereas so-called facially neutral state action is not.

This way of reasoning about the de jure–de facto distinction has its roots in equal protection doctrines requiring "heightened scrutiny" of race- or gender-specific state action. Under the pressure of this constitutional requirement, laws that only recently were cast in race- or gender-specific terms have been revised so that they are now cleansed of any race- or gender-specific references. As a consequence, the persisting race and gender stratification of American life is commonly (and often legally) attributed to "the continuing effects of past discrimination" rather than to current, "facially neutral" forms of state action.

There is little in contemporary equal protection doctrine that challenges this view. The Court will hear arguments that race- or sex-based state action is discriminatory; otherwise it requires plaintiffs to prove that facially neutral state action is motivated by a discriminatory purpose.[51] Yet the Court has construed "discriminatory purpose" to be a state of mind akin to malice,[52] and, as the Court itself has acknowledged, it is exceedingly difficult to prove "discriminatory purpose" once it is defined in this way: lawmakers can always articulate socially benign (or at least nonmalicious) reasons for policies they adopt that may "incidentally" perpetuate status inequalities among groups. Cumulatively, this body of equal protection doctrine has given lawmakers a strong incentive to change the rule structure of policies that long enforced racial or gender stratification and to articulate "legitimate, nondiscriminatory reasons" for those policies in order to immunize them from further equal protection challenge.

Thus, the civil rights revolutions of the 1960s and 1970s precipitated a shift in the rule structure and justificatory rhetoric of laws that long played a role in enforcing race- and gender-status relations. Given that today most state action has been cleansed of race- and gender-specific references, can we assume, as both the Supreme Court and the American public seemingly have, that by virtue of these reforms, the state has generally withdrawn from the business of enforcing race- and gender-status relations?

We might consider this question by examining how equal protection doctrines of heightened scrutiny have affected law enforcement policies regulating marital violence. Although general criminal assault statutes were often used to regulate "domestic disturbances," it was also commonplace for judicial opinions, statutes, and law enforcement policies to refer to the conduct as "wife beating" or otherwise to discuss the parties involved in gender-specific terms. After 1976, when the Court decided in *Craig v. Boren*[53] that sex-based state action would be subject to a heightened or intermediate standard of review under the equal protection clause of the Fourteenth Amendment, all this began to change. Residual gender-specific references were deleted from the law and replaced with gender-neutral language, with the result that the conduct is now generally referred to as "spousal assault" or "domestic violence." (To be sure, in this era many feminists advocated the use of gender-neutral language in domestic violence policies, *in the course of seeking reform of their substantive norms*; lawmakers readily adopted the gender-neutral language and moved far more slowly to revise the constitutive norms and procedures of their domestic violence policies.)

Now, when litigants challenge law enforcement policies providing lesser degrees

of protection to victims of domestic violence, they have great difficulty proving that the policies are sexually discriminatory—despite the fact that it is women who are overwhelmingly the targets of assaults between intimates.[54] A number of federal circuit courts have ruled that facially neutral spousal assault policies are not subject to heightened standards of review under the equal protection clause (although such policies may constitute discrimination against married persons or cohabitants, subject to more deferential or "rational relation" review).[55] Because such policies are couched in gender-neutral terms, plaintiffs seeking to prove that the policies were animated by a sexually discriminatory purpose would have to show that they were adopted "at least in part because of, and not merely in spite of," their impact on women.[56] Similar problems in proving sex discrimination occur with equal protection challenges to the doctrine of interspousal tort immunity (which, as we have seen, was couched, from the outset, in formally gender-neutral terms), or to the exemption for "spousal" rape, or to rules giving "spouses" rights to the value of labor performed in the household.

In this way, modern doctrines of equal protection are effacing the gender-specific (or race-specific) antecedents of state policies that in their current, facially neutral form may well continue to enforce relations of gender or racial inequality. While modern equal protection law has served to disestablish certain forms of status-enforcing state action, in many cases, the changes equal protection doctrines effected were at best superficial.[57]

Consider the domestic violence policies we have examined. The threat of equal protection litigation prompted the deletion of gender-specific references from the law; once "sanitized" in this way, such policies have become exceedingly difficult to challenge with existing constitutional tools, even when their historically rooted norms remain intact and substantially unquestioned. Under the case law we have just surveyed, a municipality defending a facially neutral domestic violence policy against an equal protection claim need show only that the policy is rationally related to some legitimate state purpose and was not adopted "because of" its "adverse effects" on women. To say the least, this showing does not require municipalities to make significant changes in the structure of their policies—even if the facially neutral policies continue to treat victims of assaults by intimates differently than other victims of assault. In *Siddle v. City of Cambridge*,[58] the court found that the city's proffered justifications did in fact pass the rational-basis test:

> The state puts forth several justifications for any differences that may exist. These justifications fulfill the rational basis test, and reach the level of an important state objective. *The first is that the criminal area may not be the best place to resolve marital problems of this sort. The government needs flexibility so that all of its resources, including mental health agencies, can rectify the situation.* Often criminal sanctions alone are ineffective. *Moreover, domestic violence situation [sic] are different from other forms of criminal behavior in their complex emotional causes of behavior....* The government need not treat cases as the same, because it would be unproductive, and possibility counter-productive, to do so.[59]

The justifications accepted by this court as satisfying the rational relation (and even intermediate scrutiny) test should be quite familiar. The reasons supplied are conventional expressions of the discourse of affective privacy, which has been used

to justify criminal law policies on domestic violence since the Progressive Era—*reasons for affording informal immunity to assaults between intimates that would not obtain in other contexts*. The analytical framework of equal protection cases such as these merely serves to rationalize a body of laws whose normative roots can be traced to the ancient doctrine of marital chastisement. For close to two decades now, the modern feminist movement has protested the inadequacy of domestic violence policies but, in the course of this work, has received considerably less assistance from the Constitution's promise of equal protection of the laws than the lineage of the policies would seem to warrant.

There are certain modifications to equal protection doctrine that could make it supple enough to police for bias in the new forms of "facially neutral" state action it has helped bring into being. For instance, the Court might revise the doctrinal criteria that define race-and sex-based state action for purposes of triggering heightened scrutiny. Given the lineage of "spousal" assault policies, why should the mere use of gender-neutral language immunize the policies from heightened scrutiny? Or the Court might revise the much-criticized doctrines of discriminatory purpose that plaintiffs must use to challenge facially neutral policies and practices. Given the history of marital violence regulation, why must a plaintiff show that a facially neutral spousal assault policy was adopted "because of" its "adverse effects" on women? This requirement seems especially perverse in an "equal rights" era, when policymakers conventionally supply "legitimate, nondiscriminatory" reasons for their actions.

Unfortunately, as currently constituted, the Court shows scant interest in revising equal protection doctrines of heightened scrutiny and discriminatory purpose. This body of constitutional law once served to dismantle status-enforcing state action, but, because of its very success in precipitating the reform—*and modernization*—of status-enforcing state action, the doctrines often serve to rationalize rather than scrutinize the new, facially neutral forms of status-enforcing state action they helped bring into being.

Conclusion

As this essay has demonstrated, status law is dynamic and evolves in rule structure and rhetoric under the pressure of civil rights reform. In the nineteenth century, when judges repudiated a husband's common-law prerogative to chastise his wife, they began to grant wife beaters a variety of formal and informal immunities from public and private prosecution. Just as the doctrine of chastisement was rationalized by rhetorics of hierarchy, this new regime of immunity rules was rationalized by rhetorics of interiority: by a discourse of affective privacy that invoked the feelings and spaces of domesticity to justify the law of marital status in an era of companionate marriage.

In short, as this essay has illustrated, emotions have a history, and their discursive roots can be traced—if only in small part—to the nineteenth-century courtroom, where the discourse of affective privacy served to make "reasonable" marital-status doctrines when talk of marital unity no longer could. There, judges invoking the discourse of affective privacy translated the hierarchy-based chastisement doc-

trine into immunity rules couched in a more modern idiom: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, *it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive*."[60] The American antidiscrimination tradition pays scant attention to these chameleon-like qualities of status talk; it has reified the phenomena it calls "sex discrimination" and "race discrimination," without attending to their dynamic character. But this study of marital violence law demonstrates that status discourse is mutable, evolving as it is contested over the course of the centuries. If civil rights reform is to be effective, civil rights law must continually adapt, striving to remain in critical dialogue with the evolving rules and rhetoric of any status regime it aspires to disestablish.

NOTES

This chapter is drawn in part from "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117–2207.

1. William Blackstone, *Commentaries*, vol. 1 (Chicago: University of Chicago Press, 1979), 441; see, e.g., Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982), 51–52.
2. Blackstone, *Commentaries*, 444.
3. See Daniel Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Cambridge, Mass.: Harvard University Press, 1941), 1.
4. See, e.g., James Kent, *Commentaries on American Law*, vol. 2 (New York: E. B. Clayton, 1840), 180; Francis Wharton, *A Treatise on the Criminal Law of the United States* (Pittsburgh: James Kay, Jr. & Brother, 1846), 314.
5. For early American cases recognizing the right of chastisement, see *Helms v. Franciscus*, 2 Bland 544, 562 n. (Md. Ch. 1840) (quoting *Bread's Case*, Chancery Proceedings, lib. C.D. fol. 319 [1681]; *Bradley v. State*, 1 Miss. (Walk.) 156, 158 (1824); *State v. Black*, 60 N.C. 262 (1864); *State v. Buckley*, 2 Del. (2 Harr.) 552 (1838); *Richards v. Richards*, 1 Grant's Cases 389, 392–93 (Pa. 1856); *Adams v. Adams*, 100 Mass. 365, 369–70 (1868).
6. For an overview of the historiography on the reform of marital status law in nineteenth-century America, see Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82 (1994): 2127, 2132–41.
7. *Report of the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19 & 20, 1848* (Rochester, N.Y.: John Dick, 1848), 6 (emphasis added).
8. For an illustration of the slow progress of common-law reform, see Siegel, "Marital Status Law," 2149–57; Reva Siegel, "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073, 1167–77.
9. Jerome Nadelhaft, "Wife Torture: A Known Phenomenon in Nineteenth-Century America," *Journal of American Culture* 10 (1987): 39, 42.
10. C. C. H. of East Orange, New Jersey, "Crimes against Women," *Woman's Journal* (December 25, 1875): 413.
11. Henry B. Blackwell, "Crimes of a Single Day," *Woman's Journal* (January 29, 1876): 34.
12. Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to the Present* (New York: Oxford University Press,

1987), 100; Elizabeth Pleck, "Feminist Responses to 'Crimes against Women,' 1868–1896," *Signs* 8 (1983): 451, 462–65.

13. *Fulgam v. State*, 46 Ala. 143, 146 (1871).

14. Elizabeth Pleck, "The Whipping Post for Wife Beaters, 1876–1906," in *Essays on the Family and Historical Change*, ed. David Levine et al. (College Station: Texas A&M University Press, 1983), 127.

15. See, e.g., Chester Vernier, *American Family Laws*, vol. 2, sec. 66 (London: Oxford University Press, 1932) (quoting, by state, statutory definitions of cruelty as grounds for divorce).

16. See, e.g., *Bailey v. Bailey*, 97 Mass. 373, 379 (1867) ("Among the lower classes, blows sometimes pass between married couples who in the main are happy, and have no desire to part. Amidst very coarse habits . . . a word and a blow go together") (quoting Shelford, *Marriage and Divorce*, sec. 764, at 428).

17. On the defense of provocation, see, e.g., *Knight v. Knight*, 31 Ia. 451 (1871). On the defense of condonation, see, e.g., *Davies v. Davies*, 37 N.Y. 45, 46, 48 (1869).

18. See, e.g. Pleck, "The Whipping Post," 135–36. For more extended discussion of race and class bias in the prosecution of wife beaters in this era, see Reva B. Siegel, " 'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117, 2134–41.

19. James Schouler, *A Treatise on the Law of Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant* (Boston: Little, Brown & Co., 1870), 59 (emphasis added).

20. 60 N.C. 262 (1864).

21. Ibid.

22. Ibid.

23. 61 N.C. (Phil. Law) 453 (1868).

24. Ibid. at 457.

25. *State v. Oliver*, 70 N.C. 60, 61–62 (1874) (emphasis added).

26. See Joseph Story, *Commentaries on Equity Pleadings, and the Incidents Thereof, According to the Practice of the Courts of Equity, of England and America*, 7th ed. (Boston: Little, Brown & Co., 1865), 54–55.

27. Carl Tobias, "Interspousal Tort Immunity in America," *Georgia Law Review* 23 (1989): 359, 383.

28. 67 Me. 304, 307 (1877).

29. Ibid. (quoting *State v. Oliver*, 70 N.C. 60, 61–62 [1874]).

30. Ibid. at 308.

31. *Thompson v. Thompson*, 218 U.S. 611 (1910).

32. Ibid. at 617.

33. Ibid. at 617–18.

34. *Drake v. Drake*, 177 N.W. 624, 625 (Minn. 1920) (emphasis added).

35. *Abbott v. Abbott*, 67 Me. 304, 307 (1877) (quoting *State v. Oliver*, 70 N.C. 60, 61–62 [1874]).

36. Ibid.

37. *State v. Fulton*, 63 S.E. 145, 145 (N.C. 1908) (quoting *State v. Edens*, 95 N.C. 693) (spousal tort immunity for slander).

38. Pleck, *Domestic Tyranny*, 137 (quoting Judge Bernhard Rabbino of New York City Court of Domestic Relations).

39. International Association of Police Chiefs, *Training Key No. 16, Handling Disturbance Calls* 1968–69), 94–95, quoted in Sue E. Eisenberg and Patricia L. Micklow, "The Assaulted Wife: 'Catch 22' Revisited," *Women's Rights Law Reporter* 3 (1977): 138, 156 (emphasis added).

40. Del Martin, *Battered Wives* (1981), 93–94 (emphasis added).

41. See Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 13,981 [1994]).

42. Joan Zorza, "The Criminal Law of Misdemeanor Domestic Violence, 1970–1990," *Journal of Criminal Law and Criminology* 83 (1992): 46, 46 (quoting Nikki R. Van Hightower and Susan A. McManus, "Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies," *Public Administrative Review* 49 [1982]: 269, 269).

43. Josh Meyer, "Police Records Detail 1989 Beating That Led to Charge; A Bloodied Nicole Simpson, Hiding in Bushes after 911 Call, Told Officers: 'He's Going to Kill Me.' Judge Overruled Prosecutors' Request That Simpson Serve Jail Time," *Los Angeles Times*, 17 June 1994, pt. A, 24 (emphasis added).

44. 42 U.S.C. § 13,981 (1994).

45. William Rehnquist, "Chief Justice's 1991 Year-End Report on the Federal Judiciary," *Third Branch*, January 1992, 3 (emphasis added), quoted in "Developments in Law: Legal Responses to Domestic Violence," *Harvard Law Review* 106 (1993): 1498, 1545–46.

46. 163 U.S. 537, 551 (1896).

47. Ibid. at 544, 551.

48. Paul Brest, "The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle," *Harvard Law Review* 90 (1976): 1, 7–8.

49. J. M. Balkin, "Ideological Drift and the Struggle over Meaning," *Connecticut Law Review* 25 (1993): 869, 872–73.

50. Of course, nothing in the account of modernization I offer requires that new status discourses be generated out of co-opted protest discourses. On the other hand, my account of the modernization of status regimes does explain why old protest discourses are especially attractive candidates for co-optation into status discourses. As I indicate in the text, old protest discourses provide seemingly unimpeachable grounds for defending the structure of a status regime when its legitimacy is under attack.

51. See *Washington v. Davis*, 426 U.S. 229 (1976).

52. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

53. 429 U.S. 190 (1976).

54. The Justice Department has estimated that 90% to 95% of domestic violence victims are women. "Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?" *Journal of the American Medical Association* 273 (1995): 1781 (quoting U.S. Department of Justice, Bureau of Justice Statistics, *Violence between Intimates* [1994]).

55. The leading case in this area is *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1031 (3d Cir. 1988).

56. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

57. Making a race- or gender-specific law facially neutral may have very different consequences, depending on a variety of factors, including the nature of the law, the nature of the social practice it regulates, and the ways in which the regulated practice allocates dignitary and/or material privileges. Although the topic is far too vast to explore in the present context, the following examples should suffice to illustrate my point. Removing racial distinctions from a school assignment policy may facilitate the integration of a school system but will have less of an integration effect if the policy endorses "neighborhood" school assignments under conditions of residential segregation. Removing gender distinctions from a law conscripting persons for military service will facilitate the integration of the armed forces but will have less of an integration effect if the conscription policy specifies height, weight, and strength requirements that relatively few women can meet. Removing gender

distinctions from the law of rape will not much alter the social conditions under which rapes are practiced; nor will removing gender distinctions from domestic violence law much alter the practice of "spouse beating." Making such laws facially neutral does not alter the constraints on men who assault women; rather it extends the scope of the prohibition to include women. Presumably this reform will have a marginal deterrent effect on women's conduct but none on men's conduct. Nor is it clear what "symbolic" message is communicated by making gender-specific laws regulating gender-salient practices into gender-neutral laws. To disrupt the subordinating practice in these cases, it is necessary to alter the norms of the laws that regulate it. In short, formal equality will disrupt certain subordinating practices and leave others relatively undisturbed—possibly even masking the nature of the harm they are inflicting.

58. 761 F. Supp. 503 (S.D. Ohio 1991).

59. Ibid. at 512 (emphasis added).

60. *State v. Oliver*, 70 N.C. 60, 61–62 (1874) (criminal immunity case) (emphasis added), quoted in *Abbott v. Abbott*, 67 Me. 304, 307 (1877) (tort immunity case).