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Title

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Journal

UCLA Women's Law Journal, 16(1)

Author

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Publication Date

2007

DOI

10.5070/L3161017802

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NOTE

MARRIAGE – THE PECULIAR INSTITUTION: AN EXPLORATION OF MARRIAGE AND THE WOMEN’S RIGHTS MOVEMENT IN THE 19TH CENTURY

Alexandra Murray¹

I. INTRODUCTION

In 1852, Elizabeth Cady Stanton wrote a letter to Susan B. Anthony stating, “I feel this whole question of woman’s rights turns on the pivot of the marriage relation.”² Indeed, marriage was a central topic of discussion for women’s rights activists in the nineteenth century. Stanton criticized marriage as the legal endorsement of inequality and called for women to rebel against marriage. Marriage, she argued, was as oppressive as slavery, denying married women the right to hold property, the right to keep wages and the right to custody of their children. Yet, while the Abolitionist movement called for an end to slavery, the women’s rights movement as a whole never called for the complete abolition of marriage. In contrast, Dianne Post argues:

The attempt to kill the poisonous tree of slavery by lopping off a few of its unsightly branches. . . works no better than trying to fix the institution of marriage by gradual reform. . .No one

1. UCLA School Of Law, JD May 2006. Associate, O’Melveny & Myers. Special thanks to Professor Clyde Spillenger for all his help with this piece.

2. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1852), *in* 1 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, 1840-1866, at 195 (Ann D. Gordon ed., 1997) [hereinafter 1 SELECTED PAPERS].

would suggest that we should have just reformed slavery, as we have done with marriage, instead of abolishing it.³

This article explores the development of the radical wing of women's rights movement⁴ in the nineteenth century and offers possible explanations for why the abolition of slavery eventually succeeded, while the abolition of marriage never achieved the same success. I suggest that several factors played a part in the unwillingness of women's rights activists to support the abolition of marriage. First, the split of the women's rights movement from Abolitionism caused the women's rights movement to lose a major source of institutional support. Second, the disfranchisement of women made marriage a form of citizenship for wives whose only connection to the public and political domain was through their husbands. This led the movement to focus on suffrage rather than destroying the only form of citizenship women had, however minimal. Third, the scandal and publicity surrounding Victoria Woodhull and the Free Love movement intensified the perception that suffrage would lead to the destruction of the family and made mainstream women's rights activists wary about challenging marriage norms. Finally, the reaction of white men to the lingering non-traditional unions of freedpeople after emancipation led to a new emphasis on marriage and made it more difficult for women to challenge the institution.

3. Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 292 (1996). Diane Post is a modern legal scholar who argues for the abolition of marriage as a remedy for the patriarchal family.

4. I have defined the "radical wing" of the women's rights movement as those women such as Stanton and Anthony who argued that women were entitled to the same rights as men, including the vote, and who rejected the notion of the woman's sphere. Lisa Higgins describes what I call radical women as "public feminists." See generally Lisa Cochran Higgins, *Adulterous Individualism, Socialism, and Free Love in Nineteenth-Century Anti-Suffrage Writing*, 21 LEGACY 193, 196-197 (2004). Higgins describes "public feminists" as those who "entered the public sphere and argued for the expansion of women's rights in the political (i.e., the public) arena." *Id.* at 197. Higgins draws a contrast between "public feminists" and "traditionalists" and "domestic feminists." "Traditionalists," she explains, believed "woman's place was strictly in the home, where she could exert a Christian influence on her husband and family without direct political activity." *Id.* at 196. "Domestic feminists" fell somewhere between the two extremes, "emphasizing the necessity for woman's Christian influence on the family and expand[ing] to include the purification of the social context in which the family dwelled." *Id.* at 197. However, unlike "public feminists," "domestic feminists" believed that women's power properly came through the home and Protestant reform, as an "indirect influence rather than direct force." *Id.*

II. WOMEN LEARN TO BE POLITICAL ACTIVISTS

The women's rights movement developed out of women's involvement with Protestant anti-slavery reform efforts. Women's experience in this arena taught them the basics of political activism. Women learned from their involvement with anti-slavery campaigns how to address effectively the problems of slavery and were able to adapt the methods they learned to their own struggle for equality.⁵ As a more radical Abolitionist wing developed in the anti-slavery crusade, a more radical version of women's rights emerged as well.

Women originally joined the anti-slavery movement in their capacity as the benevolent keepers of faith within the family. In the early years, women were involved mainly in the circulation of petitions to Congress.⁶ This activity allowed women to participate in the public political domain in a way that their husbands did not object to.⁷ Women took such an active role in circulating and signing petitions that over half the petitions sent to Congress bore women's signatures.⁸ While men encouraged these seemingly benign activities, women were gaining confidence and learning important leadership skills.⁹

In 1831, William Garrison published the first issue of the *Liberator* and emerged as a leader in the radical Abolitionist movement.¹⁰ Contrary to mainstream anti-slavery thought, which called for gradual manumission and colonization, Gar-

5. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 32 (1978).

6. JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY 82-83* (rev. ed. 1976).

7. During the nineteenth century, it was widely held that women should not involve themselves in politics outside of the home. According to a publication called *The New York Mirror*, "[W]hen a lady, forgetting the inborn and retiring dignity of her sex, steps forward as a public declaimer, and actually enlists in the party warfare waged by the press, it is difficult to restrain the expression of pity, if not contempt, which the spectacle must excite in every well informed mind. . . [T]here can be no excuse for a female deserting her allotted privacy, and volunteering to encounter gladiators in the political arena." However, women were involved in religious reform movements. Because women were widely held to be the moral guardians of the family this was considered appropriate work. In addition, women's activities in the early period the Abolitionist movement, as in other religious activities, served mainly to support men's organizations and thus were not objectionable. DUBOIS, *supra* note 5, at 32.

8. *Id.* at 83

9. *Id.* at 82.

10. *Africans in America*, Resource Bank, William Lloyd Garrison: 1805-1879, <http://www.pbs.org/wgbh/aia/part4/4p1561.html> (last visited Oct. 29, 2006).

risonian Abolitionists demanded immediate and unconditional emancipation of the slaves.¹¹ The emergence of the Garrisonian wing of Abolitionism introduced the movement to a form of politics that criticized the teachings of the Church, specifically the Protestant clergy's support of slavery.¹² Garrison did not reject religion, but rather rejected the Church's use of religion to justify the evils of slavery. Prior to this development, women involved with Protestant efforts had been confronted with a difficult conflict between activism and the demand of the Church that they remain in their traditional domestic role. However, Garrison's ideas "enabled them to hold fast to their religious convictions, reject clerical criticism, and instead indict the churches for being institutional bulwarks of slavery and women's oppression,"¹³ and to identify corrupt institutions as the source of sin.¹⁴ Thus, Garrisonian women moved beyond the religious confines of their work, borrowing Abolitionist rhetoric and strategy as the framework for their own movement.

Garrisonian women appropriated the same techniques of biblical exegesis used by Abolitionists to challenge the scriptural defense of sexual inequality.¹⁵ Through critical readings of the Bible, women were able to challenge the Church's demand that women remain in the domestic sphere. As Lucretia Mott declared, "The pulpit has been prostituted, the Bible has been ill-used. . . ."¹⁶ Stanton wrote, "No reform has ever been started but the Bible, falsely interpreted, has opposed it. . . . Now, it seems to us, the time has fully come for this much abused book to change hands."¹⁷ Just as Garrisonians stressed the moral equality of the races, promoting the notion that both blacks and whites were fundamentally human,¹⁸ women asserted that both men and wo-

11. *Id.*

12. DuBois, *supra* note 5, at 33.

13. *Id.* at 34.

14. *Id.* at 33.

15. *Id.* at 35.

16. *Id.* (quoting Lucretia Mott).

17. Letter to the Editors, *Seneca County Courier*, from Elizabeth Cady Stanton and Elizabeth W. McClintock (July 23, 1848), in 1 *SELECTED PAPERS*, *supra* note 2, at 89. "Rather let the term [infidelity] apply to him, who in direct opposition to the spirit of Christianity, endeavors, by isolated passages of Scripture, to destroy the conscience and the sense of moral accountability in one half the people of the earth; to make it their duty to look up to and obey man instead of that Divine Being who claims the reverence and obedience of all his sons and daughters." *Id.*

18. DuBois, *supra* note 5, at 35-36.

men were fundamentally human and thus the distinction between the sexes was irrelevant to equality.¹⁹

Garrisonian women also borrowed a twofold strategy of moral suasion and legal transformation from the Abolitionist movement. The two-pronged attack of Garrisonian Abolitionists was designed to effect immediate concrete legal change while challenging public notions about slavery and race.²⁰ Garrisonians saw their duty primarily as reformers of public sentiment.²¹ “The core of Garrisonian strategy was the belief that a revolution in people’s ideas must precede and underlie institutional and legal reform, in order to effect true social change.”²² In addition, Garrisonians aimed to change the legal status of slaves by demanding immediate abolition.²³ Women’s rights activists adopted this dual strategy to their own movement. On the one hand, they set out to increase women’s awareness of their own oppression²⁴ and to force public recognition of the problem.²⁵ The alliance of women’s rights activists with the Abolitionist movement provided a forum in which women could disseminate their ideas and stimulate discussion.²⁶ On the other hand, women’s rights activists simultaneously pushed for changes in the law that would elevate the legal position of women.²⁷ They hoped that this approach would bring women closer to legal equality while transforming public opinion about the equality of the sexes.

19. *Id.* at 36. However, this argument ignored the reality of women as dependents who were forced by economics to remain in the domestic sphere. Garrisonian women did not reject the suitability of women for domestic duties nor advocate a redistribution of work in the home. *Id.* at 37.

20. *Id.* at 39.

21. *Id.* at 38.

22. *Id.*

23. *Id.*

24. “I would that woman would wake up to a sense of the long-continued degradation and wrong that has been heaped upon her! Like the poor slave at the South, too many of our sex are insensible of their wrongs, and incapable of fully appreciating the blessings of freedom.” Lucretia Mott, Remarks to the Seventh National Women’s Rights Convention (1856), in *AMERICAN WOMEN ACTIVISTS’ WRITINGS: AN ANTHOLOGY, 1637-2002*, at 99 (Kathryn Cullen-DuPont ed., 2002) [hereinafter *ACTIVISTS’ WRITINGS*].

25. *DUBOIS*, *supra* note 5, at 39.

26. *STEWART*, *supra* note 6, at 122. Women published in Garrison’s *Liberator*, which allowed them to reach far broader audiences than they ever could with feminist publications. *Id.*

27. *See infra* § III.B.

As the Abolitionist movement progressed, Garrison and his followers advocated a revolution in American morals.²⁸ Garrisonians wanted to expand appeals to conscience and believed that promoting gender equality was a central part of transforming American values.²⁹ However, Abolitionists opposed to Garrison thought that including other causes in the fight for abolition would be ruinous to the success of the movement.³⁰ In fact, many Abolitionists, including some women, were not sympathetic to women's rights at all. Garrison's opponents believed that the movement should focus on direct political action, rather than the overhaul of American morality.³¹ In 1840, the Abolitionist movement was divided over Garrison's radical tactics.³² The American Anti-Slavery Society split, and Garrison and his followers took control of the remaining faction.³³

Eventually, women became dissatisfied with the subordination of women's rights under Abolitionism and began an independent movement to focus exclusively on the rights of women. While this move facilitated the independence of women activists, it also cut them off from male supporters.

After the split, Abolitionist women outside of the American Anti-Slavery Society quickly disappeared from the picture.³⁴ Even within the Society it was clear that women's rights were secondary to the goal of abolition.³⁵ In an attempt to bring women's rights to the forefront, women activists responded with the Seneca Falls Convention and thus began an independent movement focused on remedying the oppression of women.³⁶

In July 1848, Elizabeth Cady Stanton and Lucretia Mott organized the Seneca Falls convention "to discuss the social, civil, and religious condition and rights of woman,"³⁷ the first convention of its kind in the United States.³⁸ It was Stanton who

28. STEWART, *supra* note 6, at 90.

29. *Id.*

30. *Id.* at 91.

31. *Id.* at 93.

32. *Id.*

33. *Id.* at 94.

34. *Id.* at 120.

35. *Id.* at 121.

36. *Id.*

37. National Portrait Gallery, The Seneca Falls Convention: July 19-20, 1848, <http://www.npg.si.edu/col/seneca/senfalls1.htm> (last visited Oct. 29, 2006).

38. *Seneca Falls Convention*, Houghton Mifflin College Division, The Reader's Companion to American History, http://college.hmco.com/history/readerscomp/rc/ah/html/rc_078100_senecafallsc.htm (on file with author).

drafted the “Declaration of Sentiments and Resolutions” that would be the cornerstone of the convention. Using the Declaration of Independence as her template, Stanton declared “that all men and women are created equal.”³⁹ She then went on to illustrate the “repeated injuries and usurpations on the part of man toward woman.”⁴⁰ Among these injuries she included “[h]e has made her, if married, in the eye of the law, civilly dead.”⁴¹ She also touched on divorce laws and the taxation of single women who were not represented in the government.⁴² The list of injuries was followed by twelve resolutions, all of which were adopted by the convention.⁴³ The resolutions called for women to enter an “enlarged sphere,” to “secure for themselves their sacred right to the elective franchise,”⁴⁴ and to advocate “for the overthrow of the monopoly of the pulpit, and for the securing to woman an equal participation with men in the various trades, professions, and commerce.”⁴⁵

It was not until emancipation that the women’s rights movement was truly independent from Abolitionism. With the abolition of slavery came increased power for Abolitionists, who were now in a position to influence Reconstruction.⁴⁶ However, rather than a triumph for the two movements that had worked hand in hand, emancipation drove the two apart. With the opportunity to mold legal reform for the newly freed men and women, other goals fell by the wayside. Abolitionist leaders asked women to support black suffrage and to set aside the question of women’s suffrage temporarily. Stanton responded that “self-preservation [was] the first law of nature.”⁴⁷ Women would not stand aside and watch black men “walk into the kingdom first.”⁴⁸ Yet, Abolitionists saw a chance to complete their mission of legal

39. Elizabeth Cady Stanton, Declaration of Sentiments (1848), *reprinted in* LINDA K. KERBER & JANE DE HART MATHEWS, *WOMEN’S AMERICA*, at 431-433 (1982).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; see also The National Portrait Gallery, *supra* note 37.

44. The inclusion of suffrage was the most controversial of the resolutions (indeed, Mott advised Stanton against including it). While the other resolutions passed unanimously, the demand for women’s suffrage barely passed. *Id.*

45. Stanton, *supra* note 39.

46. DuBois, *supra* note 5, at 55.

47. Elizabeth Cady Stanton, Letter to the Editor, National Anti-Slavery Standard (Dec. 26, 1865), in 1 *SELECTED PAPERS*, *supra* note 2, at 564.

48. *Id.*

equality and would not risk success by joining women's rights activists in protesting the Fourteenth Amendment. Despite the efforts of Stanton and others, the Fourteenth Amendment was passed, guaranteeing the right to vote exclusively to males. Women's rights activists felt "betrayed," after years of devotion to the abolitionist movement, women had been pushed aside in Reconstruction because it was "the Negro's hour."⁴⁹ "[I]t convinced them, as Stanton put it, that woman 'must not put her trust in man' in seeking her own rights."⁵⁰ Although this split allowed women to become politically autonomous and no longer dependent upon Abolitionism, it also eliminated a major source of institutional support. The loss of this support meant that women would have to cater in some respects to the voting class, to regain their support and their political power. The movement could not defend ideas that were too radical, that challenged core values, if it was to succeed.⁵¹

III. WOMEN AND THE MARRIAGE DEBATE: A VOICE WITHOUT A VOTE

From the beginning, the marriage debate was central to the women's rights movement. In her 1852 letter to Susan B. Anthony, Stanton declared that "the right idea of marriage is at the foundation of all reforms."⁵² From the inception of the women's rights movement, marriage reform was a central question. In law, marriage was explained by the term *coverture*, which defined the wife as covered by her husband.⁵³ According to Blackstone, "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . ."⁵⁴ Thus, the prevailing

49. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, 255 (1988).

50. *Id.*

51. "Too radical" is a relative term, of course. I do not mean to say that women's suffrage was not radical, or threatening to men. Certainly women's suffrage threatened male dominance and even the stability of the family. Rather, I mean to say that the abolition of marriage was a step too far. Unlike suffrage, even "radicals" questioned whether the abolition of marriage was a good idea. In fact, many suffragists simultaneously advocated the vote and championed the sanctity of the family.

52. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1852), in 1 SELECTED PAPERS, *supra* note 2, at 194.

53. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 115 (2000).

54. WILLIAM BLACKSTONE, 1 COMMENTARIES *441.

legal view was that, once married, the woman ceased to exist as an individual.

Women activists' experience with Abolitionism naturally lent itself to a powerful analogy between the oppression of blacks and women.⁵⁵ Women quickly drew a parallel between wife and slave, using this imagery in speeches and papers to illustrate the point that married women were denied legal identity.

A married woman has no legal existence; she has no more absolute rights than a slave on a Southern plantation. She takes the name of her master, holds nothing, owns nothing, can bring no action in her own name; and the principle on which she and the slave is educated is the same.⁵⁶

As with the slave, they argued, the position of the wife was fundamentally unjust. Yet while Abolitionists demanded that slavery itself be abolished, most women's rights activists demanded only that the status of wife be redefined.

A. *Marriage as Civil Contract*

Under the common law, marriage was defined as a civil contract.⁵⁷ However, marriage was also considered a sacrament, with deep religious meaning.⁵⁸ Stanton expressed the conflict between civil and religious law, stating:

If you take the highest view of marriage, as a Divine relation, which love alone can constitute and sanctify, then of course human legislation can only recognize it. Man can neither bind nor loose its ties, for that prerogative belongs to God alone, who makes man and woman, and the laws of attraction for

55. James Stewart argues that the two movements inspired each other in a way "since 'the slavery of sex' and sexual exploitation inherent in Southern slavery seemed to those reformers so disturbingly intertwined." STEWART, *supra* note 6, at 122.

56. Letter from Elizabeth Cady Stanton to Mary Ann White and the Ohio Women's Convention (Apr. 7, 1850), in 1 SELECTED PAPERS, *supra* note 2, at 165.

57. "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law." Reynolds v. U.S. 98 U.S. 145, 165 (1878); see also 1 SELECTED PAPERS, *supra* note 2, at 256 n.10.

58. *Id.* Women's rights activists used the religious aspect of marriage to advocate for more lenient divorce laws. In arguing that drunkenness should be grounds for divorce, Susan B. Anthony "said that true marriage was a union of soul, of spirit, not a legalized form of words binding man and woman together. God never joined virtue and vice; the contract was no longer binding when one party became morally corrupt." Remarks by Susan B. Anthony to Women's New York State Temperance Society (1852), in 1 SELECTED PAPERS, *supra* note 2, at 210. "Resolved, That if it be a violation of scripture for a man to put asunder those whom God has joined together, it is equally a violation of holy writ for man, by his unjust laws, to hold together those whom God has never joined." *Id.* at 208.

which they are united. But if you regard marriage as a civil contract, then let it be subject to the same laws which control all other contracts. Do not make it a kind of half-human, half-divine institution, which you may build up but cannot regulate. Do not, by your special legislation for this one kind of contract, involve yourselves in the grossest absurdities and contradictions.⁵⁹

Stanton argued that if marriage was indeed a divine institution, then without legal regulation marriage could exist in a pure form. “[R]emove law & [sic] a false public sentiment & [sic] woman will no more live as wife with a cruel, beastly drunkard, than a servant, in this free country will stay with a pettish, unjust mistress.”⁶⁰ If, however, marriage was not a divine institution, but one of human origin, Stanton urged, “[L]et us cast it aside with other false institutions of the past. Let it *fall* with thrones and altars, with kings and priests; and let its symbols lie buried with the crown, the sceptre, the crucifix and cowl.”⁶¹

Yet, women's rights activists did not cast marriage aside; they set out to reform the existing legal regulation. It was not the existence of legal regulations itself that they challenged but the unique treatment of the marriage contract.

[I]n marriage, no matter how much fraud and deception are practised, nor how cruelly one or both parties have been misled; no matter how young, inexperienced or thoughtless the parties, nor how unequal their condition and position in life, the contract cannot be annulled.⁶²

While in other contracts “[t]he least concealment, fraud, or intention to deceive, if proved, annuls the contract,”⁶³ these rules did not apply to marriage. In addition, the marriage contract was binding, regardless of the ages of the parties,⁶⁴ and could not be terminated by the will of the parties.⁶⁵ Women did not challenge whether marriage belonged in the legal domain at all, but instead

59. Address by Elizabeth Cady Stanton to the Legislature of New York (Feb. 14, 1854), in 1 SELECTED PAPERS, *supra* note 2, at 245.

60. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1852), in 1 SELECTED PAPERS, *supra* note 2, at 194.

61. Paper by Elizabeth Cady Stanton for the Yearly Meeting of the Friends of Human Progress (June 6, 1857), in 1 SELECTED PAPERS, *supra* note 2, at 344.

62. Address of Elizabeth Cady Stanton at the Tenth National Women's Rights Convention (May 11, 1860), in 1 SELECTED PAPERS, *supra* note 2, at 421.

63. *Id.*

64. “If law makers insist upon exercising their prerogative in *some* way on this question, let them forbid any woman to marry until she is twenty one.” Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1852), in 1 SELECTED PAPERS, *supra* note 2, at 194.

65. *Id.* at 256 n.10.

demanded that as a civil contract it should be treated like all other contracts.⁶⁶ The question, as far as they were concerned, was not *whether* law should regulate marriage but *how*.⁶⁷

B. *The Married Women's Property Acts – Facing the Economic, Political and Social Dependence of Women*

Women in the 19th Century were plagued by economic, political, and social inequality. Confined to low paying jobs and unable to vote, many women turned to marriage for financial support and a place in society. Women's rights activists recognized that the economic dependence of women upon their husbands was a critical component of the marriage question. Women were often forced to enter undesirable unions because they could not support themselves otherwise.⁶⁸ "When a woman therefore is thrown upon her own resources, she has to choose one of two things, marriage or prostitution."⁶⁹ The ability to make and keep wages and the right to hold property were therefore crucial in the struggle toward gender equality.

Women succeeded in lobbying state legislators to enact Married Women's Property Acts, which allowed women to keep their own property and wages, and to have custody over their children. Starting in 1839, a series of Married Women's Property Acts, which varied widely by state, were passed.⁷⁰ Such laws were an

66. "A contract, to be valid in law, must be formed between parties of mature age, with an honest intention in said parties to do what they agree." Address of Elizabeth Cady Stanton at the Tenth National Women's Rights Convention (May 11, 1860), in 1 SELECTED PAPERS, *supra* note 2, at 421.

67. "Moreover, there is one kind of marriage that has not been tried, and that is, a contract made by equal parties to live an equal life, with equal restraints and privileges on either side." *Id.* at 426.

68. Those women that did work, did so for far lower pay than their male counterparts. "In the crowded cities of the East they are compelled to work in shops, stores and factories for the merest pittance. In New York alone, there are over 50,000 of these women receiving less than fifty cents a day." Susan B. Anthony, *Women Want Bread, Not the Ballot*, <http://www.pbs.org/stantonanthony/resources/index.html?body=Quakers.html> (follow "Historic Documents" hyperlink), (last visited Nov. 1, 2006). The 1850 census reported annual wages at \$125 for women and \$273 for men. See Robert V. Robinson & Ana-Maria Wahl, *Industrial Employment and Wages of Women, Men, and Children in a 19th Century City: Indianapolis 1850-1880,55* Am. Sociological Rev.912-928iew, (Dec., 1990).

69. Remarks by Susan B. Anthony to the American Equal Rights Association in New York (May 12, 1869), in 2 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, 1866-1873, at 240 (Ann D. Gordon ed. 1997) [hereinafter 2 SELECTED PAPERS].

70. Houghten Mifflin College Division, *Married Women's Property Acts*, http://college.hmco.com/history/readerscomp/rcah/html/rc_056700_marriedwomen.htm

important step for women because they allowed women some degree of independence from their husbands. However, in many states these laws aimed not at protecting the rights of women, but rather allowed a way for men to protect their own property. For example, Mississippi's Act, passed in 1839, allowed women to receive income from their property and protected it from the husband's creditors.⁷¹ Yet beyond serving as a protection against creditors, women had no control over the property. Under this act, men had the sole discretion to buy, sell, and manage the property.⁷²

In New York, the work of Stanton and other women's rights activists led to the passage of a more comprehensive act. The New York law, passed in 1860, allowed wives to buy and sell their own property,⁷³ as well as to sue,⁷⁴ keep their wages,⁷⁵ and act as joint guardians of their children.⁷⁶

The New York law was an important step towards gaining independence for married women. Women's rights activists hoped that women would not only be able to keep their own property, but also be capable of supporting themselves. Once women were able to support themselves, marriage would no longer be an economic necessity for them. Men and women might then be able to attain a union based not on dependence

(on file with author). In 1841, the *Liberator* reported on a bill before the Missouri legislature, stating:

We think there can be no question of the justness of its principal provisions." The bill, as reported, stated, "All the property owned by the wife, at the time of the marriage . . . by descent or gift, shall be called 'the wife's separate property.' All the property which shall be acquired during the marriage . . . shall be called 'common property.' . . . [t]he common property which is real estate, shall not be alienated or disposed of, unless the wife join the husband in the conveyance. The husband may, during the marriage, alienate and dispose of the wife's separate property, if the wife gives her consent thereto in writing."

Rights in the Marriage Relation, LIBERATOR, Jan. 8, 1841, at 8.

71. *Married Women's Property Acts*, *supra* note 70.

72. *Id.*

73. "A married woman may bargain, sell, assign and transfer her separate personal property. . . ." ch. 90, 1860 N.Y. Laws 157 (Mar. 20, 1860).

74. "Any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property" *Id.* at 158.

75. "[T]he earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name." *Id.* at 157.

76. "Every married woman is hereby constituted and declared to be the joint guardian of her children, with her husband, with equal powers, rights and duties in regard to them, with the husband." *Id.* at 159.

but on mutual love and respect. “When woman is independent and self-supporting she will not desecrate that holy relation by marrying for bread and a home.”⁷⁷

However, there was more to the Married Women’s Property Acts than economic independence for women. The acts also served to ensure that separated and abandoned (but still married) women would not become wards of the state.⁷⁸ Thus, the acts served a public function that may explain the support of male legislators. In addition, Married Women’s Property Acts did not challenge male authority in the household. Rather, these acts would often only be called upon when a husband was absent.⁷⁹ Because the acts primarily operated in homes where there was no longer a husband, and wives were left to support themselves, they did not challenge the traditional family structure. Men were willing to support the acts because in large part they served the motives of men by protecting them from creditors and reducing the burden of unwed women and children on the state.⁸⁰ The abolition of marriage, on the other hand, posed a direct threat to male authority and created a risk that women and children would all become wards of the state. Without the vote, women had little power to effect change that men considered directly in conflict with public interest.

Even with the passage of laws to protect women’s property, marriage as a legal relationship was formulated in such a way that gender equality was impossible. Women still lacked an identity separate from their husbands.⁸¹ They were expected to remain in the domestic sphere, but even within the woman’s domain men maintained control.⁸² Stanton recognized marriage as a central source of women’s oppression, stating:

77. Speech by Elizabeth Cady Stanton to a Mass Meeting of Women in New York (May 17, 1870), in 2 SELECTED PAPERS, *supra* note 69, at 345.

78. Hendrik Hartog suggests that the support of women and children was a key governmental concern. “From an early time, from a time before the creation of the United States of America, local governments had intruded whenever a husband refused to support wife and children on the theory that he was thereby making his dependents public charges.” HARTOG, *supra* note 53, at 24-25.

79. *Id.* at 33.

80. See *infra* § III.B.

81. See MARSHALL D. EWELL, BLACKSTONE’S COMMENTARIES FOR THE USE OF STUDENTS AT LAW AND THE GENERAL READER, Book I, at 84 (Boston, Soule and Bugbee 1882).

82. “Home is her sphere, her realm. Well, be it so. If here you will make us all supreme. . . leave us to make these laws that govern the inner sanctuary of our own homes.” Address of Elizabeth Cady Stanton at the Tenth National Woman’s Rights Convention (May 11, 1860), in 1 SELECTED PAPERS, *supra* note 2, at 423-424.

I would have woman repudiate marriage utterly and absolutely, until our tyrants shall revise their canons and their codes, and by the talisman of justice transform the *femme covert* into an equal partner, the weaker vessel into a morally responsible being, the angel of the family altar, now sued on bended knee, into a noble woman, whose love would dignify and not degrade the man.⁸³

Yet while Stanton and other women's rights activists called for "outspoken rebellion"⁸⁴ against marriage, the movement never followed through with a demand for the abolition of marriage, legal or otherwise. Perhaps the problem of disfranchisement was insurmountable and victories such as Married Women's Property Acts were as much as women could hope for. Women could not force political change without the vote but instead had to convince men to support their cause. For women, marriage was a form of citizenship, their husbands acted as their connection to the public world.⁸⁵ Although the degree to which husbands represented the interests of their wives in politics is questionable, without the vote single women had no political emissary at all, no one to look after their interests. Women's rights activists recognized that without the vote economic success was impossible. As Susan B. Anthony argued, "[D]isfranchisement is not only political degradation, but also moral, social, educational and industrial degradation."⁸⁶ Anthony argued that without the vote women were unable to bargain effectively and thus were confined to the jobs and pay offered to them.⁸⁷ Instead of the abolition of marriage, the movement focused on the goal of suffrage, believing that the vote could remedy the inequality of women. Speaking on what suffrage would do for women, Anthony stated:

It will change the nature of one thing very much, & [sic] that is the pecuniary position of woman. It will place her in a posi-

83. Article by Elizabeth Cady Stanton (Nov. 16, 1860), in 1 *SELECTED PAPERS*, *supra* note 2, at 447.

84. *Id.* at 448.

85. "It is said women do not need the ballot for their protection because they are supported by men. Statistics show that there are 3,000,000 women in this nation supporting themselves." Speech by Susan B. Anthony, *Women Want Bread, Not the Ballot*, in IDA HUSTED HARPER, 2 *LIFE AND WORK OF SUSAN B. ANTHONY* (n.p., Bowen-Merrill 1908) http://www.pbs.org/stantonanthony/resources/bread_not_ballot.html.

86. *Id.*

87. "Women wage-earners in different occupations have organized themselves into trade unions . . . but I have yet to learn of a successful strike of any body of women." *Id.*

tion in which she can earn her own bread, so that she can go out into the world an equal competitor in the struggle for life; so that she shall not be compelled to take such positions as men choose to accord to her & [sic] then take such pay as men choose to give her.⁸⁸

IV. FREE LOVE – MARRIAGE OUTSIDE OF LEGAL REGULATION

Although the mainstream women's rights movement was not advocating the abolition of marriage, a more radical group, the Free Lovers, was promoting the idea throughout the nineteenth century. The Free Love movement, which came into public consciousness in the 1820s and included both men and women, introduced a new possibility for radical reform of women's rights. Free Lovers advocated that sexual desire should be controlled internally, rather than through external forces, namely the church, state and public opinion.⁸⁹ They also criticized economic conditions that forced women to depend upon wage earning men, making true Free Love impossible.⁹⁰

Even though opponents argued that Free Love encouraged promiscuity, Free Lovers insisted that Free Love was not "free lust" but "'the expulsion of animalism, and the entrance of reason, knowledge and continence' into the conduct of human relationships."⁹¹ Free Love also sought to protect women from the sexual domination of men. Free Lovers believed that marriage was a threat to women's sexual autonomy, granting the husband the right to control sex in the relationship, and that Free Love would allow women to exercise control over their own sexual desires.⁹² According to Francis Barry,⁹³ Free Love was the "theoretical and practical recognition of woman's absolute right to self-ownership, and the right to decide for herself what relations she shall sustain."⁹⁴ By refusing to acknowledge legal, religious,

88. Remarks by Susan B. Anthony to the American Equal Rights Association in New York (May 12, 1869), in 2 *SELECTED PAPERS*, *supra* note 69, at 240.

89. Jesse Frank Battan, *The Politics of Eros: Sexual Radicalism and Social Reform in Nineteenth-Century America*, 149-50 (1988) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with Southern Regional Library Facility, University of California).

90. *See id.* at 150.

91. *Id.* at 145 (quoting Ezra Heywood).

92. *See id.* at 148.

93. Francis Barry was a well-known male Free Love advocate who established a Free Love community in Ohio.

94. Battan, *supra* note 89 at 149 (quoting Francis Barry).

and social definitions of intimate relationships, Free Lovers believed that equality of the sexes could be obtained through relationships based on mutual consent and desire.

Stanton, a radical in the women's rights movement, claimed to embrace Free Love despite rejection by mainstream women's rights activists. She commented on the place of Free Love in the women's movement, agreeing that legal regulation of marriage interfered with marriage as a natural organization between men and women.⁹⁵ Stanton said:

We are one and all free lovers at heart although we may not have thought so. We all believe in a good time coming either in this world or another, when men and women will be good and wise, when they will be a law unto themselves, and when therefore the external law of compulsion will be no longer needed.⁹⁶

Stanton demanded freedom of intimate relationships despite the risk that some would take advantage of such freedom to "do evil," which she explained as "the unavoidable friction of the machinery."⁹⁷ Stanton even went so far as warning women's rights activists that the suffrage movement was similarly linked to ideals of equality and freedom, and that those who were not willing to advocate for Free Love as well should "get out of the boat."⁹⁸

Yet perhaps Stanton was not really on board herself. She did not, as the Free Lovers did, believe that social ills would be accomplished by abandoning marriage.⁹⁹ Although she claimed to support the movement, she herself was married and defended traditional relationships between the sexes. In endorsing the virtue of Free Lovers, she pointed out that a man and woman living in an exclusive relationship was "just as much free love as the most unlimited variety of promiscuity."¹⁰⁰ She defended Free Love by presenting the possibility for traditional relationships within the doctrine, and by doing so undermined the possibility of challenging the marriage norm. In fact, in response to accusations that she followed Free Love herself, Stanton stated "I've lived thirty years with one man, and expect to live with him to

95. Speech by Elizabeth Cady Stanton on Free Love (1871), in 2 SELECTED PAPERS, *supra* note 69, at 392-397.

96. *Id.* at 394.

97. *Id.* at 395.

98. *Id.* at 396.

99. Higgins, *supra* note 4, at 200.

100. Speech by Elizabeth Cady Stanton on Free Love (1871), in 2 SELECTED PAPERS, *supra* note 69, at 395.

the end, and I'll let my life speak for me."¹⁰¹ Her defense of her own position as a wife was perhaps a reaction to external social pressures and suggests that, even for a radical woman like Stanton, Free Love was not a viable option for the women's rights movement.

Others believed that Stanton should have gone further than paying lip service to the Free Love movement by advocating the abolition of marriage altogether. In a letter to Stanton, Francis Barry praised Stanton for her criticism of marriage but expressed surprise at her "failure to accept the inevitable results of your own logic, and maintain the consistency of your position by demanding the *abolition* of this abomination."¹⁰² Barry made the familiar comparison between marriage and slavery and claimed that the Garrisonian demand for abolition applied to marriage as well.¹⁰³ Barry criticized Stanton for advocating the mere reform of marriage to obtain "true" marriage, asking whether "true" slavery would be an acceptable solution to the slavery question. Barry drew a parallel between using the word "slavery" to describe labor relations and using the word "marriage," which he argued had the same offensive connotations, namely, to describe relations between men and women.¹⁰⁴ He insisted that abolition rather than modification was necessary and protested "against any patching up of this barbarous system."¹⁰⁵

Victoria Woodhull was one of the most vocal advocates of Free Love and a controversial figure in the women's rights movement.¹⁰⁶ She argued that marriage forced non-consensual sex on women and had "outlived its day of usefulness."¹⁰⁷ Woodhull declared:

The supersedure of marriage in the near future, by some kind of socialistic arrangement, is as much a foregone conclusion with all the best thinkers of to-day as was the approaching dis-

101. Speech by Elizabeth Cady Stanton to a Mass Meeting of Women in New York (May 17, 1870), in 2 *SELECTED PAPERS*, *supra* note 69, at 337.

102. Letter from Francis Barry to Elizabeth Cady Stanton (Nov. 12, 1870), in 2 *SELECTED PAPERS*, *supra* note 69, at 369.

103. *Id.*

104. *Id.* at 369-370.

105. *Id.* at 370.

106. Higgins, *supra* note 4, at 202.

107. The Great Scandal Case, Detailed Statement of the Whole Matter by Mrs. Woodhull from *Woodhull & Claftin's Weekly* (Nov. 2, 1872), in *ACTIVISTS' WRITINGS*, *supra* note 24, at 153.

solution of slavery no more than five or ten years before its actual abolition in the late war.¹⁰⁸

Not only did Woodhull advocate the abolition of marriage, but she also endorsed revolutionary ways of supporting women and children once marriage was out of the picture.¹⁰⁹ She claimed that child rearing was a social labor and proposed that pregnant women be paid for their service to society.¹¹⁰ Once born, children would become the responsibility of the state, releasing women from the burden of raising children and dissolving the family altogether.¹¹¹

Not surprisingly, Woodhull was widely criticized for her radical beliefs. In 1872, she responded to Reverend Henry Ward Beecher's public condemnation of Free Love by exposing his extramarital affair with Elizabeth Tilton.¹¹² Woodhull accused Beecher, a famous clergyman and supporter of women's rights, of practicing Free Love in private, and pointed to the affair as an example of the hypocrisy of her opponents.¹¹³ She demanded that opponents like Beecher join her or conform to the morality they were preaching.¹¹⁴ Unfortunately, Woodhull's attack on a former ally of the suffrage movement, and the publicity surrounding the scandal, led feminists to retreat further from Free Love.¹¹⁵

The women's rights movement was already provoking anxieties about the role of women in society and the preservation of gender hierarchies, for which women's rights activists faced severe criticism. Anti-suffrage advocates believed that the vote would undermine the family structure and sexualize women, by allowing them into the public sphere.¹¹⁶ They reasoned that allowing women to vote invited them to vote against their husbands and thus disobey his leadership.¹¹⁷ This disobedience was

108. *Id.* at 153-154.

109. *Feminism and Free Love*, HNet, http://www.h-net.org/~women/papers/free_love.html (last visited Oct. 28, 2006).

110. *Id.*

111. *Id.*

112. Higgins, *supra* note 4, at 203-204.

113. *Id.*

114. The Great Scandal Case, Detailed Statement of the Whole Matter by Mrs. Woodhull from *Woodhull & Claftin's Weekly* (Nov. 2, 1872), in *ACTIVISTS' WRITINGS*, *supra* note 24, at 154-155.

115. See FONER, *supra* note 49, at 521.

116. Higgins, *supra* note 4, at 194.

117. *Id.*

seen as analogous to adultery.¹¹⁸ “Individualism and voting [were] associated explicitly with the promiscuity of married women.”¹¹⁹ Woodhull’s simultaneous campaign for Free Love and suffrage tied the two movements together and served to strengthen the perceived connection between women’s rights and overt female sexuality.¹²⁰

The publicity surrounding the Beecher-Tilton scandal led women’s rights activists to distance themselves from Woodhull and Free Love.¹²¹ Believing that Woodhull’s ideas weakened the cause, the mainstream women’s movement rejected her.¹²² Indeed, Woodhull herself eventually abandoned the cause by marrying and publicly renouncing her former Free Love ideals in 1876.¹²³ Despite the belief of Stanton and other radical women’s rights activists that Free Love could indeed have a place in the women’s rights movement, mainstream activists did not support the idea.¹²⁴ Even for those who did not overtly disapprove of Free Love, the women’s rights movement simply could not afford to be connected with such radical ideas as sexual licentiousness, the overthrow of the family, and the resulting social destruction.

In rejecting Free Love, the women’s rights movement lost an opportunity to pose a meaningful challenge to marriage and family. Francis Barry was correct in insisting that the abolition of marriage was the “inevitable result” of Stanton’s arguments against marriage. Perhaps women would have found the concept palatable in the more traditional form advocated by Stanton,

118. *Id.*

119. *Id.*

120. *Id.* at 204. One critic wrote, “‘Women’s Rights’ mean the abolition of all permanent marriage ties.” *Id.* at 204. Another said, “The advocates of woman suffrage. . . are moved principally. . . by the desire to abolish Christian marriage and introduce in its place what is called FREE-LOVE.” *Id.*

121. Stanton, however, continued to support Woodhull. “Victoria Woodhull has done a work for women that none of could have done. . . . She has faced and dared men to call her names that make women shudder, while she chucked principle, like medicine, down their throats. . . . In the annals of emancipation, [her] name will have its own high place.” *Feminism and Free Love, supra* note 109 (quoting Elizabeth Cady Stanton in the *NEW YORK TIMES*, July 1875).

122. *Id.*

123. *Id.*

124. Many women’s rights activists disapproved of Free Love altogether. Women’s rights activist Ernestine Rose, for example, flatly rejected Free Love. In response to an accusation that she was “for Free Love” Rose wrote a letter to the editor of the *New York Times* stating: “This I most emphatically deny. I have never advocated these sentiments, from the simple reason that I do not believe in them.” Ernestine L. Rose, *The Free Love Question – Letter from Mrs. Rose*, *LIBERATOR*, Aug. 27, 1858.

which was essentially "marriage" (that is, the union of one man and one woman) without legal regulation. Challenging legal regulation of marriage would have allowed women to achieve the goals they sought in fighting for divorce and property rights. Yet even Stanton's version of Free Love would be associated with notions of promiscuity and the upheaval of the family. The idea was too radical and the women's rights movement failed to question whether marriage should be regulated by the state.

V. FREEDPEOPLE MARRY – MARRIAGE AS RIGHT AND OBLIGATION

During the Civil War, Abolitionist women put the rights of women on hold to devote their efforts to abolition.¹²⁵ The emancipation of Southern slaves and debates over the Fourteenth Amendment refocused the efforts of women's rights activists. However, after the war, women found themselves in a very different political and social atmosphere.

The women's rights movement suffered from unfortunate timing. The revitalization of the movement after emancipation coincided with a new emphasis on defining and enforcing traditional marriage norms. This renewed attention to marriage no doubt shaped the women's rights movement to some extent during the Reconstruction period, making it more difficult for women to challenge established norms. Prior to emancipation, a large portion of the population was enslaved and thus excluded from the right to marry.¹²⁶ Not only were slaves denied the right to marry, but they fell outside the legal regulation of marriage. In the absence of white legal and social boundaries, slaves formed intimate relationships on unique terms.¹²⁷ Emancipation gave the marriage relationship a new meaning, not only for the freed men and women, but for white women as well. As Laura Edwards argues, "With the abolition of slavery, marriage acquired even greater importance."¹²⁸ The increased legal regulation of intimate relationships helped whites restructure the post-

125. DuBois, *supra* note 5 at 52.

126. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 113 (Negro Univ. Press 1968) (1853).

127. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J. L. & HUMAN.* 251, 258-74 (1999).

128. Laura F. Edwards, "The Marriage Covenant is at the Foundation of All Our Rights": *The Politics of Slave Marriages in North Carolina after Emancipation*, 14 *L. & HIST. REV.* 81, 85 (1996).

war society, forcing freedpeople to conform to white norms. Perhaps unconsciously, this focus on the importance of marriage and family became more deeply engrained in white culture as well.

As part of the denial of citizenship and even status as persons, slaves had been denied the right to marry. “Being Property, ‘Goods’ and ‘Chattels Personal,’ . . . they have no claim to each other-no security from separation-no Marital Rights-no Parental Rights-no Family Government-no Family Education-no Family Protection.”¹²⁹ After emancipation, the right to marry was one of the first sought by freedpeople in an attempt to realize the benefits of citizenship.¹³⁰ However, the “right” to marry was a mixed blessing for freedpeople, as it brought not only freedom but obligation.

With emancipation, and the loss in the South of slaves as inferior dependents, came a fear among white men that their dominance would be destroyed. In order to maintain a structured society, men looked to the family as a new framework in which to organize society. Marriage became an increasingly important social institution and violation of the regulatory regime was robustly punished. For whites, worried about the consequences of emancipation, marriage served as a form of social control over the newly freed ex-slaves. During the antebellum period slaves formed unions on their own terms. Slave relationships included “sweethearting,” “taking up,” and marriage, but even marriages took a different form than those of whites.¹³¹ “Sweethearting” and “taking up” were often non-exclusive relationships and were personal in that the community did not play a part in acknowledging the relationship.¹³² Marriage, on the other hand, was considered to be monogamous, lasting, and recognized by the community.¹³³ Contrary to white concepts of marriage, the relationship was not considered to be indissoluble in slave communities.¹³⁴ In fact, new marriages were considered to be in a sort of trial period and could be dissolved by one member moving out to live with someone else.¹³⁵ After emancipation, these concepts of intimate relationships among freedpeople endured, much to the dismay of white onlookers.

129. GOODELL, *supra* note 126, at 113.

130. Franke, *supra* note 127, at 252.

131. *Id.* at 262.

132. *Id.* at 262-63.

133. *Id.*

134. *Id.* at 263.

135. *Id.*

Many whites thought that introducing freedpeople to "traditional" marriage would help them become proper citizens by imposing white cultural norms on their intimate relationships.¹³⁶ At the same time, freed men and women were anxious to marry. In doing so, they asserted a tangible right of citizenship they had formerly been denied. To many freedpeople, marriage was a rejection of their slave status.¹³⁷ These distinct incentives resulted in the formal marriage of many freed men and women during the war and Reconstruction period.

Often marriage was not a choice but a forced condition for those who wanted to continue cohabitation. During the war, black fugitives were housed in "contraband camps."¹³⁸ Within these camps, men and women who wished to live together as husband and wife were required to legally formalize their marriage. Camp superintendents reported that "the introduction of the rite of [C]hristian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people."¹³⁹

After the war, many states enacted legislation that automatically married freedpeople who were cohabitating.¹⁴⁰ For example, in Mississippi the law stated, "[A]ll freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabitated together as husband and wife shall be taken and held in law as legally married."¹⁴¹ In South Carolina those "living together as husband and wife at the time of obtaining their freedom" were acknowledged as married.¹⁴² However, those whose marriage "was only a mutual agreement between themselves, with no public form or ceremony" were required to obtain a marriage certificate to be considered legally married.¹⁴³

In a more subtle way, many widows who lost their husbands in the war were forced to define their relationships in terms of traditional marriage in order to collect pension payments. The

136. For example, "[Marriage] is the great lever by which [the freed men and women] are to be lifted up and prepared for a state of civilization." *Id.* at 251 (quoting Colonel William A. Pile).

137. *See id.* at 276.

138. *Id.* at 279.

139. *Id.*

140. *Id.* at 277.

141. Civil Rights Act of Nov. 25, 1865, ch. 4, § 3, 1865 Miss. Laws 82.

142. *See Marriages Among the Freedmen*, *LIBERATOR*, Sept. 1, 1865, at 139 [hereinafter *Marriages Among the Freedmen*].

143. *Id.*

Pension Statute, as amended in 1866, allowed the widows of black soldiers to collect pension payments if they submitted “proof, satisfactory to the Commissioner of Pensions, that the parties had habitually recognized each other as man and wife, and lived together as such.”¹⁴⁴ In addition, a widow was not eligible if she had engaged in “immoral conduct.”¹⁴⁵ These regulations did not leave room for intimate relationships that did not conform to traditional norms. In order to collect their pension payments, women were required to present their relationship in a way that resembled marriage as closely as possible.

Still other freedpeople chose to marry as an assertion of their citizenship. To both abolitionists¹⁴⁶ and many freedpeople, the right to marry was an important element of freedom.¹⁴⁷ Marriage presented an opportunity to formalize relationships that had been marginalized by slavery.

Whether freedpeople were automatically married by virtue of cohabitation or voluntarily entered a legal marriage, failure to comply with white society’s norms was met with punishment. In those states where marriage was not automatic, continued cohabitation was prohibited until the couple married.¹⁴⁸ “No parties having agreed to enter the marriage relation will be allowed to live together as husband and wife until their marriage has been legally solemnized.”¹⁴⁹ Similarly, bigamy was not tolerated, despite the fact that many slaves found themselves with more than one spouse after emancipation.¹⁵⁰ In South Carolina, “If a man living without a wife find two wives restored to him by freedom, the one having children by him and the other not, he shall take the mother of his children as his lawful wife.”¹⁵¹ In other places, Freedmen’s Bureau agents would choose for couples: “[W]henever a negro appears before me with two or three wives

144. Franke, *supra* note 127, at 268.

145. *Id.* at 289.

146. Prior to emancipation, many Abolitionists used the denial of the right to marry to illustrate the evils of slavery. *Marriages Among the Freedmen*, *supra* note 142.

147. See Franke, *supra* note 127, at 276.

148. *Id.* at 278.

149. *Marriages Among the Freedmen*, *supra* note 142 (discussing an order issued in South Carolina in August 1865).

150. The Federal Government similarly displayed an unwillingness to tolerate multiple spouses among another marginalized group, the Mormons. In *Reynolds*, the Supreme Court upheld laws prohibiting polygamy, stating that the First Amendment did not protect polygamy even if for religious beliefs. *Reynolds*, 98 U.S. at 166.

151. *Marriages Among the Freedmen*, *supra* note 142.

who have equal claim upon him . . . I marry him to the woman who had the greatest number of helpless children who otherwise would become a charge on the Bureau."¹⁵² Those who continued to cohabit without getting legally married, or who refused to choose one partner, could be prosecuted for adultery, bigamy, or fornication.¹⁵³ Thus, the "right" to marriage was not only a privilege for freedpeople, it carried with it obligations, the violation of which was punished by criminal prosecution.

Katherine Franke argues that the prosecution of freedpeople for violating marriage norms was an attempt by Southern white men to reorder the society which they had formerly dominated.¹⁵⁴ Prior to emancipation, many white men had asserted their position as the master of their slaves. Even for those who did not own slaves, the place of white men was defined, in part, by the place of black men, as slaves. White men represented the interests of all their dependents (slaves, wives, and children) in the public and political arena.¹⁵⁵ Emancipation redefined black men as free, challenging the racial hierarchy created by slavery and the dominance of white men. Franke argues that "[i]f the integrity of white male agency could no longer be anchored as the antimony of Black chattel slavery, since all men were now, at least in theory, free market actors, then white masculinity required new ground against which to be set off."¹⁵⁶ Instead, white men turned to marriage and the women's sphere to define their own dominance.¹⁵⁷ It was important for white men not only to assert authority over their wives but to ensure that black men and women conformed to gender norms by entering marriages regulated by the state. The participation of freedpeople bolstered the system of inequality and dominance that white men had created.

The national preoccupation with marriage affected freedpeople as well as white women. White husbands were promoting and enforcing these ideas and no doubt brought them into their own families. The increased importance of marriage to white men made it more difficult for women to challenge the institution. The suffrage movement was already threatening to intro-

152. Franke, *supra* note 127, at 283-84.

153. *Id.* at 289.

154. *See id.*

155. *See* Edwards, *supra* note 128, at 82.

156. Franke, *supra* note 127, at 257.

157. *Id.* at 258.

duce woman to the public sphere, to elevate her status in the family, and to undermine the system white men were trying so desperately to maintain. Thus, the timing of the women's rights movement may have precluded women from calling for the abolition of marriage. The freedom of African Americans after emancipation challenged the position of white men as masters and leaders of the country. Not only were black men free from their masters but they were given political power through the right to vote. White men turned to women and the family to reassert their role as master and were likely more hostile than ever to the idea of women's suffrage, much less women's equality in the family. Toward the end of the century, Stanton reflected, "What I said on divorce thirty-seven years ago seems quite in line with what many say now. The trouble was not in what I said, but that I said it too soon, and before the people were ready to hear it."¹⁵⁸

VI. CONCLUSION

Katherine Franke points out the problems inherent in rights-based activism. Speaking of the newly freedpeople in the Reconstruction period she says:

Their history teaches us that the granting or winning of rights cannot be the ultimate goal of any theory of justice because the conferral of rights merely inaugurates a new regulatory relationship with the State, which provides us with a new place from which to battle structural hierarchy and subordination.¹⁵⁹

Similarly, women's rights activists focused on specific rights, such as suffrage, divorce, and property, rather than the larger goal of gender equality. They considered these rights means to an end. However, as Franke argues with regard to freed men and women, these rights merely placed married women in a new relationship with the state but did not free them from the legal regulation of marriage. The women's rights movement may have gained more by fighting for marriage as a personal union, unregulated by the state. Outside of state regulation, women would gain autonomy and no longer be defined in law through their husbands.

158. ELIZABETH CADY STANTON, 1 ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS DIARY AND REMINISCENCES 185 (Theodore Stanton & Harriet Stanton Blatch eds., 1922).

159. Katherine M. Franke, *Women Imagining Justice*, 14 YALE J. L. & FEMINISM 307, 307-308 (2002).

The failure of women to call for the abolition of marriage can be attributed in part to the lack of support from white men. Women's allies came mainly from within the Abolitionist movement, radical thinkers like Garrison who believed that morality demanded equality not only of race but also of sex. But within Abolitionism, not everyone agreed that women's rights should be pursued. Even among those Abolitionists who did support women's rights, the cause was secondary to abolition. Eventually women lost the support of their Abolitionist allies altogether.

In addition, disfranchisement weakened the ability of women to campaign for radical reform. Without the vote themselves, women could not afford to alienate the voting class. Women's suffrage was already under attack. The suspected relationship between women's rights and Free Love made the movement appear to be a repudiation of family and social order. Calling for the abolition of marriage would only have confirmed the fears of critics and likely would have led to the movement's failure.

Timing may also have played a role in women's reluctance to challenge marriage. After emancipation, the fear that racial hierarchy would be destroyed went hand in hand with the fear that gender hierarchy would be destroyed. New anxieties about the place of African Americans in society led to a new interest in marriage as a form of social control and a tool to maintain male dominance. Legal enforcement was critical to ensuring the participation of freed men and women in marriage and likely stifled the ability of women to call for its abolition.

Despite the many triumphs of women's rights activists in the nineteenth century, their failure to demand the abolition of marriage was a marked weakness in the movement. Within the marriage regime, it was impossible to gain gender equality because by definition women could not exist as individuals under coverture. Women failed to reject marriage as a legal institution and to redefine their rights as autonomous individuals. Instead, they attempted to redefine their rights within an unequal system.