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ORIGINAL ARTICLE

Creating Law through Regulating Intimacy: The Case of Slave Marriage in Nineteenth-Century New York and the United States

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Abstract

This article argues that American jurists fashioned new understandings about the capacity of states to legislate about marriage through regulating the intimate lives of enslaved and newly freed individuals. This article does so through analyzing the creation and impact of a little-studied 1809 law in New York that legalized the marriages of enslaved people—while individuals were still enslaved—as part of the state's process of gradual emancipation, which occurred from 1799 to 1827. In New York, by legalizing enslaved people's marriages, jurists privatized financial liabilities within soon-to-be freed families. The law stood at odds with national juridical understanding about marital regulation. Jurists in the early republic were uncertain about whether states could legislate about matrimony. Southern states after the Civil War then cited and replicated New York's logic in legislating to legalize the marriages of freedpeople, similarly privatizing financial claims within families. In the cases of both New York and national emancipation, jurists, in choosing privatization, foreclosed possibilities for a different or broader vision of state support for freedpeople, such as reparations. After making marital laws about slavery, both New York and Southern states created and/or tightened their marriage laws, further inscribing understandings of the marital family into American governance. This piece contributes to historiographies of slavery, the American state, and intimacy.

Intrinsic to the logic of the United States as a slave-holding nation was the idea that enslaved people could not form legalized marriages. Doing so would upset the delicate framework that held slavery together. If a man and woman had a legalized intimate attachment, a slave master's authority over their slaves would be disrupted. Contemporary legal norms regarded enslaved people as property, and provided that enslaved people did not possess the legal capacity to contract marriage that understandings of nuptials ostensibly required.

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But in 1809, as part of New York's process of gradual emancipation, the state's jurists passed a law providing that all marriages contracted by individuals who had been or currently were enslaved would be considered legal matrimony.[1] This law constituted a considerable transformation in the lives of enslaved people. Those living in bondage had the opportunity to have their two-person, intimate partnerships recognized by the state. Other enslaved individuals, who practiced different kinds of intimate arrangements, likely recoiled at the notion that New York state favored the formation of one particular kind of monogamous marital attachment. Simultaneously, this law incorporated many African Americans within the legal and financial obligations of Anglo-American coverture. Under this conception, a husband would be legally required to provide for his wife and any children that the marriage resulted in. Black people felt this change personally, but it also was important to New York officials who managed poor relief. New York state privatized financial support within African American families, rather than offering to these families land or financial support to establish themselves upon emancipation.

In addition to the sea change for the lives of enslaved people that this law evinced, New York's 1809 statute perpetuated new legal reasoning in New York —and in the nation more broadly—about individual states' capacity to regulate nuptials. American jurists during the early republic were deeply unsure about whether and to what degree they were empowered to legislate on the topic of matrimony. New York, for instance, did not pass a law specifying how a marriage would be conducted until 1827.[2] Even for states with marital laws, judges frequently ruled quite leniently when couples claimed that they were wed. Jurists situated their debates over marital laws within a broad social rhetoric about the appropriate boundaries of legislation in the new republic. These deliberations were a key facet in a larger legal and social debate about how governance should work in early America. When would common-law precedent articulated and passed down by judges apply, and when would statutory regulation apply?

Ultimately, the 1809 slave marriage law would set a standard for how New York and the nation would continue to legislate on the topic of marriage. In 1827, New York passed the state's first law that specified what a marriage would consist of for all residents. More broadly, the 1809 law established an important precedent for how lawmakers continued to tie questions surrounding the management of financial claims on the state to questions about family.[3] After Congress passed the Thirteenth Amendment abolishing slavery in 1865, Southern state governments cited New York's example and legalized

[1] "An Act to enable certain Persons to take and hold Estates within this State, and for other Purposes" (passed February 17, 1809). All laws cited in this piece can be found in the relevant year of the "Session Laws Library" for the state in question, located in the HeinOnline database.

[2] Of Husband and Wife, Chap. VIII, "Of the Domestic Relations" (passed December 4, 1827).

[3] When using the term "the state," I refer broadly to government functions, and the people who perform them. See, Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009), 4–7. As this article demonstrates changes surrounding the nature of the state over time, I add nuance and flesh to this working definition throughout this article.

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freedpeople's marriages. In so doing, Southern states displaced obligations to support wives and children on to husbands, rather than offering structural remedies such as land or cash benefits. Through legalizing the marriages of slaves in 1809, New York jurists thereby instantiated standards surrounding both marital legislation and the linking of African American emancipation to matrimony more broadly. In the ensuing decades after federal emancipation, lawmakers across the states would continue to favor the marital family as the primary unit for the provisioning of financial support more generally, and increasingly passed laws governing nuptials. This article thus argues that American jurists worked out novel understandings about the state's capacity to legislate on the subject of matrimony through regulating the intimate lives of enslaved and newly freed individuals.

This article brings together three historiographies that scholars have not often treated collectively: those of slavery, state-building in early America, and a new field that I, in addition to contemporaries, am calling "the history of intimacy." In terms of the historiography on slavery, this 1809 law has received scant scholarly attention.[4] This article-length treatment of this statute, which overturns conventional historiographical understandings that the condition of Anglo-American bondage meant that those who were enslaved could not legally marry, contributes to new understandings of the nature of slavery itself and the processes of emancipation.[5] With the 1809 law, New York jurists tied African American freedom to marriage while also not

[4] Some notable excellent historiographical literature has briefly touched on this law. See, for example, Tera W. Hunter, *Bound in Wedlock: Slave and Free Black Marriage in the Nineteenth Century* (Cambridge, MA: Harvard University Press, 2017), 74–78; Sarah Levine-Gronningsater, "Delivering Freedom: Gradual Emancipation, Black Legal Culture, and the Origins of Sectional Crisis in New York, 1759-1870" (PhD diss., University of Chicago, 2014), 129–36; Darlene C. Goring, "The History of Slave Marriage in the United States," *The John Marshall Law Review* 39 (2006): 314–15; Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000), 129–30; and Vivienne L. Kruger, "Born to Run: The Slave Family in Early New York, 1626-1827" (PhD diss., Columbia University, 1985), especially 347–65.

[5] See, for example, Deborah Gray White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (New York: W.W. Norton, 1999 [originally published 1985]); Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925* (New York: Pantheon Books, 1976); Margaret A. Burnham, "An Impossible Marriage: Slave Law and Family Law," *Law and Inequality* 5 (1987): 187–225; Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family, from Slavery to the Present* (New York: Basic Books, 2010 [originally published 1985]); Laura F. Edwards, *Gendered Strife & Confusion: The Political Culture of Reconstruction* (Champaign: University of Illinois Press, 1997); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998); Giuliana Perrone, "'Back into the Days of Slavery': Freedom, Citizenship, and the Black Family in the Reconstruction-Era Courtroom," *Law and History Review* 37 (2019): 125–61; Katherine M. Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law & the Humanities* 11 (1999): 251–309; and Michael Boucai, "Before *Loving*: The Lost Origins of the Right to Marry," *Utah Law Review* 1 (2020): 69–176. The Anglo-American world's proscription on legal slave marriages differed from the colonial law of other empires, including that of France, Spain, and Portugal, which did have precedents for legal slave marriage. See, for instance, Sophie White, *Voices of the Enslaved: Love, Labor, and Longing in French Louisiana* (Chapel Hill: Omohundro Institute/University of North Carolina Press, 2019); and Hunter, *Bound in Wedlock*, 83.

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offering reparations, thereby privatizing liabilities for financial support within freed families. This statute was unique in the Anglo-American legal world at the time that it was passed, but it would come to set a standard for how other states would manage their emancipation procedures after the Civil War.[6]

Second, this article contributes to the history of intimacy. Defining the term "history of intimacy" is no simple task, as the field has not as of yet coalesced under one title. Further, few historians have self-consciously applied the label themselves.[7] In this milieu, I contend that the history of intimacy is a broadly defined intellectual project, building on existing literatures of marriage, family, and sexuality, to be taken on by scholars interested in historicizing how individuals have created and negotiated relationships in the past. It is not rigidly thematically distinct from extant scholarship on marriage and the family, but calls for new emphasis on different kinds of questions. It involves thinking broadly about how to denaturalize how relationships have been created in the past, and to value inquiring about all the possibilities and varieties that these connections may have entailed. This endeavor means examining both legal norms and lived behavior by ordinary people. This article contributes to this subfield through demonstrating how states newly came to develop legislative authority surrounding marriage in the nineteenth century, and instantiated racialized visions of monogamous marriage into their legal codes. Earlier historians of marriage have argued that states developed novel capacities about nuptial regulation after the Civil War, in response to the perceived Mormon threat surrounding polygamy and to encourage freedpeople to marry.[8] I demonstrate how state jurists' regulation of the intimate lives of enslaved people in the early republic was central to this effort. Further, in line with other recent

[6] Although all other Northern states abolished slavery in the antebellum period, and many even before New York did, none enacted statutes legalizing the marriages of enslaved or freed people. Black couples legally married or assumed legal marital responsibilities only when freed, according to extant conceptions of matrimony in their respective states. Pennsylvania, during its process of gradual emancipation, did impose a fine on owners who separated enslaved spouses by more than 10 miles. See that state's "An Act to Explain and Amend an Act, Entitled, 'An Act for the Gradual Abolition of Slavery'" (passed March 29, 1788).

[7] For scholars and their works that I would suggest constitute historiography on intimacy, see, for example, Emily Alyssa Owens, "Fantasies of Consent: Black Women's Sexual Labor in 19th Century New Orleans" (PhD diss., Harvard University, 2015); Treva B. Lindsey and Jessica Marie Johnson, "Searching for Climax: Black Erotic Lives in Slavery and Freedom," *Meridians: Feminism, Race, Transnationalism* 12 (2014): 169–95; and Chelsea Schields, "Closer Ties: The Dutch Caribbean and the Aftermath of Empire, 1942-2012" (PhD diss., The City University of New York, 2017). George Morris recently published a very fascinating piece about the historiography of intimacy in modern British history; "Intimacy in Modern British History," *The Historical Journal* 64 (2021): 796–811. Jacqueline Allain also recently published a brilliant article deploying intimacy as an analytic to understand the affective ties of Maria Griffin, an enslaved woman in nineteenth-century Virginia; "Maria Griffin, et al.: Slavery's Intimate World," *Journal of Women's History* 34 (2022): 15–35.

[8] See, for example, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Ariela R. Dubler, "Governing Through Contract: Common Law Marriage in the Nineteenth Century," *The Yale Law Journal* 107 (1998): 1885–1920; and Janet Halley, "What is Family Law? A Genealogy: Part I," *Yale Journal of Law & the Humanities* 23 (2011): 1–109.

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scholars of Black intimacy, this article takes seriously how Black people sometimes formed and created their intimate lives in ways that transcended the boundaries of the marital relationship or romantic coupledom, even and especially as state law came to favor one particular kind of monogamous, marital interaction.[9]

Finally, this article contributes to the historiography of early American state-building by showing how matters surrounding intimacy were integral to early American debates about governance. There is a large and growing literature on the emergence of governance in early America. Much of this work has asked questions about what kind of state the United States government was developing in its fledgling years, as well as about the relative size and power of the federal government during this time as opposed to in later periods. In pursuing these threads, historians have produced abundant scholarship examining an array of institutions and processes from custom houses, to Native American regulation in the West, to marine hospitals and insurance.[10] But historians of these topics have nearly uniformly avoided the topic of intimacy. This piece integrates the study of intimacy with this legal state-building literature.[11] This article shows how questions surrounding the regulation of intimacy crucially constituted broader social and legal concerns about the appropriate boundaries of governance in the young United States. Further, New York politicians, and later federal politicians, came to actively construct a system of governance that favored the privatization of financial claims within families, rather than a different or broader vision of state support.

This article first presents an overview of the legal framework surrounding marriage in the early republic. Jurists debated questions surrounding a potential regulation of nuptials in broad language about the capacity of governance in early America. Then, the article transitions to discuss the passage and

[9] See, for example, Jessica Marie Johnson, *Wicked Flesh: Black Women, Intimacy, and Freedom in the Atlantic World* (Philadelphia: University of Pennsylvania Press, 2020); Jennifer L. Morgan, *Reckoning with Slavery: Gender, Kinship, and Capitalism in the Early Black Atlantic* (Durham, NC: Duke University Press, 2021); and Vanessa M. Holden, *Surviving Southampton: African American Women and Resistance in Nat Turner's Community* (Champaign, IL: University of Illinois Press, 2021).

[10] See, for example, Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University Press, 1995); Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: The University of Chicago Press, 2016); Bethel Saler, *The Settlers' Empire: Colonialism and State Formation in America's Old Northwest* (Philadelphia: University of Pennsylvania Press, 2014); and David F. Ericson, *Slavery in the American Republic: Developing the Federal Government, 1791-1861* (Lawrence: University Press of Kansas, 2011). For a useful overview of this scholarship, see the forum, Ariel Ron and Gautham Rao, eds., "Taking Stock of the State in Nineteenth-Century America," *Journal of the Early Republic* 38 (2018): 61–118.

[11] A wonderful recent essay collection connects the history of the state to the history of intimacy from the Civil War to the present. See, Margot Canaday, Nancy F. Cott, and Robert O. Self, eds., *Intimate States: Gender, Sexuality, and Governance in Modern US History* (Chicago: University of Chicago Press, 2021).

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enactment of the 1809 slave law, particularly its impact on the lives of enslaved African Americans. Enslaved people had a range of responses to the statute. While some enslaved couples were eager to attain the status of legalized matrimony, other individuals, who practiced other kinds of intimate arrangements, were likely displeased with this turn of events. Finally, this article will explain the 1809 slave law's broader impacts on juridical conceptions about the power of the state to legislate on the topic of matrimony. Calling on New York's 1809 statute as precedent, jurists after federal emancipation replicated the logic of New York's law by legalizing freedpeople's marriages. These measures crucially helped to create the broader cruel governing logic surrounding Reconstruction.[12] As in New York, the United States writ large did not offer reparations to African Americans, but rather privatized claims for financial assistance within the marital family, establishing a key standard for jurists' increasing encoding of marriage into the legal system for years to come.

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The novelty of the 1809 law relating to enslaved marriages in New York stands out in the context of the legal and social understanding surrounding matrimony during this period. There was a great deal of debate in the early republic about whether and when states would have the right to legislate on the topic of marriage. This debate was part and parcel of a much broader legal and social discussion about when statutory legislation, versus common-law guidelines, would apply. From whence would societal rules in the early American republic derive? Ostensibly, as a republic, law stemmed from lawmakers, who represented the will of those in early America who could vote: almost exclusively free, white men. But the United States also inherited a far-reaching British common-law tradition that permeated nearly all aspects of early American legal culture.[13] Despite claims of early America's status as a republic, legal commentators during this time were uncertain about the role of the legislature to intervene in many affairs that had been covered by the common law of England at all.

The common law in England had long held that marriages that occurred on the basis of consent of two parties alone—known as marriages contracted *per verba de praesenti*—would be considered valid marriages.[14] That standard had

[12] There is a wide array of literature on Reconstruction. For just a small sampling of these texts, see, for example, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988); Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (New York: Cambridge University Press, 2008); Tera W. Hunter, *To 'Joy My Freedom: Southern Black Women's Lives and Labors after the Civil War* (Cambridge, MA: Harvard University Press, 1997); and Edwards, *Gendered Strife & Confusion*.

[13] See, for example, Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (New York: Cambridge University Press, 2011); and Elizabeth Gaspar Brown, *British Statutes in American Law, 1776-1836* (Ann Arbor: The University of Michigan Law School, 1964).

[14] Lord Hardwicke's Act, passed in England in 1753, required that marriages receive government sanction, either by license or with the publishing of banns. However, this law did not apply to the British colonies, including what would become the United States. See, Rebecca Probert, *Marriage*

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largely applied in nascent American colonies, as well. But as the United States developed out of the Revolution, the question of whether marriages *per verba de praesenti* would continue to be legally legitimate was a matter of serious juridical question. In reality, many couples in the early republic did marry without going through a formal process. In the absence of a strong presence of ecclesiastical and governmental institutions, many couples contracted marriage on the basis of a simple exchange of vows, sometimes not even in the presence of witnesses.[15] But what was the legal status of these marriages? If nascent American states continued to adhere to common-law precedent surrounding marriage, then nuptials contracted *per verba de praesenti* would be legally valid. But what would be the role of nascent representative legislatures in governing matrimony? In the early republic, jurists remained uncertain about the respective roles of legislation and common-law understanding in regulating nuptials.

The question of how marriage would be governed was a component of a far broader societal discussion about how and when the common law of England would apply in nascent American states. The status of the reception of the British common law in the United States was murky and occurred on a state-by-state basis. Several states, such as New York, New Jersey, Delaware, and Maryland, specifically outlined in their early constitutions that the states would adopt aspects of the common law that had been embraced by local practices at various points in time. New York's constitution of 1777, for instance, declared that all aspects of the common law of England, and its statutes, that were in force in New York as of April 19, 1775, would be enacted in the new state. But even for those states that did not specifically delineate constitutionally that the common law would be adopted, common-law understandings routinely applied nearly everywhere in the early republic, unless specifically altered by local custom or direct legislation. Further, even when legislative statutes were in place in some states, judges still sometimes affirmed common-law understandings.[16]

If these statements read as unclear and non-directive, the matter was equally unclear to early American treatise writers. For instance, the Connecticut jurist Zephaniah Swift wrote about his state in 1795, "The operation of the English common law, is ascertained by no general rule, and is bounded by no known line."[17] Similarly, the prominent legal writer Henry St. George Tucker could not definitively delineate in 1803 where and in which cases the common law applied throughout the American states: "These modifications, restrictions, and limitations, being different in the different states, according to the difference of their several constitutions and laws,

Law and Practice in the Long Eighteenth Century: A Reassessment (New York: Cambridge University Press, 2009).

[15] See, for example, Cott, *Public Vows*; Grossberg, *Governing the Hearth*; and Dubler, "Governing Through Contract."

[16] NY Const. of 1777; NJ Const. of 1776; Del. Const. of 1776; and Maryland Const. of 1776. See also, for example, Parker, *Common Law, History, and Democracy.*

[17] Zephaniah Swift, *A System of the Laws of the State of Connecticut,* vol. 1 (Windham, CT: John Byrne, 1795-6), 1.

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and the different terms of adoption, it would be altogether a hopeless attempt, to endeavour to extract from such discordant materials, an uniform system of national jurisprudence, were there any grounds in the American constitutions to warrant such an undertaking."[18] Nearly all early republican commentators were comparably uncertain about how the common law versus statutory legislation would operate.

Treatise writers' lack of clarity surrounding the sweeping question over the relative influence of common-law rules versus popular legislation in early America applied even more specifically in the case of marriage. Jurists suggested roles for both popular legislation and the common law in determining the legality of marriages, maintaining that the legitimacy of marriage could extend well beyond the limitations outlined by statutes. The lawyer Zephaniah Swift, for example, wrote that marriage statutes in Connecticut existed "to give notice to parents, and all who are interested, of the intention of the parties, so that measures may be taken to prevent it, if unwarrantable or illegal, and to stop all private and clandestine marriages." However, he admitted that marriages performed outside of prescribed protocols would still be valid, on the basis that the essence of a marriage was the consent of couples. Similarly, the legal thinker Tapping Reeve penned that marriage was a "mere civil transaction, to be solemnized in such a manner as the legislature shall suggest." However, only two pages later in his treatise, Reeve asserted that to treat common-law marriages as void would be antithetical to national values. Reeve based his opinion on the widely known reality that informal marriages were, in the nascent United States, usual: "surely it would be very inconvenient, and often extremely unjust to an innocent family, to treat such marriages as void, in a country like ours, where many marriages are celebrated in a manner different from the mode prescribed by law..."[19] Treatise writers were unsure about the sovereignty of legislation in questions surrounding nuptials.

In court cases, too, judges ruled that states could not definitively legislate on the topic of matrimony.[20] Jurists in several states during the late eighteenth and early nineteenth centuries, including Kentucky, South Carolina, and North Carolina, upheld the legitimacy of marriages that did not adhere rigidly to the tenets outlined in state statutes.[21] In so doing, judges both hewed to, and further constructed, broader Anglo-American societal views surrounding contractual relations.[22] Judges thereby affirmed the nuptial practices of ordinary

[18] Henry St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (Philadelphia: William Young Birch and Abraham Small, 1803), appendix, 3–6; 411–12. See also, for example, Tapping Reeve, *The Law of Baron and Femme* (New Haven: Oliver Steele, 1816).

[19] Swift, *A System of the Laws of the State of Connecticut,* vol. 1, 189–90; and Reeve, *The Law of Baron and Femme*, 196–99.

[20] Other works that touch on some aspects of court cases affirming common-law marriage include Grossberg, *Governing the Hearth*; and Dubler, "Governing Through Contract."

[21] See, for example, *Vaigneur v. Kirk*, 2 Des. 640 (1808); *Baker v. Eliza Metzler*, Ant. N.P. Cas. 193 (1807); *Fetts v. Foster*, 3 N.C. 102 (1799); and *Crozier v. Gano*, 1 Bibb 257 (1808).

[22] See, for example, Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977).

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Americans, while also muddying the question of whether state legislatures could enact marital laws. For instance, in one case in North Carolina in 1797, the judges ruled that, despite the state's existing laws that outlined how matrimony should be conducted, if word of mouth evidence was deemed insufficient to legitimate a marriage, "we shall invalidate all the marriages in the country."[23]

The most important early legal precedent regarding what constituted valid matrimony was the February 1809 New York state Supreme Court decision of *Fenton v. Reed*. That case was headed up by then-Chief Justice James Kent, who would go on to write the canonical nineteenth-century legal treatise *Commentaries on American Law*.[24] The core legal issue in the case was whether or not nuptials between Elizabeth and William Reed, who had never gone through the formal ceremonies of marriage, were valid, in an instance in which Elizabeth sought a widow's pension from an organization of which William had been a member. The justices ultimately ruled in favor of a very broad definition of what constituted a legal marriage. The judges ruled that matrimony was a civil contract. Concomitantly, the judges detailed, all that was necessary for legitimate nuptials was a present agreement between the two parties, and that "no formal solemnization of marriage was requisite." Kent and his colleagues affirmed the validity of common-law conceptions of marriage. As New York was the main location point for legal publishing during this period, and Kent personally was growing in national renown as a jurist, the standard in *Fenton* quickly became the widely cited legal standard on the subject of marriage nationwide.[25]

New York lawmakers in the early republic shared the contractual vision of nuptials that James Kent articulated and believed that they were circumscribed in their legal capacity to legislate on the matter. New York jurists set broad boundaries for personal morality in the state's early years. However, they declined repeatedly throughout the early republic to legislate on the topic of matrimony. In the late eighteenth and early nineteenth centuries, lawmakers introduced various bills that would define what a marriage consisted of. Jurists uniformly rejected these bills, usually without any debate that legislative journals or newspapers picked up on.[26]

[23] *Whitehead v. Clinch*, 3 N.C. 3 (1797).

[24] James Kent, *Commentaries on American Law* (New York: O. Halsted, 1826–30).

[25] *Fenton v. Reed*, 4 Johns. 52 (1809). For other cases that cite *Fenton*, see, for example, *Town of Londonderry v. Town of Chester*, 2. N.H. 268 (1820); *Chambers v Dickson*, 2 Serg. & Rawle 475 (1816); and *Jackson ex dem. Van Buskirk v. Claw*, 18 Johns. 346 (1820).

[26] See, for instance, *Votes and Proceedings of the Senate of the State of New-York, at their First Session, Held at Kingston, in Ulster County, Commencing September 9th, 1777* (Kingston, NY: John Holt, 1777), 160; *Journal of the House of Assembly of the State of New-York, The Second Meeting of the Thirteenth Session* (New York: Francis Childs and John Swaine, 1790), 66; and *Albany Gazette*, January 23, 1797. It should be noted that early republican jurists reasoned that divorce fit within this contractual understanding of marriage. To twenty-first century eyes, divorce reads as a statutory remedy that exists alongside marriage under the same umbrella of "family law." This was not the case in the early republic. Rather, jurists rationalized that divorce existed as a remedy to liberate a party from a marriage contract that had been broken, as opposed to an undue legislative intervention in the marriage contract itself. See, for example, Hartog, *Man and Wife in America*, 70. Jurists' fashioning of marriage as a

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In this milieu of legal confusion surrounding nuptial regulation, and within weeks of Kent's ruling in favor of common-law marriages in 1809, New York passed a law that legalized the marriages of enslaved people within their state: "all marriages contracted or which may hereafter be contracted, wherein one or more of the parties was, were, or may be slaves, shall be considered equally valid, as though the parties thereto were free..."[27] This law was New York's first that clearly delineated the legality of nuptials. In so ruling on the subject of matrimony, the 1809 slave law shows the racialized limitations of a contractual understanding of marriage, while setting a framework for New York jurists and those from other states to begin to move beyond Kent's judicial standard nearly immediately after he articulated it.

New York held the largest enslaved population in the Northern states, consisting of approximately 20,000 people in 1800. Enslaved people in New York centrally contributed to New York's and the nation's growing economy. They toiled in fields in more rural areas and performed owners' errands and manual labor in cities.[28]

Black family life in New York took on an array of forms, which included, transcended, and defied the boundaries of the marital relationship. Enslaved couples sometimes formed marriages within their owners' homes. For instance, John and Jane of Eastchester, in Westchester County, forged a marriage, and had a child, Charlotte, together, while enslaved. The majority of enslaved couples formed marriages with those of different homesteads. For instance, Joseph and Buck wed in a church in Brooklyn in 1801, with the consent of their respective owners. Historians have also written about how some Black people practiced non-monogamous relationships, due to a combination of both the conditions of bondage and personal inclination. With sale and separation always a possibility, Black people were not always able to establish nor were they always interested in establishing monogamous attachments with one individual. Black people also formed a host of non-romantic relationships that were meaningful to their lives. When Dinah died in Brooklyn in 1797, her friends and neighbors gathered for her burial. Lue attended a frolic with other companions in 1805. Cyrus Bustill of Philadelphia shared a warm relationship with his

contract was a conceit that was far from ironclad, both conceptually and legally. The idea that marriage was a contractual relationship obscured the fact that the parties entering into the marriage were, in general, of vastly different social statuses. Differences in status based on gender permeated almost every aspect of early American life, and indelibly affected the marital relationship. Further, unlike most other contracts, matrimony conferred an array of unbreakable financial and legal understandings, whether the parties knew about them and agreed to them, or not.

[27] "An Act to enable certain Persons to take and hold Estates within this State, and for other Purposes." My read of the case law is that this statute was passed about 2 weeks after the *Fenton* ruling, but I have been unable to confirm this point.

[28] On slavery in New York more generally, see, for example, David N. Gellman, *Emancipating New York: The Politics of Slavery and Freedom, 1777-1827* (Baton Rouge: Louisiana State University Press, 2006); Shane White, *Somewhat More Independent: The End of Slavery in New York City, 1770-1810* (Athens: University of Georgia Press, 1991); and Levine-Gronningsater, "Delivering Freedom."

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mother, an enslaved woman belonging to the merchant Samuel Delaplaine of Manhattan.[29]

Prior to 1809, there were no laws in the state that specifically outlined the boundaries of matrimony for enslaved or free Blacks. Common-law norms governed marriage for enslaved people, which accorded their nuptials no legal significance. There were also no laws in New York prohibiting interracial marriage.

The 1809 slave matrimony law fit within a broader context surrounding New York's process of gradual emancipation. From the late eighteenth century onward, New York jurists established a gradual set of protocols that would result in the freedom of nearly every Black person in the state by 1827. Although diverse in methodology and in aims, abolitionists broadly shared a belief that the practice of owning humans was a moral stain on the state and on the nation at large. Abolitionist goals derived from revolutionary rhetoric that emphasized equality, as well as a nascent contemporary transnational rhetoric on humanitarianism, which shifted some white people's thinking surrounding enslaved individuals. As the state that held the greatest number of enslaved Blacks in the North, New York's emancipation statutes applied to the largest number of people in the United States prior to the Civil War.[30]

New York's process of gradual emancipation comingled concerns about enslaved people's economic values to their enslavers, as well as enslaved people's abilities to provide financially for themselves once they were emancipated. Jurists encoded these apprehensions into a series of laws that they enacted from the late eighteenth century to 1827, which ultimately resulted in the end of enslavement in the state. New York's process of emancipation relied in part on long-standing legal precedents for how the state managed the financial aspects of manumission, such as the state's 1788 statute that designated how individual slaves would be freed, which together provided a framework for how the state would later manage its emancipation procedures. The 1788 law outlined that public officials would need to ensure that a slave was capable of being financially secure prior to emancipation. When an

[29] Town of Eastchester, New York, *Book of Coloured People, 1795-1822*, Westchester County Archives, 20; Kruger, "Born to Run," 323; Hunter, *Bound in Wedlock*, 38–39; Sarah M.S. Pearsall, *Polygamy: An Early American History* (New Haven: Yale University Press, 2019), 115–49; Addenda - March 21, 1797, Journal of John Baxter of Flatlands, Long Island, Volume I, 1790-1804, ARC.257, Brooklyn Historical Society, 124; July 27, 1805, James Hawxhurst papers, 1713-1851, MssCol 3440, New York Public Library; Cyrus Bustill to Samuel Delaplaine, November 5, 1790 and October 12, 1791, Samuel Delaplaine papers, 1770-1839, New-York Historical Society. Thank you to Tal Nadan of the New York Public Library for double-checking the date of the Hawxhurst citation for me. For claim about the majority of enslaved wedded couples living separately, see, Kruger, "Born to Run," 322. Other historians have also written about the rich array of non-marital relationships that Black people formed during the time of slavery. See, for instance, Johnson, *Wicked Flesh*; and Holden, *Surviving Southampton*.

[30] See, for example, Gellman, *Emancipating New York*; White, *Somewhat More Independent*; Levine-Gronningsater, "Delivering Freedom"; and Paul J. Polgar, *Standard-Bearers of Equality: America's First Abolition Movement* (Williamsburg, VA and Chapel Hill, NC: Omohundro Institute/University of North Carolina Press, 2019).

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enslaver sought to manumit a slave, they were required to procure a certificate signed by their local overseers of the poor, and then also of the concomitant public officials—such as, depending on the locality, justices of the peace, mayors, or aldermen—affirming that the person to be freed was able to be financially self-sufficient, and under 50 years of age. That certificate was then to be registered with the relevant municipal clerk.[31]

When jurists established their broader framework for how they would eliminate slavery in New York, they followed this existing legal outline. New York lawmakers sought to balance their dual concerns of allowing enslavers some of the value of their enslaved persons' labor over time, while also ensuring—at least on paper—that freedpeople would be able to support themselves when emancipated. This process occurred in the absence of land or monetary compensation to formerly enslaved people.

Starting in 1799, New York began establishing a set of protocols that eventually liberated nearly every African American in the state by 1827. All children who would be born to an enslaved mother from 1799 onward would not take on the status of enslaved themselves. Rather, they would be designated "servants" to their masters, with periods of service lasting 28 years for men, and 25 years for women. The emancipation statutes thus ended the practice of heritable slavery in New York, while ensuring that enslavers would have access to an unpaid labor source for another generation. For most of this period, individual owners could also continue to manumit their enslaved people through registering with their municipality and attesting that the person to be freed was able to financially support themself.[32]

As enslaved people in New York transitioned to freedom, freedpeople's financial claims quickly became an issue in the eyes of New York lawmakers. Newly freed people often struggled financially in the absence of monetary compensation for their labor while enslaved or during their periods of servitude.[33] How would newly freed people fit within New York's existing poor

[31] The 1788 law and subsequent related statutes specified that if an owner could not guarantee that an enslaved person would be financially self-sufficient, the owner would have to provide security to the locality in order to manumit the enslaved person, and/or would be liable for the individual's maintenance, if need be, thereafter. See, for example, "An Act concerning slaves" (passed February 22, 1788); "An Act concerning slaves and servants" (passed April 8, 1801); *Manumission Book: Huntington, 1800-1824* (Town of Huntington, NY: 1980); Records of the New-York Manumission Society, 1785-1849, vol. 2, New-York Historical Society.

[32] "An Act for the gradual abolition of slavery" (passed March 29, 1799). In 1817, jurists passed another law stating that enslaved people born before 1799 would be freed in 1827, effectively setting an end date for slavery in New York; "An Act relative to slaves and servants" (passed March 31, 1817). The details surrounding gradual emancipation were hotly contested, and New York jurists revised the laws surrounding manumission multiple times throughout the period of 1799–1827. See, for instance, "An Act concerning slaves and servants" (passed April 8, 1801); "An Act to amend the Act, entitled 'An Act concerning Slaves and Servants'" (passed March 31, 1807); and "An Act concerning Slaves and Servants" (passed April 9, 1813). For more on the details of these debates and legal changes, see, for example, Levine-Gronningsater, "Delivering Freedom."

[33] See, for example, Helen Zunser Wortis, *A Woman Named Matilda: And Other True Accounts of Old Shelter Island* (Shelter Island, NY: Shelter Island Historical Society, 1978); Helen Zunser Wortis collection, 1977.351, Brooklyn Historical Society; and New York State Comptroller's Office, "Audited

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laws? New Yorkers debated the question of freedpeople's financial solvency regularly in the decade between 1799 and 1809.[34]

New York's state-wide framework for alleviating poverty always relied on understandings surrounding family. From the early days of New York statehood, the state had created an architecture of laws that disbursed aid to the needy. This support largely flowed from individual municipalities, through an overarching legal scaffold that the state maintained. This assistance usually consisted of what was called "outdoor relief," referring to support granted directly to individuals outside of an institutional context. Local officials also had the discretion to bind out paupers to masters for whom the pauper would labor.

Notably, however, municipalities generally only allocated aid when members of an individual's family were not able to support a needy individual. Common-law precedent surrounding coverture, which New York re-articulated in legislation from its earliest days of statehood, held that husbands were legally required to provide financially for their wives. In the absence of this support, other members of a conventional marital family, namely parents and siblings, were obliged to step in.[35]

According to existing New York state law for free people, identifying which family members were responsible for an impoverished person was a murky process. In the absence of clear records for determining family relationships, including marriage, officials needed to investigate personally who was required to provide for impoverished individuals. In lengthy proceedings, officials interrogated friends and community members so as to sort out familial relationships.[36]

Black New Yorkers during gradual emancipation had their own ideas about how financial assistance worked. In the early nineteenth century, community leaders created a number of mutual aid organizations, including the New York African Society for Mutual Relief (NYASMR), the African Marine Fund, and the Brooklyn African Woolman Benevolent Society. These groups provided mutual assistance to members and sometimes the surrounding community, demonstrating a broader vision of monetary support that went beyond

accounts of payments made by overseers of the poor for support of children born to slaves, 1799-1820," A0827, New York State Archives.

[34] See, for instance, *Journal of the Assembly of the State of New-York: At their Twenty-Fourth Session, Began and Held at the City of Albany, the Fourth Day of November, 1800* (Albany, NY: Loring Andrews, 1801), 178; *Journal of the Senate of the State of New-York: At their Twenty-Fourth Session, Began and Held at the City of Albany, the Fourth Day of November, 1800* (Albany, NY: Loring Andrews, 1800), 141–42; *Journal of the Assembly of the State of New-York: At their Twenty-Fifth Session, Began and Held at the City of Albany, the Twenty-Sixth Day of January, 1802* (Albany, NY: John Barber, 1802), 6, 23 78; *Journal of the Assembly, of the State of New-York, at their Twenty-Seventh Session, Begun and Held at the City of Albany, the Thirty-First Day of January, 1804* (Albany, NY: John Barber, 1804), 29–30, 232–35.

[35] See, for example, "An Act for the settlement and relief of the poor" (passed April 17, 1784); and "An Act for the better settlement and relief of the poor" (passed March 7, 1788).

[36] See, for example, *A New Conductor-Generalis: Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, Jurymen, Overseers of the Poor, &c. &c...By A Gentleman of the Law* (Albany, NY: D. & S. Whiting, 1803), 64–76; and *Town of Huntington, Records of the Overseers of the Poor–Part 2, 1805-1861, Index* (Huntington, NY: Town of Huntington, 1986).

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the compulsory provision of aid to those within one's marital family. In these entities and others, Black people advocated for a society premised on comity and shared connection. In 1809, NYASMR members sang a hymn composed by the Episcopal priest Peter Williams Jr., proclaiming that the group was "Knit by the bonds of MUTU'L Love [*sic*] / In social compact joined." In an address to the African Methodist Episcopal Church commemorating the abolition of the slave trade, George Lawrence extolled the importance of "social love."[37] Black people's vision of a post-emancipation social order formed an important intellectual counterpoint to the vision of New York legislators.

Over the course of the nineteenth century, as the last generation of enslaved New Yorkers grew into maturity, New York passed legislation in order to ensure that freedpeople did not become public charges. Jurists defined marital and familial relationships more rigidly as part of this effort. In 1809, despite New York jurists' framing of marriage as a civil contract with which the legislature could not interfere, the legislature passed the statute that dictated that marriages that enslaved people had formed, either with other enslaved people, or with free people, would be considered legal. This law encompassed the relationships of both currently enslaved people and those who had been formerly enslaved. This statute was New York's first that offered a decisive ruling on the topic of marriage. The marital clause was part of a broader statute that imposed Anglo-American conceptions surrounding inheritance on African Americans, and which also rendered legitimate, as opposed to bastards, the children born to enslaved married parents.[38]

The 1809 act is remarkable as it disrupted the conventional understanding that enslaved people could not form marriages that would be validated by the state. Legally conceptualized as property, Anglo-American jurists had long held that enslaved people could not establish marriages under law. As New York undid the legal architecture of slavery during this period, this statute was one key aspect of fundamentally altering, and ultimately unmaking, the household relationships that constituted bondage.

Further, this marital law validated key intimate connections that enslaved people had formed while in bondage. Enslaved people frequently married, and white people routinely referred to enslaved people's marriages in their own writings and in runaway slave advertisements and slave sale advertisements. However, these relationships did not hold legal legitimacy, and this reality constituted one of the many acute cruelties of bondage. With the

[37] Quoted in William Hamilton, "An Address to the New York African Society, for Mutual Relief, delivered in the Universalist Church, January 2, 1809," Schomburg Center for Research in Black Culture, New York Public Library; and George Lawrence, *An Oration on the Abolition of the Slave Trade, Delivered on the First Day of January, 1813, in the African Methodist Episcopal Church* (New York: Hardcastle and Van Pelt, 1813), 10. For broader context, see, for example, Craig Steven Wilder, "The Rise and Influence of the New York African Society for Mutual Relief, 1808-1865," *Afro-Americans in New York Life and History* 22 (1998); and John L. Rury, "Philanthropy, Self Help, And Social Control: The New York Manumission Society And Free Blacks, 1785-1810," *Phylon* 46 (1985): 231–41.

[38] "An Act to enable certain Persons to take and hold Estates within this State, and for other Purposes."

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1809 law, jurists overturned this legal understanding, and used the statute to provide a degree of legitimacy to the emotional bonds that the enslaved in their state had nourished. Therefore, for example, for the enslaved couple John Brown and Jane in New York county, or for Henry Bartow and Jane (a different individual), or for the free person Thomas Allicott and his enslaved wife Catherine in Albany, and for the many couples whose names have not been preserved, the 1809 legalization of their nuptials meant that the marriages that they formed and found to be meaningful were finally granted the imprimatur of state lawfulness.[39]

At the same time, in legitimating the marriages of enslaved people, white jurists did not merely validate the relationships of enslaved people in sentimental terms. Rather, by legalizing the relationships of enslaved people—and then situating these relationships within the broader framework of inheritance law—white jurists prescribed to African Americans the same gendered legal duties to which white people were subject surrounding a husband's obligation to provide for his family. By legitimating African American nuptials, jurists displaced the responsibility for aid for African Americans on to private families. This rendering circumvented some potential Black claims for more direct support from the state. Further, in a state welfare schema wherein officials made determinations surrounding financial support on a case-by-case, subjective basis, by ruling that all enslaved marriages were legal, public officials smoothed and simplified for themselves the process surrounding determining gendered marital obligations for Black people. The text of the 1809 law even explicitly spelled out that owners could manumit an enslaved child to their newly legally obligated parents, and owners would subsequently not be liable for the child's future maintenance.[40]

With this law, jurists also established legal norms for African Americans surrounding a specific kind of family life. In contrast to white jurists' legal conceptions of nuptials for white people, this 1809 statute for African Americans offered a compulsory rendering of the marital definition it bestowed. This law was passed in the very same year that Kent ruled that marriage constituted a civil contract. The 1809 act, while referring to marriage as a contract within the text of the statute—"all marriages contracted or which may hereafter be contracted..."—mandatorily rendered marriages that individuals had formed while in slavery legal according to Anglo-American conceptions. African Americans were thus subject to a wide array of legal and financial understandings about marriage that they did not necessarily agree to—or, as in the case of many people who wed both in 1809 and in the present day—were not necessarily even aware of. The version of intimacy legalized by the act was also a very specific kind: a monogamous, marital one. Jurists legally effaced the idea that African Americans would have multiple spouses, as some African Americans

[39] Harry B. Yoshpe, "Record of Slave Manumissions in New York During the Colonial and Early National Periods," *The Journal of Negro History* 26 (1941): 91, 97; and Certified copy of bill of sale by Stephen Lush to Thomas Allicott, August 23, 1815, New York State Library.

[40] "An Act to enable certain Persons to take and hold Estates within this State, and for other Purposes."

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had desired and practiced while enslaved. Further, by subjecting African Americans to Anglo-American inheritance practices, lawmakers officially disallowed the idea of a broader sharing of resources among the African American community via inheritance practices, a custom of both enslaved and free Blacks.[41] The marital act legally narrowed the kinds of intimacy that African Americans could practice.

Unfortunately, the legislative debate surrounding the law itself remains elusive to historians. While journalists covered many aspects of New York's legislative politics in local newspapers, there is a surprising lacuna in journalistic coverage of the deliberations surrounding this 1809 law. Assemblyman Jacob Van Rensselaer, who supported other causes relating to the well-being of African Americans, introduced the law.[42] Based on the Journal of the Assembly and the Journal of the Senate of the time period, jurists in New York debated the bill in each chamber over the course of about a week, and the bill was amended in that process. But this coverage, too, was terse about the nature of the deliberation itself.[43]

There are some plausible reasons for this lack of at least traceable debate, in a legal milieu where lawmakers generally had serious doubt about whether and how they could legislate on the topic of marriage. First, contemporary lawmakers situated debates about the legislative regulation of marriage within a broad framework about the appropriate boundaries of governance, and the extent to which the government could intervene in ordinary Americans' private affairs. By legislating on enslaved people's marriages, lawmakers, wittingly or not, demonstrated with their actions that they believed they could pass a different—and more rigid—legal standard surrounding matrimony for enslaved and newly freed Black people than that which existed at the time for New Yorkers more generally.

Jurists also likely viewed this bill as fitting within their broader framework surrounding the intersection of emancipation for enslaved individuals and economic self-sufficiency. This statute corresponded logically with lawmakers' more general aims of establishing the process of gradual emancipation in a manner that did not drastically upset societal order. The bill provided a blueprint for managing the financial claims of newly freed African Americans. Further, the bill incorporated Black Americans within the broad array of Anglo-American legal understandings surrounding inheritance. Thus, to the minds of contemporary jurists, this specific marriage law may not have been contentious because it sat comfortably within an overarching schema surrounding emancipation that lawmakers were already developing, while also setting a standard for what they perceived as a normalized family life for

[41] See, for instance, Hunter, *Bound in Wedlock*; Pearsall, *Polygamy*, 115–49; and Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003).

[42] See, Levine-Gronningsater, "Delivering Freedom," 129.

[43] *Journal of the Assembly, of the State of New-York: At their Thirty-Second Session, Begun and Held at the City of Albany the First Day of November, 1808* (Albany, NY: Solomon Southwick, 1808); and *Journal of the Senate, of the State of New-York: At their Thirty-Second Session, Begun and Held at the City of Albany the First Day of November, 1808* (Albany, NY: Solomon Southwick, 1808).

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Black people. Still, with the 1809 statute, legislators established a precedent by which they tied questions surrounding African American emancipation to marriage. To do so, jurists in New York for the first time legislated a clear demarcation on the topic of matrimony.

How did this law work in practice? All marriages involving enslaved people were legalized under the 1809 law.[44] Even so, the 1809 law only truly ensured the gendered legal obligations between couples where one or both of the parties was free. The condition of bondage meant that owners still held legal dominion over their enslaved people. The New York state Supreme Court even explicitly ruled in 1822 that the doctrine of coverture would not apply in the case of a marriage between an enslaved man and a free woman, suggesting that the status of slavery still held priority over gendered legal understandings.[45] However, as enslaved individuals attained freedom in New York over the course of the early nineteenth century, to the minds of jurists, already-legalized marriages facilitated enslaved people's transitions into free society. The gendered legal understandings that undergirded the early American fabric already applied to newly freed individuals.

Even with these caveats, the 1809 statute constituted a momentous change for both current slaves and their owners. Examining runaway slave and slave sale advertisements provides a window into how the law played out on the ground. These documents were created by enslavers and their counterparts and thus are not to be taken purely, or even, at times, mostly, at face value. Still, these sources, when studied critically and in aggregate, likely reveal some degree of the realities of enslaved people's lives and their relationships. Particularly when primary sources produced by enslaved people themselves rarely exist, these advertisements, which frequently contain pointed descriptions of the relationships of people in bondage, should be regarded by historians as a key source for understanding enslaved people's intimate networks.[46]

After the 1809 slave law was passed, enslaved people from other states fled from their owners to form or preserve their family lives in New York. Soon after the slave marriage law was enacted, Phebe and Cuff, an enslaved married couple in New Jersey, along with their five children, crossed the Hudson River to start a new life in New York City. Similarly, in 1814, 22-year-old Harry absconded from New Milford, New Jersey in order to be with his wife and

[44] The historian Vivienne Kruger fascinatingly shows how, after 1809, some churches changed their recording practices surrounding the marriages of enslaved people. She argues that some churches ceased explicitly noting that individuals were enslaved in marriage records and excluded writing their masters' names in the records. In her words, "With blacks no longer labelled in terms of legal status, slave marriages per se disappeared, replaced simply by unions between black persons"; Kruger, "Born to Run," 359.

[45] *Overseers of Marbletown v. Overseers of Kingston*, 20 Johns. 1 (1822).

[46] Anthony E. Kaye deploys runaway slave advertisements in a similar way in his book, *Joining Places: Slave Neighborhoods in the Old South* (Chapel Hill: University of North Carolina Press, 2007). Shane White recently published an excellent essay about the kinds of information that might be gleaned from runaway slave advertisements in New York City, although he does not focus on intimate relationships. See, Shane White, "The Allure of the Advertisement: Slave Runaways in and around New York City," *Journal of the Early Republic* 40 (2020): 611–33.

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children in New York. Phebe, Cuff, and Harry's actions continued a longer trend of enslaved people from other states running away to New York in order to live free lives as New York gradually emancipated its enslaved population. That said, in the period after 1809 in New York, Phebe, Cuff, Harry, and other self-freed individuals could hope to benefit from the new slave law by living in a new state that, at least on paper, legally respected their marital relationships, a key and new component of the process of freedom.[47]

Phebe, Cuff, Harry, and other enslaved individuals likely knew about the advantages that the 1809 slave marriage law afforded, as enslaved individuals were routinely aware of the affairs and legal news around them in the early republic. Despite the heavy constraints that the condition of bondage imposed on their lives, enslaved people in New York and its environs often sought out and attained opportunities to engage in a broader social world of news and current events. Enslaved people often lived in cities, where they regularly mixed and mingled with many other people who could share news with them, in addition to having access to periodicals themselves. When judges heard cases in local courts, people of all walks of life gathered to stay abreast of proceedings. Slaves frequently visited each other's homesteads, where they could share local gossip and goings-on. Enslaved and free African Americans often consorted in familial and platonic relationships, constituting another key source of information-sharing.[48]

At the same time, the kind of intimacy that the 1809 slave law favored is not one that some Black people would have welcomed. Some African Americans, just like some people of other races, formed their intimate lives in ways other than that of a monogamous, marital attachment. When New York legislated to compulsorily legalize the relationships of all enslaved couples, it is far from clear that all African Americans would have hailed the measure. Under the new marital law, the polygamous relationships that some Black Americans coveted in slavery were legally prohibited. What is more, it is not at all certain from the 1809 law which of the relationships in a polygamous arrangement gained primacy, which left determinations about the relative importance of the various relationships that enslaved people formed potentially up to the judgment of local officials. Runaway slave advertisements also shed light on instances in which enslaved individuals likely would not have wanted the retroactive legalization of their nuptials. For instance, Violet Smith, a woman who enjoyed wearing colored handkerchiefs, escaped from her enslaver in New York City in 1814 while pregnant. The enslaver supposed that Violet and the enslaved man Tom shared an intimate affair, after Tom had left his wife to be with her. To Tom and Violet, a forcible legalization

[47] *Evening Post*, July 31, 1809; and *Evening Post*, July 6, 1814. See also, for example, *American Citizen*, February 7, 1810; *Mercantile Advertiser*, May 30, 1812; *Commercial Advertiser*, May 27, 1814; and *Evening Post*, June 16, 1814.

[48] See, for example, Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York: Cambridge University Press, 2018); Leslie M. Harris, *In the Shadow of Slavery: African Americans in New York City, 1626-1863* (Chicago: University of Chicago Press, 2003); and White, *Somewhat More Independent.*

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of Tom's relationship with his former spouse would hardly have been seen as welcome.[49]

Slave owners, too, understood in part that the 1809 law meant that their relationships to their slaves, and the relationships among their slaves, were now altered. When advertising sales of slaves in the years after the 1809 law, enslavers emphasized the marital and parental status of their slaves, although their so doing may well have been begrudging or reluctant. Owners specified, for example, that an individual to be sold was unwed and childless, which indicated to prospective buyers that the enslaved did not have any legalized intimate attachments that an owner would have to respect. For instance, one owner advertised in Albany in 1810 that a 20-year-old woman they were selling was "without a husband or children." In another advertisement for the sale of an enslaved man, the owner even explicitly delineated that if the man was sold without his wife, he must remain in New York City, so that he could continue to be near his spouse.[50] The 1809 slave law provided legal significance to such owners' claims.

Despite the family law, enslavers continued to overtly exercise their ownership privileges to separate parents from their children, demonstrating the overarching dominance that enslavers continued to hold over the lives of other humans even amidst the process of gradual emancipation. One enslaver advertised the sale of a 26-year-old woman "with or without her boy of 5 years old." Another owner in Albany in 1813 endeavored to sell a teenager "for no other cause than her having a young child, which is inconvenient to the family in which there are several."[51] Owners remained willing to cruelly break up kin, and publicly proclaim their doing so in newspapers.

In addition to the transformative impacts that the 1809 law had on enslaved people, with this statute, jurists in New York also created a novel legal precedent surrounding the capacity to regulate matrimony through statutory legislation, so as to displace the obligations for financial assistance onto individual families more broadly. As the early republic transpired, New York gradually sought to assert more control over welfare functions as the state's number of impoverished people increased. In the 1820s, New York revised its welfare functions across the state to promote the creation of residential poorhouses. In those houses, men and women labored in exchange for housing and food. With this scheme, New York sought to eschew providing direct financial assistance to residents so as to reduce the costs of welfare operations. Because the state only stepped in to assist an individual when a husband—or other members of a marital family—could not provide financial support, in order to enact their new welfare aims, the state required a clearer understanding of who was married. As a result, in 1827, New York passed its first law defining

[49] *Commercial Advertiser*, October 1, 1811.

[50] *Albany Register*, March 20, 1810; and *Mercantile Advertiser*, June 29, 1814. See also, for example, *Republican Watch-Tower,* April 13, 1810; *Columbian*, September 19, 1810; and *Columbian,* November 25, 1811.

[51] *New-York Gazette*, October 13, 1810; and *Albany Gazette*, April 12, 1813.

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what a marriage consisted of for all residents.[52] Through legislating on slave marriage, New York jurists established a precedent for passing laws on the topic of nuptials, and for legislatively tying nuptials to state support schemes.[53]

In the decades immediately following the passage of New York's slave marriage law, other states paid it little heed. There is almost no coverage of New York's law in newspapers or periodicals from other states during the period immediately after the statute's passage. In some respects, this omission is telling. Other states had little incentive to want to publicize the existence of a law that, to them, would overturn the logic of their economies that relied on enslaved labor.

Even so, by the mid-nineteenth century, knowledge of the 1809 law circulated in the broader legal world. The most prominent legal treatises about slavery cited the law within their texts. Particularly, the slavery apologist Thomas Cobb referenced New York's slave marriage law in his tome to make the argument that in the absence of a statute, slave marriages were invalid at common law.[54]

On their part, jurists in mid-nineteenth century Southern courts began to deploy New York's statutory precedent surrounding slave marriage to uphold their own slave regimes. Judges in Mississippi, Alabama, and Pennsylvania cited New York court cases that affirmed the 1809 law in order to advance arguments that without such a law, slave marriages should be deemed invalid, and/or slaves could not be understood to inherit property. For instance, the Supreme Court of Alabama in 1854 cited New York slave marriage law to affirm that without a statute, the marriage of Tom and Charity, two enslaved people, was null and void at common law, and consequently their children, Malinda and Sarah, could not inherit from Tom even after the four had been freed.[55] By acknowledging New York's law in this regard, jurists in other states opened the door to a legal ability of states to legislate on slave matrimony.

Indeed, after the federal emancipation of slaves in the late nineteenth century, jurists from slave states recovered the logic of New York's slave law in order to fit their contemporary needs for managing the financial claims of freedpeople after emancipation. After the federal Thirteenth Amendment mandated that Southern states liberate their enslaved populations, Southern lawmakers were faced with governing a newfound social class of millions of freedpeople, who, due to the circumstances of bondage, overwhelmingly had neither land nor money to their names. In this milieu, lawmakers chose not to offer widespread land and financial compensation in order to enable African Americans to establish themselves on firm footing in the post-

[52] Of Husband and Wife, Chap. VIII, "Of the Domestic Relations" (passed December 4, 1827).

[53] See my forthcoming dissertation.

[54] See Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America*, vol. 1 (Philadelphia: T. & J. W. Johnson & Co.; Savannah, GA: W. Thorne Williams, 1858), 242–43; and William Goodell, *The American Slave Code In Theory and Practice*...(London: Clarke, Beeton, and Co., Foreign Booksellers, 1853), 78.

[55] Tom and Charity had ceased cohabitating together prior to their emancipation; *Malinda v. Gardner*, 24 Ala. 719 (1854). See also, *Minor v. State*, 7 George 630 (1859); and *Holmes v. Johnson*, 42 Pa. 159 (1862).

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emancipation world, as many of them advocated for.[56] Instead, lawmakers, replicating New York's example, displaced the burdens of support away from the government and onto the marital relationship.

After the Civil War, jurists across the South enacted statutes that legalized the marriages that formerly enslaved people had contracted, as New York had during its process of gradual emancipation. Some Southern states retroactively legalized the marriages that individuals had formed during slavery, while others, including Georgia, Mississippi, and Arkansas, validated the nuptials of freedpeople that were in place at the time that their respective laws were passed.[57] The federal government, via the Freedmen's Bureau, sanctioned and facilitated the effort to encourage marriages among freedpeople, establishing a vast licensing and registration infrastructure across the Southern states.

Jurists emphasized the gendered rights and obligations that newly legalized married couples would be required to assume in the language of the marriage statutes that states passed. These legal obligations had altered somewhat over the course of the nineteenth century. Due to women's persistent activism, jurists had struck down some aspects of coverture, especially through the passage of Married Women's Property Acts, which entitled women in some states to independently maintain the wages they earned from work.[58] However, in most Southern states, the core governing logic of husbands' marital responsibilities still persisted, and Southern states underscored these commitments in their statutes legalizing freedpeople's marriages. For instance, both Virginia and South Carolina emphasized the "duties and obligations" of newly married couples in their laws of 1866 and 1872, respectively.[59] Georgia and South Carolina's laws also specified that in cases of plural marriages, a partner would have to choose among their multiple spouses who would be their

[56] See, for example, Foner, *Reconstruction*; Katherine Franke, *Repair: Redeeming the Promise of Abolition* (Chicago: Haymarket Books, 2019); Mary Frances Berry, *My Face is Black is True: Callie House and the Struggle for Ex-Slave Reparations* (New York: Alfred A. Knopf, 2005); and W. Caleb McDaniel, *Sweet Taste of Liberty: A True Story of Slavery and Restitution in America* (New York: Oxford University Press, 2019).

[57] I relied heavily on Giuliana Perrone's excellent article "'Back into the Days of Slavery'" to identify these provisions. See page 133–34, footnote 21 of that piece. Specifically, see, for example, Tex. Const. of 1869, art. XII, §27; Florida—"An Act to establish and enforce the Marriage Relation between Persons of Color" (passed January 11, 1866); Florida—"An Act Legalizing the Marriage of Persons of Color" (passed December 14, 1866); Alabama—"An Ordinance Relative to marriages between freedmen and freedwomen" (passed November 30, 1867); "An Act to amend and re-enact the 14th section of chapter 108 of the Code of Virginia for 1860, in regard to Registers of Marriage; and to legalize the Marriages of Colored Persons now cohabiting as Husband and Wife" (passed February 27, 1866); Georgia—"An Act to prescribe and regulate the relation of Husband and Wife between persons of color" (passed March 9, 1866); Mississippi—"An Act to confer Civil Rights on Freedmen, and for other purposes" (passed November 25, 1865); Arkansas—"An Act to legalize marriages of persons of color" (passed December 20, 1866); and Arkansas—"An Act to declare the rights of persons of African descent" (passed February 6, 1867).

[58] See, for instance, Stanley, *From Bondage to Contract*.

[59] For the Virginia and South Carolina laws, respectively, see, "An Act to amend and re-enact the 14th section of chapter 108 of the Code of Virginia for 1860..."; and "An Act Legalizing Certain Marriages, and for Other Purposes Therein Mentioned" (passed March 12, 1872).

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legal spouse.[60] By legalizing slave marriages, and emphasizing the obligations attendant therein, government officials both privatized the financial claims of newly freed people within matrimony, and established a norm for a particular kind of monogamous married life for newly freed African Americans. In so doing, jurists joined marriage and state ever more closely together after the Civil War, a subject that jurists across the nation had deliberated over throughout the early republican and antebellum eras.

The passage of these laws directly replicated the logic of New York's 1809 law that Southern lawmakers had long been aware of from legal treatises, and had cited in their own legal opinions for years. Further, after the Civil War, jurists from Southern states cited and called out specifically New York court cases relating to its 1809 slave nuptial law in order to uphold the legality of the ties that enslaved people had formed during bondage.[61] Referencing New York's standard, judges affirmed the architecture of a post-emancipation political economy that would further privatize liabilities for financial assistance within the freed family. For instance, justices of the Supreme Court of South Carolina ruled in 1878 that marriages that enslaved people had contracted would retroactively be rendered legal according to that state's statute of 1865, which declared that for freedpeople, "The relation of husband and wife amongst persons of color is established." The case involved determining the legitimacy of the nuptials of Joe and Nancy, two enslaved people who had borne children together, but passed away prior to federal emancipation. The question arose about whether their two children, Katie Davenport and Willis Caldwell, could be understood to be legitimate heirs of property that the other possessed, per South Carolina's inheritance protocols. Ultimately, the judges ruled to affirm the legality of Joe and Nancy's marriage, and consequently the legitimacy of both Davenport and Caldwell. In so deciding, the justices specifically referenced the New York judicial decision in 1826, *Jackson v. Lervey*, which had upheld an expansive interpretation of the 1809 matrimonial law. In the New York case, the justices had argued unequivocally that the New York state law clearly pertained broadly to marriages contracted during the time of slavery: "The words are general, and extend to all marriages."[62]

In the South Carolina case, justices similarly ruled to affirm that their state's 1865 statute rendered legal the marriages of emancipated couples enacted during bondage. The justices argued, "we are strengthened by the case of *Jackson vs. Lervey*..." and spent a full two paragraphs describing how the logic in *Lervey* applied in the state's case. The judges confirmed that the South Carolina statute could retroactively sanction marriages: "To construe it otherwise would

[60] South Carolina—"An Act to Establish and Regulate the Domestic Relations of Persons of Color, and to Amend the Law in Relation to Paupers and Vagrancy" (passed December 21, 1865); and Georgia—"An Act to prescribe and regulate the relation of Husband and Wife between persons of color."

[61] This notion that slaves had latent rights that the legal system could retroactively apply after emancipation is the legal concept of "dormancy." See, Perrone, "'Back into the Days of Slavery'"; and Goring, "The History of Slave Marriage in the United States." The early republican New York antecedents of "dormancy" have been heretofore largely unstudied.

[62] *Davenport v. Caldwell*, 10 S.C. 317 (1878); *Jackson, ex dem. The People, v. Lervey*, 5 Cow. 397 (1826).

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make that important portion of the Act a meaningless, or at least needless, enunciation of acknowledged law."

Similarly, the Supreme Court of Tennessee in 1892 confirmed the legitimacy of marriages contracted by couples during slavery, citing integrally another New York Supreme Court case relating to slave marriages.[63] The justices ruled in Tennessee that, "If married conformably to the usages of slavery," then marriages that had been contracted by individuals in bondage would be valid according to the state's legalization statute of 1866. Notably, the judges distinguished these legal marriages from other forms of "meretricious cohabitations," which involved intimate relations that had transpired without the owner's consent. The process of legitimating slave marriages after the Civil War entailed that Southern jurists make delineations among enslaved people's relationships to determine which met white people's standards for legalized conduct.[64]

But even for states that did not explicitly cite New York law, lawmakers and judges across the South adopted New York's broader logic that had widely circulated in legal circles that states could compulsorily render nuptials—and the financial obligations attendant therein—legal by statute. Nearly all states in the South passed similar statutes affirming the legitimacy of marriages that freedpeople had contracted in the past. At a time when Southerners faced unprecedented claims for aid for African Americans, Southerners adopted the rationale of New York's long-existing legal standard to fashion novel laws to protect the state's purse from African Americans.[65]

In ruling to legitimate the marriages of enslaved people, jurists set precedents surrounding their capacity to legislate on the topic of marriage more

[63] *Marbletown v. Kingston*.

[64] *Brown v. Cheatham*, 91 Tenn. 97 (1892). This Tennessee case was then cited in *Coleman v. Vollmer*, 31 S.W. 413 (1895), a Texas case that affirmed the validity of a marriage that an enslaved couple had first contracted while in bondage. For more on the coercive nature of Reconstruction-era slave marriage laws, see, for example, Franke, "Becoming a Citizen."

[65] For instance, in 1875, the United States Supreme Court ruled as an aside in a labor compensation case, *Hall v. U.S.*, that the marriages of enslaved people were null and void at common law, citing *Jackson v. Lervey* among other cases. In so doing, the court left open the idea that state statutes could legalize slave marriages. Southern jurists then cited *Hall v. U.S.* in several subsequent state proceedings that validated freedpeople's marriages. However, as Perrone writes, *Hall*'s oblique reference did not provide a definitive ruling on the subject of slave marriage, and not all states cited it in their case law. Some states that cited *Hall* also cited early republican New York legal cases. See, *Hall v. U.S.*, 92 U.S. 27 (1875); Perrone, "'Back into the Days of Slavery.'" See also, for example, *Davenport v. Caldwell*; *Scott v. Raub*, 88 Va 721 (1891); and *Jennings v. Webb*, 8 App.D.C. 43 (1896). Postbellum jurists also sometimes cited *Girod v. Lewis*, an 1819 Louisiana case that argued that the marriages that enslaved people had contracted would entail civil effects upon emancipation. See, 6 Martin 559 (1819). See also, for example, *Johnson v. Johnson*, 45 Mo. 595 (1870). However, these cases do not speak directly to the specific claims that I am making, about Southern states asserting new rationale about their capacity to legislate on the topic of nuptials, which relied on New York's precedent. In sum, I am *not* claiming that the New York cases were the only cases that postbellum jurists cited to justify the legalization of freedpeople's marriages contracted during slavery. However, Southern jurists called out New York cases in especially prominent ways, and New York established the earliest state precedent for making laws legalizing enslaved people's marriages.

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broadly. Almost all states tightened their laws surrounding marriage during the late nineteenth and early twentieth centuries, enacting licensing procedures, registration requirements, and protocols for how a wedding ceremony should transpire.[66] While not all of these statutes were linked to jurists' decisions to regulate the nuptials of enslaved people, through legislating on the topic of slave marriage, lawmakers increasingly had a robust background of statutory precedent to rely on in asserting their power to legislate on matrimony. The United States ever more developed to maintain legislative control over the primary intimate act of most Americans' lives.

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Going forward, the United States would continue on a path that further instantiated the primacy of the marital family within law over a more universalist vision of aid directly to citizens. The United States developed immigration policies that favored marital family unification. Jurists formulated early health insurance schemes around assumptions that medical costs would be borne within families. Economic policies continued to be predicated on the idea of two-adult households, where the man was the primary breadwinner.[67]

There were always alternative ideas. African Americans advocated for broad-based reparation policies. Socialist activists of various kinds sought more direct aid from the state.[68] But lawmakers increasingly inscribed into the legal code the family as the core unit of the polity. This series of decisions shaped the United States' character: the country prioritized the self-sufficiency of individual families, rather than creating a broad social safety net to protect and support all individuals it housed.

In the early republican United States, jurists deeply worried over whether they had the right to legislate on the topic of nuptials. In direct response to the process of gradual emancipation, and the potentiality of enslaved people making claims on the state, New York jurists demarcated a statutory boundary surrounding marriage for the first time. In so doing, New York jurists shaped a novel legal understanding that asserted a legislative prerogative to regulate the subject of matrimony, as well as spurred the growth of a political economy in the United States that banked on individual families' self-reliance. At the same time, these standards, passed in the age of gradual emancipation in New York, and then re-articulated by Southern states in the era of national emancipation, demonstrate the continued challenges that African Americans faced in reaping

[66] See, for example, Cott, *Public Vows*; and Grossberg, *Governing the Hearth*.

[67] See, for example, Cott, *Public Vows*; Canaday, *The Straight State*; Martha Gardner, *The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870-1965* (Princeton: Princeton University Press, 2005); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003); and Robert O. Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012).

[68] See, for example, Berry, *My Face is Black is True*; McDaniel, *Sweet Taste of Liberty*; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995); Howard Brick, *Transcending Capitalism: Visions of a New Society in Modern American Thought* (Ithaca, NY: Cornell University Press, 2006); and Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (New York: Cambridge University Press, 1990).

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the same rights and privileges as white people in the United States, even at the very historical moments that seemingly offered ripe opportunities for a re-envisioning of racial relations.

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