Freedom Bound

LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865

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Modernizing: Polity, Economy, Patriarchy

> Things are come to that pass now, that tho' Masters have the Name of Government indeed, the Servants really govern throughout this Nation, and especially that Part of them who we hire for daily Labour, who if but one crooked Word be spoken to them, will turn their Backs upon you, and upon your Business, and be gone, in spight of Contracts and Bargains and in spight of any Damages you may suffer by it.
>
> Daniel Defoe, *The Great Law of Subordination Consider'd* (1724)

> The original political right that God gives to Adam is the right, so to speak, to fill the empty vessel.
>
> Carole Pateman, *The Sexual Contract* (1988)

> I doubt not but we shall soon have a very severe Law upon that Subject. *But of this hereafter.*
>
> Daniel Defoe, *The Great Law of Subordination Consider'd* (1724)

At a strategic moment early in his extended study of the culture of eighteenth-century working people, *Customs in Common*, the late E. P. Thompson invokes Daniel Defoe's vexed anatomy of English social relations, *The Great Law of Subordination Consider'd* (1724), to oil the hinge of a fundamental transformation he contends was afoot in eighteenth-century English society. Pointedly, Thompson notes Defoe's observation that an England was coming into being in which, unless decisive measures were taken, "the Poor will be Rulers over the Rich, and the Servants be Governours of their Masters, the Plebeij have almost mobb'd the Patricij ... in a Word, Order is inverted, Subordination ceases, and the World seems to stand with the Bottom upward."[1] In the throes of his anxiety for orderliness, says Thompson, Defoe has correctly foreseen two essential characteristics of the coming century: First, growing social polarization between on the one hand the world of the "patrician" gentry (an "agrarian

[1] E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York, 1991), 16; Daniel Defoe, *The Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behavior of SERVANTS in England Duly Enquir'd into, Illustrated with a Great Variety of Examples, Historical Cases, and Remarkable Stories,... As also a Proposal, Containing such Heads or Constitutions, as would Effectually Answer this Great End, and bring Servants of*

bourgeoisie," crowned at its metropolitan apex by a parasitic "banditti," the whole representing "predatory oligarchic power" in operation[2]) and on the other the local, customary, and largely opaque world of "plebeian" culture: but also, second, a simultaneous erosion of the mechanisms upon which patricians had relied in earlier generations to maintain plebeians in place – the "old means of social discipline"[3] more precisely, the forms and institutions of legal subordination.

For Thompson, Defoe's narrative offers concrete examples of the impact of waxing freedom in the petty interactions of daily life.[4] He draws particular attention to Defoe's indignant account of a poor cloth worker's carefully calibrated defiance of a magistrate before whom he has been hauled to answer for neglecting his work. Defoe's story is elaborately scripted:

> Justice: Come in Edmund, I have talk'd with your Master.
> Edmund: Not *my Master*, and't please your Worship, I hop I am *my own Master*.
> Justice: Well, your Employer, Mr E–, the Clothier; will the word Employer do?
> Edmund: Yes, yes, and't please your Worship, any thing, but *Master*.

In Thompson's reading, the exchange captures perfectly the lofty arrogance of patrician society's encounters with cowering plebs, but also the ragged notes of uncertainty beginning to be audible in their interactions, the notes that sound the passing of those old legal disciplines. Edmund's refusal to accept the label of routine subservience and his subsequent success in avoiding punishment for his neglect of work, Thompson tells us, "is a large change in the terms of relations: subordination is becoming (although between grossly unequal parties) negotiation."[5]

[2] Thompson, *Customs in Common*, 84, 27, 33; and see generally 24–33.

[3] Ibid., 42; and see generally 35–42.

[4] Ibid., 16, 37–8, 43.

[5] Ibid., 38. Defoe sustains his narrative of Edmund the cloth worker over several pages of *The Great Law*, but does not locate it with any specificity. The question arises whether this narrative has any grounding in "historical reality." Thompson assumes it is fictional and thinks of it as a moralistic anecdote – evidence of beliefs held rather than a historical circumstance encountered. Certainly *The Great Law* is composed of many anecdotal narratives, of which this is only one, albeit one of the longest. Its "actuality" might seem beside the point. But it would not do to dismiss the matter, for the question of what it can tell us about historical reality beyond providing evidence of Defoe's beliefs is not unimportant, and in fact may supply its larger significance. In *History and the Early English Novel: Matters of Fact from Bacon to Defoe* (Cambridge, 1997), Robert Mayer argues that Defoe was a pivotal figure in the early eighteenth century's transformative rearrangement of the literary relationship between reality and representation. The rearrangement would call forth novelists like Samuel Richardson and Henry Fielding, whose work was produced intentionally as fiction. But Defoe situated his work prior to the divide. Defoe, says Mayer, "sought to ensure that his most famous narratives would be read not as fiction but as history" (181). In his hands "if a narrative was substantially true, if it was a historical account based on reliable sources, neither a fictional frame, nor a fictionalized narrative, nor even the use of fictional material, altered the narrative's essentially historical [illegible]

Thompson's interpretation of Defoe's narrative conveys an important claim about the role of law in the century's large change in relations of subordination. Law in the early eighteenth century, he writes elsewhere, was "class-bound and mystifying." But it was also beginning to be possessed of its own "logic, rules and procedures."[6] Although capable of "being devised and employed, directly and instrumentally, in the imposition of class power," law had nevertheless come to exist in its own right, that is "simply *as law*." Because law was possessed of "its own characteristics, its own independent history and logic of evolution," it could display "an independence from gross manipulation" and grant the Edmunds of the world a real measure of justice in the face of power.[7] Both in setting and outcome, this representative plebeian's defiance demonstrated in microcosm that the law was on its way "to a role more prominent than at any other period of our history," that, in the wake of the Glorious Revolution, it had become society's foremost "arbitrating authority," and that, to the extent it remained true to the distinct identity that its forms and rhetoric nourished – transcendent values of equity and of "the rule of law" – it could be accepted on all sides as a "medium within which other social conflicts [might be] fought out" and therefore recognized as "an unqualified human good."[8]

Though by reputation and conviction Thompson was a critic of received liberal history and political theory, the themes he chose to emphasize

that later were read as fictions, and, most paradoxically, that sometimes have been read as both" (154). Below I consider whether we can locate Defoe's narrative of Edmund the cloth worker more precisely, and thereby improve our understanding of it as history.

[6] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, UK, 1977), 260. And see *Customs in Common*, 34–5.

[7] Thompson, *Whigs and Hunters*, 260, 262, 263.

[8] Thompson, *Customs in Common*, 34; *Whigs and Hunters*, 265–7. For extended commentaries on Thompson's formulation see, for example, Adrian Merritt, "The Nature and Function of Law: A Criticism of E. P. Thompson's 'Whigs and Hunters'," *British Journal of Law and Society*, 7, 2 (Winter 1980), 194–214; Perry Anderson, *Arguments Within English Marxism* (London, 1980), particularly 199–205. Merritt criticizes Thompson for his reliance on an idealist liberal meta-narrative that spuriously invokes law, equity, and justice as universal essences autonomous of social relations. "Law can never be seen '*simply as law*', '*simply* in terms of its own logic'. Blind formalism like that belongs only in the sterile environment of traditional law schools" (199). Thompson's invocation of the rule of law as an "unqualified human good," she argues, is no more than a "fetishism" of law (208) that is atheoretical and disarming. More forgiving, Anderson concludes that Thompson's growing legalism is attributable to changes in his politics, reflecting an increasingly libertarian conceptualization of "the rule of law" founded less on bourgeois conceptions of legality than on native English traditions of oppositional radicalism. (Anderson's judgment is confirmed by the tenor of Thompson's final book, *Witness against the Beast: William Blake and the Moral Law* [New York, 1993]). Anderson nevertheless finds Thompson's legalism romantic and simplistic and, like Merritt, ultimately disabling. Thompson's rhetorical counterposition of "traditional freedoms" to "new statism" extols only a negative liberty and a naive faith in the good offices of the householder (205). See in addition Christopher Tomlins, "How Autonomous Is Law?" *Annual Review of Law and Social Science*, 3 (2007), 49–52. For additional evaluations, see Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal*, 86, 3 (January 1977), 561–6; Karl Klare,

when it came to eighteenth-century law – its elevation from mere tool to "hypostatized construct,"[9] and the acceleration of freedom and consent in productive relations that accompanied that elevation – have always enjoyed an intimate relationship in liberal history, where they perform as twinned signifiers of "progress," the gathering disengagement of modernity from feudalism and the posited release of individual energies (social and political, intellectual and scientific) by which disengagement is signified.[10] Quintessentially, liberalism defines its difference as a theory of polity and economy precisely in terms of the emergence of changes in polis and society that underscore the primacy of "*meum* and *tuum*," of individuated property right, to civic right. Necessarily, labor must become legally free in that large change, else the individual at large would not be empowered at all, but merely those who enjoyed command of what individuals, en masse, produced. Here lies the revolutionary promise of the new property theory of the seventeenth century, the theory that Grotius began and that after him Locke thought the particular promise of the Atlantic world's new commonwealths: human equality in place of natural subjugation; hierarchy and command undone by contract and consent; humanity in thrall to scarcity replaced by "the ease and bounty of a civil, laborious life."[11] And with the possibilities of propertied abundance – the "sufficiencies" of an economy uncontained – would come the prospect of ever greater inclusion in the politics of *vita activa*. Thus, Locke imagined governance not as a visitation of sovereignty upon subjects from above but founded on the consent of those who, by natural right, had acquired private property by individual exertion and who sought its protection through their own civic action in the consensual creation of a body politic.[12] Property begun in an individual's own labor became the basis of the state, its security the state's reason for being. Men would no longer be born slaves to the necessities of subsistence, but free to fabricate and circulate and enjoy as they willed "the sheer unending variety of things" that is modern life.[13] They would no longer be born superiors and subordinates, but co-equal makers of contracts, individual, social, and political. Once accepted, "this foundation leads to a rethinking of all human communities, and the establishment of equality and voluntariness as key elements shaping relations of power within them."[14] Here in full flush was the fleeting glimpse caught by everyman's colonizer, John Smith, in the first moments of England's contacts with "New" England: "euery man … master and owner of his owne labour and land."[15] Invented in England's encounter with America, propertied independence would become the touchstone of Lockean civic modernity. Here was civility's ultimate gift to the barbarous.[16]

In this telling, the two stories, of civic modernizing and of the legal transformation of labor, necessarily become one. For as, "in social reality labour is becoming, decade by decade, more 'free' of traditional manorial, parochial, corporate and paternal controls, and more distanced from direct client dependence upon the gentry," so the reproduction and eventual worldwide transmission of that fundamental transformation in society's productive relations relies for its permanence upon the law that defines, records, and implements those relations. "Productive relations themselves are, in part, only meaningful in terms of their definitions at law."[17]

Locke wrote to elevate consent as a paradigmatic discourse of human society. He did so to devastate the political theories of Sir Robert Filmer, notably Filmer's patriarchal construction of politics which relied upon the household and its hierarchical order of paternal subjection (the "claim that every person 'is born subject to the power of a Father'"[18]) as a model of proper authority by which to constitute the state, and to establish in its place a distinct trajectory for state formation grounded on individual property right. Locke's success in the matter has been widely celebrated: Can there really be any doubt of Locke's centrality in Anglo-America's dominant

[9] Anderson, *Arguments Within English Marxism*, 200.

[10] For the latter, see J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wis., 1956). Much of the more recent writing on the history of Anglo-American labor law has undertaken a critical reexamination of this paradigm. See Karen Orren, *Belated Feudalism: Labor, the Law and Liberal Development in the United States* (New York and Cambridge, 1991); Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill, 1991), and *Coercion, Contract and Free Labor in the Nineteenth Century* (New York and Cambridge, 2001); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York and Cambridge, 1993).

[11] Paul Corcoran, "John Locke and the Possession of Land: Native Title vs. the 'Principle' of *Vacuum Domicilium*" 18, Australasian Political Studies Association Annual Conference, 2007, Monash University, available at http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/#political_theory (accessed 22 August 2009).

[12] John Locke, *Two Treatises of Government: In the Former, the False Principles and Foundation of Sir Robert Filmer, and His Followers, are Detected and Overthrown. The Latter is an Essay Concerning the True Original, Extent, and End of Civil Government* (London, 1698), 184–202 [§§25–51 "Of Property"], 238–65 [§§95–131 "Of the Beginning of Political Societies," and "Of the Ends of Political Society and Government"]; Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford, 1996), 43, 155–62.

[13] Recall Hannah Arendt, *The Human Condition* (Chicago, 1958), 136, 7–9, on the conditions and elements of *vita activa*, cited in the Prologue to this book. For the strategic social and political importance of modernity's sheer variety of "things," see T. H. Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* (New York, 2004).

[14] William James Booth, *Households: on the Moral Architecture of the Economy* (Ithaca, N.Y., 1993), 101. Of all recent American historians, Joyce Appleby is perhaps the most successful in conveying the sheer exhilaration conveyed in these manifestations of early liberal thought. See her *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York, 1984), and *Liberalism and Republicanism in the Historical Imagination* (Cambridge, Mass., 1992).

[15] John Smith, *A Description of New England*, in Philip L. Barbour, editor, *The Complete Works of Captain John Smith* (Chapel Hill, 1986), I, 332.

[16] Locke, *Two Treatises of Government*, 184–202 [§§25–51 "Of Property"]; Arneil, John Locke and America, 132–67. And see Chapter 4, section I.

[17] Thompson, *Customs in Common*, 9; *Whigs and Hunters*, 267.

[18] Booth, *Households*, 98.

tradition of liberal modernism?[19] Thompson, for one, testifies – involuntarily – to the extent of the ideational shift that Locke helped induce. As a conception of social and political order, Thompson has argued, patriarchy is bounded in time. Patriarchy embodies "a very specific set of theories and institutions where the monarch or the head of the household commanded authority over subjects, wife, children, apprentices, servants, etc."[20] These were not only under challenge by the beginning of the eighteenth century, Thompson's Lockean chronology tells us, they had already begun to decompose, giving way to a different determinative context – of wealth and poverty and the struggles over distribution that are modernity's mark. Bernard de Mandeville helps him mark the transition. "It is impossible," Mandeville wrote in 1723, "that a Society can long subsist, and suffer many of its Members to live in Idleness, and enjoy all the Ease and Pleasure they can invent, without having at the same time great Multitudes of People that to make good this Defect will condescend to be quite the reverse, and by use and patience inure their Bodies to Work for others and themselves besides." These, Thompson tells us, are the "class-bound apologetics" that called a new politics and its symbol, "economic man," into existence.[21] They and their ilk have kept him in being ever since. They are the key to the social relations of Anglo-American industrialization. They are the key to its successor, globalization, for they are "the hidden text of the discourse between North and South."[22] Displacing the patriarchal polis, the politics of "economic man" dictate a new and [illegible] its objectives.

These interlocked themes – escape from subsistence, the decomposition of patriarchy, the appearance of discourses of consent in polity and economy, the freeing of labor and the changing contours of exploitation and distribution, the emergence of law as supreme social mediator and the consequent "rethinking of all human communities" in contractarian terms – have been accepted as fundamentals of mainstream Anglo-American history, whether of liberal or, in Thompson's case, radical bent.[23] All crowd into the specific interpretation that Thompson gives to the story of Edmund the cloth worker's encounter with the magistrate.[24] Edmund's avoidance of penalty for his "refusal … to submit to the work-discipline demanded" shows that "[p]aternalist control over the whole life of the labourer was in fact being eroded"; the refusal itself evidences the "newly-won psychology of the free labourer." And the location of the refusal (before a magistrate) signals conclusively the replacement of the old legal disciplines by the rule of law. "[A] substantial proportion of the labour force actually became *more* free from discipline in their daily work, more free to choose between employers and between work and leisure, less situated in a position of dependence in their whole way of life, than they had been before."[25] As befits "a Man of the Left,"[26] Thompson's telling tale does not have a classic liberal ending: the laborer's new procedural freedoms do not herald substantive autonomy. They are prelude, rather, to the factory discipline that would penetrate and reconstitute the lives of the eighteenth century's "idle and disorderly" plebeians.[27] Still, factory discipline was not a return to old legal burdens only temporarily abated; it was itself a further signifier of modernity. That is, rather than a reversion to the discipline of renewed legal unfreedom, factory discipline meant a transition to a new kind of freedom, one measured in relativities of deprivation (crudely, *need*), one exposed to a new oppressive reality – a structure of command grounded on control of the detail of production. Factory discipline was *modern* discipline – the discipline of the clock, not the dock.[28] In relation to this discipline, law stood as salve, even salvation.[29]

[19] The returns are debated in Arneil, *John Locke and America*, 11–16; Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, 1969), 218–19, 283–9, 601–2; J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975), 526–52. For more recent commentary bearing on the matter, see Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill, 2005); Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge and New York, 2009), 41–8.

[20] Thompson, *Customs in Common*, 500. Because of his insistence that "patriarchy" represents a particular form of social and political organization that is specific to a particular historical moment that no longer pertains in the eighteenth century, Thompson argues that it cannot be used as a general description or categorization of social practice. He comments that "feminist theorists, who allocate a central place to patriarchy, are rarely historians," and criticizes their indiscriminate invocation of the practices of patriarchy "to cover every situation and institution of male-domination" (499–500). Time has passed patriarchy by. But as Carol Pateman has, tellingly, written, to abandon patriarchy "would mean that … feminist political theory would then be without the only concept that refers specifically to the subjection of women, that singles out the form of political right that all men exercise by virtue of being men. If the problem has no name, patriarchy can all too easily slide back into obscurity beneath the conventional categories of political analysis." Carol Pateman, *The Sexual Contract* (Cambridge, 1988), 20. See also 21–2.

[21] Thompson, *Customs in Common*, 14–15. The citation to Bernard de Mandeville is to *The Fable of the Bees: Or, Private Vices, Publick Benefits. With an Essay on Charity and Charity-schools. And a Search into the Nature of Society* (London, 1724), 326. We shall see, in fact, that Mandeville distinguishes society's "members" from its "people" in precisely the fashion that the classical household [*oikos*] distinguishes its patriarchal head from its interior supporting cast.

[22] Ibid.

[23] For liberal versions, see, for example, Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979); Gordon S. Wood, *The Radicalism of the American Revolution: How a Revolution Turned a Monarchical Society into a Democratic One unlike any that had Ever Existed* (New York, 1992). For a radical version of the American case, see Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977).

[24] The interplay between these large themes of social transformation and Defoe's anecdote also exemplify Thompson's methodology, which he describes as the ornamentation of "impressions" and "hunches" with "elegant or apt quotations." *Customs in Common*, 24.

[25] Ibid., 37, 38 (emphasis in original).

[26] Morton Horwitz's phrase, in "The Rule of Law," 566.

[27] Thompson, *Customs in Common*, 38, 39.

[28] Ibid, 352–403. [These pages of *Customs in Common* reprint Thompson's well-known essay, "Time, Work-Discipline and Industrial Capitalism," *Past and Present*, 38 (December 1967).]

[29] Thompson, *Whigs and Hunters*, 262–7. As in *The Making of the English Working Class* and *Customs in Common*, Thompson's setting is England, but the lesson is for the world.

Thompson, however, tells only a fragment of Defoe's tale, and in certain crucial details his rendition is incorrect. Add what's missing, correct what's wrong, and the meaning of the story changes rather dramatically. The alteration makes it a different microcosm, one that does not illustrate the liberal conjuncture's "rise" of free labor at all but in very basic ways calls it in question.

By re-telling Thompson's telling tale, I will show that a condition of "free labor" did not arise in the course of a unidirectional eighteenth-century transformation of Anglo-American polis and society from rule by traditions of patriarchal magistracy to the rule of individuality and consent. In Part II, we have already seen that the question of labor's legal freedom was both situational and relative: some who labored and had once been unfree became freer; others who labored and who had once been free became less so. Many, meanwhile, were enslaved, and were thereby rendered absolutely and irrevocably and perpetually unfree. In this chapter we shall see specifically that patriarchal authority and its social relations of subordination did not decompose. Far from it. Both in the civic realm (the state) and the domestic (the household), it was composed anew.

To investigate the new, extended, contours of patriarchal authority, and – in the following chapter – the rise of slavery in Anglo-America, is to offer new lines of sight, both legal and political, on the development of the new commonwealths that colonizing formed in mainland America and on the entwined fate of labor in that process of development. Investigation establishes as well a further and distinct standpoint from which to examine colonizers' new theory of property, and what has traditionally been accepted as their accompanying desire to rethink "all human communities" in terms of equality and voluntariness, which is to say their commitment to improvement and progress. The objective in Part III of this book, then, is to grapple with the liabilities of modernity.

1. Re-telling Tales

In the second part of this book, just concluded, I offered an account of the law of labor unfreedom and its subjects in early modern England and in England's mainland American colonies that showed how law's institutional interactions with regional culture in both locales created a legal culture of work in no sense uniformly unfree, but rather shot through with gaping holes through which (particularly in America) plebeian bodies – white bodies, to be sure, and mostly male – can be found constantly slipping. This account, if correct, undermines the temporal and causal trajectory that both liberal and radical historiography have normalized, generally without much question. The history of labor un/freedom, the ordering of its segmentations and imbrications, is simply not one that can be traced to or explained by the classic engine of modernization, capitalism, alone. Its secrets lie as much in the processes and demands of colonizing, and their far less linear historical trajectory. Colonizing's incessant demands for labor, the forms in which both the supply of labor and the work performed were organized in response, and the social and ideological practices that resulted, interrupt conventional narratives of Anglo-American modernity and the waxing formal freedoms in relations among law, economy, and society that are their marker. The juxtaposition of the first and second parts of this book prepares the way, I hope, for the altered constellation – the reassemblage of parts – that will make the interruption explicit here, in the third.[30]

Colonizing induces a new constellation because it introduces us to a temporality distinct from modernity's idealization of "progress." It draws to our attention the constancy of differentials and occlusions in the measurement of civic capacity, the ease with which liberal modernity actually coexists with innovations – disciplined service, gendered subalternship, and racialized enslavement – that seem to contradict it. Certain coexistences encountered in the first part of this book have already pointed the way. There I presented English colonizing discourse as a discourse of improvement (a manuring of lands and sometimes, but only incidentally, of the people found wandering upon them) that constructed an armature for itself out of *ius naturale* and *gentium* by conjuring into coexistence with the new commonwealths it desired to create an array of threats to confront and, where necessary, destroy: savages to conquer and brutes to exterminate; marauding enemies to pen behind constantly expanding frontiers. Outside *ius gentium*'s interior gestures of courtesy, owed one European sovereign by the next, lay another realm of action far more characteristic of world historical experience, in which – notwithstanding the protests of scholastic critics – the judgments of nature and of the community of the humane were co-opted as legitimate and sufficient grounds for making war when necessary to civilize and cultivate. Here were the origins of the discourse of sovereign right by conquest and then by use that would sustain European empires for half a millennium as they departed on one civilizing mission after another into the zones of exception they had created for themselves beyond the boundaries of the old medieval map. Colonizing, one may argue, is the normalization of exception.[31] It occurs in the world's

liberalism's rule of law (Locke's, Blackstone's) is "a cultural achievement of universal significance" that arms all those who struggle against oppression, economic or imperial (205–6).

[30] See generally Christopher Tomlins, "Afterword: Constellations of Class in Early North America and the Atlantic World," in Simon Middleton and Billy G. Smith, editors, *Class Matters: Early North America and the Atlantic World* (Philadelphia, 2008), 213–33.

[31] On "exception," see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Calif.: Stanford University Press, 1998), 18: "The particular 'force' of law consists in th[e] capacity of law to maintain itself in relation to an exteriority. We shall give the name relation of exception to the extreme form of relation by which something is included solely through its exclusion." Agamben here draws upon the theory of sovereignty developed in the early 1920s by Carl Schmitt, who held that "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides that such a normal situation actually exists," but also and necessarily

barbaric zones as an unending condition of emergency – the unending necessity that order and improvement be visited upon the disordered by the civil, lest they face otherwise, as Robert Cushman wrote, "a vast and emptie *Chaos*."[32] Once they had landed, colonizers strove to familiarize the exceptional, to make it (in everyone's interest) a bit more like home.[33]

But colonizing is as potent a description of the sovereign impulse to create "due regulation and order" in locales of exception *within* the physical boundaries of the homeland as much as in the world beyond. Both are meet for improvement. England's transoceanic colonizing lived cheek by jowl with like initiatives to civilize "the rude parts" of the British archipelago. Indeed, the two overlapped: in the tracts of the Hakluyts and others, the inhabitants of those rude parts are precisely the instrument for their schemes. A disorderly population that threatens social order within the realm can be shipped to an archipelago of plantations overseas to become a tractable labor force that "improves" the wilderness. The experience improves the population. By subtraction, it also improves the realm.[34]

The intimacies of colonizing and the improvement of labor are nowhere more clearly underscored as they bear down on each other during the course of the eighteenth century than in the work of Daniel Defoe. For Defoe's vexed and vexatious *Great Law* itself is best read, like so much of his work, as a colonizing discourse.[35] Like all such discourses it elaborated upon a project of discovery, in this case of an England, a Britain, that in crucial respects remained regionally detached from the dictates of its metropolitan center. The conjectural narratives that illustrated the *Great Law*'s polemic had been accumulated during Defoe's many years of travel "through the whole island of Great Britain," travels eventually summarized

that "sovereign is he who decides on the exception." Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, 1985), 13–5.

[32] Robert Cushman, "Reasons & Considerations Touching the Lawfulnesse of Removing out of *England* into the parts of *America*," in William Bradford et al., *A Relation or Iournall of the Beginning and Proceedings of the English Plantation Settled at Plimoth in New England, by Certaine English Adventurers both Merchants and Others* (London, 1622), 69 (emphasis in original).

[33] See generally Christopher L. Tomlins, "The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History," in Christopher L. Tomlins and Bruce H. Mann, editors, *The Many Legalities of Early America* (Chapel Hill, 2001), 1–5.

[34] See Jane H. Ohlmeyer, "'Civilizinge of those Rude Partes': Colonization within Britain and Ireland, 1580s–1640s," in Nicholas Canny, editor, *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century*, volume I of *The Oxford History of the British Empire*, William Roger Louis, general editor (Oxford, 1998), 124–47; Mark Netzloff, *England's Internal Colonies: Class, Capital, and the Literature of Early Modern English Colonialism* (New York, 2003), 91–134, 208–10. See generally Part I of this book.

[35] See J. A. Downie, "Defoe, Imperialism, and the Travel Books Reconsidered," in Roger D. Lund, editor, *Critical Essays on Daniel Defoe* (New York, 1997), 78–96. Downie writes that an "insistence on imperialism runs throughout Defoe's writings on economics, and finds a place in his narratives" (87). See also Maximillian E. Novak, *Economics and the Fiction of Daniel Defoe* (Berkeley and Los Angeles, 1962). "In whatever form, Defoe propagandized for travel, foreign commerce, and colonization" (146). The *Great Law*'s stress on labor [illegible] complemented those prime directives.

in his *Tour* of the same name, published immediately after the *Great Law*, in 1724–6. In the manner of the narratives that composed the younger Hakluyt's *Principall Navigations*, Defoe's *Tour* was a manufacture of nation, though on this later occasion the direction of composition was from the center outward, the reverse of Hakluyt. Consistently engaging in its capacity to express the island's regional variation, Defoe's chorography also suggested that variation always hung on the frontier of profound alterity to a metropolitan norm. Take, for example, his well-known account of the "Peakrills," the cave-dwelling lead miners of the Derbyshire peak district, whom Defoe described as "subterranean wretches," creatures from "the dark regions below," whose speech required the services of an interpreter before it could be comprehended in "the world of light" that Defoe inhabited. So great was their remove from the villages and country estates of the south which, earlier in the *Tour*, Defoe had described with an easy and delighted familiarity, that the Peakrills seemed a different race of beings, "rude boorish" and "uncouth" in manner, collectively "strange, turbulent, quarrelsome."[36] In a word, foreign. One might even hazard barbaric. Describing his journey onward from the peak district, his descent into the West Riding of Yorkshire from Blackstone Edge in the Pennines, Defoe had resort to a familiar and unmistakable trope that put the Peak's alterity beyond doubt: "We thought now we were come into a Christian country again, and that our difficulties were over."[37]

Unfamiliar legal cultures attracted Defoe's curiosity no less than unfamiliar peoples. Defoe found the Peak District's barmote (mining law) court

[36] Daniel Defoe, *A Tour Throughout the Whole Island of Great Britain*, Introduction by Pat Rogers (London, 1971), 460, 463–7. On the south and east, see 47–336. Peter Earle has commented that Defoe "knew the south and the east of the country best. He wrote his descriptions of these parts first and clearly got bored with the project as he went on." Peter Earle, *The World of Defoe* (London, 1976), 126.

[37] Defoe, *A Tour Throughout the Whole Island*, 490. Defoe's text pointedly contrasts barrenness and plenitude, wilderness and cultivation, arbitrariness and authority. Note, for example, the palpable relief that attended his arrival at the Duke of Devonshire's estate at Chatsworth in Derbyshire, an aristocratic island of civility and social-spatial order amid the deep foreignness and desolation of the Peak. To the northeast of Chatsworth lay "a vast extended moor or waste, which, for fifteen or sixteen miles together due north, presents you with neither hedge, house or tree, but a waste and howling wilderness, over which, when strangers travel, they are obliged to take guides … Nothing can be more surprising of its kind, than for a stranger … wandering or labouring to pass this difficult desert country, and seeing no end of it, and almost discouraged and beaten out with the fatigue of it … on a sudden the guide brings him to this precipice, where he looks down from a frightful height, and a comfortless, barren, and, as he thought, endless moor, into the most delightful valley, with the most pleasant garden, and most beautiful palace in the world." 476–7, and generally 475–7. These discursive tropes of savagery and civility, waste and garden, barbarity and *exotica* are, we saw in Chapter 4 (section I), deeply embedded in English colonizing discourse. They are part and parcel of the cultural negotiations of early modernity. See also generally Christopher Tomlins, "Law's Wilderness: The Discourse of English Colonizing, the Violence of Intrusion and the Failures of American History," in John Smolenski and Thomas J. Humphrey, editors, *New World Orders: Violence, Sanction and Authority in the Colonial Americas* (Philadelphia, 2005), 21–46; Francis Barker, *The Culture of Violence: Essays on Tragedy and History* (Chicago, 1993).

"very remarkable," particularly its jurisdiction over the Peakrills' "subterranean quarrels and disputes."[38] He found the extensive authority that Halifax magistrates exercised over the West Riding's cloth manufacture equally interesting. Indeed, the extent of Defoe's interest strongly suggests that Halifax might well have been the "certain Town of Note" that was the site for the incident recounted in the *Great Law* and picked over by E. P. Thompson.[39] The suggestion must remain speculative for there is no way to corroborate it. What is not speculation, however, is the contrast in the two accounts of difference within the island that the *Tour* and the *Great Law* present. In the *Tour*, Defoe's mien is primarily chorographic narrative. Like the voyaging narratives that Hakluyt assembled in the *Principal Navigations*, he told of what had been found and seen – people, places, flora, fauna, climates, cultures, trades, and commodities. In the *Great Law*, in contrast, Defoe is explicitly normative. The *Great Law* tells tales not to illustrate difference but to instantiate difference's depravity and to demand its overthrow. The book is a polemic against social chaos. It seeks colonization of the internal lands of the island.[40]

The errant cloth worker's full name was Edmund Pratt.[41] He was a "journeyman weaver."[42] He had been hired by a clothier, E–, to fill an order that E– had received from a third party. E– had supplied the materials expeditiously and the whole was to be finished by an agreed date. But after completing about half the job Pratt ground to a halt, preferring the Alehouse to his loom. When E– "entreated" him to finish the job, he answered "*flat* and *plain*" that he had no need of the money. E– then went to the magistrate to swear out a warrant for Pratt's arrest on a charge of neglecting his work. Thompson tells us that the magistrate summonsed the cloth worker to answer to his employer's complaint of neglect, leading to the dialog already recounted.[43] But this is not so. What the magistrate told the clothier was that "the Case did not lie before him" and that no warrant could be granted. He had no jurisdiction over the matter, the magistrate said, because Pratt "was not an Apprentice, or a hir'd Covenant-Servant, bargain'd with for the Year." He advised the clothier that his only option, if Pratt continued in his refusal to perform, was to sue him for damages for breach of contract. Pratt's refusal to work, then, was not criminally punishable under existing law. "It was not the work of a Justice of the Peace … he cou'd not make the Fellow work." Only apprentices and yearly servants-in-husbandry could be so compelled. Nor could a civil suit ("*long, chargeable, and uncertain*") produce an award of performance but only damages in lieu – an outcome, according to Defoe, "not worth [the clothier's] while."[44]

Thompson has mistold the tale's most important details. Yet to this point the story might still be judged, if not specifically an illustration of his "rise of free labor" trope, at least not wholly incompatible with it. One might, for example, suppose that the magistrate was reluctant to enforce old laws compelling labor that had fallen into disuse. And indeed, much later in the programmatic climax to his polemic, Defoe includes this charge in his inventory of fault. The laws were not sufficient, and "'tis long since they were made." The laws were ill executed; "Magistrates are degenerated in themselves." The laws in being should be made "more effectual" than they were.[45] This notwithstanding, Defoe's telling tale was not that of a reluctant or degenerate magistrate, but of a magistrate rendered helpless by the law's insufficiencies. The case did not lie, there were no grounds for a criminal complaint, no basis upon which he could proceed. And this is borne out by the reason Defoe gave for telling the story in the first place: his concern was not that appropriate laws were not being enforced, but that appropriate laws did not exist. The *Great Law* was an agitation for a remedy.[46]

Why is this important? First, because according to Defoe the "Deficiency of the Law" rendered the magistrate powerless to act. He could not require Pratt's attendance before him, he could only request it.[47] Second, because

[38] Defoe, *A Tour Throughout the Whole Island*, 360. And see also Chapter 5, nn.65–70 and accompanying text.

[39] Defoe, *Great Law of Subordination Consider'd*, 91; *A Tour Throughout the Whole Island*, 491–3. Peter Earle notes Defoe's consuming interest in the cloth industry in *The World of Defoe*, 126.

[40] I take this term from Michael Brogden. See his "An Act to Colonise the Internal Lands of the Island: Empire and the Origins of the Professional Police," *International Journal of the Sociology of Law*, 15, 2 (May 1987), 179–208.

[41] The following account, like Thompson's, is based on *The Great Law of Subordination Consider'd*, 91–103. Defoe supplies "Edmund's" full name. Use only of his Christian name reinforced the tale that Thompson wanted to tell, one of an obsequious dependant, a child, hesitantly challenging his subordination for the first time.

[42] Ibid., 91.

[43] Thompson, *Customs in Common*, 37. See also 43 (Edmund was "called before the magistrate to account for default").

[44] Defoe, *Great Law of Subordination Consider'd*, 91–3, 97 (emphasis in original). We have encountered precisely this situation in the mainland colonies discussed in Chapter 7.

[45] Ibid., 286–7. This is Robert Steinfeld's preferred position on the incident. See Steinfeld, *Coercion, Contract and Free Labor in the Nineteenth Century* (Cambridge and New York, 2001), 44 n.20, citing the piece-work clause of the Statute of Artificers as sufficient formal authority for the magistrate to take action. That argument, however, assumes both a uniformity to comprehension of the statute and the existence of a national jurisdiction within which it could be applied that the statute's own composition and history of enforcement comprehensively countervail. See Chapters 5 and 6.

[46] Thus, Defoe's *Preface* to the *Great Law* stated, at ii, "no Men who, in the Course of Business, employ Numbers of the Poor, can depend upon any Contracts they make, or perform any-thing they undertake, having no Law, no Power to enforce their Agreement, or to oblige the Poor to perform honestly what they are hir'd to do, tho' ever so justly paid for doing it." And again, at 92–3, "if the Laws of England are deficient in any thing, it is in this, namely, that they do not empower the Justices to compel labouring People who undertake work, to finish it before they be Employ'd by any other." Magistrates should be enabled to determine such matters "in a summary way," obliging the worker to give bail to perform, "or send him to the House of Correction till he was humble enough to go about it."

[47] Ibid., 93. The magistrate told the clothier, "he cou'd not make the Fellow work unless he would do it willingly … but *pray go and tell him I would speak with him*," 92 (emphasis in original). This is what Thompson describes as a summons.

Pratt was well aware of the deficiency ("it seems the Fellow knew"), his demeanor before the magistrate ("looking something Confident") takes on a coloration completely at variance with the brow-knuckling ingratiation that Thompson attributes to him. The magistrate was bluffing and Pratt knew it.[47] And third, because Defoe felt all such exhibitions of "insolence" were humiliating, he campaigned for the law to be changed, for magistrates to be furnished with the means to discipline an existing independence.[48] And not only in this case, but all others like it: "A Servant who hires himself to a poor Farmer, to do his business, and runs from him in Harvest, as much as in him lies betrays him [sic], and ruins him; and this very thing is so notoriously practis'd at this time, and is so much a Grievance, that the Parliament, since my writing these Letters, have it under Consideration to oblige Servants to perform their Agreement, and stay out the Year; and to empower the Justices of Peace, and proper Officers, to punish fugitive Servants."[49]

Defoe was confident of Parliament's response. "We shall soon have a very severe Law upon that Subject."[50] And he was right. "More free to choose"? Edmund Pratt had faced the magistrate knowing that a meaningful legal distinction separated his working life from those to which the criminalized disciplines of service applied. The distinction (between *employment* and *service*) kept him from jail, it recognized his mastery of himself, and it acknowledged that his choice to work or not as he pleased was not one to be coerced.

[47] Thompson describes Pratt's behavior as "the calculated obsequiousness" of one who wished "to struggle free from the immediate, daily, humiliations of dependency" but to whom "the larger outlines of power, station in life, political authority, appear to be as inevitable and irreversible as the earth and the sky." *Customs in Common*, 43. He concludes, "Cultural hegemony of this kind induces exactly such a state of mind in which the established structures of authority and modes of exploitation appear to be in the very course of nature" (43). Defoe, in contrast, writes that Pratt's knowledge of the law "made him not only saucy and peremptory to his Employer, but very pert, and almost impudent before the Justice," to whom he spoke "*in as merry a Manner as I could desire.*" *Great Law of Subordination Consider'd*, 93, 96 (emphasis in original).

[48] "The insufferable Behaviour of Servants in this Nation is now (it may be hop'd) come to its Height; their Measure of Insolence, I think, may be said to be quite full." Ibid., i. Insolence is a word often encountered in eighteenth-century Anglo-American discourse applied not only to the behavior, manner, or speech of working people considered by the observer insufficiently deferential, but also to their apparent willingness to work. Thus in 1745, Josiah Tucker, dean of Gloucester, equates the idleness of "the *lower* class of people" with "brutality and insolence." In Thompson, *Customs in Common*, 383. Interestingly for my purposes, the etymology of insolence indicates that the word had also been used to describe unused or neglected land: Thus *Palladius on Husbandry*, 1257 (c.1420): "Where is lond vnkept & insolent [*ingio insolens et incultodita*] Take from the tronke al clene, vntil so hie As beestis may by noon experiment Attevne; and there let bowis multiplie." See the *Oxford English Dictionary* (entry for "insolent") at http://dictionary.oed.com (accessed 22 August 2009), and Hans Kurath, editor, *Middle English Dictionary* (Ann Arbor, 1952), Part E:2, 207 (entry for "unkept").

[49] *Great Law of Subordination Consider'd*, 282–3.

[50] Ibid., 285.

Justice: Well, but why will you not finish the Piece of Work you began?
Edmund: Does he say, I won't finish it Sir?
Justice: He says you don't finish it.
Edmund: There's much Difference, and 't please you, between don't and won't.

But Parliament annulled the distinction in the Woollen Manufactures Act of 1725. Thereafter the Pratts of the whole island could no longer ignore their employers and instead lie "Drunk and sotting in the Alehouse" whenever they chose. Neglect or abandonment of work by weavers was made a criminal offense, punishable by imprisonment. By a stroke of law, Parliament made Pratt's employer what a year previously he had not been – Pratt's master.[52]

The Woollen Manufactures Act was but one of many similar statutes passed by Parliament in the century following 1720, collectively establishing an ever-widening ambit for criminalized discipline in the employment relationship.[53] In 1765, Blackstone confirmed the emergence of

[52] Ibid., 91, 97. See 12 Geo. I, c. 34 (1725), *An Act to Prevent Unlawful Combinations of Workmen Employed in the Woollen Manufactures, and for Better Payment of their Wages*, at §II: "if any person actually retained or employed as a woolcomber or weaver, or servant in the art or mystery of a woolcomber or weaver shall … depart from his service before the end of the time or term for which he is or shall be hired or retained, or shall quit or return his work before the same shall be finished, according to agreement, unless it be for some reasonable or sufficient cause … [he] shall be committed to the house of correction, there to be kept to hard labour for any time not exceeding three months."

[53] The following are the most important: 7 Geo. stat. 1, c. 13 (1720), *An Act for Regulating the Journeymen Taylors within the Weekly Bills of Mortality*; 9 Geo. c. 27 (1722), *An Act … for Better Regulating [Journeymen Shoemakers]*; 13 Geo. II, *c.* 8 (1740), [journeymen and other persons employed in the leather trades]; 20 Geo. II, c. 19 (1747) *An Act … for the Better Regulation of [Certain] Servants and of Certain Apprentices* (and extending to "servants in husbandry … artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner," amended in 1758 to apply to hirings in husbandry for less than one year); 22 Geo. II, c.27 (1749), *An Act for the more Effectual Preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair and Silk Manufactures* (and extending to "any Person or Persons whatsoever, who should be hired or employed" in any of the stated industries); 6 Geo. III, c. 25 (1766), *An Act for Better Regulating Apprentices and Persons working under Contract* (and extending to "Artificers, Callicoe Printers, Handicraftsmen, Miners, Colliers, Keelmen, Pitmen, Glassmen, Potters, Labourers, and others"); 17 Geo. III, c. 56 (1777), *An Act for Amending and Rendering More Effectual* the Act of 22 Geo. II, c.27. The trend culminated in the Act of 4 Geo. IV, c. 34 (1823), *An Act to Enlarge the Powers of Justices in determining Complaints between Masters and Servants, and between Masters, Apprentices, Artificers and Others.*" For summaries and further details, see Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (Westport, Conn., 1989), 62–4; George White, *The Laws Respecting Masters and Work People* (London, 1824; repr. New York, 1979). In this light it is not at all surprising that when Lord Mansfield and his King's Bench brethren came to consider the meaning of employment halfway through this hundred-year sequence of increasing statutory severity, they determined that employment and service had become legally indistinguishable. Whether working by the day or the piece, in one's own house or elsewhere, to be *employed* by another was, "*quoad hoc*," to be the *servant* of a *master*, subject to all the statutory and common-law disciplines that service entailed.

"master and servant" as a generic legal category applicable to all relations of employment "whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him."[54] Robert Steinfeld agrees that "these eighteenth- and nineteenth-century statutes represented a genuinely new departure,"[55] and no wonder. Throughout the century Parliament responded continuously and increasingly generally to the rapid expansion and extension of English labor and product markets. One can term the process a "uniformalization" of the legal culture of work – the creation of a ubiquitous legal structure for an increasingly uniform economy, grounded on the criminalization of employment contract breach wherever it might occur, every "County, Riding, Division, City, Liberty, Town, or Place."[56] As Defoe put it at the outset, "the Circumstances of things are alter'd in the Nation." All the laws in being between masters and servants, employers and workers, required Parliamentary inspection and "a new Regulation." The "unsufferable Burthen" of insubordination was "a *National Grievance*." Its resolution lay in law "strictly observ'd" throughout "*Great-Britain*."[57]

Over the course of the eighteenth century, Mandeville's multitudes would be inured to work by law at least as much as by the relativities of their material deprivation. Indeed, the surplus that supported the leisure of Mandeville's minority, which it was supposedly the lot of the multitude to produce, was far more an artifact of law than of need. Take our

Hart v. Aldridge, 1 Cowp. 55, 98 English Reports 964 (1774). See also *Blake v. Lanyon*, 6 T.R. 221, 101 English Reports 521 (1795).

[54] Sir William Blackstone, *Commentaries on the Laws of England* (1st edition Oxford, 1765–69; facsimile edition Chicago, 1979), I, 410.

[55] Steinfeld, *Coercion, Contract and Free Labor*, 12. Steinfeld does refer to the statutes as a "revitalization" of elements of Tudor legislation, but his larger argument presents them as a departure from the "comprehensive" regulation and compulsory labor provisions of the Tudor statutes in favor of penal enforcement of contracts that were ostensibly freely entered, and hence an unmistakably coercive accompaniment of modern "free" labor. I have already had occasion to question the comprehensiveness of the Tudor statutes, but I am certainly at one with Steinfeld in his conclusion that compulsion and modern free wage labor are no contradiction.

[56] This statement of spatial ubiquity is taken from 22 Geo. II, c. 27 (1749). On market extension, see Steinfeld, *Coercion, Contract and Free Labor*, 42–7, particularly 46. On state formation and trends in the responsiveness of local government to national policies, see Joan R. Kent, "The Centre and the Localities: State Formation and Parish Government in England, circa 1640–1740," *The Historical Journal*, 38, 2 (1995), 363–404. Kent argues that "institutional changes and innovations in procedure ... made government in the localities more uniform, more professional, and more accountable," and as well that local elites grew willing "to implement national policies" (363). For the same, expressed as legal effects, see Christopher W. Brooks, "Litigation, Participation, and Agency in Seventeenth- and Eighteenth-Century England," in David Lemmings, editor, *The British and their Laws in the Eighteenth Century* (Rochester, N.Y., 2005), 155–81.

[57] Defoe, *Great Law*, 286, 287, 297 (emphasis in original). On the ideological and cultural formation of Britain during the eighteenth century, see David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000), 170–1; Linda Colley, *Britons: Forging the*

representative weaver: once his needs were sufficiently met, his choice was to stop producing altogether. He preferred his own leisure to subsidizing that of others:

> Edmund: I work for nothing but Money; and why should I work if I do not want Money? would anybody work if they had Money enough?
> Justice: No, not if they had enough, it may be, they would not: but what do you call enough?
> Edmund: Why, if in the Morning I have enough to spend for that Day, that's enough to me; for to Morrow I can work for more.[58]

For the minority to get its leisure subsidized, Pratt's exercise of his own leisure-preference – what Defoe was pleased to call his "insolence" – had to be curbed: hence the Woollen Manufactures Act and its progeny. Once bodies had chosen to work, inuring them to that work required that they be prevented from working only as they chose. By the mid-nineteenth century, according to Daphne Simon's venerable estimate, ten thousand criminal prosecutions for breach of employment contracts were occurring every year.[59]

But there was more to it than that. Reminiscent of the younger Hakluyt, Defoe's travel narratives and his writings on economics constantly stressed the intertwined relationship between English domestic prosperity and order, labor mobilization, and transoceanic expansion.[60] Take for example his *Plan of the English Commerce*: "An Encrease of Colonies encreases People, People encrease the Consumption of Manufactures, Manufactures Trade, Trade Navigation, Navigation Seamen, and altogether encrease the Wealth, Strength, and Prosperity of England."[61] In Defoe's schema, the

[58] *Great Law of Subordination Consider'd*, 101.

[59] Daphne Simon, "Master and Servant," in John Saville, editor, *Democracy and the Labour Movement: Essays in Honour of Dona Torr* (London, 1954), 160–200; Steinfeld, *Coercion, Contract and Free Labor*, 72–82. See generally Douglas Hay, "England, 1562–1875," in Douglas Hay and Paul Craven, editors, *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill, 2004), 91–116.

[60] The comparison to the younger Hakluyt is far more than a matter of chance. Defoe's works reproduce both the younger Hakluyt's reliance on chorographic narrative and his conception of colonial commerce (shared with his elder cousin) as an intra-imperial monopoly that directly increases the wealth of the metropolis. The temporal gap between Hakluyt and Defoe in writing upon the economics of empire is filled by such as Francis Cradocke, *Wealth Discovered: Or An Essay upon a Late Expedient for Taking Away All Impositions and Raising a Revenue without Taxes* (London, 1661); Thomas Mun, *England's Treasure by Forraign Trade. Or, The Balance of Our Forraign Trade is the Rule of our Treasure* (London, 1664); Josiah Child, *A New Discourse of Trade* (London, 1694); and Charles Davenant, *Discourses on the Publick Revenues and on the Trade of England* (London, 1698). For commentary on Cradocke et al., addressing in particular such of their writings on plantations and colonies as influenced John Locke, see Armitage, *John Locke and America*, 88–117. See also Appleby, *Liberalism and Republicanism in the Historical Imagination*, 34–57, and Istvan Hont, "Free Trade and the Economic Limits to National Politics: neo-Machiavellian Political Economy Reconsidered," in John Dunn, editor, *The Economic Limits to Modern Politics* (Cambridge, 1990), 41–120.

[61] Daniel Defoe, *A Plan of the English Commerce* (London, 1728), 367.

role of working people in both metropolis and colonies was to be industrious and disciplined, work hard, accept their due subordination, and spend their earnings in consuming each other's products, thereby increasing commerce.[62] The "domestic" relationship between colonizing the island and mobilizing labor charted in the *Great Law* and the *Tour*, in other words, was reproduced at a transoceanic level in Defoe's speculations on the relationship between mobilizing labor and empire abroad.[63]

As the eighteenth century progresses, the "massive movement of people and goods" that marks the expansion of English empire becomes, both conceptually and institutionally, more and more sophisticated.[64] At the end of the century, one encounters that sophistication most clearly in Patrick Colquhoun's treatises *On the Police of the Metropolis* (1796), *On the Commerce and Police of the River Thames* (1800), and *On Indigence* (1806), which contemplate the complete and systematic consolidation of the terms of all transactions involving labor power around the money wage through an intensification of work discipline, an assault on leisure-preference, and a persistent criminalization of perquisites, complemented by "a free circulation of labour." In his *Wealth, Power and Resources of the British Empire* (1814), Colquhoun extends his scheme into a full-blown imperial political economy.[65] In the works of the Hakluyts, colonization and labor interacted principally through the *export* of disorderly population in the expectation it might become productive overseas. In Defoe's works, disorderly population is no longer for export. Intensified statutory discipline at home becomes part of the repertoire of improvement – it improves a realm that is simultaneously undergoing improvement by domestic colonizing and by the expansion of opportunities for domestic consumption and wealth accumulation that commodity-producing, manufacture-demanding colonies overseas provide. By the end of the century, Colquhoun's generalization of the wage form improves all the labor of the empire, binding all into one political economy through the extension of free circulation and commensurability throughout the British Empire, safeguarded by further intensifications of legal-contractual discipline.

[62] See Downie, "Defoe, Imperialism and the Travel Books," 92–3; Earle, *The World of Daniel Defoe*, 130–1, 161–2, 174–81.

[63] For recent (and distinct) explorations of which, see Hay and Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire*; and Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston, 2000).

[64] Simon Newman, "Theorizing Class in Glasgow and the Atlantic World," in Middleton and Smith, eds., *Class Matters*, 34.

[65] Patrick Colquhoun, *A Treatise on the Police of the Metropolis* (London, 1796); Colquhoun, *A Treatise on the Commerce and Police of the River Thames* (London, 1800); Colquhoun, *A Treatise on Indigence* (London, 1806); and Colquhoun, *A Treatise on the Wealth, Power, and Resources of the British Empire* (London, 1814). See also Mark Neocleous, "Theoretical Foundations of the 'New Police Science,'" in Markus Dubber and Mariana Valverde, editors, *The New Police Science: The Police Power in Domestic and International Governance* (Stanford, Calif.,

In the mainland colonies, Part II showed, the legal culture of work as it affected Europeans was in no intelligible sense pervasively "unfree." Nor would that situation change much during the eighteenth century, except insofar as the spread of African slavery both prompted and permitted the white working population to elaborate upon its sense of its own defining difference.[66] Scholars have often read well-known English manuals that digested law and applicable procedure to advise seventeenth- and eighteenth-century Justices of the Peace as if they were also standard descriptions of the law of labor as it prevailed in early America; but they were not. Manuals published in the colonies for the use of local justices ignored English statutes disciplining labor, making offhand reference to their irrelevance to the mainland colonies' situation.[67] In marked contrast,

[66] See, for example, Simon Middleton, *From Privileges to Rights: Work and Politics in Colonial New York City* (Philadelphia, 2006), 130–46.

[67] See, for example, the *Conductor Generalis: or The Office, Duty and Authority of Justices of the Peace* (title varies) published in numerous editions between 1711 and 1794 in New York, Philadelphia, Woodbridge, N.J., and Albany, N.Y. The *Conductor* was an abridgment of well-known English manuals: Michael Dalton, *The Countrey Justice: Containing the Practice of the Justices of the Peace Out of Their Sessions* (London, 1619; published in numerous editions throughout the following century); Richard Burn, *The Justice of the Peace and Parish Officer* (London, 1745; published in numerous editions throughout the following century); and particularly William Nelson, *The Office and Authority of a Justice of Peace* (London, 1704; published in numerous editions). It was used widely throughout the middle colonies, as the preface to the edition published in Philadelphia 1792 notes. "For a number of years previous to the late revolution, this book has had a general and very extensive circulation, and as there have been several impressions of it since that period, it is manifest, that it is still looked on as a useful and necessary publication." The 1792 preface continued, "when it is considered, that the legislatures of most, if not all, of the United States, have adopted the laws of England as the ground-work of their respective codes, it will necessarily follow, that the republication of what, before that era, was deemed important, cannot, at present, be without its advantages. This, too, may account for what may, at first sight, appear as an absurdity; namely the frequent citing of British acts of parliament, and quoting of precedents and authorities from the most eminent lawyers of that kingdom." It is significant, then, that like its predecessors this 1792 edition was completely bare of English master/servant law. On eighteenth-century American JP manuals in general, see John A. Conley, "Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America," *Journal of Legal History*, 6, 3 (December 1985), 257–98. On the eighteenth-century American manuals' indifference to English labor law, see Tomlins, *Law, Labor, and Ideology*, 254–5, 256–7; see generally 239–58. Commentators like Benjamin Franklin insisted categorically that "the Statutes for Labourers … are not in force in America, nor ever were." Leonard W. Labaree et al., editors, *The Papers of Benjamin Franklin* (New Haven, 1959–), XVII, 352. (It is worth noting that Franklin's statement was a retort to Josiah Tucker, dean of Gloucester, who, like Defoe, was one of the eighteenth century's foremost "propagandists of [labor] discipline." Thompson, *Customs in Common*, 383.)

In each of the main regions of settlement, we have seen, local statutes not English law set the terms and limits of the master-servant regime. Unlike the JP manuals published in the middle colonies and New England, which contented themselves to abridging English manuals, southern manuals attempted a more complete integration of local statutes with such English law as was in local use. Thus see George Webb, *The Office and Authority of a Justice of Peace … Collected from the Common and Statute Laws of England, and Acts of Assembly, Now in Force; and adapted to the constitution and practice of Virginia* (Williamsburg, 1736).

nineteenth-century American authorities showed themselves well aware of the English statutes and of the common-law discourse of master and servant that supplied their terms of reference.[68] Courts cited the statutes knowledgeably, though opining how in America "public opinion [would

which precisely because it was not simply an abridgment is identified in Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (New York, 1908), I, 127, as the first law book *written* by an American. Webb's manual reproduces Virginia master-servant law and the law of slavery as it stood in the wake of the *Act Concerning Servants and Slaves* (1705) as amended (1726). As seen in Chapters 6 and 7, the statutes and local courts overwhelmingly identify the category "servant" as encompassing indentured migrants. Manuals published after Webb's confirmed this identification. Thus, in his *Office and Authority of a Justice of Peace Explained and Digested, under Proper Titles* (Williamsburg, 1774) – conceived as a revision and update of Webb – Richard Starke prefaced his title "Servants" with the statement "It must be understood that Servants are here distinguished from Slaves, and that they are also different from Hirelings, who engage themselves in the Service of another, without being obliged thereto by Transportation, or Indenture" (318–19). This was the only occurrence of the word "hireling" in the entire manual. In other words, hired labor existed entirely outside Virginia's master-servant regime. The point was underlined twenty years later by William Waller Hening in the first edition of his *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, in the Commonwealth of Virginia* (Richmond, 1795), at 405: "Persons contemplated by the act of the General Assembly, under the denomination of servants, are neither *Slaves*, *Hirelings*, who are citizens of this commonwealth, or *Convicts*." The same was the case in North Carolina. See James Davis, *The Office and Authority of a Justice of the Peace* (Newbern, N.C., 1774), 310–20; John Haywood, *The Duty and Office of Justices of Peace ... According to the Law of the State of North-Carolina* (Halifax, N.C., 1800), 212. See also *State v. Higgins*, 1 N.C. 36 (1792).

[69] In the early nineteenth century, John Bristed's *America and her Resources* (London, 1818), 160, could still be found denying the very existence of the relation of master and servant in America. By then, however, local abridgements and treatises had begun to chart a general turn to the use of master and servant as a generic common-law category for employment relations. For example, in the second edition of his *New Virginia Justice ... Revised, Corrected, Greatly Enlarged, and Brought Down to the Present Time* (Richmond, 1810), at 393–5, William Waller Hening noted that "the relation of master and servant" had become "of general concern" and added an entirely new section to his manual entitled "Master and Servant," dependent in its entirety on Blackstone's *Commentaries* and other late eighteenth-century English sources, that for the first time brought hireling labor in Virginia within the ambit of the relation. Hening's second edition continued to include the section on local servant law that had appeared in 1795, but it was completely separated from the new "Master and Servant" title, and had been amended to indicate that "Persons contemplated by the act of the general assembly, under the denomination of servants" were "such as were formerly denominated indented servants, concerning whom ... many laws have been enacted, which have now become obsolete" (527–8). See also Hening's third edition (Richmond, 1820), 466–8, 625–6. For comparable developments over the same period in the law in New England and New York, see Zephaniah Swift, *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795), I, 218–24, and II, 59–67; Tapping Reeve, *The Law of Baron and Femme, of Parent and Child, of Guardian and Ward, of Master and Servant, and of the Powers of Courts of Chancery* 2nd ed. (Burlington, Vt., 1846), 339–77 (1st ed. New Haven, 1816); and Chancellor James Kent, *Commentaries on American Law*, in 4 volumes (New York, 1826–30), II, 201–15. In Philadelphia, the clerks keeping the docket of the Mayor's Court began using "Master and Servant" as a descrip- [illegible] January 1796 and reorganize cases on the docket accordingly. See City of

not] tolerate a statute to that effect."[69] Throughout the nineteenth century, American courts applied all such powers as they possessed – common law and statutory – to effect a regulation of all such labor indiscipline as they could reach. How could anyone possibly think, said the U.S. Supreme Court in *Robertson v. Baldwin* (1896), that the Thirteenth Amendment's prohibitions against involuntary servitude could protect sailors from arrest and imprisonment for departing their employment? Even after such legalized disciplines were finally relaxed, well into the twentieth century, labor was still not "free" of legal impediment for the employment contract "was deemed to include 'implied' terms which reserved to the employer the full authority and direction of employees."[70]

To pore over the history of Anglo-American labor law from early modernity to the present, then, is to uncover a world that simply does not comply with "the implied Whiggism of standard labor history"[71] or with that of its traditional radical alternatives. It is a world in which, in England, over the course of the eighteenth century, "employees" become "servants,"

Law (Philadelphia, 1837) embraces master and servant as a generic legal category of American law, adverting all the while to its "strangeness" to republican ears. Thirty-six years and a civil war later, James Schouler found master and servant "rather a repulsive title ... fast losing favor in this republican country" and "hostile to the genius of free institutions." See his *Law of the Domestic Relations* (1st ed., Boston, 1870), 8, 599. Thirty years on, the 6th (1905) edition of Schouler's thesis reported (this time, however, in a footnote) that master and servant was still "rather repulsive" and still "fast losing favor" (3–4, n.2). As to its hostility to the genius of free institutions, Schouler had fallen silent. Rather more matter-of-factly, as already noted, Schouler's contemporary Horace Gay Wood held in his *Treatise on the Law of Master and Servant* (Albany, 1877), generally regarded as the first modern American treatise on the subject, that master and servant embraced "all who are in the employ of another, in whatever capacity" (3–4). See the conclusion to Chapter 7.

[69] *Robertson v. Baldwin*, 165 US 275 (1896), 281. The statement was of course quite incorrect, for long before 1896 there were lots of statutes "to that effect." Penal sanctions for the enforcement of labor contracts were used to mediate the abolition of slavery in the North prior to the Civil War, with little evidence of public disapproval. They were also used in the Northwest Territory, in the South following the war, and in colonized territories such as Hawai'i. See Steinfeld, *Coercion, Contract and Free Labor*, 255–89. Amy Stanley has also shown how, after the Civil War, vagrancy laws North and South coerced free workers and freedmen both to enter and remain in binding wage contracts on penalty of imprisonment, again without evidence of disapproval from "opinion leaders." See Amy Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York, 1998), 98–137.

[70] *Robertson v. Baldwin*, 165 US 275 (1896), 281, 287–8; James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst, 1983), 14, and generally 1–16. See generally David Montgomery, *Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century* (New York and Cambridge, 1993), 13–114; Tomlins, *Law, Labor, and Ideology*, 265–92. See also Karen Orren, *Belated Feudalism: Labor, the Law and Liberal Development in the United States* (New York and Cambridge, 1991), 68–159; Lea VanderVelde, "The Gendered Origins of the *Lumley* Doctrine: Binding Men's Consciences and Women's Fidelity," *Yale Law Journal*, 101, 4 (January 1992), 775–852.

[71] William H. Sewell, Jr., "History in the Paranoic Mode?" *International Labor and Working Class History*, 39 (Spring 1991), 21.

not vice versa. It is a world in which, hard on the heels of the eighteenth-century creation of the English employee-servant, one encounters the nineteenth-century creation of the American equivalent. This is a world in which Edmund Pratt cannot play the role Edward Thompson assigned him, of exemplar of labor's journey along a trajectory from subordination to negotiation, because no such journey occurred: by concentrating upon the loosening of the bonds of explicit servitude – apprenticeship, indentured servitude, and eventually slavery – we have ignored the changes, the tightenings, in the social and legal meaning of employment that began in England during the eighteenth century and continued in America during the nineteenth century. It is a world, finally, in which many of the phenomena over which we pore are consequences of expansion and circulation. It is a world of empire and of empire's unremitting thirst for improvement.[72]

Though Edmund Pratt cannot, therefore, stand for "progress," neither does he stand for a uniform declension, from autonomy to subjection. That would be nothing more than revision by inversion. Rather, he stands at the beginning of the eighteenth century for the possibility that remained in "the human condition of plurality."[73] Of all the social orders of early-modern society, working people "may well have been the least homogenous."[74] Both in early-modern England and in early mainland America, working people were constituted in an extraordinary variety of relationships: they were apprentices – in husbandry and in trades; they were servants – minor and adult, domestic and out-of-doors, in husbandry, under covenant; they were *housewives and "helps"; they were outworkers and artisans;* they were day-laborers, workmen, yeomen, journeymen, artificers, artisans, hirelings. In England's American colonies, besides all these, they were indentured servants, and slaves as well. Widely varying conditions of autonomy and dependence, profoundly fractured by race, gender, wealth, and age, were represented in a variety of legal categories of labor spread across multiple economic functions and regional cultures ranging from forms of employment whose original distinguishing characteristic was that their denizens claimed immunity from direction from any source,[75] through the relatively

[72] I pursue this matter further in "Afterword: Constellations of Class in Early North America and the Atlantic World," 219–33.

[73] Arendt, *The Human Condition*, 7. Recall that for Arendt, "plurality is specifically the condition – not only the *conditio sine qua non*, but the *conditio per quam* – of all political life."

[74] A. Hassell Smith, "Labourers in Late Sixteenth-Century England: A Case Study from North Norfolk [Part 1]," *Continuity and Change*, 4, 1 (1989), 31.

[75] In 1771, for example, the Pennsylvania glass manufacturer Henry William Stiegal offered a reward for apprehension of a craftsman who had quit his employment in a dispute over wages owed as a runaway. The workman offered a public rejoinder in the *Pennsylvania Packet* (11 November 1771), p. 3, col. 1: "As [Mr. Stiegal] has forfeited the covenants on his part, I have a right to leave his employ, and to bring an action against him; for, I am not by the laws of nature, to drudge and spend my whole life and strength in performing my part of the articles, and Mr. Stiegal not paying me my wages. I have taken the opinion of an eminent gentleman of the law upon the articles, who declares, no person can be justified in apprehending me, as I am no servant, and that any person so doing will subject himself to an action of false imprisonment."

greater answerability of the hireling, to the variety of degrees and temporalities of subjection and attachment represented in the household and its different forms of service, and so on to the total and permanent subjection of enslavement.[76]

What this suggests is that, prior at least to the early eighteenth century in England, the early nineteenth in America, work as an activity cannot be allowed to imply a single conceptualization of labor as a form of social action, such that *labor* can be understood as an expression of common-denominator social and legal characteristics reproduced across a diversity of relationships. To encounter labor in English and American history is to encounter not a single form of relationship but multiple forms, some of *sanctioned abuse and abasement* (those old disciplines), some of temporary and shifting attachment, some of autonomy and self-direction. It is an encounter not with a uniform subjectivity but with multiple subjectivities.

When, eventually, these multiple forms began to be represented as a single form, the nature of that form was in good part consequential upon the deployment in English and American law of generic rules implementing *uniform relations of subjection* (master and servant) to pertain between those who worked and those for whom they worked.[77] It is at this point, not by the action of *need* but by the action of *law*, that one begins to encounter labor in the uniformalized category, the single subjectivity (crudely, wage-work) that it has assumed in liberal modernity, to which all the rest – slavery, housewifery, &c. – become "other." Liberal historiography has labeled this uniformalized category "freedom," and certainly the assertion of their freedom was a matter of the first importance to its inhabitants, as indeed it always had been. But the truth of the claim lies in the details, and in the legal details of the uniformity that prevailed one finds something rather less than freedom.[78]

Modernity's single subjectivity, "free" labor, does have a history, therefore, just not the history of progress that normalizes it. Earlier chapters have shown that both in England and its mainland American colonies, many of those who worked – usually adult, male and white; often (but by no means always) skilled – could and did engage in work relations that were initiated in voluntary transactions governed by civil and not criminal law. They have also shown that early-modern regulatory regimes were highly porous: that

[76] Legal descriptions of these different statuses were composed of definitional specificities rather than generalities. Prior to Blackstone, at least, English law books bespeak a concern with the creation of authoritative orderings of specificities, not with jurisprudential generalizations. Law's claims to discursive generality and universality – Thompson's "equity" and "justice" – are historical and political specificities, not essences. See generally Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London, 1990), 1–148.

[77] I use the term "generic" advisedly, for what I am arguing for is precisely the creation of a general legal category in a place where previously there had existed a series of particulars

[78] I have explored some of these ambiguities in *Law, Labor and Ideology*. See also Steinfeld, *Coercion, Contract and Free Labor*; Orren, *Belated Feudalism*.

in England particular regional legal cultures could sustain the negotiation of practical freedoms by such workers even when hemmed in by legislation that purported to impose national regulation; and that in any case, even in statutory form "national" regulatory generalities were a composite of regional particularities that responded to a complex array of interests and collective claims of civic right. As the tale of Edmund Pratt suggests, that is, the freedom of work organized transactionally by contracts and agreements was not a modern invention. During the eighteenth century, this chapter has so far argued, that situation had begun to change. By colonizing the island the metropolitan state displaced porous, decentralized, and disparate early-modern regulatory regimes in favor of a regime that was coherent, pervasive, nationally enforced.

Though this new national regime was founded on coercive resort to criminal sanctions, what it criminalized was *contract* breach. No one was compelled to enter upon work, unless without visible means of support. Need and law cooperated to drive people to work and keep them in it, but this was quite compatible with an ideology of "consent."[79] The "new laws" that Defoe had deemed "absolutely necessary to enforce the Obedience of Servants" were to "oblige them to continue in their Places, according to the Time they respectively *agree* for, when they are hir'd."[80]

Neither in England nor its colonies, however, did this emerging social world of covenants and contracts, of free labor exercised and its exercise enforced, encompass the full extent of the world of work. This world of labor sat atop another, defined by distinct structures of socio-legal relations – the world of the household, of production but also of reproduction. Law's manifold contributions to the "inurings of bodies" are clearly on display in the construction of the household too, in the law of man and wife, and of parent and child. Each was a body of doctrine with which the law of master and servant enjoyed growing commonality: by the early nineteenth century the three were intimately intertwined as the law of domestic

[79] One should note, of course, that "need" was hardly autonomous of "law." As Defoe has shown us, law's manipulation of "need" was a crucial aspect of the production of disciplined labor in both the English and the American case. Thus, in the course of the manual *Laws Concerning Masters and Servants* (London, 1767), written to instruct English JPs, its author, a "Gentleman of the Inner-Temple," observes that the wage-fixing clauses of the Statute of Artificers remain in effect and urges, Defoe-like, that they be used to drive down the price of labor. "High Wages serve only to debase the Morals of Servants, and make them more idle; a Fellow who earns three Shillings a Day, is not content now a days with keeping *Saint* Monday as it is called, but thinks it early enough to begin the Week on *Thursday* Morning, as he can by *Saturday* Night, get enough to subsist him till *Thursday* again: By which the Master loses one half of his Time, and the Servant gains nothing, but wastes one half of the Week in spending what he has got in the other half" (233). For further exploration of the law-need axis in the English case, see Richard J. Soderlund, "'Intended as a Terror to the Idle and the Profligate': Embezzlement and the Origins of Policing in the Yorkshire Worsted Industry, c.1750–1777," *Journal of Social History*, 31, 3 (Spring 1998), 647–69. For the same in the American case, see Tomlins, *Law, Labor, and Ideology*, 96n.; Stanley, *From Bondage to Contract*, 98–137.

[80] Defoe, *Great Law of Subordination Consider'd*, 301 (emphasis added).

relations, a new composition laboriously constructed over the previous two centuries.[81] But the law of the household had a genealogy distinct from the contractual world of labor, one founded in patriarchy. Nor was the household the sum of patriarchy's prescriptive ambition. Indeed, the development of polity and economy, the new world of economic and civic action, was balanced on patriarchy no less than on the new property (the "*meum* and *tuum*") from which Lockean liberalism constituted and theorized its state and its workers. Patriarchy's presence in the mix was just a little bit less overt, that's all.

II. Household and Polis

Once more, Daniel Defoe supplies a first point of entry. For Defoe, the subordination he thought appropriate to the ordering of the labor process properly began in the household. The chaos of insubordination in service and labor that so vexed him in the *Great Law* was a marker of a more general crisis in the household, one in large part the fault of "the very *Masters* and *Mistresses* of Families themselves" who had improperly "slacken'd the Reins of Family Government." Heads of households were failing in the performance of an essential jurisdictional role – that of "good Governour to his Family," of ensuring "justice" within the household – upon which order in society and economy was founded.[82] "As things are now, Masters, or Heads of Families, are no more Masters; *Subordination* seems to be at a *Crisis*, and the Government is shar'd between the Head and the Tail, the Master and his hir'd Servant; the last receives the Wages indeed, but the work is done when and how the hir'd Gentlemen please to perform; and if they think fit, 'tis often not done at all."[83]

Though Defoe's demand in 1724 that Parliament adopt a "severe law" was addressed to the necessity for social discipline in the emerging national economy that he would shortly describe in the *Tour*, Defoe's conception of the structure of that economy remained in large part familial. Discipline hence meant reinforcing magisterial authority in the household. Defoe wanted measures that made "sufficient Provision … for preserving the Government of our Families from the Encroachments and Usurpation of our Servants."[84] Household discipline could not exist without the state: it was precisely to the state that Defoe went in his quest for enforcement of household rule. But household discipline could not be created by the state: proper discipline required the reassertion of an original capacity of moral command, "an orderly and vertuous Governing of Families," without

[81] On the processes of composition of domestic relations law, see Holly Brewer, "The Transformation of Domestic Law," in Michael Grossberg and Christopher Tomlins, editors, *The Cambridge History of Law in America* (Cambridge and New York, 2008), I, 288–323.

[82] Defoe, *Great Law of Subordination Consider'd*, 286–7, 292, 293.

[83] Ibid., 288–9.

[84] Ibid., 288.

which "no Laws, Acts of Parliament, or publick Regulations, will be effectual to this Purpose."[85]

Scholarly debates over the relationship between household, state, and economy have focused on changes over time in the distribution among different jurisdictional locations of socially authoritative rule over economic activity. Predominantly, change has been given a unidirectional character. Flows of authority have been thought of as one-way movements away from the pre-modern or early-modern autarkic patriarchal household toward social interdependence structured by a politics of individual consent, instancing one of whig history's most enduring clichés: the decomposition of patriarchy in a posited shift "from status to contract."[86]

Patriarchy, however, is not necessarily the embodiment of status; nor is consent patriarchy's nemesis. In early-modern England, status meant the enjoyment of differential legal capacities, and hence the determination of legal outcomes, largely by inherited position within a hierarchical social-political structure ("Aristocracy … an Assembly of certain persons nominated, or otherwise distinguished from the rest"[87]) in which allegiance flowed upward to elite lordship in exchange for downward flows of protection.[88] Such status relations could certainly be conceptualized as patriarchal in origin, but not necessarily so.[89] Contract, in contrast, posits formal equivalence in legal capacity, hence the determination of outcomes according to individual consent without the necessity of reference to subject position within any social or legal hierarchy. But contract is not

[85] Ibid., 293.

[86] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (New York, 1864), xl. See generally Steven Mintz and Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (New York, 1988). Among labor law historians, Robert Steinfeld has subtly addressed household and market as jurisdictions, but appears generally inclined to go along with the traditional status-to-contract shift. The effect of this is a progressive "silencing" of the household as the "market" (notwithstanding its contradictions, ambiguities, and coercions) takes over, an interpretive schema that imposes a logic of irreversible liberal modernizing. See Steinfeld, *The Invention of Free Labor*, 3–9, 55–60, 147–63, 185–7. On markets, see his "The *Philadelphia Cordwainers'* Case of 1806: Alternative Legal Constructions of a Free Market in Labor," in Christopher L. Tomlins and Andrew J. King, editors, *Labor Law in America: Historical and Critical Essays* (Baltimore, 1992), particularly 20–4. For distinct accounts of the status-contract trajectory in the American case, see Jeanne Boydston, *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (New York, 1990), and more generally Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill, 1980). I explore Boydston's account further in section IV of this chapter.

[87] Thomas Hobbes, *Leviathan: or the Matter, Forme, & Power of a Common wealth Ecclesiasticall and Civill* (London, 1651), 98.

[88] Steve Hindle, *The State and Social Change in Early Modern England, 1550–1640* (New York, 2002), 42, 44. See generally Richard Lachmann, *From Manor to Market: Structural Change in England, 1536–1640* (Madison, Wis., 1987); also the discussion in Chapter 2 of relations of ligeance and their exploration in *Calvin's Case* (1608).

[89] Sir Thomas Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England* (written [illegible] 1565 and 1565; first published 1583), L. Alston, editor (Cambridge, 1906),

incompatible with patriarchy.[90] Though "status to contract" is not a meaningless formulation, historically it obfuscates more than it clarifies. Rather than status to contract, we are better off conceptualizing the birth of liberal modernity in a movement from lordship to consent.[91]

Lordly hierarchies constituted the essence of the state (as seventeenth-century Anglo-American colonizing designs attest). Lordly hierarchies were patriarchal, in that lordship depended for its practical longevity on the maintenance and servicing of lineage – the preservation of concentrations of landed wealth through primogeniture. They were dependent *too* upon delegation of much of the practice of governance – the discipline, education, and maintenance of dependents, for example – to household heads.[92] But within a decentralized political-governmental structure founded on landed lordship, subordinate household heads' capacity to exercise their own patriarchal authority was at best qualified.[93] In champion England, for example, the character of most land tenures meant ultimate authority rested with manorial landlords, their institutions, and the body of manorial custom and law governing subordinate tenures.[94] Regionally, the extent of household autonomy, and hence of effective jurisdiction, varied inversely with the strength of manorial lordship (and, in incorporated towns, of corporate governance). External scrutiny was "tightest in well-governed corporate towns, close in nucleated villages, [but] comparatively loose in the scattered woodland and upland settlements where family and household enjoyed most autonomy."[95] Patriarchal households were strongest, that is, where manorialism was weakest.

[90] Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (Oxford, 1975), 7–10.

[91] See generally Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill, 2005).

[92] Carole Shammas, "Anglo-American Household Government in Historical Perspective," *William and Mary Quarterly*, 3rd Ser., 52, 1 (January 1995), 108. See also generally Carole Shammas, *A History of Household Government in America* (Charlottesville, 2002), 24–52; Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York, 2005), 3–46.

[93] Studies of English family structure and kinship indicate that kinship ties and extended families were strongest among elites and weakest at the bottom. The core of most English households was nuclear, not extended. In other words, insofar as decentralized landed lordship actually left significant room for ordinary household heads to exercise autonomous jurisdictional authority over household subordinates (and here recall the clearly delimited authority of the patriarchal household unit outlined in More's *Utopia*; see Chapter 4, section I), the effective ambit of that authority was not very extensive. See Ralph A. Houlbrooke, *The English Family, 1450–1700* (London and New York, 1984), 14–15, criticizing the views of Lawrence Stone, *The Family, Sex and Marriage in England, 1500–1800* (New York, 1977), e.g., 6–7. See also Brewer, *By Birth or Consent*, 230–87; Dubber, *Police Power*, 36–40.

[94] Brewer, *By Birth or Consent*, 339–40. See also A.W.B. Simpson, *A History of the Land Law* (Oxford, 1986), 155–72.

[95] Houlbrooke, *The English Family*, 23. See also generally Barry Levy, *Quakers and the American Family: British Settlement in the Delaware Valley* (New York, 1988); Margaret R. Somers, "Rights, Relationality and Membership: Rethinking the Making and Meaning

Both legally and politically, the exercise of governance internal to the household by its patriarchal head was compromised by clear jurisdictional boundaries. In the late sixteenth and seventeenth centuries, parents were severely restricted in their capacity to exercise determinative legal control over the legal actions of their children. Children could and did bind themselves to contracts, usually labor contracts, often at very young ages, without parental consent. Nor were parents able to assert a supervening custody right that trumped the claims of others – masters and/or guardians.[95] In matters falling within ecclesiastical court jurisdiction too, such as marriage contracts or wills, children could act legally without any requirement of parental consent. In general, "The head [of household] in early modern England, as in the rest of western Europe, exercised no power over life or limb of his dependents; he could not take as many wives as he pleased, force a son or daughter to marry, or sell his servants. Over time, the medieval monarchies and the Christian church, for their own reasons, had worked to limit such prerogatives of patriarchs."[97]

"Worked to limit" carries the connotation that although monarchy and church made inroads on its expression, patriarchal prerogative had nevertheless provided the original pre-modern default understanding of political authority, and that the household had anciently been its institutional expression and locale. Classical political theory does indeed grant the autarkic patriarchal household major significance in the creation of human societies, polities, and economies, a significance revived in early-modern European political theory. Crucially, however, classical political theory did not depend on familial analogies to produce an account of political obligation, or of institutional structure. Rather, the two were held separate: the autarkic household was conceived to be a crucial condition for the existence of political association, but not itself an instance of political association, nor an institutional model for association. No familial account of the origins of political obligation was attempted before the later sixteenth century.[98] Moreover, when it did appear, principally in English political thought, it did so already intertwined with contractual theories of association. Politically, that is, patriarchal and contractual accounts of association rose together, as two sides of the same argument, not as successive alternate statements in a teleological process of modernization.

Little "genuine" political theorizing occurred in England before the second half of the sixteenth century. According to Gordon Schochet, "prescription appears to have been the most widely accepted basis of legitimacy. Obedience was due to the reigning king simply because he was in

of Citizenship," *Law & Social Inquiry*, 19, 1 (1994), and "Citizenship and the Place of the Public Sphere: Law, Community and Political Culture in the Transition to Democracy," *American Sociological Review*, 58, 5 (October 1993).

[95] Brewer, *By Birth or Consent*, 230–87.

[97] Shammas, "Anglo-American Household Government," 107. See also Peter Laslett, *Family Life and Illicit Love in Earlier Generations: Essays in Historical Sociology* (Cambridge and New York, 1977), 4.

[98] *Political Thought*, 10, 51.

power."[99] To the extent that the obligation to obey kingly power was theorized, its foundations were located in God's injunction to obey magistrates. But obedience could be owed without much theorizing of its foundations because the practical reach of monarchical power, hence the effect of obedience, was delimited. Political authority was not centralized but dispersed through structures of local and regional lordship.[100] When necessary, dispersed lordly authority could make its opinions known collectively, through Parliament,[101] but Parliament's relationship to the monarchy was advisory. As long as the monarch did not seek to enlarge the practical extent of its own sphere, Parliament had no need to extend or theorize a countervailing claim to its own sovereign authority.

The appearance of contending theories of political obligation and association signifies the growth of pressure upon the sixteenth century's practical accommodation of delimited central monarchical power with regional lordly authority. Tudor and Stuart ambitions to create a more powerful metropolitan state – one that possessed ascendancy over both church and magnates, one with executive authority rather than merely influence in the regions – meant resistance. Resistance required theorization. Debates over the origins of political obligation and association, that is, arose not in a vacuum but coincident with contests over the proper location of legitimate rule, and the role of particular institutions in exercising rule.

Smith and Hooker

At the outset, patriarchal and contractual accounts were not distinct. The sudden efflorescence of patriarchalism in English political thought attests to a growing awareness of the capacities of households and their heads to take part in the maintenance of a social order undergoing political and economic crisis and experiencing stress and fragmentation in the institutional hierarchies relied upon to that point: it was a seizure upon the household as a newly appropriate model of hierarchical obligation.[102] But patriarchalism's early exponents expressed no intimation of any necessary contradiction between patriarchal and contractual modes of thought. Thus, in *De Republica Anglorum* Sir Thomas Smith (1513–77) found "in the house and familie ... the first and most naturall (but private) apparance of one of the best kindes of a common wealth, that is called *Aristocratia*, where a few and the best doe governe ... not one alwaies." He found in the collectivity of

[99] Ibid., 37. For, as it were, "pre-political" theorizing in England, see Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, 1957).

[100] We have seen (Chapters 5 and 6) that those structures were highly uneven in their effectiveness.

[101] As Brewer notes, "a Parliament whose members (of both houses) were substantial property owners could be seen, as it was in the late Middle Ages, as a division of lordship rather than the representation of those below." *By Birth or Consent*, 46.

[102] See, for example, David Underdown "The Taming of the Scold: The Enforcement of Patriarchal Authority in Early Modern England," in Anthony Fletcher and John Stevenson, editors, *Order and Disorder in Early Modern England* (Cambridge, 1985), 116–36.

houses and families the material that constituted the nation: "so from one to another in space of time, of many howses was made a streete or village, of many streetes and villages joyned together a citie or borough. And when many cities, boroughes and villages were by common and mutuall consent for their conservation ruled by that one and first father of them all, it was called a nation or kingdome."[103] Still, Smith called the household nothing more than a metaphor for *Aristocratia*, for it was "but an house," no more than "a litle sparke resembling as it were that government."[104] And both Smith's households and the nation they spawned had their origins in a distinctly contractual moment – an initial "society or common doing of a multitude of free men collected together and united by common accord and covenauntes among themselves, for the conservation of themselves aswell in peace as in warre." House and family did not precede the moment of covenant but rather grew from it: "if this be a societie, and consisteth onely of freemen, the least part thereof must be two. The naturalest and first conjunction of two toward the making of a *further* societie of continuance is of the husband and of the wife."[105] Husband and wife formed their further, private, society in an association that was highly gendered in its division of labor, yet not overtly patriarchal in its internal order, in that "ech obeyeth and commaundeth other, and they two togeather rule the house."[106] Households coalesced in "cities, boroughes and villages," which, in their turn, created a state that was overtly patriarchal, "ruled by that one and first father of them all," but who did so "by common and mutuall *consent*."[107] Initially a kingdom, on the death of the first patriarch king the political form of the nation became an "*aristocratia*" of male heads of families (the founding king's "brethren", his "sonnes," their "sonnes and nephewes, and such"). Finally, as their numbers increased over time, "it came to passe that the common wealth must turn and alter as before from one to a few, so now from a few to many … bearing office and being magistrates." And so the commonwealth became a patriarchal republic, the prince governing with the advice of a parliament constituted from among all the sorts of men who ruled.[108]

[103] Smith, *De Republica Anglorum*, 23–24.

[104] Ibid., 23.

[105] Ibid., 20, 22 (emphasis added).

[106] Ibid., 23. "House" meant "the man, the woman, their children, their servauntes, bond and free, their cattell, their household stuffe, and all other things, which are reckoned in their possession, so long as all these remaine togeather in one" (23).

[107] Ibid., 24 (emphasis added). The "consent" referred to here is the consent of the various cities, boroughs, and villages to submit "for their conservation" to a single ruler. How consent is obtained, and from whom, is left unclear. Smith refers to "societie" consisting of "freemen" but it is clear from the text that both husbands and wives are encompassed in the category "freemen." Overall, Smith's formulation is passive – "And when many cit- … common and mutuall consent for their conservation …" (24).

Aristotle gave Smith's theory of rule its second contractual moment (the common and mutual consent of households coalesced in cities) but not the first. In identifying the covenant of freemen as an original point from which both family and, eventually, the patriarchal state grew, Smith rejected Aristotle's derivation of "the entire social order from the primitive household."[109] But in fact Smith's primary goal was less to explain rule than to describe its appearance in the contemporary English state. The existence of law and governance was not per se problematic, hence theorizing the basis of obligation was unnecessary. Even when "the common wealth is evill governed by an evill ruler and unjust.… Certaine it is that it is alwayes a doubtfull and hasardous matter to meddle with the chaunging of the lawes and government, or to disobey the orders of the rule or government, which a man doth find alreadie established."[110]

Smith's near contemporary, Richard Hooker (1554–1600), followed a course of reasoning in many respects similar. But Hooker was more faithful to Aristotle, more overt in his attempts to theorize rule, and more explicitly patriarchal both in his account of the nature of rule within households and the relationship between rule in the household and in the state.

Like Smith, Hooker began with men in a natural state, "living singly and solely by our selves," who "forasmuch as we are not by our selves sufficient to furnish our selves with competent store of things needful for such a life as our Nature doth desire … are naturally indu'd to seek Communion and Fellowship with others," voluntarily uniting in "Politick Societies," which "could not be without government, nor government without a distinct kind of Law," through which to address the "defects and imperfections" of their original condition.[111] Unlike Smith, however, Hooker represented family not as a *further* society consequent upon the original formation of society among freemen, but more in Aristotelian vein as an explicitly patriarchal order of being, anterior to political society, itself founded in nature. In their natural state, "to take away … mutual grievances, injuries and wrongs," men had ordained "some kind of Government publick" and had yielded themselves "subject thereunto." But men had done so already as patriarchs of families. "To fathers within their private Families Nature hath given a supream Power; for which cause we see throughout the World, even from the Foundation thereof, all Men have ever been taken as Lords and lawful Kings in their own Houses." In Hooker's discourse, patriarchy was synonymous not only with nature, but with Creation itself.[112]

A natural order of patriarchy and hierarchy in the family predisposed household heads to accept patriarchal monarchic rule in the state. But familial patriarchy did not furnish an unproblematic theory of rule in the state, for Hooker could discover no natural origin for any obligation of

[109] Schochet, *Patriarchalism and Political Thought*, 50.

[110] Smith, *De Republica Anglorum*, 13.

[111] *The Works of that Learned and Judicious Divine, Mr. Richard Hooker, in Eight Books of the Lawes of Ecclesiastical Polity …*

household heads to accede to the rule of other men as such: "Howbeit, over a whole grand multitude, having no such dependency upon any one, and consisting of so many Families, as every politick Society in the World doth; impossible it is, that any should have compleat lawful Power but by consent of Men, or immediate appointment of God." Rule in the state had to be by virtue of the consent of male household heads, or divine right, because rulers as such did not possess "the natural superiority of Fathers."[113]

The contributions of Smith and especially Hooker to late sixteenth-century English political thought signify a rapidly emerging awareness, amid the contemporary "crisis of order," of the patriarchal household as a key institution of contemporary social ordering,[114] and at the same time a comparative lack of differentiation between contractual and patriarchal discourse. Each discourse provided key conceptual components of both men's work. As patriarchal and contractual thought became more sophisticated, and as the political and institutional crisis of the English state deepened during the seventeenth century, exponents came to concentrate precisely on the nexus between obligation in household and state. As they did so, their diverging theories of obligation yielded different implications for theories of rule in household and in state. At the end of the century, with contractual theory clearly ascendant in the representation of the basis of rule in the state, patriarchy had become as well secured in the household.

Filmer and Locke

"Crises of legitimation engender questions about the entitlement of those in power to rule, and about the obligation which subjects have to obey them."[115] So it was that, during the course of the seventeenth century, patriarchal and contractual theories of rule became explicitly opposed, each developing in identification with a different side in England's long revolution. Patriarchalism became a key discourse in defense of monarchical ascendancy. On his coronation, according to James VI of Scotland, a king became "by the law of nature … a naturall Father to all his Lieges."[116] As a father was "bounde to care for the nourishing, education and vertuous gouernment of his children," so was a King "bounde to care for all his subjects."[117] But natural fatherhood was not the basis of kingly rule. Writing five years after Hooker, James VI found that subjects obeyed their

[113] Ibid.

[114] Schochet, *Patriarchalism and Political Thought*, 57, 63–4.

[115] Daniela Gobetti, *Private and Public: Individuals, Households and Body Politic in Locke and Hutcheson* (London and New York, 1992), 47.

[116] *The True Lawe of free Monarchies: or, The Reciprock and Mutuall Dutie Betwixt a free King and his naturall Subjectes* (Edinburgh: printed by Robert Waldegrave, 1598), sig. B_3v. And see James's first address to the English Parliament following his coronation (also noted in Chapter 2) which included the statement, "I am the Husband and all the whole Isle is my lawfull Wife; I am the Head and it is my Body." King James VI and I, *Political Writings*, [illegible] editor (Cambridge, 1994), 136.

king not as a father in a great household but as the ruler designated by God to rule over them. It was God's grace that created legitimate rule, God's "throane in the earth" upon which kings sat, whose "*minister*" they were, and on whose behalf they administered justice and judgment to the people, procured obedience and peace, decided controversies, and sought prosperity. It was to God (not the people) to whom was owed "the count of their administration." Politically, the subject of James's discourse, the "reciprock and mutuall dutie betwixt a free king and his naturall subjects," was a creature of the king's accountability to God for the fairness of his rule over subjects required to submit to it. "*Monarchie*" was "the true paterne of Diuinitie." Fatherhood carried no comparable determinative or reciprocal weight. The relationship between king and subject was merely analogous to the natural order of the household, not founded in it.[118]

It was in Filmer that the two became united (or, as Daniela Gobetti puts it, "assimilated"[119] – rendered conceptually identical):

> If we compare the Natural Rights of a Father with those of a King, we find them all one, without any difference at all, but only in the Latitude or Extent of them: as the Father over one Family, so the King as Father over many Families extends his care to preserve, feed, cloth, instruct and defend the whole Commonwealth. His War, his Peace, his Courts of Justice, and all his acts of Sovereignty, tend only to preserve and distribute to every subordinate and inferior Father, and to their Children, their Rights and Privileges; so that all the Duties of a King are summed up in an Universal Fatherly Care of his People.[120]

Like James VI, Filmer grounded the rule of the king not in the consent of household heads, here labeled "subordinate and inferior," but in a grant from God. The grant that Filmer stressed, however, was not as conceived by James, that of God's ministry to his people. Rather, "the ultimate ground of paternal/kingly power [was] the *proprietorship* over the earth and its creatures which God assigned to Adam in creating him." Here, in Adam, was a beginning that embodied a threefold assimilation – of household patriarchy, monarchical dominion, and property. In creating this "one adult self-sufficient male," God chose to make simultaneously the first "monarch of the world" (the original embodiment of *monarchia universalis*) and the first patriarchal proprietor of everything in it – *imperium* and *dominium* over all, by God's grace. "All human beings, starting with Eve, are thus not merely Adam's dependents, but rather his possessions."[121]

[118] Ibid., sigs. B_3r, B_3v.

[119] Gobetti, *Private and Public*, 44–46.

[120] Sir Robert Filmer, *Patriarcha: Or the Natural Power of Kings* (London: Printed by Walter Davis, 1680), 24.

[121] Gobetti, *Private and Public*, 49 (emphasis added). It was precisely proprietorial authority over the earth and its creatures, one should note, that had been underlined across the years of English colonizing discourse since the early seventeenth century. See Chapter 4.

Conjoined in Adam, the state and patriarchal proprietorship were one and the same hierarchy, monarch and household head rendered identical.[122] But as Gobetti points out, "if paternal power and political power have the same origin, foundation, nature, and extent, then a problem of conflicting jurisdictions immediately arises."[123] The monarch is a patriarch, but not all patriarchs can be monarchs. Filmer's patriarchal conjunction had obliterated the Aristotelian distinction between the interior hierarchy of the household and the exterior world of politics created by independent and equal heads of household, as well as the contractarian ideal of an original compact of free and equal individuals. "There never was any such thing as an Independent Multitude, who at first had a natural Right to a Community: this is but a Fiction, or Fancy of too many in these days, who please themselves in running after the Opinions of Philosophers and Poets, to find out such an Original of Government, as might promise them some title to Liberty, to the great Scandal of Christianity, and Bringing in of Atheism, since a natural freedom of mankind cannot be supposed without the denial of the Creation of Adam."[124] Assimilation of household and state meant humans were born into an undifferentiated (non-plural) condition "of subjection to their father/monarch … without any right of redress."[125]

Patriarchal theory had, it appeared, assimilated to itself the logic of early-modern lordship, creating a socio-political structure "in which the distinction between a private and a public sphere is merely rhetorical, and where fathers, dispossessed of their natural authority, will only exercise authority over household dependents as delegates of the sovereign … In the logic of assimilation, the monarch dispossesses fathers of their power and incorporates their domains into his. Households are no longer the private possessions of adult males who can dispose of them at their discretion, but are merely branches or agencies of a centralized public power."[126] In fact, Filmer stopped short of so complete an assimilation, arguing that households and their heads retained an existence and a jurisdiction distinct from the domain of the monarch. Yet precisely to avoid compromising the greater patriarchal jurisdiction of the monarch, Filmer rendered

[122] For Filmer's decisive unification of arguments for monarchic divine right with patriarchal authority, see Schochet, *Patriarchalism and Political Thought*, 139–40.

[123] Gobetti, *Private and Public*, 53.

[124] Sir Robert Filmer, "Observations upon Aristotle's Politics, Touching Forms of Government," in *Observations Concerning the Original and Various Forms of Government* (London: Printed for R.R.C., 1696). Preface. Filmer continued: "And yet this conceit of Original Freedom is the only Ground upon which not only the Heathen Philosophers, but also the Authors of the Principles of the Civil Law; and Grotius, Selden, Hobs, Ashcam, and others raise, and build their Doctrines of Government, and of the several sorts or kinds, as they call them, of Commonwealths. Adam was the Father, King, and Lord over his Family: a Son, a Subject, and a Servant or a Slave, were one and the same thing at first; the Father had power to dispose, or sell, his Children or Servants."

[125] Gobetti, *Private and Public*, 52.

the lesser patriarchal jurisdiction of the father dependent where it counted most, in the reproduction of subordination in the household itself:

> though by the Laws of some Nations, Children, when they attain to years of Discretion, have Power and Liberty in many actions; yet this Liberty is granted them by Positive and Humane Laws only, which are made by the Supreme Fatherly Power of Princes, who Regulate, Limit, or Assume the Authority of inferiour Fathers, for the publick Benefit of the Commonwealth: so that naturally the Power of Parents over their Children never ceaseth by any Separation, but only by the permission of the transcendent Fatherly Power of the Supreme Prince. Children may be dispensed with, or privileged in some cases, from obedience to subordinate Parents.[127]

Filmer, patriarchy's defender, thus chose to subordinate the household head to the state in the interests of maintaining the monarch's supervening paternal authority. Patriarchal intervention by the monarch in the realm of the father expressed the public interest of the commonwealth, distinct from and superior to that of natural fathers, heads of household, and expressed in laws that trumped unalloyed parental power.[128]

If the contradiction in patriarchal reasoning lay precisely in its denial of patriarchal autonomy to household heads in the interests of the greater patriarchy of the state, in contractual reasoning, supposedly patriarchalism's obverse, the contradiction lay in the continuing effusions of patriarchy that it accommodated. In appearing to separate paternal from political power, in creating private and public, contractualists appeared to refute patriarchalism's attempts to derive politics from nature. Political authority was conventional, founded on the consent of plural free and equal persons, not a natural order of subordination founded on the natural ascendancy of fathers over children. Yet contractualists did not deny that patriarchal ascendancies were natural, or that politics could be hierarchical. In fact, their segregation of the household from the polis allowed them to achieve what patriarchal theory could not – the possibility of an autonomous patriarchal household founded in nature. So doing, contractual theory actually tracked the social emergence of the patriarchal household out of its original subordination to lordship and toward the relative autonomy that, amid the fragmentation of other institutions, took shape during England's long seventeenth-century trudge toward modernity. They created the political and philosophical conditions necessary to support what, in the later

[127] Filmer, *Observations Concerning the Original and Various Forms of Government*, 226.

[128] Gobetti, *Private and Public*, 54. See also Pateman, *The Sexual Contract*, 84. Pateman too notes the "insoluble problem" of Filmer's identification of paternal and political right – that patriarchal kings and patriarchal fathers contradicted each other. Filmer, we have seen, gave primacy to the patriarchal king. His solution to the problem of the household head – which was no solution philosophically but only practically – was to continue ascribing unlimited power over household dependents to fathers while actually limiting power according to the actualities of state ascendancy. Rather than assimilate all households to the great household of the king, Filmer allowed the distinct existence of private households but in subordination to the state.

eighteenth century, Blackstone would confidently dub "the empire of the father."[129] And at the same time, because they founded politics on contract among formally free and equal individuals whose actual (though hidden) identity as political actors was determined by sex-right, contractualists also ensured that patriarchy would be central to the political public realm as well as the familial private realm that they had succeeded in creating.

The best illustration of these implications of the course of contractualist theory, and also the most logical choice of counterpoint to Filmer (because so much of his theorizing was devoted to a refutation of Filmer's patriarchalism) is to be found in the work of John Locke. Locke made manifest his ambition to undermine patriarchalism's defense of political absolutism in the subtitle of his *Two Treatises of Government* (1689), which promised that the reader would find in the first treatise "The False Principles and Foundation of Sir Robert Filmer, and His Followers are Detected and Overthrown."[130] Locke's, however, was not an assault on hierarchy as such.[131] Rather, it was a forceful and successful attempt to distinguish politics as a sphere of activity from human beings' social or private relations.

Politics and patriarchy, Locke argued, were quite distinct. Political authority and obligation was founded in convention, not nature (or grace). The power of a magistrate over a subject, even in matters of life and death, was founded on the subject's consent that the magistrate wield the power. The powers of "a Father over his Children, a Master over his Servant, a Husband over his Wife, and a Lord over his Slave," in contrast, were different from political powers and not to be appropriated to politics by the magistrate. Alike in the one respect that they were not political, they were dissimilar in others, some founded in nature, others on agreement, others apparently on sheer force. Because their practice often coincided – "All which distinct Powers happening sometimes together in the same Man" – analogical reasoning resulted in confusions. Hence "it may help us to distinguish these Powers one from another, and shew the difference betwixt a Ruler of a Common-wealth, a Father of a Family, and a Captain of a Galley."[132]

Paternal and conjugal authority was founded in nature. "The Law of Nature" obliged all parents "to preserve, nourish, and educate the Children, they had begotten, not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them." The powers that parents enjoyed were consequent upon that duty.[133] Nature, too, was at the root of the submission every wife owed her husband.[134] Entry upon marriage was contractual, but in marriage, just as Eve had been made subject to Adam by God, so "every Husband hath [a Conjugal Power] to order the things of private Concernment in his Family, as Proprietor of the Goods and Land there, and to have his Will take place in all things of their common Concernment before that of his Wife."[135]

The submission of servant to master, in contrast, was that of one free man to another, and hence could have no natural foundation. A servant was merely one who sold "for a certain time, the Service he undertakes to do, in exchange for Wages he is to receive."[136] The distribution of power in the relationship purportedly extended no further than was encompassed by the contract itself. Locke was willing to acknowledge that exogenous conditions could make a nonsense of actual bargaining. The bare equality of property in self was easily overwhelmed by the disparities of power inherent in differential proprietorship of things (land, commodities). Nonetheless, in Lockean discourse, exchanges between a "Rich Proprietor" and the "Needy Beggar" who "preferr'd being his Subject to starving" still qualified as consensual and contractual because the contract was not the point of origin of the disparities between them.[137]

Yet in fact the contract was precisely the means to the reproduction of exogenous asymmetries as endogenous conditions of service itself.[138] Hence the separation – and equality – that Locke argued for was not only purely formal, but in fact nonexistent. Considered as a contractual institution, "servitude *structurally requires* an asymmetrical power relation."[139] The service contract both acknowledges the anterior condition of disciplinary asymmetry structurally essential to the operation of the institution and reproduces it in each specific instance of contracting. The servant would discover that entry into the transaction had transferred to the master as a matter of course much more than a right to the services sold: the wage that purchased the value that service added also purchased control over the detail of the servant's performance. "The contract in which the [servant] allegedly sells his labour power is a contract in which, since he cannot be separated from his capacities, he sells command over the use of his body and himself."[140] Historically, this had by no means been true of all

[129] Blackstone, *Commentaries on the Laws of England*, I, 441.

[130] Locke, *Two Treatises of Government* (for the complete title see earlier in this chapter, n.12.

[131] Ibid., 204 [§54].

[132] Ibid., 166 [§2].

[133] Ibid., 205 [§56]. Schochet notes that the "parental" power of the First Treatise was treated as a synonym for "paternal" power in the Second. See Schochet, *Patriarchalism and Political Thought*, 248–50.

[134] As to the relationship between nature and God, said Locke, God gave no political (mag- [illegible] foretels what should be the Womans Lot, how by his Providence he would order it so, that she should be subject to her husband, as we see that generally the Laws of Mankind and customs of Nations, have ordered it so; and there is, I grant, a Foundation in Nature for it." Locke, *Two Treatises*, 46 [§47]. See also Pateman, *The Sexual Contract*, 52–3.

[135] Locke, *Two Treatises*, 46 [§48].

[136] Ibid., 228 [§85].

[137] Ibid., 41 [§43].

[138] On exchange asymmetry, see William M. Reddy, *Money and Liberty in Modern Europe: A Critique of Historical Understanding* (New York, 1987), 62–106.

[139] Gobetti, *Private and Public*, 74 (emphasis added). See generally Christopher L. Tomlins, "Law and Power in the Employment Relationship," in Tomlins and King, eds., *Labor Law in America*, 71–98, and "Subordination, Authority, Law: Subjects in Labor History," *International Labor and Working-Class History*, 47 (Spring 1995), 56–90; Steinfeld, *Coercion, Contract and Free Labor*, 10–26.

[140] Pateman, *The Sexual Contract*, 151. Tom Koivet puts it thus, writing of the modern employment contract: "To enter a labor contract . . . is to accept a non-negotiable status. The regular purposive contract is neutral to status, for it regards it as a datum of the transaction

contracts for the performance of work.[111] It was rather a convention. But in English law during the course of the eighteenth century it would be a convention extended to and inserted in the meaning of employment in general.[112]

Slavery, as we shall see in Chapter 9, required the greatest asymmetry of all – so great, indeed, that for Locke it could not be encompassed by contract. Slavery was at once a permanent alienation to another of property in person, and an exhibition of absolute magistracy – vesting powers of life and death in the master – that comported neither with the lesser asymmetries of the other nonpolitical relations nor with the conventional foundation of politics.[113] Locke set an absolute, but at the same time low, threshold for the difference of slavery: "if once Compact enter … Slavery ceases."[114] Free men could sell themselves, and command of

at hand. The labor contract, in contrast, first defines the status of employers and employees as those who may issue and enforce orders and those who have to obey. The duty to obey is a personal one. An employee cannot let himself be represented by someone else. However interchangeable and substitutable the job that the employee has to perform may be, the worker himself is contractually bound to an individual, nonsubstitutable responsibility for his indistinguishable task. For the employee there is no intermediate zone between being there in person and quitting." Tom Kotver, *The Fictitious Commodity: A Study of the U.S. Labor Market, 1880–1940* (Westport, Conn., 1990), 3. It is apparent from William James Booth's analysis of Lockean thought that this is a sufficient description of individual autonomy and freedom from a Lockean point of view. See Booth, *Households*, 162–76, confirming (at 164) that from a Lockean point of view "even the most severe constraints on available options [work or starve] do not render the labor contract unfree."

[111] In addition to the employment relationships discussed in Chapter 7, see Toulins, *Law, Labor, and Ideology*, 229n. (discussing *locatio operis*, or the hiring of labor and services according to the law of bailments).

[112] See section I, this chapter. The historical arguments are summarized in Christopher Tomlins, "Early British America, 1585–1830," in Hay and Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire*, 117–52.

[113] Locke followed law of nations scholars (as we shall see in Chapter 9) in founding slavery on capture. "Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joined with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another power over it. Indeed having, by his fault, forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may (when he has him in his Power) delay to take it, and make use of him to his own Service, and he does him no injury by it … This is the perfect condition of Slavery, which is nothing else, but the State of War continued, between a lawful Conqueror, and a Captive." *Two Treatises*, 182–3 [§§23–4]. There is something of a contradiction, however, in Locke's contention that "a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one," given that he also argues that "whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in [the slave's] Power, by resisting the Will of his Master, to draw on himself the Death he desires." By choosing to induce the Will of his Master, to draw on himself the Death he desires, the slave does in fact retain power over his own death in preference to slavery; the slave does in fact retain power over his own life. In that sense the slave does consent to slavery as long as s. he prefers it to death and Locke's statement that slavery is the absence of compact is therefore incorrect.

[114] Ibid., 183 [§24]. See also 302 [§174].

their bodies, for "a certain time" and remain free. "For, it is evident, the Person sold was not under an Absolute, Arbitrary, Despotical Power. For the Master could not have power to kill him, at any time, whom, at a certain time, he was obliged to let go free out of his Service."[115] Free men could consent that powers of life over themselves be vested in the state for the whole of their lives without being thought slaves to the state's magistracy. The line Locke's formula drew was the line of permanent subjection to an extreme instance of private power ("Absolute, Arbitrary, Despotical Power") – the involuntary alienation of self for life to a private magistracy.[116]

Patriarchy, hierarchy, and coercion to the very lintel of slavery were all thus quite compatible with Locke's account of nonpolitical relations. So, however, were they with his account of the *polis*.

I have argued that, considered as tendencies in English political theory, patriarchalism and contractualism developed more or less simultaneously, rather than sequentially, and that their relationship was more one of interaction than simple opposition. Even during the tumult of the English Revolution, their separation was incomplete: sophisticated royalists, for example, defended the monarch's paternal powers but were willing to derive them not directly from primordial patriarchy but from "the consent of the people," by which they meant an original and irrevocable compact among then-existing household heads to "reduce themselves into a civill unitie, by placing over them one head, and by making his will the will of

[115] Ibid., 183 [§24].

[116] Pateman, *The Sexual Contract*, 70. The shallowness of Locke's threshold for the difference compact makes is evident in the extent to which his account of slavery simultaneously reproduces and differs from that of Hobbes. In *Leviathan* (1651), Hobbes too founds slavery on capture, and distinguishes between slavery and servitude by the entry of compact. But the compact of servitude in Hobbes begins in capture, not freedom – it is a permanent condition of parole forced upon captives by the alternative of immediate death; it signifies not freedom but lifetime service. "Dominion acquired by Conquest, or Victory in war, is that which some Writers call DESPOTICALL, from ΔΕΣΠΟΤΗΣ, which signifieth a *Lord* or *Master*; and is the Dominion of the Master over his SERVANT. And this Dominion is then acquired to the Victor, when the Vanquished, to avoyd the present stroke of death, covenanteth either in expresse words, or by other sufficient signes of the Will, that so long as his life, and the liberty of his body is allowed him, the Victor shall have the use thereof, at his pleasure. And after such Covenant made, the Vanquished is a SERVANT, and not before: for by the word *Servant* (whether it be derived from *Servire*, to Serve, or from *Servare*, to Save, which I leave to Grammarians to dispute) is not meant a Captive, which is kept in prison, or bonds, till the owner of him that took him, or bought him of one that did, shall consider what to do with him: (for such men (commonly called Slaves,) have no obligation at all; but may break their bonds, or the prison; and kill, or carry away captive their Master, justly;) but one, that being taken, hath corporall liberty allowed him; and upon promise not to run away, nor to do violence to his Master, is trusted by him." G.A.J. Rogers and Karl Schuhmann, editors, *Thomas Hobbes's Leviathan: A Critical Edition* (Bristol, U.K., 2003), 161. The master-servant compact in Locke is presented ideally as a temporary and partial alienation – a sale of services. Yet the coerced lifetime use of his body at the pleasure of the master agreed by a captive exhibiting "sufficient signes" of will when confronted by imminent death will qualify not only for Hobbes but also for Locke as the entry of compact and hence cessation of slavery.

them all."[147] Contractualists were content to see a politics of consent and mutual compact conditioned by precisely the same original structure of familial patriarchy while arguing that the character of rule established by a compact among original patriarchs was qualitatively different from that which characterized their own households. "This kind of Authority is not to be indured in a State, because it is incompetent with liberty, provided onely for slaves, and such as have no true direct interest in the State."[148]

The Aristotelian distinction between polis and household could thus be detected in both strands of English political thought, so it is unsurprising that it should be found also in Locke. What was original to Locke's political theory was the further claim that legitimate governance was founded on continuing consent, not simply an original compact, for this enabled Locke at once to allow that government could be traced to familial origins and at the same time to deny those origins any value to the explanation of current political obligation. "Allegiance was due to the state because of the trust that it held and only so long as that trust was not violated. Thus, each generation and, in fact, each individual person theoretically retained the right to determine whether or not a government was properly performing its functions. If the answer was no, the base of political authority was liable to be withdrawn."[149] The state was continuously reaffirmed as conventional, and the distinction between polis and household, correspondingly continuously underscored. Consent purported to render familial hierarchy an asymmetry exogenous to politics no less than it purported to render material asymmetries exogenous to employment.

Yet, how credible, in fact, is the distinction? Locke's consenting individuals were all male proprietors.[150] This has been held irrelevant to the actual nature of the polis. Locke's theorizing was descriptive, not normative – "how *some* political societies *may* have *first* been established."[151] The qualifications of consenting individuals are hence not fixed. But if, as Carol Pateman puts it, civil freedom per se "is a masculine attribute and depends upon patriarchal right,"[152] the credibility of the "descriptive" liberal divorce of polis from patriarchy becomes less tenable. One discovers, rather, another instance of structural requirement. And indeed, Pateman's assertion is entirely accurate. Contract theorists challenged paternal right – generational dominion of fathers over sons – as the basis for political society, but not conjugal right, or what Pateman calls sex-right, the procreative precondition of fatherhood and the original political dominion

[147] See Schochet, *Patriarchalism and Political Thought*, 103–4, discussing [Dudley Digges], *The Unlawfulnesse of Subjects Taking up Armes against Their Soveraigne in What Case Soever* (1643).

[148] Ibid., 105, discussing [Henry Parker], *Jus Populi: or, A Discourse Wherein Clear Satisfaction is Given* (London, 1644), 28.

[149] Schochet, *Patriarchalism and Political Thought*, 267.

[150] Pateman, *The Sexual Contract*, 3, 11, 13, and generally 1–18.

[151] Schochet, *Patriarchalism and Political Thought*, 263 (emphasis in original).

[152] Pateman, *The Sexual Contract*, 2.

granted Adam. Locke granted marriage foundational character – "the first Society was between Man and Wife"[153] – and correspondingly attempted to restate that foundational social compact in voluntaristic terms; its genesis was "voluntary Compact between Man and Woman."[154] But voluntary compact reproduced a "natural" subordination. "Locke agrees with Filmer, that there is a natural foundation for a wife's subjection. Thus Locke's first husband, like Adam, must have exercised conjugal right over his wife before he became a father. The 'original' political right or government was, therefore, not paternal but conjugal."[155] Just as the service contract was negotiated subject to conditions precedent that reproduced within the contractual relationship exogenous asymmetries of power, so male conjugal right was a condition precedent to marriage (and thus a condition precedent to all social formation) similarly reproduced as an exogenous asymmetry within the marriage contract.

The individuals that contractualism released from paternal dominion engaged in their acts of political creation on the same foundation of anterior control of procreative activity that patriarchal theory had embraced. Just as Filmer's father "denies any procreative ability to women, appropriates their capacity and transforms it into the masculine ability to give political birth," so Locke's victorious sons transmute "the awesome gift that nature has denied them … into masculine political creativity."[156] Filmer's appropriation was an affirmation of a politics that assumed an absolutist hierarchy among men and hence severely limited political participation. Locke on the other hand embraced a desirably universal and continuing right of consent, though one contradicted in fact by exclusions. Both, however, appropriated to men alone the capacity for politically generative action.

There was nevertheless a major difference between Filmer and Locke in the theory and strategy of their appropriations. Filmer's paternalism, founded on hierarchical absolutism and the assimilation of family and monarchy, had no need to justify differentiation within the polis or out of it, either between men and women or among men. Political obligation was consequential upon the universal social-political rule of paternal right, of which the monarch's claim was the first and most fundamental instance. Denying that the foundation of political obligation lay in paternal right or familial duty, emphasizing instead that its foundations lay in the consent of autonomous individuals, Locke (unlike Filmer) had to find means

[153] Locke, *Two Treatises of Government*, 223 [§77].

[154] Ibid., 223 [§78]. Conjugal society consists chiefly in such "Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation" [§78]. Husband and wife have but one common concern, yet have different understandings and hence unavoidably sometimes different wills; in which case, "it therefore being necessary, that the last Determination, *i.e.* the Rule, should be placed somewhere; it naturally falls to the Man's share, as the abler and the stronger" 226 [§82]. See also 46 [§47].

[155] Pateman, *The Sexual Contract*, 93.

[156] Ibid., 95, 102.

to justify differentiation – to explain why autonomy, and hence participation in consent, was not universally enjoyed. None of these means could appear unmediated as limits on rights of participation; the very absence of such limits was the essence of contractualism's ascendancy as a theory of the polis. All, however, justified Locke's continuing discriminations in his descriptions of political participation, for all were reincarnated by contractualist theory *socially*, in the household, at a remove from the polis but still the condition of its formative contract. As Aristotle had indicated, as Locke fully accepted, the household remained the condition for the existence of the polis, because it was the locus of production and reproduction of the free individuals whose consent fashioned the polis. And by the eighteenth century, the household had become definitively what before it had not been, a private patriarchal order.[157]

III. Locke's Oikos

The process of producing and reproducing free individuals within the household was deeply conditioned by law. Not, to be sure, by the same law; we have already encountered Locke's "insistence on the specificity" of the subordination produced in each type of interpersonal relation existing within the household.[158] The servant's subordination was conditioned by contract, the child's by age, the slave's by the immanence of death, the wife's (the most stable of all) by nature. But the household stands as the crucial and historically specifiable point of intersection in the genealogy of each of these strands of legal discourse: the law of service and of employment, the law of conjugal and familial relations, the law of slavery. Well into the late nineteenth century, Anglo-American writers treated the interrelationship of these strands, spun together over the previous two centuries,[159] as both obvious and natural, a timeless legal homology – "the domestic relations" – that boxed the compass of normative social life.[160] Hence, the full title of Tapping Reeve's seminal American treatise, published in 1816: *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant*.[161] Kent's *Commentaries on American Law* offered precisely the same

[157] To Locke it is clearly a paternal order, an empire of which the father was the prince, "Ruler in his own Household." *Two Treatises of Government*, 213 [§65], 221–2 [§§74–6], and generally 203–22, [§§52–76].

[158] Goluth, *Private and Public*, 67.

[159] See generally Brewer, *By Birth or Consent*; Tomlins, *Law, Labor, and Ideology*. For the creation of an Anglo-American law of slavery, see Chapter 9.

[160] For examples of more contemporary scholarship attempting (from rather different perspectives) to bring employment and family law back together, see Mary Ann Glendon, *The New Family and the New Property* (Toronto, 1981); Amy Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History*, 75: 2 (September 1988), 471–500; Stanley, *From Bondage to Contract*; VanderVelde, "Gendered Origins," 775–852.

[161] (New Haven, 1816), with *The Powers of the Courts of Chancery* and *An Essay on the Terms Heir,*

set of structural connections.[162] A half century later, James Schouler was still presenting the law of service and employment as a subcategory of the law of domestic relations.[163] So was Irving Browne, although in a manner that hinted at an emerging separation.[164]

The commonalities among the domestic relations were commonalities of legal authority: of masters over apprentices, servants, slaves, employees; of husbands over wives; of parents over children. Categorical commonality did not mean that these were identical relations. Marriage and unenslaved service were distinguished from involuntary relations by the appurtenances of consent they had acquired. But consent applied to entry into a relationship already legally defined, not to entry upon a process of mutual design. Master-slave and parent-child relations were of course distinguished by the complete involuntariness of entry – at least so far as the slave or child was concerned – but otherwise they also came as, so to speak, preexisting conditions. Despite dramatic nineteenth-century reform movements, moreover, the domestic relations the century inherited exhibited substantial staying power, such that, in their essentials, legal structures governing production and reproduction put in position in the early decades of the nineteenth century remained in place at the century's end. Slavery's abolition, for example, did not mean the obliteration of master and servant law. If anything, by liberating master-servant's application to hirelings from the inhibiting impediment of an obvious (and damaging) comparison, it achieved the reverse. Emancipation, whether gradual or cataclysmic, eliminated a peculiarity from American law, not a genus, as one can tell from the renewed relations of restraint into which those emancipated were injected.[165] Contemporaneous changes in the law of coverture in marriage, meanwhile, were held "minor and relatively inconsequential" by disappointed mid-nineteenth century reformers, tinkerings that left the structure of coverture untouched. Even in areas of family law where more substantial reform did take place, as in paternal rights to the custody of children,

[162] Kent, *Commentaries*, II, Part 4 (1–253): "Of the Law Concerning the Rights of Persons."

[163] The full title of Schouler's treatise (1st edition Boston, 1870) was *A Treatise on the Law of the Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant*. Schouler in 1870 was still reproducing a classically Lockean discourse of (a) consent's reproduction of exogenous asymmetries, and (b) the specificities of each relation of subordination. For example (at 509): "The relation of master and servant *presupposes* two parties who stand on an unequal footing in their mutual dealings; *yet not naturally so*, as in other domestic relations."

[164] Thus the title of Browne's treatise suggested a different slant than Schouler's: *Elements of the Law of Domestic Relations and of Employer and Employed* (Boston, 1883).

[165] See, e.g., ch. DCCCLXXXI, *An Act for the Gradual Abolition of Slavery* (1 March 1780), in *Statutes at Large of Pennsylvania*, X, 67–73; ch. LXII, *An Act for the Gradual Abolition of Slavery* (29 March 1799), in *Laws of the State of New York, Passed at the twenty-second session, second meeting, of the Legislature* (Albany, 1798), 721–3, and ch. CXXXVII, *An Act Relative to Slaves and Servants* (31 March 1817), in *Laws of the State of New York, Passed at the Fortieth Session* (Albany, 1817), 136–44; Stanley, *From Bondage to Contract*, 122–30.

"changed rules and rights overlaid but did not obliterate and replace older visions of marital rights."[166]

To the legal theorists of the early republic, men such as Reeve and Kent, those "older visions" of marital (and familial and employment) relations expressed the essential enduring order of human affairs "derived from the law of nature, and ... familiar to the institutions of every country."[167] As in other incarnations,[168] however, the law of nature furnished not a transhistorical meta-narrative of the human condition but rather an ark of convenience for – in this case – the numerous elements of the laws of subordination that liberal modernity had excepted from its selective assault on patriarchal politics: the very elements, in fact, that sustained production and reproduction within the walls of the households of the free individuals who formed the liberal polis.

In performing that role, the household appeared Aristotelian in its relationship to politics and the state, "the root of our economy ... an association of persons united in a certain purpose and mutuality (*philia*), in relations of domination and subordination, and striving for those ends that composed the good life as they understood it."[169] As William James Booth has put it, the Aristotelian household economy (*oikos*) is to be understood as the principal institution in which "human interchange with nature is conducted, in which that interchange is organized according to what is appropriate for the persons involved and for ends determined within the community of the *oikos*."[170]

As an organic community – that is, viewed from the "outside"– the *oikos* sought a collective freedom from dependencies upon others through autarky. At the same time, it "contained" the effects of the activities necessary to achieve that end by construing economic activity according to a standard of sufficiency, the securing of a *sufficient* livelihood, rather than a drive for wealth (*pleonexia*) that would trespass on and consume "that space needed for other and higher human possibilities."[171] The household

[166] Hendrik Hartog, "Mrs. Packard on Dependency," *Yale Journal of Law and the Humanities*, 1, 1 (December 1988), 89, and generally 79–103. See also Hendrik Hartog, *Man and Wife in America: a History* (Cambridge, Mass., 2002), for the argument that "the long nineteenth century of American marriage law" (1790–1950 by Hartog's reckoning) was characterized by "a legal vocabulary continuous with a long patriarchal tradition," albeit one "inflected and transformed ... in the American context, on the American continent, through multiple marital regimes" (39). For compatible arguments in the realm of employment relations, see Tomlins, *Law, Labor, and Ideology*, 223–92; Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor movement in America, 1880–1960* (Cambridge and New York, 1985); Orren, *Belated Feudalism*, 68–159.

[167] Kent, *Commentaries*, II, 33.

[168] See Chapter 3.

[169] Booth, *Households*, 1.

[170] Ibid., 8; see generally 1–93. On the relevance of *oikos* to *economy* – that is, the theory and practice of colonial American household order, see Boydston, *Home and Work*, 18–20.

[171] Booth, *Households*, 88. William Manning made the point in 1798. "For the prinsapel hapiness of a Man in this world is to eat & drink & injoy the good of his Labour, & to feal that his Life Libberty & property is secure, & not in the abundance he poseses nor in being the instrument of other mens miseryes." William Manning, *The Key of Libberty: Shewing the Causes Why a Free Government has always Failed, and a Remidy Against It* (Billerica, Mass., 1922), 66. On the ideology of "sufficiency," see generally Daniel Vickers, "Competency and Competition: Economic Culture in Early America," *William and Mary Quarterly*, 3rd Ser., 47, 1 (January 1990), 3–29.

economy of the *oikos*, then, gave leisure – release from toil, opportunity to participate in *vita activa* – primacy over accumulation as a value to be cherished. But the leisure that it was the object of the *oikos* to produce was not designed for equal distribution; it was not the role of the *oikos* economy to relieve all within from toil. Rather, its "containment" of economic activity had a dual meaning: the necessities of production were prevented (contained) from consuming the whole life and energies of the household by confining (containing) production within that portion of the household whose unrelieved duty it was to produce. Viewed from the "inside," the *oikos* was a rank-ordered hierarchy: "master, wife, servant, slave." This interior order "determines the source of command and of the purposes to be served by the economy":[172]

> The *oikos* is a community of persons living together, bound by a *philia* and sharing a common purpose, wealth creation within the framework of need-satisfaction and autarky. Giving this community its distinctive form, however, is its order, both human and inanimate: everyone and everything has its proper place ... [T]here is an order of authority and appropriate functions among [the household's persons]. The master oversees the *oikos*' outdoor work and the wife is the guardian of its indoor functions; a good steward manages the work of the household's servants and slaves. The master, the wife, and the servile laborers – these are the elements that compose the *oikos* hierarchy, and rulership is essential to that composition.[173]

The point of the ruled hierarchy of the *oikos*, its reason for being, is to realize the purposes of the *oikos* master. Those purposes – freedom from the necessities and obligations of self-support, allowing virtuous civic participation and a life of "*ta kala*" (noble and free action) – are not ignoble or necessarily self-serving, but their realization requires servile persons

[172] Booth, *Households*, 8. "The subordination of the laborer and the suppression, or containment, of the economy are thus intimately bound one to the other" (32). The contained economy "is understood as one in which compulsion reigns, whether induced by poverty and appearing in the forms of the unceasing necessity to labor or of submission to an employer or, in its most radical guise, caused by the subordination of slave to master. Being 'inside' the contained economy entails, in varying degrees, a constrained and unfree life, one without leisure and so with limited possibilities for the cultivation of excellence and for sharing in the higher *philia* that binds the truly human communities" (91). On the ubiquity of inside-outside distinctions in master-servant law – where the "inside" of the relation is both a rank-ordered hierarchy and an organic union to be protected from interferences from the "outside" – see Karen Orren, "Metaphysics and Reality in Late Nineteenth Century Labor Adjudication," in Tomlins and King, eds., *Labor Law in America*, 160–79. The parallels to the other domestic relations (for example, the common vocabulary of "seduction" and "enticement") are obvious.

[173] Booth, *Households*, 39–40.

to undertake the "necessitous struggle for livelihood"[174] that sustains the master in their enjoyment.

> If nature were so abundant that there was no scarcity … the economy could be contained without hierarchy, without transferring its burdens onto the shoulders of the servile. That not being the case, however, a human solution must be found to the scarcity and containment problems: slaves and servants, one's wife and children … It is thus that the ancient theory of the economy moved from general propositions about scarcity and the neediness of the human condition, from theories of the good life and its relation to the production of human livelihood, to the necessary hierarchy that stands at the very center of their idea of community.[175]

The precise meaning of *oikos* freedom inhered in the containments that sustained it. The "hierarchy, domination and exclusion" central to the *oikos* community were not simply functional disciplinary controls in a common fight against scarcity – requirements of production – but chosen conditions of social existence.[176] The *oikos* was not a creature of survivalist necessity, not an organic disciplined pursuit of material self-sufficiency amid scarcity with a bonus of freedom at least for some. Rather, it was a creature of choice: choice of what constituted "the good life," choice of how to attain it, choice of who should enjoy it, choice of who should be worked to sustain it.[177]

In canvassing the dimensions of choice, it cannot but be immediately noticeable that the pinnacle of command and of benefit in the *oikos* economy is occupied by a male patriarch. Sexual differentiation characterizes the organization of the *oikos* as a whole: each side of the division between free and unfree is characterized by a further gendered division. "There is a vertical division of labor within the household, a division corresponding to the free or servile statuses of the various groups comprising the home's order. In the Homeric world the free plow and reap, but as a sport, a demonstration of prowess … The servile, on the other hand, labor to produce, and they do so under the compulsion of a master. And within that ordering there is a further status differentiation: that between male and female. Free men and free women have different activities appropriate to their gender, as do their servile counterparts."[178] Yet it is clear that the luxuries of a life of *ta kala*, of release from toil, that it is the function of the *oikos* to produce are not distributed to the general advantage of free people as such, but to the advantage of free men. Certainly women exercise command in the *oikos* economy. Mostly they command other women; sometimes they might command men.[179] But their commanding role is functional and intermediate, for this is an economy focused on the interests of the *oikos* master. Though separate strands, the vertical and sexual divisions of labor are part of the same phenomenon, a hierarchical structure of household authority which is male in authorship and ultimate benefit.[180]

Liberal political theory contends that the contractarian assault on patriarchy "dismantle[d] … the premises of natural subjection within the household community," resulting in an "egalitarian/voluntarist reconstruction" of the household no less sweeping than the reconstruction of the polis.[181] In fact, liberalism's reconstruction of the polis was highly conditional. First, it was founded upon a recomposition of patriarchal sex right in the polis that was in its turn dependent not upon the dismantling of "natural subjection" in the household, but its reassertion. The form of the reassertion did little to disturb the household master's actual position, filling Locke's contractualism with "philosophical embarrassments." Second, it was founded upon a highly formalistic conception of consent, one that saw nothing short of "actual or threatened … violence" as an impediment.[182]

Finally, liberalism's reconstruction was founded upon a conception of the economic sphere's autonomy – its separation from the polis – that bore little actual relation to reality: "control over economic activities is taken from the household despot … ends and choices become the rightful property of autonomous individual agents."[183] The economy, then, becomes the "private" to the polis's "public" sphere. Yet, neither liberalism's economy

[174] Ibid., 27.

[175] Ibid., 92.

[176] The same is true, of course, of the managed division of labor of the modern world. The joining of authoritative hierarchy (management) to a distribution of functions is no more a requirement of modern technologies of production than of ancient. In both cases the arrangement is chosen. See Dan Clawson, *Bureaucracy and the Labor Process: The Transformation of U.S. Industry, 1860–1920* (New York, 1980); Christopher Tomlins, "'Of The Old Time Entombed': The Resurrection of the American Working Class and the Emerging Critique of American Industrial Relations," *Industrial Relations Law Journal*, 10, 3 (1988), 426–44, at 433–4, 442–3.

[177] This, as we have seen, was the political economy of Mandeville and Defoe.

[178] Booth, *Households*, 25. The principal axis of gender difference in work is location. "Indoor … of the household's females … The work of men is outdoors" (24).

[179] That is, where male servants or slaves are engaged in indoor work, they are within the sphere of the *oikos* mistress and subordinate to her authority (although even here there is likely to be a steward to act as overseer).

[180] Booth implies that gender and economy offer distinct sites for analysis of the dynamics of the household (*Households*, 2–3). Indeed, the household must be approached as a place of gendered hierarchy no less than of economic hierarchy. Given, however, that Booth's analysis from the site of economy suggests that the *oikos* was organized to subsidize one sex, it seems to me to risk distortion to imply that gender and economy are not related.

[181] Ibid., 97, 100–1. Contrast Pateman, *The Sexual Contract*, 10–1, 52–3, 58–60.

[182] Booth, *Households*, 101, 134. Booth's analysis of the liberal household shows that its voluntarist bets are substantially hedged when it comes to spousal and parental relations. According to Booth, "tensions" occur in Lockean thought "where the contractarian drive of Locke's analysis encounters relations that appear to him as less amenable to egalitarian, voluntaristic redefinition." Booth attempts to turn these "tensions" into exceptions by calling them "embarrassments," but it is difficult to maintain a paradigm of freedom and equality in human relations where these are riddled by subordinations founded in "nature." See Booth, *Households*, 101, 101–6.

[183] Ibid., 152; for a summary of Booth's "disembedded" (uncontained) liberal political economy, see 173–6.

nor its polity can be located outside the civil (public) realm of law and police, the conditions of freedom and coercion.[184] They are the joint creations of the same civil transformation, and rendered interdependent by it. The true antinomy of private and public is rather the opposition of nature to civil jurisdiction that contractualism creates, the private "womanly [and] natural," the public "masculine [and] civil." As Pateman puts it, "what it means to be an 'individual', a maker of contracts and civilly free, is revealed by the subjection of women within the private sphere."[185]

Interlude

One can use these observations on the distribution of subjection and freedom, private and public, to return once more for a moment to Daniel Defoe's story of Edmund Pratt, and cast it in a slightly different light. From the outside, Pratt's household economy was, one might say, successfully "contained." He had earned a sufficiency from his labors – enough, at least, to afford him the modicum of leisure that enabled him to drink rather than to weave E–'s cloth. He was indifferent to accumulation for its own sake.[186] If not exactly a life of *ta kala*, Pratt's was clearly an existence marked by a felt quantum of autonomy, which his own description of his legal standing vis-à-vis E– expressed quite substantively.[187] However much the clothier might have complained about it, his legal relationship with Pratt was not that of master and servant but of customer and supplier. They were in fact two men, respectively heads of their own households, meeting in a proceeding that expressed their jural equality. This perfected transactional encounter – a Lockean moment – was, to Defoe, insolence personified. It was the cause of the clothier's frustration, the object of Defoe's indignation, and the stimulus for Parliament's intervention.

In Defoe's story, Pratt has neither wife nor children. He is an obstinate old man, obdurately set in his ways, the eccentricities of his self-perception underlined by his riddling speech: "I lodge in an Alehouse, so that I am always at Home; he can't keep bad Hours that is at-home in good Season; nor you can't deny me Drinking in my own Chamber, tho' it be on a Sunday."[188] But it is safe to say that, had Pratt been married, the "inside"

[184] See generally Tomlins, "Constellations of Class," 213–33; Dubber, *Police Power*; Steinfeld, *Coercion and Contract*, 1–26; Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly*, 38, 3 (June 1923), 470–94.

[185] Pateman, *The Sexual Contract*, 11. Pateman continues (12–13), "Most contemporary controversy between liberals and socialists about the private and the public is not about the *patriarchal* division between natural and civil. The private sphere is 'forgotten' so that the 'private' shifts to the civil world and the *class* division between private and public. The division is then made within the 'civil' realm itself, between the private, capitalist economy or private enterprise and the public or political state, and the familiar debates ensue.

[186] "When I have finish'd ten – Yards, I come for my Money, which is ten Shillings, as by Agreement, and then I go … to the Alehouse, and work hard to spend it, and when it is all spent, then I come to work again." Defoe, *Great Law of Subordination Consider'd*, 99.

story of his household would have been that of a typical putting-out weaver's household, organized as a little occupational hierarchy that serviced its male head's production of cloth from his loom.[189]

Seen through the lens of the eighteenth century's expanding law of master and servant, the story of Edmund Pratt signifies a descent from a modest autonomy grounded on his mastery of his own little *oikos* to a legalized subordination within the larger *oikos* of another. The story of a married Pratt's fictional wife and children, seen through the lens of their legal relations with him, would have shown less change. Married or single, the weaver lost the legal capacity to refuse those who would require him to work at their pleasure rather than his own. But that was a capacity his wife and children would not have had to lose.[190] Nor did the artisan's decline from leisure mean that his and theirs had now become a uniform subordination. However mean the working man's "outside" relations might become, inside he was the master of his household.

IV. Locke's Mainland

I have argued that the location of liberalism's birth in a movement from status to contract is deceptive, that liberal modernity was born in the passage from lordship to consent, a passage that underlines the *ascendancy* of patriarchal household government by locating it in relationship to lordship's relative decline rather than simply assumes its "natural" primordial origins. This argument also emphasizes the deep compatibility between an ideology of consent in the civil sphere and the continuation of patriarchy in the private. It denies the claim that the latter was eviscerated by revolution.[191]

In the early American case, one can observe the relationships between lordship and household government, and between patriarchy and consent, exemplified several times over. From the beginnings of English colonizing, households in general assumed a more extensive jurisdictional presence in social life than they had enjoyed in England, due in part to the relative paucity of lordly institutions in early American state forms, in part to the demographic and social instability that had disrupted household formation in early seventeenth-century England.[192] But there was no uniformity; the distribution of lordly institutions varied substantially by place

[189] On which see Thompson, *Customs in Common*, 371–81.

[190] While artisans celebrated "Saint Monday" with drink and conviviality, their wives and children worked. Ibid., 374, 376.

[191] Gordon Wood, for example, assumes patriarchal government was "traditional" and "ancient" until finally called into question by liberal political theory and by the American Revolution. See Wood, *The Radicalism of the American Revolution*, 145–7. So also Rhys Isaac, *Landon Carter's Uneasy Kingdom: Revolution and Rebellion on A Virginia Plantation* (New York, 2004), xi, 180–3 (the Revolution's assault on patriarchal monarchy destroyed "the keystone of the cosmic arch of public and private authority").

[192] "The rather undeveloped state of governmental institutions enhanced the authority of the household head." Shammas, "Anglo-American Household Government," 126. See also Mintz and Kellogg, *Domestic Revolutions*, xiv, 1, 7–8.

and design. The proprietary colonies were founded upon the presumption that lordship would be pervasive in their social and political structure, as represented, for example, by the seigneurial authority accorded proprietors, the practice of primogeniture, and the political and legal powers granted to prominent landholders.[193] Notwithstanding the efforts of promoters to plant families, and so "fix the people on the soil,"[194] lordship's ascendancy was complemented by the weak contribution of formed families to the European migration stream entering those areas of settlement. Predominantly youthful male migration patterns and the catastrophic disease environment were formidable obstacles to family formation in the seventeenth-century Chesapeake.[195] Carolina and New York both spun lordly patterns into the design of their polities.[196] In the New England and Delaware Valley colonies, in contrast, complete households played a crucial associational role in the structure of European migration and social life. "English migrants who ventured to New England sought to avoid the disorder of English family life through a structured and disciplined family … [E]stablishment of a holy commonwealth in New England represented a desperate effort to restore order and discipline to social behavior. And it was the family through which order could most effectively be created."[197] The same was true for each of the major migrant groups to populate the Delaware Valley.[198] We have already seen that patterns of English and mainland variation in the relationship of household and lordly jurisdiction correlated with patterns of English migration to the mainland. Relatively lord-free pastoral regions characterized by high familial solidarity and household-centered socio-political behavior supplied the strategic core of the migration to New England and the Delaware Valley. Low-solidarity arable regions dominated by lordly elites set the tone for the social and political order of the Chesapeake.[199]

Political Economy and Household – "Lockean" New England

How deeply was the jurisdictional imprint of these distinctive household regimes etched into the political economy of English America? Stephen

[193] See Chapter 4, section II. On primogeniture, see Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform," *William and Mary Quarterly*, 3rd Ser. 54, 2 (April 1997), 307–46.

[194] Julia Cherry Spruill, *Women's Life and Work in the Southern Colonies* (New York, 1972 [1938]), 9.

[195] See Chapter 4, section IIB.

[196] See Chapter 4, section II.

[197] Mintz and Kellogg, *Domestic Revolutions*, 8. Mary Beth Norton, *Founding Mothers and Fathers, Gendered Power and the Forming of American Society* (New York, 1996), 12–14, usefully contrasts the Chesapeake and New England colonies, but overemphasizes the normality of English household stability.

[198] See generally Barry Levy, *Quakers and the American Family, British Settlement in the Delaware Valley* (New York, 1988); Aaron Fogleman, *Hopeful Journeys: German Immigration, Settlement, and Political Culture in Colonial America, 1717–1775* (Philadelphia, 1996).

Innes argues that the course of New England's economic development was decisively influenced by the interplay between a "distinctive civic ecology" based on strong families, strong town organizations, and a vibrant public sphere, and a "culture of discipline" that "fostered industrious and 'striving' behavior, communal responsibility, and a high ratio of savings and investment relative to income by its limitations on leisure."[200] Crucial to that civic ecology was the first generation's pre-migration origins in East Anglia, with its relative freedom from lordly tenures and social relations, and from the manors and trade corporations that embodied and implemented them. Crucial to the culture of discipline was New England's shared ascetic Protestantism, which succored ethics of hard work and enterprise and mediated (through denunciation) its dark side, "calculative and secularized rationalism."[201] The result was a Lockean commonwealth that considerably antedated Locke: guarantees of basic political liberties and accountable political authority; guaranteed property rights, a labor theory of property and a will theory of contract; and mobile labor and capital liberated from the restraints of "patrimonial mercantilism" (coercive state or corporate regulation). Puritan New England was a "regime of economic freedom" whose founders "from the very beginning" envisioned a dynamic and diversified "industrializing economy," not the static undifferentiated "household-based agricultural economy" of earlier portrayals.[202]

The claim for the novelty of New England's economic culture is not per se problematic; English migrants indeed established a distinctive political-legal and economic culture in New England from which vast swathes of contemporary English law and political-institutional restraint were absent.[203] The devil is in the details.[204] Innes reads seventeenth-century economic culture according to the bundle of practices, values, and attitudes that characterize those species of activity that only came to be demarcated as distinctively "economic" in the nineteenth century. The activity thus identified for investigation becomes identified precisely by its status as recognizable precursor to the particular genus of economic modernism that only emerges later.[205] Thus, "economic culture" becomes the cultural

[200] Stephen B. Innes, *Creating the Commonwealth: The Economic Culture of Puritan New England* (New York, 1995), 9.

[201] Ibid., 37.

[202] Ibid., 14, 50, 90–1, 98, and generally 1–38, 64–106.

[203] Ibid., 175–82, 220–36. Innes's research, for example, provides major resources for critical reconsideration of Richard B. Morris's *Government and Labor in Early America* (Boston, 1981 [1st edition New York, 1946]). See Chapter 6, section II.

[204] In a sense I mean this quite literally. For that sense, see Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England* (New York, 1989), 77–116. Carlson describes how women who "stood in the way" (116) of forms of male economic activity could encounter trouble in the shape of witchcraft accusations. As I try to show here, *Creating the Commonwealth* "bedevils" women in Carlson's sense by casting them "out" of the economy altogether.

[205] Innes acknowledges and defends the anachronism. "In economic affairs and the creation of a civil society, the saints' progressive tendencies are unmistakable. There is ample evidence that in their productive activities, exchange ethics, and political economy, the

conditions encouraging the emergence of the modern capitalist-industrialist economy, which in turn identifies the early-modern economy with particular specialized locales wholly exterior to households: market spaces where particular forms of exchange occur, industrial spaces where particular kinds of commodities are fabricated. Overwhelmingly in orthodox liberal discourse, work – descriptively, conceptually, culturally – is associated with these exterior spaces.[206] Overwhelmingly, these spaces, and the activities and occupations that are undertaken in them, are male. So, hence, is the early modern economy. Households are interior spaces in this account, where families reside, where the civic culture is reproduced and discipline inculcated through education and example but where economic activity is not to be found. Households become support mechanisms, integral to the cultural reproduction of "the economic" but not part of the economy. Here, and only here, is where "the issue of gender" and "women's role" gain attention.[207]

Separation of household from economy, of what women and children do from work, reads liberal modernism's category of "the economic" back into the forms of seventeenth-century behavior that constituted New England's "economy." But this is deceptive. Central to the discourse of European work and life in New England, for example, was the ideal of competency, or "comfortable independence."[208] Competency was a "masculine ideal," a yeoman/artisan restatement of the *oikos* philosophy of *ta kala*, on display, for example, in the boisterous sufficiency that satisfied Edmund Pratt. As in the *oikos*, the achievement of comfortable independence was a household project, envisaged by male household heads as the employment of themselves and their families in more or less self-directed household production. Competency subordinated familial dependents (women, children) to the achievement of a patriarchal ideal,[209] but it hardly separated

Bay Colonists were discernibly and irrevocably capitalists. In their behavior in the marketplace, in their public policies regarding property, law, contract, and (especially) land tenure, as well as in their Weberian virtues of industry, enterprise, and prudence, the New Englanders ... had clearly crossed the threshold that separates a pre-capitalist from a capitalist society." *Creating the Commonwealth*, 39, 45. The issue, however, is not whether the New Englanders Innes examines were capitalists or not, but whether the social and ideological locales which Innes investigates to arrive at that conclusion are the most, or only, appropriate locales upon which to arrive at what is "economic" behavior. That is, do we assess "economic culture" according to these measuring sticks because we have already been directed to these measuring sticks by our modern understanding of what "economy" constitutes? That is an anachronism that Innes does not address. Instead, by the end of *Creating the Commonwealth* (see 368) it has become anachronistic in Innes's book to be anything *other than* capitalist.

[206] Note the trenchant critique offered by Chris Tilly and Charles Tilly, *Work Under Capitalism* (Boulder, Colo., 1998).

[207] Innes, *Creating the Commonwealth*, 31, 149. The maleness of work is particularly evident in Innes's conceptualization of workplaces, work discipline, and calling. See 107–26.

[208] Daniel Vickers, *Farmers and Fishermen: Two Centuries of Work in Essex County, Massachusetts, 1630–1850* (Chapel Hill, 1994), 14.

[209] The conceptualization of "independence," Vickers notes, specifically excluded women,

them from "the economic." On the contrary, in the case of farming and farm formation – the primary occupations of rural male New Englanders during the first two centuries of European settlement – "farmers usually worked the lands they occupied in household units, of which nuclear family members constituted the core. The most basic lines of economic power ... were those that linked parents with their children and organized daily work among them."[210]

This household-based agricultural economy was indeed long-lived. "Mixed family farming, the division of labor by gender, and a patriarchal household structure" predominated in the region's rural economy into the late eighteenth century. During the century, growing population and the beginnings of land scarcity created a supply of property-less late-adolescent male labor for hire. The elaboration of exchange networks encouraged some diversification of male productive effort into craft manufacture, and also saw a greater incidence of youthful dependents laboring outside the family. But though extremes of intergenerational interdependence declined, "most householders and their sons spent the majority of their working days on the exploitation and improvement of their own family property." Nor did hirable labor appear as a distinctive "class or ... age cohort." No large-scale turn toward commercial or industrial activity occurred prior to the end of the eighteenth century. And when it did, "it was the traditionally dependent portion of the population – women, children, and younger men – who provided the bulk of that labor." As long as adult men clung to their ideal of competency, it was the age and gender specificities of the New England farm household that constructed the region's emergent workforce. "The practice of working for pay *outside* the family spread first among those with the longest tradition of dependence *inside* the family."[211]

Though men were not the first industrial workforce, the eventual industrialization of the male economy would imprint two entirely misleading identities on the culture of work: that it was masculine and that it was remunerated.[212] Retroactively, women who worked for wages were rendered exceptional to work's gendered identity. Women who worked in any other sense – unremunerated reproductive and household labor – were not "workers" in work's cultural sense at all.[213] One might explain this

[210] Ibid., 35. Innovations that responded to the peculiar demands of new farm formation in an environment of severe capital and labor shortages relative to land tended to bind all family members even more tightly into household production than had been the case in England, and prolonged intergenerational dependencies far beyond the English norm of early adulthood. (51, 76, 252–3).

[211] Ibid., 205, 239, 245, 323. See also Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780–1860* (Ithaca, N.Y., 1990); Barbara M. Tucker, *Samuel Slater and the Origins of the American Textile Industry, 1790–1860* (Ithaca, N.Y., 1984), 159–62.

[212] See generally Ava Baron, editor, *Work Engendered: Toward a New History of American Labor* (Ithaca, N.Y., 1991); Tilly and Tilly, *Work Under Capitalism*, 22–3, 128–30.

[213] "In industrial America," Jeanne Boydston observes succinctly, the housewife was "a blank." Boydston, *Home and Work*, xi. As Reva Siegel summarizes the matter: "Census

disappearance of women as a consequence of the impact of industrialization on the household, the creation of distinct disaggregated zones of economic workplace and noneconomic home, except that industrialization did not constitute a transformative moment in the history of production and household in America. The foundations "had been laid earlier, in the fabric and evolution of colonial life itself, and especially in the changing relations of gender and labor over the course of the preindustrial period." Change was long-term, not sudden, critically mediated by culture rather than determined by sudden transformations in material life. "Changing attitudes toward women's labor contributions … were not paralleled by changes in the work itself." The gender division of labor remained stable. The matter was one of cultural redefinition of the value of what women did. In the early colonies, women were "openly and repeatedly acknowledged" as vital economic agents, as workers whose labor in household and community was crucial to the fate of both. But "new cultural understandings of what constituted 'economic' and what constituted 'non-economic' terrain" arose from growing population density, commercial expansion and attendant civic effects – heightened concern for property titles, the monetization of transactions, the erosion of social collectivity, an increased formality in legal relations in general. These trends "heightened the association of *men* with the symbols of economic activity and profoundly weakened the ability of women to lay claim to the status of 'worker'."[214]

Good evidence for the cultural mediation of the meaning of women's work is the decreasing presence of women in the archives (largely local court records) from which histories of work have emerged.[215] Histories of

measures of the economy that appeared in the aftermath of the Civil War characterized [labor within the household] as 'unproductive,' and, consistent with this gendered valuation of family labor, excluded women engaged in income-producing work in the household from the count of those 'gainfully employed.'" Reva Siegel, "Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal*, 103 (1994), 1092.

[214] Boydston, *Home and Work*, 3–4, 5, 11, 20–1, 27. As commerce placed increasing emphasis on the household economy's "outside," on markets and cash relations, on credit networks, on the world of more-or-less contractual meetings that involved mostly men, "economy" came to be associated with what men in the household's gendered division of labor did. Clearly the inside functions of the household went on apace. Just as clearly, recognition that this was "economic" activity died and, as Boydston puts it, "a gender *division* of labor" became "a gendered *definition* of labor" (55, emphasis in original). Throughout this transformation in the discourse of the economy, households in practice remained "'mixed economies'– economic systems that functioned on the bases of both paid and unpaid labor and were dependent on both" (123). What this means is that the process of socioeconomic transformation celebrated in liberal thought as the "uncontaining" of the economy - its liberation from household hierarchies by market ideologies of unconstrained participation and individual self-government – was in fact nothing of the sort. Rather, this was a refiguring of containment, a market-driven ascendancy of commerce and, eventually, industry (the exterior of the economy) built upon a formidable discursive containment of the economy's interior element, a containment so complete, in fact, that the interior vanished from view.

[215] Daniel Vickers indicates that the records upon which he relies are not so much silent on women's work as too sparse to permit observations with statistical significance. *Farmers and Fishermen*, vi–vii, 12. His requirement is continuity of observable data over two centuries – a threshold that, if Boydston is right about women's work's cultural disappearance during the eighteenth century, women's work could not meet. If Boydston is right, however, one should expect to find at least some evidence of women at work in seventeenth-century legal records. And in fact one does. Thus, according to Gloria Main, Essex County court records show seventeenth century Salem women "engaged in men's work [*sic*] or working with men" – winnowing corn, carrying grain to be milled, milking cows, branding steers. See Gloria L. Main, "Gender, Work, and Wages in Colonial New England," *William and Mary Quarterly*, 3rd Ser., 51, 1 (January 1994), 54 (citing C. Dallett Hemphill, "Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683," *William and Mary Quarterly*, 3rd Ser., 39, 1 (January 1982), 166–7.

litigation record women's increasing civic invisibility, which suggests that the economic identification of work with men is an artefact of legal culture. Seventeenth-century New England courts "had been occupied by the sorts of community activities to which women were integral: maintaining harmonious neighborly relations, ensuring equitable local trading, and monitoring sexual and moral conduct." During the eighteenth century the courts' prime constituency became "propertied men active in the expanding economy." The volume of their litigation grew astronomically; courts became "adjuncts and facilitators" of the transactional networks into which farmers and tradesmen were increasingly drawn. "Women's economic and social activities did not change markedly," but "in a schematic sense what was happening in court reveals a new set of divergences in men's and women's spheres taking hold gradually throughout the century," foreshadowing the nineteenth century's more explicit reservation of "the public realms of commerce, law, and politics" to men. This was not simply a cultural reflection of a causal sequence occurring at some more basic social level: the occlusion of women's legal presence was in part attributable to shifts occurring from early on in the eighteenth century in the legal system itself; the increasing resort to professional attorneys and "stricter attention paid to common law procedures and rules of evidence" that is associated with the gradual "anglicization" of local colonial legal cultures. In instrumental procedural terms, anglicization "reshaped the county court from an inclusive forum representative of community to a rationalized institution serving the interests of commercially-active men." In its wider cultural resonances, anglicization was a significant element in the appearance of "a more traditional type of patriarchy in Britain's New World colonies."[216]

Such legal-cultural agency is highly significant. Stephen Innes analyzes legal materials for his history of New England's economic culture not simply because they are valuable sources of information about behavior and events but because law per se is a crucially important modality of rule. For Innes (in a fashion reminiscent of E. P. Thompson, with whom I began), "the rule of law" is New England's distinguishing characteristic,

[216] Cornelia Dayton, *Women before the Bar: Gender, Law and Society in Connecticut, 1639–1789* (Chapel Hill, 1995), 8, 9, 10, 11, 13, and generally 69–104. On long-term change in the character of litigation and procedure see also Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, 1987).

the foundation of its economic culture, in that it authorizes, embodies, and implements New England's unique "civic ecology" of property rights and personal liberty. The argument is classically Weberian: "Neither capitalism nor civil society could emerge in the absence of some legal/juridical separation between the political realm and the economic realm ... Only after a law-governed regime was established could private actors begin to behave in a rationally-calculating fashion."[217] One can fully endorse this observation of law's cultural significance, pausing only, in light of the discussion in which this book has been engaged, to propose a refinement. It should be clear by now that law does a great deal more than create facilitative frameworks for rationally calculated action. Law is a technology that shapes action in accordance with its own conditions of formation and existence. In Part II my goal was to show how early American economic culture was legally conditioned by regionalized ideologies of law-formation that expressed variant forms of work relations. Here I have stressed the further salience of patriarchy to understanding those work relations. We have also seen that the gradual anglicization of mainland legal cultures (an expression of the process of metropolitan cultural and political ascendancy in Britain and North America already described in this and earlier chapters) would envelop and redirect the formation of work relations. We have now see how it actually undertook that work on the terrain of gender.

Political Economy and Household – the "Lockean" Chesapeake

Histories of England's mainland colonies have generally relied upon differences in material environments and in settlers' extractive ambitions to explain dissimilarities in economic trajectories and in labor systems established in each region of settlement. The most obvious material contrasts in early mainland colonizing were, of course, those distinguishing export-oriented cash-crop plantation economies of the Chesapeake from the non-staple subsistence agriculture of New England. So understood, the organization of work in the two regions of settlement appears quite distinct. The traditional association of the plantation colonies with legal bondage (originally indentured servitude, later slavery), and of New England with a far greater incidence of free labor and a relative absence of involuntary servitude has seemed to follow clearly from differences in factor endowments.[218]

Refracted through the prism of society and culture, the causality of material differences becomes less clear because the systems seem less distinct. Certain contrasts in local conditions and their effects remain obvious. Population growth in the Chesapeake was not self-sustaining until late in the seventeenth century. Unlike New England, then, the region's

[217] James, *Creating the Commonwealth*, 193–4.

[218] John J. McCusker and Russell R. Menard, *The Economy of British America, 1607–1789* (Chapel Hill, 1991), 235, 236–57.

economy during the seventeenth century was heavily dependent on the importation of labor. Once at work, however, that labor force's salient characteristics rendered it somewhat less distinct from its counterparts to the north than one might suppose. Like rural labor in New England, imported Chesapeake labor was predominantly youthful and predominantly male. In New England, settlers mostly used their own male children for field work; in the Chesapeake, where proportionately fewer families were formed and fewer children born, settlers imported the children of others. Adult Creole labor was of considerable importance in both regions, and not significantly different in legal status. Second, in the Chesapeake, as in New England, work was organized through households. Not just in the north but everywhere, "the household was the predominant unit of production, and the work was done by family members, often without the assistance of outsiders, bound or free."[219] As in New England, further, distributions of tasks and life-chances within households varied significantly according to gender.

Chesapeake households, however, were substantially less stable than those of New England. Both the region's demographic uncertainties and the overwhelming masculine skew in immigration rendered sustained rates of family formation highly problematic. Though the Virginia Company envisaged the settlement of "'honest' laborers with wives and children"[220] – men of families, whose domestic stability and well-regulated households would render them tractable and tie them to the colony – what they managed to recruit was an overwhelmingly unattached and youthful male population, dogged for more than half a century by the constant instabilities of disease and frontier warfare, the often-oppressive discipline of indentured servitude, and sparse opportunities to form families. The minority of female migrants (15–20 percent of the total in the 1620s and 1630s, 30–40 percent after mid-century) that was supposed to foster the ideal of "good wife" domesticity and household stability by supplying potential marriage partners mostly contradicted the ideal in practice by ending up at work in the tobacco fields.

The instability of the Chesapeake household had legal-political effects, notably the relative weakness of households as jurisdictional entities. For Mary Beth Norton, the primary effect was to push the Chesapeake's seventeenth-century legal culture along a path for which she too seeks the label of "Lockean" before Locke. Norton argues Chesapeake legal culture was an exception to an otherwise ubiquitous Anglo-American "unified theory" of patriarchal power, embracing a conception of governance that founded legitimate political and legal authority not on analogies to primordial household hierarchies but on a consensus of free property-holders whose gathering constituted the "formal" public sphere. Norton contrasts the

[219] Ibid., 246.

[220] Kathleen M. Brown, *Good Wives, Nasty Wenches and Anxious Patriarchs: Gender, Race and Power in Colonial Virginia* (Chapel Hill, for the Institute of Early American History and Culture, 1996), 80.

"Lockean" Chesapeake with "Filmerian" New England, where, she argues, demographic stability and the ideological significance accorded the household sustained patriarchal power and its intimate articulation of household with state roles in governance, and where, correspondingly, "what was public – and thus properly subject to regulation by the community – was difficult to distinguish from what was private – and thus exempt from such supervision."[221]

Norton's categories of analysis (like those used by Innes) are anachronistic.[222] More important, her model is of limited service, not because it is anachronistic but because modes of thought and action that Norton treats as sequential and distinct, "primordial" paternalism and contractarian individualism, are in fact simultaneous and intertwined. Her "Lockean" Chesapeake public sphere of free property-holders is more fruitfully described as Aristotelian, balancing household masters on the tips of modest but nevertheless hierarchically organized *oikoi*. And in the Chesapeake, "public" authority and "private" household authority mingled quite routinely in the police of inside relations.[223] Not until Virginia was launched on its journey to maturing slave society does one encounter the beginnings of state abstention from supervision of the detail of master-subordinate relations and the creation of the household as a "de facto private realm of family life."[224] Certainly contrasts between New England and the Chesapeake sustain the assertion that they were characterized by distinct legal cultures, but "Filmerian" and "Lockean" are poor labels. We have seen that Stephen Innes finds New England's legal-political culture just as open to the "Lockean" label (strong public sphere and divergence of public and private realms) as Norton's Chesapeake.[225] Holly Brewer likewise finds ideologies of government by consent strongest in the dissenter colonies of New England and the Delaware Valley, in marked contrast to the Chesapeake's aristocratic commitments to lordship.[226]

Kathleen Brown's account of the political economy of the Chesapeake household is more consistent than Norton's with the overall Anglo-American trajectory canvassed in this chapter. A gendered "language of power" permeated the normative English social order, expressed in the

[221] Norton, *Founding Mothers and Fathers*, 9, 402. See generally 6–56.

[222] Norton, 100, acknowledges the anachronism. Ibid., 5.

[223] For legal oversight of master-servant relations in the Chesapeake see Chapters 6 and 7. On more general policing of morality in seventeenth-century Virginia, see Brown, *Good Wives, Nasty Wenches*, 91.

[224] Norton, *Founding Mothers and Fathers*, 49. See also Anthony S. Parent, Jr. *Foul Means: The Formation of a Slave Society in Virginia, 1660–1740* (Chapel Hill, 2003), 105–34, 197–267.

[225] Treated as ideal types, "Filmerian" and "Lockean" philosophies of rule can facilitate analysis of the configuration and reconfiguration of social relations and household structures, not least those that displaced women as such from recognizably public roles into an "interior" sphere. But one must be careful in granting ideal types historical reality.

internal order of households, the division of labor, the distribution of property ownership between men and women, and the structure of law and governance.[227] Gendered discourse also comported with the ideology of English overseas expansion, in that its "naturalized" explanations of power and weakness were available to explain and justify other exercises of dominion. Wherever they landed, for example, the English consistently remarked on the "unnatural" division of indigenous labor that had men hunt and fish – a life of ease and leisure in English eyes – while women toiled in raising crops. The distribution of tasks did not comport with English agricultural practice that made fields the preserve of men. It became in English eyes "another distinguishing mark of the savage," another error to be corrected by English civility. "The coming of the English would help Indian men to see their errors," assume their laborious responsibilities, and so become civilized. "Only large-scale settlement, with a full representation of English society, would allow such learning to take place."[228] The discourse of gender fit snugly the manifold resorts to natural law that, as we have seen, rendered "acts of dispossession and imperial appropriation … comprehensible as part of the natural order."[229]

But though in general seventeenth-century English migrants might treat patriarchal representations of household and community as an expression of the appropriate and natural order of things, gender nevertheless proved unstable as a consistent predictor of their social practice. In Chesapeake practice, as in New England, white women could enjoy considerable influence and authority. We have already seen that regional cultures of origin were themselves characterized by distinct authority relations and household practices. Those brought to the Chesapeake tended to trump patriarchy with lordship. Too, though patriarchy might proffer an idealized form of social relations, gender roles, politics, and governance, its actual expression in the stressed demographic circumstances of seventeenth-century settlement was compromised and erratic. Indentured English women ended up working the fields alongside the men. Not until the eighteenth century does one encounter the turn toward "high" patriarchy and its decisive masculinization of law, politics, and the public sphere.[230]

When it came, the Chesapeake's turn to patriarchal stability would be characterized by the same anglicization of social practice and legal culture already noted elsewhere. In the Chesapeake, that is – as in New England, as in the "rude parts" of the home islands – the eighteenth century meant a mimetic bourgeoisification of manners that created a recognizably Anglo-American social and legal order. Where the Chesapeake would differ was

[227] Brown, *Good Wives, Nasty Wenches*, 6, 7.

[228] Karen Ordahl Kupperman, *Indians and English: Facing Off in Early America* (Ithaca, NY, 2000), 149–50.

[229] Brown, *Good Wives, Nasty Wenches*, 17. On gender and colonizing, notably reproductive capacity as a colonizer's resource, see also Joyce E. Chaplin, *Subject Matter: Technology, the Body and Science on the Anglo-American Frontier, 1500–1676* (Cambridge, Mass., 2001), 119.

[230] Brown, *Good Wives, Nasty Wenches*, 75–104 and compare 247–366.

that *its* patriarchal stability was definitively a *white* patriarchal stability, built on and assisted by a successful racialization of toil derived from resort to widespread African slavery.[231]

In Chapter 9 I will argue that slavery's installation of racial power was not fully established in the Chesapeake until the second half of the seventeenth century. Before then, just as some white women might slip through holes in a gendered social order, at least some African men might acquire at least some of the markers that English masculinity associated with civic freedom. The fate of African women, though, underscored how limited the racial easement was even before slavery became ubiquitous. African women were labeled drudges from the outset, "an exploitable new source of agricultural labor," and condemned to the very bottom of the colonial social hierarchy, the "nasty wenches" who worked in the fields.[232] Where white women's field labor upset the normative English division of labor, African women's field labor confirmed their racial place. Simultaneously it became a means to normalize English gender roles by releasing white women from drudgery to participate in household formation and achieve an approximation of "goodwife" domesticity.

The substitution (both actual and symbolic) of African women for white women as field workers began in advance of the Chesapeake's comprehensive late seventeenth-century transition to slavery. It was marked by changes to tax laws that cast all African women (enslaved or free, married or unmarried) as the equivalent of field laborers. The tax laws effectively abstracted gender from the determination of African women's status. They became simply "negroes."[233] Laws institutionalizing matrilineal inheritance of enslavement then made them the means to naturalize slave status for *all* "negroes." Womanhood, meanwhile, became irreducibly white, enshrined in Virginia law as a condition of "domesticity and economic dependence."[234] And as slavery took hold, all white males of whatever estate were joined to the social order "with the promise of future status as voters, citizens, and patriarchs." Solidly founded on the twinned creation of division of white from black laborers and unity among white men, the promise would win Virginia a significant degree of political stability.[235]

[231] See generally Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill, 1982), 20–1, 338–9, 344–9; Isaac, *Landon Carter's Uneasy Kingdom*; Parent, *Foul Means* 197–235.

[232] Brown, *Good Wives, Nasty Wenches*, 116.

[233] Ibid., 116–20, 128. See "Minister's Allowance" Act I (1642/3) in Hening, *Statutes at Large*, I, 243: "*Be it also enacted and confirmed* That there be tenn pounds of tob'o. per poll & a bushell of corne per poll paid to the ministers within the severall parishes of the colony for all tithable persons, that is to say, as well for all youths of sixteen years of age as vpwards, as also for all negro women at the age of sixteen years."

[234] Brown, *Good Wives, Nasty Wenches*, 128, 132–3, 135. See also Chapter 9, section IV.

[235] Ibid., 181, 181–6. See generally Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York, 1975), 295–387. But see also Parent, *Foul Means*, 190–94.

Conclusion

"I long to hear that you have declared an independency." Thus wrote Abigail Adams at the end of March 1776, to her husband John in distant Philadelphia, where he and other delegates to the Second Continental Congress were joined in anxious debate over the latest depredations of the imperial metropolis. Famously, she immediately appended longings for additional declarations that would incinerate other dependencies, equally tyrannous and closer to home:

> and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticuliar care and attention is not paid to the Ladies we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

That men were "Naturally Tyrannical," Abigail Adams thought, was a truth that could admit no dispute. Some men nevertheless had proven themselves able to abdicate "the harsh title of Master." Why not then take it from all? "Why … not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity."

John Adams' reply teased his wife, affectionately no doubt. He could not "but laugh" at her "extraordinary" suggestion. "Depend upon it, We know better than to repeal our Masculine systems." Surely, in any case, Abigail knew full well that men only played the master. "Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects." Here was the soft banter of good-humored prevarication, the master adroitly protesting his weakness, his power a name only, his subjection (incredulity aside) the reality. John Adams was acting Defoe's long-suffering "good Governour," patiently soothing the little rebellions of malcontents with pleas for their understanding.

Still, humor always has its edge, and at that edge in John Adams' letter lurked a certain knowledge that in the world of the Philadelphia confrérie "the Ladies" were, like many others, woven into subaltern webs that declarations of independence must leave untouched lest the "Tail" seize government from the "Head," and "Ochlocracy" (mob rule) assume the name and power of master:

> We have been told that our Struggle has loosened the bands of Government every where, That Children and Apprentices were disobedient – that schools and Colledges were grown turbulent – that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your letter was the first Intimation that another Tribe more numerous and powerfull than all the rest were grown discontented.

Abigail Adams' response to her husband's jovial obduracy noted the edge but did not retreat from its challenge. Instead she underlined what was at stake, with a thick edge of her own:

> I can not say that I think you very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist upon retaining an absolute power over Wives. But you must remember that Arbitrary power is like most other things which are very hard, very liable to be broken.[236]

Eleven years after the Adams' exchange, eight of the brethren of 1776 reassembled in Philadelphia, with forty-seven others, to reconstitute the confederation that their earlier declaration had helped call into existence. Their assembly was singular in the confidence of its assumptions: most spectacularly of its authority to act, for whether it actually had any formal basis to do what it actually did is not entirely clear;[237] but also – for

[236] Abigail Adams to John Adams, 31 March 1776 (sent 5 April); John Adams to Abigail Adams, 14 April 1776; Abigail Adams to John Adams 7 May 1776 (sent 9 May 1776); all in *Adams Family Papers: An Electronic Archive*, Correspondence Between John and Abigail Adams, Letters during Continental Congress, 1774–1777 (Massachusetts Historical Society), at http://www.masshist.org/digitaladams/aea/ (accessed 22 August 2009). In parallel correspondence with James Sullivan, Attorney-General of Massachusetts – "moderate Jeffersonian … classical liberal" and advocate for a widened suffrage – John Adams expressed strong opposition to any alteration to existing suffrage restrictions in terms that clearly reflected his correspondence with his wife but substituted an urgent foreboding for humorous indulgence. "Depend upon it, sir, it is dangerous to open So fruitfull a Source of Controversy and Altercation, as would be opened by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common level." John Adams to James Sullivan (May 26, 1776), in Philip B. Kurland and Ralph Lerner, editors, *The Founders' Constitution* (Chicago, 1987), available at http://press-pubs.uchicago.edu/founders/documents/v1ch13s1o.html (accessed 22 August 2009). On Sullivan, see Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York, 1998), 22–4.

[237] Neither the convening of the Philadelphia Convention nor its product had formal constitutional-legal standing according to established process. Fifty-five delegates from all states but Rhode Island assembled in May 1787 in Philadelphia at the invitation of the Confederation Congress to attend a convention called at the instigation of the rump Annapolis Convention of September 1786 for the advertised purpose of revising the Articles of Confederation. The process for amending the Articles of Confederation, however, required action in Congress and agreement thereto, followed by unanimous consent of the states – a vote of approval in each state legislature – not agreement by nine of thirteen ratifying conventions. See *Articles of Confederation*, art. XIII ("Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.") On receiving the draft Constitution from the Philadelphia Convention, the Confederation Congress did not "agree" to it but resolved simply to refer it to the state legislatures without endorsement or recommendation. The state legislatures were themselves instructed that the Constitution was to be submitted to ratifying conventions called "in conformity to the resolves of the Convention made and provided." See Carl Van Doren, *The Great Rehearsal: The Story of the Making and Ratifying of the Constitution of the United States* (New York, 1948), 177–8; Max Farrand, *The Framing of the Constitution of the United States* (New Haven, 1913), 7–12, 61; Jack N. Rakove, "Confederation and Constitution," in Grossberg and Tomlins, eds., *Cambridge History of Law in America*, I, 493–502, 511–12; Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass., 1998), 34–65.

these were fathers unaccompanied by mothers – of its progenerative capacity. Yet perhaps their assumptions were not so singular.[238] After all, the capacity these fathers assumed to be theirs was founded on their right, as Carole Pateman puts it, "to fill the empty vessel," the original political right, descended to them from the first man, Adam, to whom it had been granted by God.[239]

Theirs was an epochal representation of social formation as contract. In it, however, the ladies were once more forgotten. Perhaps the ladies should have been grateful for the lack of attention given the fate of others not forgotten, for the Philadelphia convention of 1787 did what it could to tighten the bands of government involuntarily shaken loose in the earlier struggle for independence and its aftermath. Most important were the bands reuniting in good government states once united (as colonies) in rebellion, whose excesses and fragmentation since had prompted the convention in the first place. The elevated bands of the Constitution's preamble promised a more perfect union of justice, tranquility, and universal well-being; the less elevated instrumentalities of the text settled instead on the purposeful sedimentation of enslavement, without which these founding fathers knew there would be no unity among the states, no federal republic, at all. Precisely 143 words separate the Constitution's soaring self-justification from its pay dirt, the three-fifths compromise.[240] But other bands needed tightening too. Before the founders exited Article I, they had agreed that justice, tranquility, and universal well-being required a guarantee of twenty uninterrupted years of slave importation.[241] A few clauses later, the founders further agreed that restraint of movement was a required element of the fundamental law of a well-ordered republic: the movement of the fugitive slave, that is, but actually of more besides, of any and every person "held to Service or Labour." Disobedient apprentices were joined with insolent Negroes in the fugitive clause, as they had been in John Adams' imagination eleven years earlier.[242] The texts that secured

[238] As Rakove puts it in "Confederation and Constitution," at 511, though the Philadelphia convention was, in the strictest sense, an extra-constitutional device, that "was how the Anglo-American tradition ordinarily understood conventions of any kind."

[239] Pateman, *The Sexual Contract*, 87.

[240] See *United States Constitution*, Preamble; Art. I, §2, cl. 3. For a cogent demonstration of the absolute centrality of slavery to the debates of the Philadelphia convention, and their product, see David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York, 2009), 3–10, 57–105.

[241] *United States Constitution*, Art. I, §9, cl. 1.

[242] *United States Constitution*, Art. IV, §2, cl. 3. Of Indians who slighted their guardians the Constitution had less to say other than to claim the guardianship (Art. I, §8 cl. 3), but in

"Liberty to ourselves and our Posterity" were, to that precise end, riddled through with the necessities of containment to sustain hierarchies both civic and personal.[215] The primal American statement of enlightened autonomy sat atop an enacted political and legal economy of alterity and subjection.

In Part II of this book I began the "inside narrative" of English colonizing, the narrative of what colonizers built for themselves within their enclaves. There I concentrated on certain of the freedoms that segments of the working population came to enjoy as they labored – their origins and expression, their legal reality. In this chapter, I have continued to tell the "inside" story of English colonizing, only here the discussion has turned from freedoms to liabilities – the bounds that accompany freedoms and condition both their existence and extent. In the course of the discussion the exterior and interior narratives of English colonizing have merged to form an interlocked meta-narrative of transformative impositions. Both in England and on the American mainland the English colonized barbarous others and simultaneously the rude parts of themselves. New conceptions of property destroyed collectives and created consenting individuals. Improvement bred independence and new dependencies to secure it. Coercive legalities disciplined contracts, patriarchy underpinned politics. The empire of the father shaped the empire the fathers founded.

John Smith's dream of New England as the acme of opportunity for those of small means willing to pledge "long labour and diligence" properly identifies colonizing as the essence of modernity. Expansion answered the question of how to disengage from ancient constraints; colonizing appropriated space wherein men might build propertied freedom by individual effort. Though it largely ignores modernity's origins in colonizing – or at least colonizing as represented in Part I's exterior narrative of appropriation – American historical orthodoxy has long seized upon the social and political modernity colonizing made possible and has lashed it to an idealized temporality of progress that leaves (as Smith had hoped to leave) the pre-modern in its wake.[216] Witness the desire to render so many different

that guardianship the federal judiciary that the Constitution created would find extraordinary powers. See, e.g., *Johnson v. M'Intosh* 21 US 543 (1823). Of insolent wives, the Convention had nothing to say at all, but in the newspapers the delegates read they would have found plenty of "runaway" wives advertised by husbands declaring they would not be responsible for debts their wives incurred. On the law of marriage in the era of the Philadelphia Convention and the early Republic, see Hartog, *Man and Wife in America*, 40–62; Linda K. Kerber, "The Paradox of Women's Citizenship in the Early Republic: The Case of *Martin v. Massachusetts*, 1805," *American Historical Review*, 97, 2 (April 1992), 349–78.

[215] It is little remarked, but worth remarking, that in this most public of documents the fugitive clause grants jurisdiction and makes restoration not to a state whose laws may have been offended by mobility but to a private person, "the Party to whom such Service or Labour may be due." The criminal who flees public justice in the previous clause shall be returned to face public justice (*United States Constitution*, Art. IV, §2, cl. 2); the laborer who flees a master shall be returned to face the master. The clause secures the seigneurial right of the household master.

[216] Wood, *The Radicalism of the American Revolution* is a convenient example.

parts of the mainland "Lockean."[217] But as I have tried to show in this chapter, an exploration of colonizing compounds its interior and exterior narratives and in so doing introduces us to a temporality for modernity quite distinct from that supplied by John Smith, or by historicism's idealization of his dream – or, for that matter, by J.G.A. Pocock's distinct account of *virtù*'s quarrel with commerce.[218] It introduces us instead to constancy – the constancy of differentials and occlusions of freedom and civic identity, and of the easy coexistence of liberal modernity with gendered subalternship and with an expanding discourse of disciplined service.

The republic created in Philadelphia bore all the marks of that constancy. It was founded as a property-based democracy for and by household masters.[219] Its *oikos* ideal successfully accommodated republicanisms otherwise as varied as elite planter aristocracy and yeoman and artisanal proprietorship.[220] In each case the ideal was given expression in a discourse of adult male agency (political and economic independence) made possible by the "leisure" of freedom from all-consuming toil (the planter elite) or the "sufficiency" at least of moderate toil (the proprietor). As in the *oikos* itself, that discourse of agency expressed the continuation of strategies for preventing too great a trespass of household demands on its master's independence – a continuing displacement of substantial responsibilities

[217] See section IV, this chapter. The most sweeping statement of the Lockean claim is Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York, 1955).

[218] Pocock, *Machiavellian Moment*, 548–52.

[219] See Robert J. Steinfeld, "Property and Suffrage in the Early American Republic," *Stanford Law Review*, 41, 2 (January 1989), 335–76; Bowdoin, *Home and Work*, 43–4. On its liberal face, this reinscription of relations of household mastery after the Revolution on what otherwise now professed itself a "free" – that is a contractarian – legal-political culture was a meeting between incompatible tendencies. But those tensions were resolvable along the lines of demarcation between polis and household, public and private, that by the time of the Revolution structured political and social life throughout Anglo-America. The public realm was where economically independent heads of households met, their participation sanctified, democratized, and to a degree equalized by the polity's civic guarantees. Relations within households, in contrast, occurred within a separate domestic realm. These were not relations between heads of household, they were relations between heads and dependents. They were household heads' private business, their hierarchical character protected by private law, more or less impervious to revolutionary discourses of *public* liberty. Linda Kerber provides potent illustration of the resolution in "The Paradox of Women's Citizenship in the Early Republic." In "On Language, Gender, and Working Class History," *International Labor and Working Class History*, 31 (Spring 1987), at 9, Joan W. Scott shows in somewhat similar vein how the English Chartist movement drew on Locke's political philosophy to formulate a theory of universal entitlement to political rights based on a proprietorial claim of property in labor-power that simultaneously stated the theory as a theory of *manhood* suffrage. "The Chartists demand for universal manhood suffrage accepted the idea ... that only men concluded and entered the social contract; indeed, the identity that Chartists claimed with those already represented was that all were male property holders."

[220] On the former, see Waldstreicher, *Slavery's Constitution*; on the latter, Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, & the Political Culture of the Antebellum South Carolina Low Country* (New York, 1995); Manning, *The Key of Liberty*.

for securing survival onto subordinates, built on the same foundation of "inside" hierarchical social relations that presumed the master's control over the disposition of the household's total product and the activities of its producers.

For the proprietor, the prime expression of constancy was the law of his conjugal relations, of family and domestic service, and of employment and apprenticeship (the relations of man and wife, parent and child, master and servant) that I have traversed in this chapter. For the planter, the prime expression lay in the law of slavery. The separation between these *oikoi* – between the planter's slave relations and the proprietor's domestic relations and their respective forms of legal expression – was very real. Their forms of un/freedom were very distinct.[549] Still, John Adams lumped all the transgressors together, discontented children, apprentices, wives, Negroes; feared insolents, all. Slavery was never a matter for the planter alone, nor ever so confined (however we remember it) that its history is one of a region.[550]

To this point this book has been written in the shadow of slavery. But the trail of hints and asides and short, incomplete expositions stretching back to Chapter 1 has established the absolute necessity of its presence and signifies its refusal to be contained. The reason is simple enough: slavery was the single most powerful material force in the modernization of the Anglo-American mainland. To the unfreedom of slavery and its relationship to liberal modernity, American freedom's quintessential liability and always its essential inescapable condition, I now turn.

[549] Though not so distinct that it would prevent many antebellum feminists and workingmen from examining their own situations through slavery's lens. See Stanley, *From Bondage to Contract*, x–xiii, 175–86; David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class*, 3rd ed. (London and Brooklyn, N.Y., 2007), 43–163.

[550] As Nell Irvin Painter writes in her biography *Sojourner Truth, A Life, A Symbol* (New York, 1996), 10, "In the nineteenth century – as in our own times, *mutatis mutandis* – northerners preened themselves in their moral superiority to the slave drivers of the South, as though their own section had remained innocent of involuntary servitude. Such self-righteous censure of the South exempts northerners from their own slave-holding legacy, for when Isabella [Truth] was born a slave, a commonplace national institution bound her."