

# From Coverture to Contract: Engendering Insurance on Lives

Mary L. Heen†

**ABSTRACT:** In the 1840s, state legislatures began modifying the law of marital status to ease the economic distress of widows and children at the family breadwinner's death. Insurance-related exceptions to the common law doctrine of "marital unity" under coverture permitted married women to enter into insurance contracts and protected life insurance proceeds from their husbands' creditors.

These early insurance-related statutory exceptions to coverture introduced an important theoretical question that persisted for the rest of the nineteenth century—and into the next—as broader legal and social reforms took hold. How could equality of contract for married women be reconciled with the traditional dependencies of the home? Equality of contract also introduced the practical economic problem of how the lives of women could be valued apart from their husbands when the law otherwise enforced their economic dependency.

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The theoretical and practical issues were resolved for life insurance and annuity contracts, the Article argues, by an increased emphasis on “natural” differences between men and women when those differences comported with traditional gender status hierarchies and dependencies. Gender-distinct mortality tables and higher rates for coverage of women first appeared in annuity contracts used to fund lifetime financial support independent of or as a substitute for marital rights. Gender-merged tables and unisex rates generally prevailed, however, in life insurance contracts used to protect wives and children from the family breadwinner’s death, a more traditional pattern of household dependency. Gender-distinct rates thus tempered, in both symbolic and practical/economic terms, the equality of contract recognized by the statutory exceptions to coverture. The selective adoption of gender-distinct insurance rates during the first wave of woman’s rights activism illustrates the role played by marketplace contracts in reinforcing the traditional status relationships and dependencies of the home.

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How people count and measure embodies certain assumptions about the thing they are counting; this was true in the nineteenth century, and it is equally true today . . . . What people chose to count and measure reveals not only what was important to them but what they wanted to understand and, often, what they wanted to control.<sup>1</sup>

## I. INTRODUCTION

In the 1840s, shortly after state legislatures altered the common law doctrine of “marital unity”<sup>2</sup> for life insurance contracts, a leading American life insurance company began pricing life annuities<sup>3</sup> by using separate male and female mortality tables to assess the risk of life contingencies.<sup>4</sup> Until then, gender-merged mortality tables<sup>5</sup> and unisex premium rates for insurance coverage of men and women had been the industry norm.<sup>6</sup> The change from merged to separate tables for annuities and the subsequent selective adoption of gender-distinct rates for life insurance<sup>7</sup> resulted in higher rates for coverage of female lives,<sup>8</sup> and in the case of life insurance, sometimes in outright denial of coverage of women.<sup>9</sup>

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1. PATRICIA CLINE COHEN, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* 206, 211 (1982) (emphasis omitted and sentence order reversed).

2. See *infra* Part II.A.

3. Life annuities provide financial protection against outliving one’s assets by providing income to the annuitant for life. An annuitant with a greater probability of having a long remaining life would be charged a *higher* amount for a life annuity (or alternatively, would receive lower annual income amounts) than someone with a shorter remaining life expectancy.

4. See *infra* Parts II.B and III.C. In the nineteenth century, as now, the commercial life insurance industry justified its premium rates and policy benefits by reference to actuarial science, a professional discipline that applies mathematical and statistical methods to assess risk. Insurance companies use risk assessment and interest rate assumptions to price their products as well as to establish adequate financial reserves and to value their policy obligations. Actuaries assess the risk of life contingencies by studying past mortality rates, arranged in tables showing the probabilities of death and survival at each age. In addition to interest rate assumptions and mortality risk assessments, companies add in a margin of safety in pricing products. See generally KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986) (discussing theoretical issues and practical problems in pricing insurance products).

5. Gender-merged tables report rates of mortality at various ages by combining rather than separating the mortality experience of males and females.

6. See discussion *infra* Part II.B.

7. Life insurance protects the insured’s beneficiaries against financial loss from the untimely death of the insured. An insured with a greater probability of having a long remaining life would be charged a *lower* premium for life insurance benefits payable at death than someone with a shorter remaining life expectancy.

8. I use the term “lives” to refer to the persons insured under life insurance or life annuity contracts rather than to the policy owners or beneficiaries. From an actuarial risk perspective, life insurance provides a mirror image of a life annuity, so that a person with a longer life expectancy would pay

This Article examines the development of gender-distinct insurance rates during the first wave of woman's rights activism, beginning in the antebellum period and ending with the ratification of the Nineteenth Amendment in 1920.<sup>10</sup> The origins and selective use of these rates reveal how legal reforms and dominant gender ideologies<sup>11</sup> during and after the antebellum period influenced the adoption of gender as an insurance contract pricing category. This story offers a more complete account of variation in the use of gender in pricing than one focused solely on actuarial or economic factors<sup>12</sup> and illustrates the transition from coverture to separate contract rights for married women in an unexplored subset of marketplace contracts used to facilitate family support.<sup>13</sup>

Prior to "first wave" legal reforms, married women generally had no separate capacity to enter into contracts. Under coverture and the common law fiction of "marital unity," a husband and wife became one person, represented legally by the husband. Wives came under their husbands' protective cover in the legal status known as "coverture," and thus were restricted in their capacity to enter into contracts, to own property, and to file suit in their own names.<sup>14</sup> Simply put, unless certain equitable doctrines applied, wives became legally invisible<sup>15</sup> and, under law, economically dependent on their husbands. They could not contract for insurance coverage on their own or their husbands' lives. Coverture's restrictions thus extended beyond the family into markets and society.

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*higher* rates for a life annuity than a person with a shorter life expectancy, and would pay *lower* rates for life insurance than someone with a shorter life expectancy. Beginning in the antebellum period, insurance companies charged higher rates for life annuities for women than for men of the same age. As discussed in Part III.B, when companies in the nineteenth century charged gender-differentiated rates for life insurance coverage, they also charged higher rates for insurance on women's lives.

9. See discussion *infra* Part III.B.

10. U.S. CONST. amend. XIX; *Leser v. Garnett*, 258 U.S. 130 (1922) (upholding the 1920 ratification of the Nineteenth Amendment).

11. Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, in *TOWARD AN INTELLECTUAL HISTORY OF WOMEN: ESSAYS BY LINDA K. KERBER* 159, 170 (1997).

12. Historical accounts of industry actuarial practice tend to focus on advances made during the nineteenth and twentieth centuries in statistical, demographic, and actuarial methodology and analysis. See, e.g., LAURIE DENNETT, *MIND OVER DATA: AN ACTUARIAL HISTORY I* (2004); *HISTORY OF ACTUARIAL SCIENCE* (Steven Haberman & Trevor A. Sibbett eds., 1995). However, accounts using other methodologies and disciplines have added to that understanding by tracing how life insurance developed into a new discourse about risk and security as well as a business that made judgments about human life by determining how much and who should be paid under purchased policies. See, e.g., TIMOTHY ALBORN, *REGULATED LIVES: LIFE INSURANCE AND BRITISH SOCIETY, 1800-1914* (2009); SHARON ANN MURPHY, *INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA* (2010).

13. Although Sharon Ann Murphy's study of American life insurance in the antebellum period provides much useful information about antebellum life insurance companies and the context in which they operated, it focuses primarily on ordinary life insurance and not on life annuities. MURPHY, *supra* note 12.

14. See *infra* Part II.A.

15. Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 *FEMINIST STUD.* 346, 347 (1979).

The insurance-related statutory exceptions to coverture, which were adopted by several states after the financial panic and economic depression of the late 1830s and early 1840s,<sup>16</sup> altered the common law by permitting married women to contract for insurance and by protecting their life insurance proceeds from the claims of their husbands' creditors. These reforms also marked a step toward separate contract and property rights for married women during the antebellum period, a time of transition in the law of marital status and in the law of contract.

The conflict introduced in the insurance setting between coverture and a more egalitarian contractual model raised fundamental issues fiercely contested in the legal and political debates of the period. Significantly, before the Civil War, debates regarding legal transitions in the law of contract,<sup>17</sup> fueled by struggles over slavery, led to a new emphasis on the distinction between home and the marketplace. Mainstream abolitionist theorists challenged slavery and at the same time legitimized free labor contracts by drawing a sharp new distinction between the freedom and equality of contracting parties in the marketplace and the status relations and dependencies of the home.<sup>18</sup> Women's rights theorists within the abolitionist movement argued instead for the equality of the marriage contract, contrasting the goal of equality or self-ownership in marriage with bondage or other dependency relationships.<sup>19</sup>

From a common law perspective, the recognition of separate contract rights for married women in commercial insurance markets presented the question of how the freedom and equality of contracting parties in the marketplace could be reconciled with the legally established dependency relationships of the home. Because the early insurance-related statutory exceptions to coverture left the law of marital status otherwise largely intact, they also introduced the economic problem of how to value the lives of wives apart from their husbands when the law generally enforced women's legal and economic dependency. Shortly after these statutory changes, a leading private insurance company introduced "modernized" actuarial risk categories that defined and quantified "natural" differences between men and women.

The contract pricing distinctions adopted in the nineteenth century by private commercial life insurance companies, I argue, resolved the conflict

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16. *Id.* at 349, 356; *see also* MURPHY, *supra* note 12, at 137 (noting that the "nominal value of commodities, land, and other assets fell by 40% under the deflationary pressures" of the panic of 1837 and depression of 1839-43); *see generally* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 32-41 (2001) (describing the financial panic of 1837 and the economic depression of 1839 as the "most important proximate causes" of business failure for bankrupts on federal court dockets under the short-lived federal Bankruptcy Act of 1841).

17. *See generally, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 186-88, 207-10 (1977) (describing the transition from paternalism in employment relationships to a contractarian framework).

18. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 175-81 (1998).

19. *Id.* at 184; *see also* discussion *infra* Part II.C.

posed by the statutory exceptions to coverture by translating traditional marital status hierarchies and dependencies into new marketplace terms. The development of mortality tables and rates categorized by gender reflected perceived “natural” differences between the sexes, in which women were viewed as inferior, as physically and economically dependent on men, and as confined by nature to maternal and domestic roles.

This account of legal and ideological influences on nineteenth century actuarial practices illuminates the social meaning<sup>20</sup> of gender-differentiated pricing as both analogous to and distinct from that of the race-differentiated pricing practices of life insurance companies from Reconstruction to the beginning of the modern Civil Rights Era.<sup>21</sup> Compared to the history of race-based insurance practices, however, the historical roots of gender-based insurance pricing categories have remained largely unexamined.<sup>22</sup> Although gender-based pricing classifications by modern private commercial insurance companies have attracted critical commentary by legal scholars for many decades, little attention has been paid to their historical origins.<sup>23</sup>

Such an examination, although long overdue, benefits from the rich scholarship of the last several decades on nineteenth-century legal history and nineteenth-century views of gender as well as new perspectives on the dynamics of legal change. Legal historians have shown in other contexts<sup>24</sup> how status relationships threatened by political activism and legislative reform may be reinforced and modernized through modification or reformulation of legal doctrine. This scholarship, as well as work tracing the modernization of marital status law more generally,<sup>25</sup> provides valuable context for and insight into the original meaning of gender-distinct insurance pricing.

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20. See Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053, 1067-69, 1073 (1986). In her influential essay, Scott proposed a core definition of gender that rested on an integral connection between two propositions: “gender is a constitutive element of social relationships based on perceived differences between the sexes and gender is a primary way of signifying relationships of power.” *Id.* at 1067. Under Scott’s formulation, gender as a constitutive element of social relationships involves interrelated elements of culturally available symbols and normative concepts that set forth interpretations of the meanings of symbols, and is constructed through the polity and the economy as well as through kinship and subjective psychological identity. *Id.* at 1067-69.

21. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 316 (1944) (describing race-based insurance practices).

22. A notable recent exception includes MURPHY, *supra* note 12.

23. *But see* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 35-62 (2010) (examining the historical use of race and gender by courts as a valuation factor in the computation of tort damages).

24. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

25. See, e.g., HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2002); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 117-91 (1991); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

Like the now-rejected race-based life insurance pricing practices of the past, gender-distinct pricing developed as a result of mortality classifications defined by the cultural meaning of perceived natural or biological difference.<sup>26</sup> The use of mortality categories defined by race and gender and other developments in actuarial methodology revealed mortality trends that companies took into account in various ways to ensure profitability. Unlike explicitly race-based pricing, which was discontinued in the modern Civil Rights Era despite continuing race-correlated mortality differentials,<sup>27</sup> gender-distinct pricing remains a common commercial practice. In the 1970s and 1980s, such gender-based distinctions were invalidated under Title VII of the Civil Rights Act of 1964 for employment-related insurance and retirement benefits,<sup>28</sup> leaving a discontinuity between insurance and annuity pricing practices in the employment setting compared to private insurance obtained outside of the employment setting.<sup>29</sup>

The historical roots of a numerical category, as Patricia Cline Cohen has argued, reveal how the “concerns of the moment led to the reformulation, along numerical lines, of a subject,” about which “people were once content to be imprecise[.]”<sup>30</sup> For after a “particular form of enumeration has become accepted, familiar, and established, it is harder to read its meaning than at the time of its origin.”<sup>31</sup> The origins of gender-distinct life insurance and annuity rates thus provide important context for understanding their continued and

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26. See, e.g., Paul Finkelman, *Introduction, On Reading and Understanding Scientific Racism: A Brief Introduction to the Work and World of Frederick L. Hoffman*, in FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (Publ'ns Am. Econ. Ass'n, The Lawbook Exchange, Ltd. 2004) (1896) (describing the racial views of Hoffman and others at the time Hoffman of the Prudential Insurance Company developed his influential race-based mortality classifications).

27. Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 NW. J. L. & SOC. POL'Y 360, 379-83 (2009).

28. See, e.g., *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

29. In the United States, no federal statute prohibits gender-distinct pricing of life insurance or annuities provided outside of the employment context; only Montana prohibits gender-distinct life insurance and annuity rates or benefits as a matter of state law. MONT. CODE ANN. §49-2-309 (2010). In a significant recent development in Europe, in March 2011 the Court of Justice of the European Union ruled that different insurance rates or benefits for men and women constitutes sex discrimination incompatible with the European Union's Charter of Fundamental Rights. Member states are not permitted to deviate from that principle in their national legislation, as of December 21, 2012. Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v. Council*, 2011 E.C.R. I-0000. At the time of the ruling all twenty-seven member states permitted gender-distinct rates for life insurance and annuities.

30. COHEN, *supra* note 1, at 207.

31. *Id.* The five censuses preceding the census of 1840, for example, “had gradually departed from the Constitution's bare requirement to count the total population, first by creating, then by progressively refining, categories based on age, sex, and color.” *Id.* at 176-77. See also MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 4 (1988) (observing that census statisticians, sometimes in consultation with and sometimes in opposition to political leaders, have “determined the categories and classifications used to interpret population change” and have “created and shaped the very concepts we use to understand social change.”).

expanded use<sup>32</sup> in private commercial life insurance markets<sup>33</sup> by revealing the cultural work performed by such practices as they evolved over time.

When differentiated by gender, insurance contract pricing reflected the categorization of women's lives as providing a lesser amount of financial security, or as being of lesser economic value when considered apart from their husbands. Those pricing differentials thus translated into modernized contractual form the gendered patterns of household status and dependency previously enforced by coverture. When not differentiated by gender, insurance contract pricing reflected the status of men under coverture as "providers," who during life were legally obligated to support their dependent wives and children. Thus, men's lives tended to be used as a "unisexual" measuring standard for life insurance products that provided benefits to dependents at the family breadwinner's death.

Although mortality trends<sup>34</sup> and advances in actuarial and statistical methodology<sup>35</sup> provide necessary perspective for this story, they fail to provide a full explanation for *variation* in the use of race- and gender-based mortality classifications in insurance markets during the nineteenth and early twentieth centuries. Both before and after the Civil War, I argue, the pattern of pricing adopted by the life insurance industry in various markets for insurance reflected elite and middle-class anxieties about gender relations amid industrialization and the end of slavery; in addition, the coverage restrictions and pricing policies adopted by the insurance industry reinforced the underlying ideologies that gave rise to those anxieties.

The discussion of those early insurance pricing practices proceeds as follows. Part II describes the antebellum legal reforms in marital status law that immediately preceded the first use of gender-differentiated rates, examines the actuarial developments leading to their use for life annuities but not for life insurance, and traces the influence of legal and social changes in both Great Britain and in America on the adoption of gender-distinct rates for life annuities. Part III, drawing from and building on the work of insurance historians, summarizes evolving practices in various life insurance markets in

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32. See *infra* Part IV.

33. Recently, government policymakers have been considering the expanded use of commercial life annuities to supplement social security and employer-provided retirement plans. See, e.g., Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed. Reg. 5253 (Feb. 2, 2010).

34. See generally, e.g., IRVINE LOUDON, DEATH IN CHILDBIRTH: AN INTERNATIONAL STUDY OF MATERNAL CARE AND MATERNAL MORTALITY 1800-1950, at 25, 365-95 (1992) (summarizing problems with measurement of mortality in the United States due to the incompleteness of pre-1933 vital statistics of birth and death registration).

35. See, e.g., ALAIN DESROSIERES, THE POLITICS OF LARGE NUMBERS: A HISTORY OF STATISTICAL REASONING 67-146 (1998); HORWITZ, *supra* note 17, at 226-37. As Drew Gilpin Faust has pointed out, in the decades preceding the Civil War, Americans began to view numbers as a "tool of mastery over both nature and society." DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE CIVIL WAR 251 (2008).

America from after the Civil War up to the ratification of the Nineteenth Amendment. It shows, through comparison of risk classifications and the ways insurance companies responded to mortality differentials within those classifications, that the development of gender-distinct pricing cannot be explained entirely through either economic rationality or the profit motive. It then discusses how those practices mirrored and underscored important legal and social changes after the Civil War. This Article ends with questions for further investigation by looking forward to the second wave of women's rights reforms in the modern Civil Rights Era.

I will assume for purposes of the following discussion that, despite profound deficiencies in the mortality data available to American insurance companies in the nineteenth century, insurers sincerely believed that mortality rate differentials existed, to a greater or lesser extent, among groups classified by race, sex, occupation, or geography.<sup>36</sup> Researchers have long debated the reason for these mortality differentials, and explanations for the use of these categories, particularly of race and gender, have shifted as scientifically and socially acceptable views concerning the use of those classifications have changed over time.<sup>37</sup> Nevertheless, determining when greater precision in enumeration was deemed appropriate and when imprecision was more readily tolerated reveals inconsistencies that cannot be completely explained by developments in actuarial practice. Instead, I argue that inconsistencies in practice can be found along the fault lines created by shifts in the legal and social foundation of gender relations during that time.

## II. THE ANTEBELLUM ORIGINS OF GENDER-DISTINCT INSURANCE RATES, 1820-1860

This Part provides historical background for my central argument, introduced here and developed in the next Part, that life insurance companies resolved the highly contested theoretical and practical conflict between equality of contract for married women and the traditional dependencies of the home through the selective adoption of gender-differentiated contract rates. The discussion below sets the stage for that argument by describing the economic impetus for the enactment of insurance-related exceptions to coverture, the role played by the common law of coverture in enforcing the traditional dependency relationships of the home, and the fundamental conflict with the status of

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36. I leave to demographers and insurance historians a determination of whether nineteenth-century insurance classifications represented an accurate generalization of statistical groupings. For the argument that the anti-discrimination principle also operates to prohibit gender-based generalizations that appear to rest on a sound statistical foundation, see FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 151-54 (2003).

37. See, e.g., Lea Brilmayer et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 538-58 (1980).

coverture created by the recognition of separate contract rights for married women.

Next, this Part uses a case study to introduce the insurance pricing patterns that became more established in the latter half of the nineteenth century. In 1845, a year after Massachusetts's enactment of insurance-related exceptions to coverture, the Massachusetts Hospital Life Insurance Company (referred to hereafter as "MHL") adopted gender-distinct mortality tables and rates for its life annuity business. MHL's life annuity contracts were used primarily to fund lifetime financial support for elderly dependents and to supplement or replace women's marital rights of support or dower. MHL also retained gender-merged tables and unisex rates for its life insurance business. At that time, MHL's life insurance contracts were used primarily to protect wives and children from the death of the family breadwinner—a more traditional pattern of dependency. The newly adopted lifetime annuity pricing practices thus emphasized gender difference in those contracts which posed the most threat to traditional marital or family dependency relationships.

Finally, this Part describes the broader legal and social changes at issue during the antebellum period that influenced those involved in developing these insurance pricing practices. First-wave women's rights activism sharpened the fundamental theoretical conflict at issue in the insurance context between contract rights and dependency, and established the centrality of that conflict to the wider struggles within abolitionism and the movement for women's rights. These insurance pricing policies thus both reflected and reinforced the dominant gender ideologies of the time.

#### *A. Insurance-Related Exceptions to Coverture*

During the antebellum period, life insurance became more viable as a form of economic security for families following certain statutory changes to the law of marital status. In the 1840s, during a period of financial stress for many families, state legislatures began removing the legal obstacles to insurance coverage posed by coverture. However, because these newly developed statutory exceptions to the common law fiction of "marital unity" permitted married women to enter into insurance contracts separate and apart from their husbands, they also created a fundamental conflict with the legal status regime of coverture. Under coverture, as described in greater detail below, husbands served as legal representatives of their wives and "masters" of their households.

In the first half of the nineteenth century—during a period of rapid industrialization, increased reliance on wage labor, and vulnerability to financial crises<sup>38</sup>—the restrictive legal environment for married women and the

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38. See, e.g., ALBORN, *supra* note 12, at 4 (describing a similar growth of the life insurance business in Great Britain); MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910*, at 6-7

relatively minor scale of the American life insurance business impeded adequate economic security for American families.<sup>39</sup> The early insurance-related statutory changes, led by legislation adopted in New York<sup>40</sup> following the financial panic of 1837 and a severe economic depression that began in 1839,<sup>41</sup> removed legal obstacles posed by coverture to the successful marketing<sup>42</sup> of life insurance as a means of providing families with greater economic security.<sup>43</sup>

Although economic conditions provided the impetus for these insurance-related statutory modifications to the law of marital status, woman's rights activists in New York and other states soon demanded expanded property and contract rights for married women. These insurance-related legislative changes<sup>44</sup> thus marked an early step toward more comprehensive married women's property acts<sup>45</sup> that granted married women broader rights to own property, and later to enter into contracts other than life insurance contracts. Over time, the theoretical conflict between equality of contract for married women and the status of coverture expanded into a broader range of issues both at home and in the marketplace.

Coverture prevented married women from entering into insurance or other contracts on their own behalf. Under coverture, as explained by Blackstone, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."<sup>46</sup> The common law fiction of "marital unity"<sup>47</sup> thus impaired a

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(1963) (observing that American life insurance "emerged as a full-fledged enterprise" in the 1840s, and connecting the growth of mutual insurance companies to the financial panic of 1837 and the ensuing depression); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 16-77* (2003) (examining early twentieth-century changes in the mass marketing of private insurance); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 5* (2004) (comparing the Civil War's legacy of "questions about the meaning of free labor and about distinctions between a free labor society and a slave society," with the late nineteenth century industrial accident crisis, which "introduced to the American legal system new ideas and institutions organized around risk, security, and the actuarial categories of insurance").

39. MURPHY, *supra* note 12, at 138-42.

40. 1840 N.Y. Laws 59.

41. MURPHY, *supra* note 12, at 127, 137.

42. See generally, e.g., VIVIANA A. ROTMAN ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 91-117* (1979) (describing changes in the marketing of life insurance during the nineteenth century).

43. Basch, *supra* note 15, at 356; see also I R. CARLYLE BULEY, *THE AMERICAN LIFE CONVENTION, 1906-1952: A STUDY IN THE HISTORY OF LIFE INSURANCE 50* (1953).

44. MURPHY, *supra* note 12, at 142-5; see also Basch, *supra* note 15, at 349.

45. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 137-200* (1982) (discussing enactment of New York's married women's property law in 1848). Other states adopted married women's property acts both before and after 1848. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *Geo. L.J.* 1359, 1397-1412 (1983).

46. WILLIAM BLACKSTONE, *ABRIDGEMENT OF BLACKSTONE'S COMMENTARIES 75* (William C. Sprague ed., 1895) (1892).

47. See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY 550-57* (3d ed. 1990).

married woman's separate capacity to contract, to convey or devise property, and to file suit.<sup>48</sup> Under the law of agency, a wife might be permitted to enter into certain types of contracts as her husband's agent.<sup>49</sup> However, a married woman in her own capacity could not purchase life insurance on her own or her husband's life.

Under the common law, all of a married woman's personal property and the management of her real property went to her husband.<sup>50</sup> Unless her family could provide property in an equitable separate estate or trust,<sup>51</sup> a woman entered marriage as a dependent, without property or the legal right to earnings through her own labor.<sup>52</sup> Well-to-do families might reserve in a marriage settlement a fixed sum to be administered by trustees during the marriage. When invested in an annuity, such a sum generated a stream of income for life or for a term of years, providing a source of income security for the wife during and after the marriage.<sup>53</sup> For many families of lesser wealth or those living in states without courts of equity, however, such arrangements would have been out of reach; instead, under coverture wives became economically and legally dependent on their husbands. The husband in turn had the responsibility to represent and support his wife.<sup>54</sup> Although a husband could take out a life insurance policy on his own life and designate his wife or children as the beneficiaries,<sup>55</sup> the policy was considered part of the husband's estate and thus could be reached by the husband's creditors.

Unmarried women, by contrast, were treated under the common law category of *feme sole* rather than *feme covert*, and as such, were "unconstrained by coverture's strictures" and inhabited a space largely "outside of the

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48. BASCH, *supra* note 45, at 17; *see also* HARTOG, *supra* note 25, at 93-135.

49. JOAN R. GUNDERSON, *TO BE USEFUL TO THE WORLD: WOMEN IN REVOLUTIONARY AMERICA, 1740-1790*, at 87-88 (2d ed. 2006); Joanne Bailey, *Favoured or Oppressed? Married Women, Property and "Coverture" in England, 1660-1800*, 17 *CONTINUITY & CHANGE* 351, 355-61 (2002).

50. Chused explains that "[w]here equity courts existed, separate equitable estates could be created for married women's property, but the protections to be provided a wife by the equitable forum had to be specifically delineated in the document creating the estate." Chused, *supra* note 45, at 1361.

51. *See* MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 83 (1986); Chused, *supra* note 45, at 1361.

52. *See, e.g.*, JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* 142-63 (1990); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor 1850-1880*, 103 *YALE L.J.* 1073, 1082-85 (1994).

53. In England, for example, although such arrangements were used more frequently by the aristocracy, they began to be used as an alternative to life insurance by the propertied middle classes beginning in the nineteenth century. *See* ALBORN, *supra* note 12, at 140.

54. HARTOG, *supra* note 25, at 136-66.

55. Legal constraints also generally prevented a husband from purchasing insurance on the life of his wife or child. The legal or contractual requirement of an insurable interest necessitated adequate evidence of a specific monetary interest in the insured. MURPHY, *supra* note 12, at 141. Affection alone, evidenced by the relationship of husband and wife or parent and child, generally did not suffice. Some financial interest such as an interest in services or property depending on the life of the wife or child was required. *See, e.g.*, Edwin W. Patterson, *Insurable Interest in Life*, 18 *COLUM. L. REV.* 381, 407-09 (1918).

regulatory framework of marriage law.”<sup>56</sup> They could enter into contracts, sue and be sued, own property, and earn and keep their own income and the rents from their real property. A married woman could be treated as a *feme sole* under very limited circumstances: following an annulment or separation agreement; abandonment by her husband; or in certain jurisdictions, with her husband’s consent, as a *feme sole* trader engaged in separate business activities.<sup>57</sup>

Although widows assumed the status of *feme sole* upon the death of their husbands, the law preserved the reach of coverture through dower, which generally provided widows a life estate in the amount of one third of their husbands’ real property. Dower defined the widow as “less than a full contractual agent” by restricting her ability “to contract, to own, manage and dispose of property subject to dower . . . .”<sup>58</sup> State statutory restrictions on widows’ common law dower share and the failure of husbands to provide for their wives by will frequently left widows dependent on the good will of other family members or on the charity of others.<sup>59</sup>

The common law of coverture and dower thus enforced the economic dependency of married women and of widows. However, at the same time, it also posed an obstacle to the use of life insurance to protect widows and children from destitution, particularly when creditors asserted claims over amounts paid at the family breadwinner’s death. During a time of financial crisis and widespread business insolvencies in New York and other commercial centers, providing targeted relief could remove the obstacle of coverture in that limited context, assist private enterprise, and potentially relieve localities from added burdens of poor relief.

The insurance-related exception to coverture enacted by the New York State Legislature in 1840 allowed a married woman to contract for insurance on her husband’s life and protected insurance proceeds from her husband’s creditors.<sup>60</sup> The New York law permitted a woman to enter into a contract of insurance on the life of her husband “by herself and in her name, or in the name of any third person, with his assent, as her trustee.”<sup>61</sup> It also provided that insurance, up to a capped amount, would be “free from the claims of the representatives of her husband, or of any of his creditors.”<sup>62</sup> In the event of the

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56. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1655 (2003).

57. SALMON, *supra* note 51, at 44-53, 58-59.

58. Felice Batlan, *Engendering Legal History*, 30 L. & SOC. INQUIRY 823, 833 (2005).

59. SALMON, *supra* note 51, at 141-84; *see also* HOFF, *supra* note 25, at 82-90; HORWITZ, *supra* note 17, at 56-58 (discussing judicial decisions undermining the right of dower).

60. An Act in respect to insurances for lives for the benefit of married women, 1840 N.Y. Laws 59; ELIZABETH BOWLES WARBASE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861*, at 221 (1987).

61. 1840 N.Y. Laws 59 at §1.

62. *Id.* This exemption only applied, however, to policies with an annual premium of less than three hundred dollars. In 1858, the statute was amended to provide that “such exemption shall not apply where

wife dying before her husband, the policy reverted to the children.<sup>63</sup> The New York approach, enacted in acknowledgement of the financial plight and dependence of widows and orphans in an increasingly complex and unstable economy, was actively supported by the life insurance industry<sup>64</sup> and proved influential in other states.

Massachusetts enacted a similar statute in 1844, which applied to any policy “on the life of any person” for the “benefit of a married woman,” whether “effected by herself or her husband, or by any other person on her behalf,” and provided that it “shall enure to her separate use and benefit and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives.”<sup>65</sup> The Massachusetts statute thus differed from New York’s law by providing explicit protection from husbands’ claims as well as uncapped protection from the claims of creditors. The Massachusetts version was drafted by the founding president of the New England Mutual Life Insurance Company, according to a company history, after he received an inquiry from one of the company’s directors about the status of policies on the lives of his daughters if any of them were to marry.<sup>66</sup> A New England Mutual solicitation pamphlet, published in 1844, included a copy of the newly enacted law as well as copies of the company’s charter, by-laws, and a detailed explanation of the principles and practices of a mutual company.<sup>67</sup> Other states followed with similar insurance-related statutes during the next several decades.<sup>68</sup>

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the amount of premium annually *paid out of the funds and property of the husband* shall exceed three hundred dollars.” 1858 N.Y. Laws 81 at §1 (emphasis added).

63. 1840 N.Y. Laws ch. 80, N.Y. Sess. Laws 59 at §2.

64. BASCH, *supra* note 45, at 137 (noting that business journals greeted the insurance legislation “with enthusiasm and found no threat in it to the institution of marriage.”); MURPHY, *supra* note 12, at 138 (observing that the New York Life Insurance and Trust Company, the largest life underwriter in 1840, “spearheaded” the legislative campaign). Within weeks after the enactment of the New York law in April 1840, a pattern of wives being listed as applicants for life insurance on the lives of their husbands began to appear in company records. See New York Life Insurance and Trust Company Collection, Series EB-1, Register of Life Insurance, 1830-1878, (policy nos. 1811, 1931, 1957, 2227, 2298), Baker Library Historical Collections, Harvard Business School.

65. MASS. GEN. LAWS ch. 82, §1 (1844). However, the statute provided some limited protections for creditors in cases where policy premiums were paid “by any person, with intent to defraud his creditors.” *Id.* at § 3. In subsequent years, the statute was modified to alter the scope of that protection. MASS GEN. LAWS ch. 58, § 62 (1860); MASS. GEN. LAWS ch. 197 (1864).

66. ABRAM T. COLLIER, A CAPITAL SHIP: NEW ENGLAND LIFE, A HISTORY OF AMERICA’S FIRST CHARTERED MUTUAL LIFE INSURANCE COMPANY 1835-1985, at 38 (1985).

67. *Id.* at 33.

68. See MURPHY, *supra* note 12, at 145 (recounting the adoption of such statutes by Maryland in 1841, Massachusetts in 1844, Tennessee in 1846, and New Jersey in 1851); see also, e.g., 1895 Minn. Laws 429; 1850 N.H. Laws 950; 1868 Pa. Laws 136; 1851 Wis. Sess. Laws 136. In those states without a statute, new companies sometimes had the provisions incorporated into their charter, and such provisions were upheld by state courts. MURPHY, *supra* note 12, at 145 (listing examples from 1846 through 1868).

After the adoption of insurance-related exceptions to coverture and other statutory changes aimed at protecting widows and children from creditors,<sup>69</sup> a broader movement toward married women's property rights developed, with the support of woman's rights activists such as Elizabeth Cady Stanton.<sup>70</sup> That activism led to the adoption in New York, for example, of the Married Women's Property Acts of 1848<sup>71</sup> and 1860.<sup>72</sup> The enactments in New York and other states, despite narrowing interpretations by the courts,<sup>73</sup> gradually led to an expansion of married women's separate contract and property rights during the latter half of the nineteenth and beginning of the twentieth century.<sup>74</sup>

Along with other factors, including increased marketing efforts by newly formed mutual life insurance companies,<sup>75</sup> these legal reforms facilitated the dramatic growth of the life insurance business over the next several decades.<sup>76</sup> The growth of mutual life insurance companies provided middle class men with greater access to financial security for their surviving dependents in the event of their death. The New England Mutual Life Insurance Company, in its second annual report of 1845, observed:

A very considerable number of the policies are for security to creditors; some to protect the insured against the loss of an interest in property depending upon a life; but much the greatest number to make provision for the families of the parties insured, or persons dependent, or having strong claims upon them.<sup>77</sup>

The report then explained the benefits of policies for the whole life of the insured, rather than policies for a term of years, for family provision.<sup>78</sup>

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69. Chused, *supra* note 50, at 1361 (describing some of these statutory changes).

70. BASCH, *supra* note 45, at 167-72.

71. 1848 N.Y. Laws 307.

72. 1860 N.Y. Laws 90.

73. Siegel, *supra* note 25, at 2131, 2141 (describing the restrictive judicial interpretation of married women's "earnings statutes," which permitted married women "to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity to contract and file suit").

74. See Chused, *supra* note 50, at 1384, 1398 (discussing nineteenth-century expansions of married women's contract and property rights).

75. MURPHY, *supra* note 12, at 147-48 (describing marketing efforts and increased policies taken out by wives on the lives of their husbands).

76. See *id.* at 5; see also KELLER, *supra* note 38, at 6-7.

77. *Second Report of the Directors at the Annual Meeting of the Members, Dec. 1, 1845*, at 7-10, in ANNUAL REPORTS OF THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, 1844-1862 (1863). The company reported that the largest number of life insurance policies issued since its founding was to merchants, traders, brokers, mechanics, and tradesmen. It had also issued policies to clerks, cashiers, students, lawyers, teachers, manufacturers, farmers, clergymen, physicians, and some "females." *Id.*

78. *Id.* at 11.

In an advertising campaign in 1855, the Mutual Life Insurance Company of New York—a future industry giant—directed an appeal specifically toward women in its *Consideration on Life Insurance by a Lady*:

It is the wife, the mother, the daughter, and the sister, who need to be protected when their natural protector is taken away. It is to these Life Insurance makes its appeal; and for these may not man be taught to practise prudence, sobriety, and economy, and become the possessor of a life policy?<sup>79</sup>

At the same time, The Mutual Life Insurance Company of New York advertised its life insurance products to married men, as follows in *The Advantage of Life Insurance*: “The pangs of separation are greatly increased by the bitter reflection, that a beloved wife or children are about to lose their natural protector and friend, and be left, often worse than penniless, to the cold charities of the world.”<sup>80</sup> The early modification of marital status law thus facilitated financial protection for families in an economy increasingly dependent upon wage labor, but it also created a fundamental theoretical tension with the common law status of coverture by recognizing married women’s separate capacity to enter into life insurance contracts.

#### *B. From Gender-Merged to Gender-Distinct Rates for Life Annuities*

Shortly after the adoption of insurance-related exceptions to coverture, American life insurance companies began to adopt gender-distinct rates or benefits for life annuities. Before that time, insurance companies used gender-merged mortality tables and unisex pricing for both annuities and life insurance.<sup>81</sup> Uncovering how and why that shift occurred reveals a confluence of legal, financial, social, and political factors that contributed to the adoption of gender-distinct rates or benefits for life annuities. The statutory innovations discussed in the previous section set the stage for married women to contract for insurance in their own capacity without the need for special trust arrangements or the establishment of equitable separate estates. The financial issues discussed in this section created a pressing need for upward adjustments in life annuity rates. The adoption of higher gender-distinct rates met that need and, as discussed in the next section, also responded to legal, social, and political developments that were increasingly emphasizing differences between

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79. SHEPARD B. CLOUGH, A CENTURY OF AMERICAN LIFE INSURANCE: A HISTORY OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK 1843-1943, at 94 (1946).

80. *Id.*

81. MURPHY, *supra* note 12, at 14-42 (describing the mortality tables in use and the pricing practices of the major American life insurance companies operating during the years before the Civil War).

men and women. This shift in underlying assumptions about gender difference can also be found in changes in the actuarial explanations for the use of gender-merged and gender-distinct mortality tables.

Gender-merged mortality tables were utilized in the late eighteenth and early nineteenth centuries because of limitations in the available data as well as the judgment by a leading eighteenth century British actuarial expert, Dr. Richard Price, that mortality differences were based, at least in part, on geographic or environmental factors, and thus were not entirely “natural.”<sup>82</sup> After noting greater mortality among men and women in cities than among those in the countryside, for example, Price constructed a gender-merged, or combined, table from detailed gender-differentiated Swedish data to “exhibit more accurately than any other, the probabilities of living among the general mass of mankind, consisting of males and females taken collectively.”<sup>83</sup> The mortality table Price constructed from more limited British data, the Northampton table, was also gender-merged.<sup>84</sup>

Price’s Northampton table was widely used in Great Britain until well into the nineteenth century,<sup>85</sup> and was also influential in the United States. For example, the first commercial life insurance company established in America, chartered in 1812, based its early rates on the gender-merged Northampton table.<sup>86</sup> That company, the Pennsylvania Company for Insurances on Lives and Granting Annuities, issued both life insurance and annuities<sup>87</sup> and charged equal premiums for male and female covered lives of equal ages.<sup>88</sup> As discussed below, the Northampton table was also adopted by an early commercial life insurance business established in New England, the

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82. RICHARD PRICE, OBSERVATIONS ON REVERSIONARY PAYMENTS 140 (1783), *reprinted in* 2 HISTORY OF ACTUARIAL SCIENCE, *supra* note 12, at 39, 66 (commenting on Swedish national mortality data, which unlike some of the mortality data compiled in Great Britain, contained gender- and age-differentiated mortality rates).

83. *Id.* at 59-60 (explaining his method of combining male and female experience); *see also* 1 HISTORY OF ACTUARIAL SCIENCE, *supra* note 12, at 40 (noting, in comments of editors, that although Price’s method of combining male and female experience was “not entirely sound,” Price’s Swedish table was “well-received” and used into the early nineteenth century).

84. *See infra* note 116 (discussing the construction of Price’s Northampton table).

85. *See* ALBORN, *supra* note 12, at 107 (noting that the proportion of British life insurance offices using Price’s Northampton table “diminished from roughly half in 1826 to under 20 per cent fifteen years later”).

86. 1 R. CARLYLE BULEY, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 1893-1968, at 31; *see also* MURPHY, *supra* note 12, at 17 (noting that the Pennsylvania Company for Insurances on Lives and Granting Annuities constructed tables in 1814 based on American mortality records compiled by the Episcopal Church and the Philadelphia Board of Health but that it never adopted either of those tables and instead used the British Northampton tables to price its products).

87. BULEY, *supra* note 86.

88. *See, e.g.*, HARRISON S. MORRIS, A SKETCH OF THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES 101-02, 106, 113, 121-28 (1896) (including life insurance and annuity premium rate tables, referred to in a document dated 1814); J. OWEN STALSON, MARKETING LIFE INSURANCE: ITS HISTORY IN AMERICA 56, 58-59 (1942) (noting that in 1814, the company had thirty life insurance and annuity policies in force, of which ten covered women and three covered female children).

Massachusetts Hospital Life Insurance Company. This company, which later became one of the first American companies to adopt gender-distinct mortality tables and rates for life annuities, was chartered in 1818 under a profit-sharing arrangement with Massachusetts General Hospital, and began operations in 1823.<sup>89</sup>

MHL developed into one of the largest financial institutions in Boston in the nineteenth century, primarily through its trust deposits, and served as an important source of funds for New England's industrial growth.<sup>90</sup> Although the life insurance and life annuity division of the company remained relatively small in comparison to its trust business,<sup>91</sup> the primary concern of the company as a whole was with the economic protection of dependent members of society, including women, children, and the elderly.<sup>92</sup>

MHL's life annuity contract, for example, permitted "[a]n aged person whose income is not sufficient for his maintenance" to "exchange his capital for a life annuity, and thus provide for an expenditure, much exceeding the simple interest of his money, without fear of being reduced to poverty if he should live to an extreme old age."<sup>93</sup> It was designed so that a "large interest is allowed during the life of the party, and at his death the capital becomes the property of the Company."<sup>94</sup> The contracts could be written with an inalienability clause protecting the individual in any payments received under a contract from the claims of creditors. With a life annuity, the company also explained, "a wife can obtain an equivalent for the surrender of her right of dower, or the assignees of a bankrupt's estate can extinguish a claim for dower."<sup>95</sup> By contrast, the company explained, life insurance permits a "young man of small property, by an annual appropriation of a part of the proceeds of his labour" to make insurance on his own life, and thus "secure to his family or friends the payment of a large sum in case of his death."<sup>96</sup>

For the life insurance and life annuity branch of the company's business, MHL's first actuary, Nathaniel Bowditch,<sup>97</sup> took as his guide on actuarial matters the experience of the Pennsylvania Company for Insurances on Lives

89. GERALD T. WHITE, *A HISTORY OF THE MASSACHUSETTS HOSPITAL LIFE INSURANCE COMPANY* 9, 19 (1955).

90. *Id.* at xiii (introductory comments by Henrietta M. Larson and Thomas R. Navin, editors of *Harvard Studies in Business History*).

91. *Id.* at 192-94.

92. *Id.* at 28.

93. PROPOSALS OF THE MASSACHUSETTS HOSPITAL LIFE INSURANCE COMPANY TO MAKE INSURANCE ON LIVES, TO GRANT ANNUITIES ON LIVES AND IN TRUST, AND ENDOWMENTS FOR CHILDREN, AUGUST 18, 1823 (under "Object of the Society"), Massachusetts Hospital Life Collection, Baker Library Historical Collections, Harvard Business School.

94. *Id.* (under "Annuities").

95. *Id.* (under "Object of the Society").

96. *Id.*

97. See RONALD STORY, *THE FORGING OF AN ARISTOCRACY, HARVARD AND THE BOSTON UPPER CLASS, 1800-1870*, at 45-47 (1980) (discussing Bowditch's background and experience); WHITE, *supra* note 89, at 63 (noting that Bowditch served as MHL's actuary until his death in 1838).

and Granting Annuities (referred to hereafter as “The Pennsylvania Company”).<sup>98</sup> Accordingly, Bowditch used Price’s Northampton gender-merged mortality table in setting rates for both life insurance and life annuities. From the beginning, however, MHL’s overall rates on life annuities were somewhat higher than those of The Pennsylvania Company although its life insurance rates were initially identical.<sup>99</sup> In 1829, Bowditch sent The Pennsylvania Company a copy of MHL’s book of rates,<sup>100</sup> reported that a committee had been formed to study the need for increased rates for annuities, and outlined a list of proposed revised rates which were not differentiated by gender.<sup>101</sup>

During the following decade, the influence of the gender-merged Carlisle table gradually superseded that of the Northampton table among American insurance companies. The Carlisle table, constructed in 1815 by Joshua Milne, was based on records from the English town of Carlisle from 1779 to 1787 that did not distinguish between sexes within its age distribution.<sup>102</sup> Significantly, however, the life expectancies of the Carlisle table were much longer than those of the Northampton table, prompting life insurance companies like the New York Life Insurance and Trust Company,<sup>103</sup> and later The Pennsylvania Company,<sup>104</sup> to offer lower, more competitive rates for life insurance.<sup>105</sup>

MHL, however, was much slower to act. Since life expectancies were longer under the Carlisle table compared to those under the Northampton table, retaining the outdated Northampton table without adjusting other assumptions

98. WHITE, *supra* note 89, at 29 nn.26-27.

99. *Id.* at 31.

100. Letter from N. Bowditch to T. Smiley, dated March 2, 1829, Massachusetts Hospital Life Insurance Company Collection, Case LA-1, at 186, outgoing letters copied into volumes, 1823-1834. Baker Library Historical Collections, Harvard Business School. Bowditch noted that “[w]e . . . have always supposed we granted the annuities at too low a rate, and I have so reported at our successive annual meetings. . . .”

101. *Id.*

102. Thus, it was not possible for Milne to use the data to determine death rates for the sexes separately, but only in combination with each other in a gender-merged mortality table. JOSHUA MILNE, A TREATISE ON THE VALUATION OF ANNUITIES AND ASSURANCES (1815), *reprinted in* 2 HISTORY OF ACTUARIAL SCIENCE, *supra* note 12, at 79, 98. Milne pointed out that this was “the less to be regretted, as the numbers, when kept distinct for each sex, would have been so small.” *Id.* at 98.

103. New York Life and Trust, which began business in the 1830s, adopted the Carlisle table in 1832, with thirty-five percent added for the “loading” of expenses, profits, and contingencies, allowing it to undercut The Pennsylvania Company at that time by as much as twenty percent. MURPHY, *supra* note 12, at 20 & 303 tbl. A.2 (comparing the life expectancies of various tables).

104. I BULEY, *supra* note 86, at 33; *see also* J.A. FOWLER, HISTORY OF INSURANCE IN PHILADELPHIA FOR TWO CENTURIES (1683-1882), at 654, 656 (1888).

105. MURPHY, *supra* note 12, at 17-22; *see also* W.A. Armstrong, *The Trend of Mortality in Carlisle Between the 1780s and the 1840s: A Demographic Contribution to the Standard of Living Debate*, 34 ECON. HIST. REV. 94, 99 (1981) (stating that the Carlisle table, which replaced the less reliable Northampton table, remained widely used by insurance societies until the 1870s).

used to compute its rates might increase its life insurance profits but also result in greater losses in its annuity business.<sup>106</sup>

In the 1840s, new, more sales-oriented mutual companies<sup>107</sup>—such as the New England Mutual Life Insurance Company,<sup>108</sup> whose directors overlapped with MHL's board of directors,<sup>109</sup>—began marketing life insurance more aggressively than the relatively staid companies that relied primarily on their general trust business. In this more competitive environment for life insurance, and at about the time New England Mutual was seeking an insurance-related statutory exception to coverture in Massachusetts, MHL sought additional outside advice on modifying its rates. That advice, as discussed in some detail below, led to the adoption of higher gender-distinct rates for its life annuity business and lower, gender-merged rates for its life insurance business.

In 1844, MHL commissioned Elizur Wright, a Yale graduate and former mathematics professor at Western Reserve College in Ohio, to gather information on English actuarial practices.<sup>110</sup> Wright, an impassioned abolitionist who served as secretary of the American Anti-Slavery Society and manager of its New York headquarters in the 1830s, had recently left the employ of abolitionist organizations to pursue other writing and business projects after breaking with various factions within the movement. Wright's views are discussed in greater detail in the next section of the article,<sup>111</sup> but his own summary of his situation suffices for now. Looking back at that time some years later, Wright wrote that having lost "popularity" and "consideration" in the Anti-Slavery Society, "I . . . was left in fact to cut my own fodder in my own way, looked upon by ecclesiastical people as an infidel, by political people as an ultra, and by the abolitionists, so called, as a renegade."<sup>112</sup>

MHL requested that Wright, while in Great Britain on other business, meet with Joshua Milne—the creator of the Carlisle Table—and others, in an effort to establish a more satisfactory rate structure for the company's life insurance

106. WHITE, *supra* note 89, at 31 (noting that during MHL's first fifteen years of operations, its losses in its annuity business were more than offset by its total profit during that time in its life insurance business).

107. KELLER, *supra* note 20, at 6-7.

108. WHITE, *supra* note 89, at 82. *See also* COLLIER, *supra* note 66, at 7, 19-21.

109. WHITE, *supra* note 89, at 84, 66 (noting that five of the eleven directors of the New England Mutual Life Insurance Company were also employees or directors of the Massachusetts Hospital Life Insurance Company during the mid-1840s, including Francis C. Lowell who served as actuary of MHL from 1845 to 1854, following the resignation of Joseph Tilden in February 1845). *See also* COLLIER, *supra* note 66, at 21, 44.

110. WHITE, *supra* note 89, at 83; *see also* LAWRENCE B. GOODHEART, ABOLITIONIST, ACTUARY, ATHEIST: ELIZUR WRIGHT AND THE REFORM IMPULSE 16-23, 34 (1990).

111. *See infra* Part II.C.

112. GOODHEART, *supra* note 110, at 113-14, 114 n.32 (quoting from Wright's autobiographical defense of his role in the state regulation of insurance in *A Curiosity of Law* at 16, published in 1866).

and annuity businesses.<sup>113</sup> In addition to Milne, Wright met with the actuary of the National Debt of Great Britain, John Finlaison.<sup>114</sup> The British government's National Debt Office had "adopted the Northampton tables in 1808 . . . as the basis for the sale of [British government] life annuities" to redeem the public debt.<sup>115</sup> The British government, like MHL, had continued to use that table despite the availability of the Carlisle table during the next decade and despite growing evidence of problems with the Northampton table, including revenue losses on the sale of annuities.<sup>116</sup>

In the late 1820s, after compiling extensive information on the mortality experience of government annuitants, Finlaison advised Parliament that significant losses were being sustained each week on the sale of life annuities calculated on the basis of the outdated and flawed Northampton table.<sup>117</sup> Finlaison's study showed that average life expectancy had increased over the previous century.<sup>118</sup> In addition, Finlaison observed that "except under the age of 12 and above the age of 85 . . . there is at every other period of life a remarkable and decided advantage in favour of the female."<sup>119</sup> He noted that the rate of mortality had declined "on each sex equally, but not by equal gradations, nor equally at all periods of life."<sup>120</sup> He observed that for males, the rate of mortality "seems in early and middling life to have remained for a long

113. *Id.* at 144. MHL's annuity business at that time was "subject to violent fluctuations in profit and loss, owing to the small number of annuitants." WHITE, *supra* note 89, at 85; *see also* WHITE, *supra* note 89, at 31.

114. *Id.* at 85. Finlaison, who had earlier established Admiralty pension funds for widows and orphans of the British navy, was appointed Actuary of the National Debt Office, a position created in 1821. DENNETT, *supra* note 12, at 4. Finlaison later served as the first President of the Institute of Actuaries of Great Britain and Ireland. *Id.*

115. DENNETT, *supra* note 12, at 2-3 (describing the recommendation by William Morgan, Richard Price's nephew who served as actuary for the Society for Equitable Assurance of Lives and Survivorships from 1774 to 1830, that the National Debt Office adopt Price's Northampton tables for its life annuities); *see also* MAURICE EDWARD OGBORN, *EQUITABLE ASSURANCES: THE STORY OF LIFE ASSURANCE IN THE EXPERIENCE OF THE EQUITABLE LIFE INSURANCE SOCIETY, 1762-1962*, at 107-10 (1962).

116. The data used in the Northampton Table came from death records for a parish in Northampton, England, gathered between 1735 and 1780. At the time Dr. Price constructed the table, he had been under the "misapprehension that the population of this parish was stationary, judging by the number of infantile baptisms," but at the time the data had been recorded, "there were a large number of Baptists in Northampton, who repudiated infantile baptism." B. Benjamin et al., *Actuarial Methods of Mortality Analysis: Adaptation to Changes in the Age and Cause Pattern*, 159 *PROC. ROYAL SOC'Y LONDON, SERIES B, BIOLOGICAL SCIS.* 38, 38-39 (1963). Because of this underestimation of life expectancy based on ratios of the dead to the living, the government charged lower than necessary premiums for payments made over lives, and the government steadily lost money over time. OGBORN, *supra* note 115, at 197, 199. On the other hand, use of the Northampton Table resulted in large profits by companies engaged in selling life insurance policies. *See* 2 J.L. ANDERSON & J.B. DOW, *ACTUARIAL STATISTICS, CONSTRUCTION OF MORTALITY AND OTHER TABLES* 158-59 (1952).

117. JOHN FINLAISON, *LIFE ANNUITIES—REPORT OF JOHN FINLAISON, ACTUARY OF THE NATIONAL DEBT, ON THE EVIDENCE AND ELEMENTARY FACTS ON WHICH THE TABLES OF LIFE ANNUITIES ARE FOUNDED* (HOUSE OF COMMONS 1829), *reprinted in* 2 *HISTORY OF ACTUARIAL SCIENCE*, *supra* note 12, at 219-85.

118. *Id.* at 232.

119. *Id.* at 234.

120. *Id.* at 232.

time as it stood about fifty years ago,” but that for females “it has, during the same time, visibly and progressively diminished to this day, by slight but still sensible gradations.”<sup>121</sup> Finlaison also noted that the “gradual diminution of mortality in maturer life, in middle and old age especially, presents one practical consequence of the greatest importance in financial calculations.”<sup>122</sup> To stem the government’s revenue losses from the flawed projections of the Northampton table and from generally improved mortality,<sup>123</sup> Finlaison recommended that life annuity premium rates be adjusted upward.

Finlaison constructed separate male and female mortality tables and recommended gender-distinct rates, with higher rates for female annuitants.<sup>124</sup> In 1829, the British government adopted Finlaison’s recommendations, and for the first time, adopted higher premium charges for women than men in the sale of government annuities.<sup>125</sup> Finlaison’s tables provided the basis for pricing of government life annuities for the next half-century; in addition, they influenced the establishment of separate mortality tables for male and female annuitants in the commercial setting.<sup>126</sup>

After Wright met with Finlaison, he proposed to MHL’s Finance Committee—then chaired by Francis C. Lowell, an MHL director and its newly appointed actuary—that MHL use separate male and female mortality tables in place of its former single merged table. In November 1845, on the report and recommendation of the Finance Committee, MHL adopted separate male and female mortality tables in place of its former single merged table at a time when the granting of annuities on lives was a relatively small part of its overall business.<sup>127</sup> Both before and after the change in practice, a majority of MHL’s life annuitants were female and their average age was over sixty-five, with few annuitants below the age of fifty.<sup>128</sup> As noted by the company’s actuary in early 1845, most of MHL’s deposits had gone through probate or were “the earnings of persons unused to making investments for future support.”<sup>129</sup> After its adoption of separate tables, MHL distinguished between male and female life

121. *Id.*

122. *Id.*

123. In his concluding observations, Finlaison raised the important question of how mortality rates might be affected by the selection bias in favor of healthy applicants among purchasers of annuities. Finlaison determined that this could not be resolved without further inquiry. *Id.* at 235.

124. *Id.* at 219-85.

125. *Id.* at 217 (the editors observing that these tables were the “basis for the grant of Government life annuities until 1884,” and that from “this time on, the necessity of using separate mortality tables for male and female annuitants was established”).

126. 2 HISTORY OF ACTUARIAL SCIENCE, *supra* note 12, at 219 (comments of editors Steven Haberman and Trevor A. Sibbett).

127. WHITE, *supra* note 89, at 84.

128. *Id.* at 31, 84-85. As recounted by White, “[b]y the end of 1840 a total of 91 annuities had been issued, of which about 60 were then in force.” *Id.* at 31.

129. Letter from Joseph Tilden, Feb. 19, 1845, at 2 (Massachusetts Hospital Life Insurance Company Collection, AA-1, Case 1, Minutes of the Board of Directors, Feb. 22, 1845. Baker Library Historical Collections, Harvard Business School).

annuitants of the same age, and charged higher rates for coverage of women. The Finance Committee's report to MHL's Board of Directors noted that the proposed tables were based on experience in Europe, as well as on the company's own, so that MHL had the means to make the tables "much more equitable and reliable" than those made previously.<sup>130</sup> The Committee proposed these changes "not only for the public & our own convenience, but also for the sake of sustaining the reputation of the Company."<sup>131</sup>

At the same time, the Finance Committee also recommended updated rates for life insurance, a business declining due to competition from mutual companies. It proposed an age-differentiated and gender-merged table based on the combined mortality experience of seventeen British life insurance offices, which would result in lower, but still gender-neutral, rates for life insurance coverage.<sup>132</sup>

A similar pattern of gender distinctions in life annuities but unisex rates for life insurance can be found in the pricing practices of another company at about that time. A few years after the adoption of gender distinct annuity rates by MHL, a company incorporated in Pennsylvania in 1848 known as the Equitable Life Insurance, Annuity and Trust Company (hereinafter referred to as Equitable) introduced gender-distinct benefits (rather than rates) for its newly established life annuity business.<sup>133</sup> The company's first actuary, H.G. Tuckett, formerly of Great Britain and trained in mathematics as part of his British military education, also introduced significantly lower life insurance rates than those charged by other companies.<sup>134</sup> For its life annuity business, Equitable utilized gender-distinct mortality tables similar to Finlaison's gender-distinct

130. *Id.*

131. Report of Francis C. Lowell, Chairman of the Committee of Finance, Massachusetts Hospital Life Insurance Company, Nov. 5, 1845, at 1 (Massachusetts Hospital Life Insurance Company Collection, AA-1, Case 1, Minutes of the Board of Directors, Feb. 19, 1845. Baker Library Historical Collections, Harvard Business School).

132. *Id.* at 1-2, 4 (appending rates for insuring lives "based upon the experience of Seventeen of the oldest and largest Life insurance Companies in England" and noting that the business of insurance on lives "has become almost nothing since the establishment of the New England Mutual" and thus "not likely to be very considerable for the future. . ."). As noted by a mid-twentieth-century treatise on life insurance, the Seventeen Offices Table or Actuaries' Table, which preceded the American Experience Table, was introduced into the United States by Elizur Wright as the standard for the valuation of policies in Massachusetts. S. S. HUEBNER & KENNETH BLACK, JR., *LIFE INSURANCE* 189 (4th ed. 1950).

133. J.A. FOWLER, *HISTORY OF INSURANCE IN PHILADELPHIA FOR TWO CENTURIES (1683-1882)*, at 670 (1888) (referring to discrimination between male and female life duration in life annuity benefits as "sex discrimination"). Fowler later states that this was "the first discrimination of the kind introduced into the United States," indicating either that he is unaware of the earlier use of such distinctions in life annuity rates by the MHL or that he is drawing a distinction between the use of gender distinct rates and benefits. *Id.* At the time of the adoption of gender-distinct annuity benefits by Equitable, Pennsylvania had no statutory provisions permitting married women to enter into insurance contracts. However, as Fowler points out, Equitable's corporate charter, sanctioned by the state, provided that married women could insure the lives of their husbands free of the claims of representatives or creditors of their husbands. *Id.* at 666. Pennsylvania provided similar protections by statute some years later. See *supra* note 68 and accompanying text.

134. FOWLER, *supra* note 133, at 666.

tables. Under those mortality assumptions, Equitable provided greater benefits per hundred dollars paid to the company for male lives than for female lives. Its annuity benefits were higher for men than those of the older Pennsylvania Company for Insurances on Lives and Granting of Annuities,<sup>135</sup> and were lower for women than those of The Pennsylvania Company. However, the “mean of the two sex age-annuities was lower” than that of the original gender-merged annuity of The Pennsylvania Company, reflecting the longer average life expectancies shown in Finlaison’s tables.<sup>136</sup> Nevertheless, like MHL, Equitable priced its life insurance without gender distinctions in rates or benefits.<sup>137</sup>

For the New England Mutual Life Insurance Company, which had insured Wright’s life before he embarked on his voyage to Great Britain,<sup>138</sup> Wright advised a quite different innovation for risk classification in life insurance—one based on behavior rather than gender. Wright persuaded the company to experiment with temperance life insurance rates. He believed that strong drink and poverty were closely connected and that the two combined produced crime.<sup>139</sup> Wright was convinced that those who totally abstained from alcohol were preferred risks and had been favorably impressed by a temperance life insurance company in Great Britain.<sup>140</sup> On his return, Wright persuaded the officers of New England Mutual Life to put abstainers in a special risk classification, and to sell them “temperance” life insurance at preferred rates.<sup>141</sup> Under a contract entered into with the company in 1845, as noted later by two of his adult grandchildren, Wright received a commission on the first premium of all temperance life insurance policies.<sup>142</sup>

As editor of *The Chronotype*, Wright reported on and actively promoted temperance life insurance.<sup>143</sup> He also advocated more generally for temperance and a regimen of frequent physical exercise, modest meals, and at least one cold bath a day.<sup>144</sup> Despite Wright’s efforts, the company did not receive

135. *Id.* at 670. For discussion of The Pennsylvania Company, see *supra* text accompanying notes 86-88. Tuckett served as actuary for Equitable until a change in management in 1849, and then for a short time served as Philadelphia agent for the Eagle Life and Health Insurance Company of New Jersey. *Id.* at 678, 685.

136. *Id.* at 670.

137. *Id.* at 667-69.

138. WHITE, *supra* note 89, at 83.

139. PHILLIP GREEN WRIGHT & ELIZABETH Q. WRIGHT, ELIZUR WRIGHT: THE FATHER OF LIFE INSURANCE 156, 164 (1937).

140. GOODHEART, *supra* note 112, at 144-45 (not naming the company). See also ALBORN, *supra* note 12, at 39-40 (observing that the United Kingdom Temperance & General, formed in 1840, initially restricted to strict abstainers, opened a general section in 1847 and paid separate bonuses to each section with higher bonuses to non-drinkers, “which built a loyal following among the largely lower-middle-class customer base that turned temperance into a national campaign by the 1870s”).

141. COLLIER, *supra* note 66, at 44.

142. WRIGHT & WRIGHT, *supra* note 139, at 228-29 (citing a contract made with the company August 12, 1845).

143. See, e.g., WRIGHT & WRIGHT, *supra* note 139, at 228 n.7; Elizur Wright, *Temperance Life Insurance*, THE CHRONOTYPE, Sept. 19, 1846, at 2.

144. GOODHEART, *supra* note 112, at 145.

enough applications for insurance with a total-abstinence condition to make the plan a success.<sup>145</sup>

In sum, Wright's actuarial investigations in Great Britain resulted in American companies adopting two new risk classifications—a gender-based risk classification for life annuities, and a behavioral classification for life insurance. The gender-based classification became established in general commercial practice for the sale of annuities by the end of the nineteenth century;<sup>146</sup> Wright's recommendation for adoption of a behavior-based risk classification for life insurance purchased by nondrinkers did not take hold, however, although a parallel could be found today in favorable life insurance rates for nonsmokers.

A focus on the mortality classification of gender in one line of business but on behavioral factors in the other may have reflected the background assumption, different from that of Dr. Price when he constructed the gender-merged Swedish and Northampton tables, that mortality differentials between men and women primarily reflected "natural" difference rather than environmental or geographical factors such as occupational hazards or living conditions, or behavioral influences such as engaging in dangerous activities or consuming alcohol or tobacco products. In addition, generalized improvements in mortality for both men and women during the nineteenth century contributed to unsustainable cost pressures in the lifetime annuity line of business, while at the same time leading to increased potential for profitability in the life insurance business.

The financial pressure on the life annuity business would have been intensified by the relatively small number of annuitants and the greater percentage of women covered by those products as compared to life insurance. This pattern of coverage paralleled the differing legal and economic status of men and women, with women more heavily represented as insured lives in annuities aimed either at providing women with marriage settlements in trust or at providing widows with annual financial support during their remaining years. Married men, by contrast, were much more heavily represented as insured lives in products aimed at protecting their families against the loss of support represented by an untimely death.

Nevertheless, the resolution of the financial issues caused by the continued use of the outdated and flawed Northampton table to price life annuities could have been achieved through lowered interest rate assumptions, the use of an updated gender-merged table reflecting improvements in mortality for both men and women, or a combination of the two. Antebellum companies essentially took such an approach when they adopted updated gender-merged tables to offer lower, more competitive rates in their life insurance business. As

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145. WRIGHT & WRIGHT, *supra* note 139, at 229; see GOODHEART, *supra* note 112, at 145.

146. See *infra* Part III.C.

argued in the next section, the gender-distinct tables and rates developed in Great Britain for life annuities and exported to America during the antebellum period reflected views about differences between men and women that were increasingly prominent in both Great Britain and in America during that time. Those views developed amid industrialization, the demise of slavery, and the legal transitions that accompanied them.

C. *“First Wave” Activism and the Dependencies of the Home*

The conflict created in the insurance context between contract rights for married women and the traditional dependencies of the home echoed a much broader legal and political struggle. In both Great Britain and the United States during that time, increased attention was being paid to the social and political significance of differences between men and women. At the same time that industrialization was transforming nineteenth-century ways of life, powerful economic, political, and social forces reinforced the idea of “separate spheres” for men and women.<sup>147</sup>

In both countries, gender ideology had long been influenced by religious thought about the natures and roles of women and men. Under those views, women played a divinely determined subordinate role as a helpmate to men, and in marriage, husband and wife became “one flesh,”<sup>148</sup> a concept related to the fiction of “marital unity” under the common law status of coverture. More radical religious traditions and Enlightenment-inspired ideas countered those views of gender difference. Influenced by the French Revolution, English radicalism, and the dissenting views of influential figures like Dr. Richard Price, later writers such as Mary Wollstonecraft<sup>149</sup> sought to determine, on the basis of observation and critical thinking rather than scripture, which sexual differences were innate and which were a product of society.<sup>150</sup> By 1850, most of the ideas used to define women as innately different from, and inferior to, men had been challenged in both Europe<sup>151</sup> and America.<sup>152</sup>

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147. See, e.g., NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND 1780-1835*, at 197-206 (1977); LEONORE DAVIDOFF & CATHERINE HALL, *FAMILY FORTUNES: MEN AND WOMEN OF THE ENGLISH MIDDLE CLASS 1780-1850*, at xiii—xviii (rev. ed. 2002); ROBERT B. SHOEMAKER, *GENDER IN ENGLISH SOCIETY, 1650-1850: THE EMERGENCE OF SEPARATE SPHERES?* 305-18 (1998); see also Siegel, *supra* note 25, at 2139-41.

148. The term “one flesh” was originally biblical. *Genesis* 2:24 (King James); see Basch, *supra* note 15, at 346, 356.

149. CLAIRE TOMALIN, *THE LIFE AND DEATH OF MARY WOLLSTONECRAFT* 31, 97 (1974).

150. *Id.* at 42-43 (describing Price’s dissenting views and their influence on Wollstonecraft); see also Letter from Lucretia Mott to Elizabeth Cady Stanton (March 16, 1855), in *SELECTED LETTERS OF LUCRETIA COFFIN MOTT* 234 (Beverly Wilson Palmer ed., 2002) (urging Stanton to give credit in an upcoming book to Wollstonecraft for her “radical claim” of the rights of woman); Letter from Lucretia Mott to Elizabeth Neall Gay, Montgomery County, Pennsylvania (May 7, 1858), in *SELECTED LETTERS*, *supra*, at 272 (referring to *Vindication of the Rights of Women* as having been for twenty years “my pet book”).

151. See, e.g., SHOEMAKER, *supra* note 147, at 15-58.

During the years leading up to the adoption of gender-based pricing, the ideology of separate spheres for men and women was contested, and sometimes also reinforced, through political activism related to abolitionism.<sup>153</sup> In both Britain and America, women played an important role in anti-slavery organizing efforts,<sup>154</sup> beginning in Britain in the late eighteenth century with a boycott of slave-grown sugar.<sup>155</sup> Women's anti-slavery activism eventually led them to draw connections between chattel slavery and their own subordinate position.<sup>156</sup>

As activism on these and other issues increased, gender distinctions also began appearing in the law more generally. In Great Britain, for example, only three years after the adoption of gender-distinct rates for the sale of government annuities, Parliament enacted the 1832 Reform Act,<sup>157</sup> which extended the franchise to the middle classes and introduced gender as a legal determinant of enfranchisement for the first time.<sup>158</sup> According to a British historian, the "fraught politics of class" impeded radicalization of the British abolitionist movement along gender lines; instead, the construction of British middle class identity was tied to the promotion of "separate spheres" for men and women, with women's anti-slavery rhetoric resting "on assertions of their own privileges as women, and the desire to extend these privileges to others."<sup>159</sup> The Reform Act was soon followed by the 1833 Act for the Abolition of Slavery,<sup>160</sup> which closed down the "possibility for the development of an equation between the position of women and that of slaves" within Great Britain "at just the time when it was opening up with the United States."<sup>161</sup>

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152. SENECA FALLS DECLARATION OF SENTIMENTS (1848).

153. See, e.g., Siegel, *supra* note 52, at 1098-1112.

154. DAVIDOFF & HALL, *supra* note 147, at 433.

155. David Brion Davis, *Declaring Equality: Sisterhood and Slavery*, in *WOMEN'S RIGHTS AND TRANSATLANTIC ANTI-SLAVERY IN THE ERA OF EMANCIPATION* 3, 11 (Kathryn Kish Sklar & James Brewer Stewart eds., 2007). See generally DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 234-38 (2006).

156. Davis, *supra* note 155, at 11; see also 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861, at 13 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage eds., 1887).

157. An Act to Amend the Representation of the People in England and Wales, 1832, 2 & 3 Will. 4, c. 45 §§ 19-20 (Eng.) [hereinafter 1832 Reform Act].

158. *Id.* Sections XIX and XX refer to "every Male Person of full Age and not subject to any legal Incapacity. . . shall be entitled to vote. . ." and Section XXVII refers to the rights of voting in Boroughs for the male residents of the city or borough. *Id.* See, e.g., SHOEMAKER, *supra* note 147, at 231-32; T. Chisholm Anstey, *On Some Supposed Constitutional Restraints Upon the Parliamentary Franchise (1867)*, reprinted in *CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA* 19-27 (David S. Berkowitz & Samuel E. Thorne eds., 1978). Prior to that time, civic rights had been class and land based; the wives of English lords or ladies of reigning families could exercise under certain circumstances powers that were attached to the land or throne. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 23, 103-04 (1869).

159. Clare Midgley, *British Abolition and Feminism in Transatlantic Perspective*, in *TRANSATLANTIC ANTI-SLAVERY*, *supra* note 155, at 121, 125.

160. An Act for Abolition of Slavery Throughout the British Colonies, 1833, 3 & 4 Will. 4, c. 73 (Eng.).

161. Midgley, *supra* note 159, at 126.

In America, by contrast, the fierce debates surrounding the place of women in the abolitionist movement provided a backdrop against which other powerful institutional forces emphasized the domestic and dependent role of women. Women who played increasingly public roles in the anti-slavery movement later emerged as leaders in the nascent American woman's rights movement.<sup>162</sup> Before the "first wave" of woman's rights activism took hold, however, the "woman question" provoked fundamental disagreement among American abolitionists.

Elizur Wright, who recommended to Massachusetts Hospital Life that the British approach to gender-distinct life annuity tables and rates be imported into the United States, was actively involved in these abolitionist debates. In 1839, disagreement about the role of women and of woman's rights in the abolitionist movement divided abolitionist organizations. Elizur Wright initially argued for a pragmatic middle way between those who believed women should be barred from politics and the more absolutist views of William Lloyd Garrison, who viewed woman's rights to be a moral issue like slavery.<sup>163</sup> Although Wright publicly supported the activist role of women such as Lucretia Mott and the Grimké sisters,<sup>164</sup> he privately admitted to being most comfortable with the conventional pattern of gender relationships. For example, in a 1838 letter to another abolitionist, Wright observed, "I think the tom-turkies ought to do the gobbling, I am opposed to hens' crowing, and surely, as a general rule, to female-preaching; [but] . . . if some women insisted on acting the part of men they should be permitted to do so; nature would assert itself in the end."<sup>165</sup> He believed the "woman question" to be a false issue diverting attention away from freeing the slave, writing that it "belittles us—it is tying a tin kettle to the tail of our enterprise."<sup>166</sup>

In 1839, Wright became editor of the *Massachusetts Abolitionist* in Boston, a factional competitor of Garrison's paper, the *Liberator*. As the rift among factions deepened, Wright joined the traditionalists in opposing any action on the "woman question."<sup>167</sup> In a confidential letter to Henry Stanton in October 1839, which later fell into the hands of Garrison, Wright complained that "[e]verything has been made to turn upon the *woman question*," and that "[t]he

162. See, e.g., BRUCE DORSEY, *REFORMING MEN AND WOMEN: GENDER IN THE ANTEBELLUM CITY* 136-94 (2002); BETH A. SALERNO, *SISTER SOCIETIES: WOMEN'S ANTISLAVERY ORGANIZATIONS IN ANTEBELLUM AMERICA* 4-7 (2005); JUDITH WELLMAN, *THE ROAD TO SENECA FALLS* (2004).

163. David B. Houston, *Elizur Wright: The Man and His Work*, 26 J. INS. 11, 16 (1959).

164. See, e.g., GERDA LERNER, *THE GRIMKÉ SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMAN'S RIGHTS AND ABOLITION* (1967) (describing the public roles assumed by the sisters Angelina Grimké and Sarah Grimké, who had first-hand experience with slavery on their family's plantation, and recounting their contacts with Quaker activist Lucretia Mott).

165. AILEEN S. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM* 61 n.75 (1969) (quoting from a letter dated July 11, 1838, from Wright to Amos Phelps).

166. GOODHEART, *supra* note 112, at 104-05 (citing letters from Wright dated 1837-38 and an October 20, 1846 issue of *The Chronotype*, a Boston paper edited by Wright).

167. Houston, *supra* note 163, at 15.

political has been left to fall out of sight.”<sup>168</sup> When the American anti-slavery movement splintered over this issue, the Garrisonians retained control over the American Anti-Slavery Society, which Wright had helped found, and Garrison’s opponents formed a competing organization, the American and Foreign Anti-Slavery Society. Wright ultimately sided against the Garrisonians and with the opposition.<sup>169</sup>

Following the practice of the British and Foreign Anti-Slavery Society, the American organization’s constitution established separate women’s societies, which were to be represented by male delegates at conventions.<sup>170</sup> The British and Foreign Anti-Slavery Society demonstrated its support of the new American organization by refusing to seat women delegates from the Garrisonian society at its World Anti-Slavery Convention in 1840. At the convention, Garrison expressed his support of woman’s rights and his opposition to the position of the new American organization and its British counterpart by sitting with the female delegates in the visitors’ gallery.

Significantly, after their experience in London Lucretia Mott and Elizabeth Cady Stanton resolved to hold a woman’s rights convention in the United States, leading to the Seneca Falls Convention in 1848.<sup>171</sup> Looking back on that time period, Stanton also listed the reform of property rights of married women as an immediate cause of the demand for equal political rights for women, stating that the “press and pulpit became suddenly vigilant in marking out woman’s sphere, while woman herself seemed equally vigilant in her efforts to step outside the prescribed limits.”<sup>172</sup>

The role of women in the abolitionist movement, as well as women’s increased activism in support of their own legal and political rights, exposed the underlying theoretical tension between property rights and equality of contract for married women and certain free labor arguments against slavery. As pointed out by historians of that period, abolitionist theorists developed arguments against slavery by challenging theories of contract that equated wage

168. GOODHEART, *supra* note 112, at 110.

169. Lucretia Mott later noted that “prominent abolitionists who had before given countenance to the Grimkes” in the division within the Society beginning in New England in 1837-38, “either secretly or more openly acted against woman’s co-operative action with men” and that Elizur Wright, the Tappans, and others in New York united in 1839-40 with the New England opposition. Letter from Lucretia Mott to Elizabeth Cady Stanton (Mar. 16, 1855), in *SELECTED LETTERS*, *supra* note 150, at 233.

170. KRADITOR, *supra* note 165, at 52; Kathryn Kish Sklar, “*The Throne of My Heart: Religion, Oratory, and Transatlantic Community in Angelina Grimké’s Launching of Women’s Rights, 1828-1838*,” in *TRANSATLANTIC ANTI-SLAVERY*, *supra* note 155, at 211, 220.

171. Sklar, *supra* note 170, at 220. Stanton later wrote that the convention gave “rise to the movement for women’s political equality in both England and the United States.” *ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE* 82 (1898).

172. 1 *THE HISTORY OF WOMAN SUFFRAGE, 1848-1861*, at 52 (Elizabeth Cady Stanton et al. eds., 1887). The Seneca Falls Convention took place shortly after the enactment by New York of the Married Women’s Property Act of 1848. See *supra* Part II.A.

labor and marriage as relations of household dependency.<sup>173</sup> The wage laborer or “servant,” Locke had written, puts himself “into the family of his master, and under the ordinary discipline thereof,”<sup>174</sup> and a husband’s authority over his wife mirrored that of “a master over his servant.”<sup>175</sup> During the first half of the nineteenth century, as explained by Morton Horwitz, there was a “gradual decay” of a “paternalistic and hierarchical relationship among employers and workers” and the subsequent development of a contractarian framework, in which “equal bargaining power inevitably became established as the inarticulate major premise of all legal and economic analysis.”<sup>176</sup>

Anti-slavery theorists disrupted the analogy between hired men and wives by distinguishing between “the formal freedom and equality of contracting parties in the marketplace [and] the benevolent dependencies of the home—an antithesis symbolized by separate spheres.”<sup>177</sup> These theorists argued that by eliminating slavery, a dependency distinguished by the lack of freedom in entering the master’s service, the wage contract would sustain the marriage contract by permitting former slaves to enter into free labor contracts to maintain their own homes and families, an important element of self-ownership. The household, a place of traditional family dependencies and male mastery, would be a sphere insulated from the marketplace. Unlike pro-slavery theorists, abolitionists thus dissociated the free labor contract from the domestic dependency of bondage and the marriage contract.<sup>178</sup>

Some feminist abolitionists, particularly in the black anti-slavery community, strongly challenged that distinction,<sup>179</sup> arguing that a married woman should also possess the right to self-ownership, rather than simply being an object of her husband’s contract rights.<sup>180</sup> In addition, woman’s rights activists argued for economic equality within the marriage contract itself. The dominant view, however, sharply distinguished between freedom and equality of contract in the marketplace and the benevolent dependency of the home.

Insurance contracts for married women, whether covering their own lives or those of their husbands, posed the theoretical problem of how the dependencies of the home could be reconciled with notions of equality and freedom of contract in the marketplace. That issue was initially resolved soon after married women’s contract rights were recognized in this context by an increased emphasis in commercial insurance contract terms on differences

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173. STANLEY, *supra* note 18, at 18 n.38. Stanley explains that abolitionism “reshaped the meaning of contract freedom by dissociating wage labor from relations of personal dependency . . . .” *Id.* at 18.

174. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 47 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1975) (1690).

175. *Id.* at 4.

176. HORWITZ, *supra* note 17, at 208, 210.

177. STANLEY, *supra* note 18, at 166.

178. *Id.* at 21.

179. *Id.* at 29-35.

180. *See id.* at 30-31 (describing the arguments of Frances Ellen Watkins Harper).

between men and women which comported with traditional gender hierarchies and dependencies. The gender ideology of separate spheres for men and women fit within dominant religious as well as more traditionalist abolitionist perspectives, and framed the legal, political, and economic issues faced by the woman's rights movement after the Civil War.

### III. REINFORCING THE DEPENDENCIES OF THE HOME, 1870-1920

This Part argues that the use of gender-based risk classifications by the insurance industry during the late nineteenth and early twentieth centuries reflected and reinforced evolving legal and social views about gender relations. After the Civil War, with the end of slavery and expansion of insurance markets, the use of gender-distinct rates for life annuities became more widespread as that market slowly grew, and certain other gender-based and race-based pricing practices began to appear in other life insurance markets. By the end of the nineteenth century, the gender-related pricing patterns developed during the antebellum period had become more entrenched within the insurance industry as surviving aspects of coverture continued to be challenged and reinforced in legal, political, and social settings.

The following sections summarize the evolution of specific pricing practices in different markets for life insurance, including industrial life insurance aimed at the working class, ordinary life insurance for the middle class, and the relatively smaller market for life annuities. Examination of pricing in a range of life insurance markets, including insurance products sold to lower-income wage earners, reveals overall patterns not apparent when focusing on the characteristics of each separate market. The last section argues that although these pricing patterns can be partially explained by economic pressures and product differences, they cannot be fully explained by such factors. Instead, a more complete understanding of the overall patterns can be achieved when they are also seen as a reflection and reinforcement of the evolving ideology of separate spheres for men and women.

#### *A. Industrial Life Insurance: Unisex Rates in Working Class Markets*

Beginning in the 1870s, newly formed American life insurance companies, including Prudential, Metropolitan Life, and John Hancock,<sup>181</sup> sold small individual life insurance policies to a growing market of low-income working

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181. The John Hancock Mutual Life Insurance Company was formed in 1862, a decade before the other two companies, and began selling "industrial" or "weekly premium" insurance in 1879. JOHN HANCOCK MUTUAL LIFE INSURANCE CO., JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY: THE FIRST SEVENTY-FIVE YEARS 10 (1937); EMIL SCHWAB, THE JOHN HANCOCK: AN HISTORICAL SKETCH 18, 39, 76 (1912).

class wage earners.<sup>182</sup> This type of life insurance, called variously “industrial,” “weekly premium,” “debit,” or “burial” insurance, provided protection against the financial burden of a last illness and burial for the “industrious” or wage-earning classes.<sup>183</sup>

In that same decade, the difficulty that male workers had in earning enough to support their families, heightened by the economic depression of 1873, became an increasing concern to social reformers.<sup>184</sup> The inability of working class men to support their families without the supplemental wage labor of wives and children revealed the tension inherent in the link identified by abolitionists between contract freedom in the wage labor market and male mastery in the home.<sup>185</sup>

American industrial life insurance companies initially patterned their business on British industrial life insurance companies that grew out of the “friendly” and insurance societies developed in eighteenth- and nineteenth-century England.<sup>186</sup> After a British House of Commons committee in 1853 reported on the defects of the friendly societies and burial clubs and on the need for more dependable life insurance for the working classes, the Prudential Assurance Company of London, which had previously sold ordinary life insurance, opened an industrial branch in 1854.<sup>187</sup> The company sold individual life insurance policies with weekly premiums collected from the families of wage-earners.<sup>188</sup> The early commercial companies operating in this market in Great Britain insured men, women, and children.<sup>189</sup>

The newly formed American insurance companies modeled their operations after British Prudential<sup>190</sup> by selling weekly premium industrial life

182. Although twenty different companies issued industrial insurance in 1905, Metropolitan, Prudential, and John Hancock accounted for ninety-five percent of this business and industrial insurance constituted about seventeen percent of all life insurance. See Roger L. Ransom & Richard Sutch, *Tontine Insurance and the Armstrong Investigation: A Case of Stifled Innovation, 1868-1905*, 47 J. ECON. HIST. 379, 385 n.15 (1987).

183. MALVIN E. DAVIS, *INDUSTRIAL LIFE INSURANCE IN THE UNITED STATES* 6 (1944).

184. STANLEY, *supra* note 18, at 138-217.

185. *Id.* at 153 (citing, among other studies, a report by the Massachusetts Bureau of Labor Statistics on the condition of working families published in 1874 stating that this unnatural situation “unsexed men and women” and threatened coming generations by drawing whole families into the labor market).

186. See Elizabeth Kowaleski Wallace, *The Needs of Strangers: Friendly Societies and Insurance Societies in Late Eighteenth-Century England*, 24 EIGHTEENTH-CENTURY LIFE 53 (2000).

187. DAN M. MCGILL, *LIFE INSURANCE* 713-14 (rev. ed. 1967). According to Hoffman, the Prudential Assurance Company of London in 1854 absorbed a company founded in 1849 called the “Industrial and General.” FREDERICK L. HOFFMAN, *HISTORY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (INDUSTRIAL INSURANCE) 1875-1900*, at 5 (1900).

188. HOFFMAN, *supra* note 187, at 3-5.

189. See, e.g., *id.* at 24; H.W. Andras, *The Rise and Progress of Industrial Assurance*, in *HISTORICAL REVIEW OF LIFE ASSURANCE IN GREAT BRITAIN AND IRELAND, BEING A SUPPLEMENT TO THE INSURANCE GUIDE AND HAND-BOOK* 78, 79-83, 88 (5th ed. 1912) (discussing controversy over insuring young children).

190. In America, Prudential began in a basement in Newark in 1875 as the Prudential Friendly Society and two years later changed its name to the Prudential Insurance Company of America. Metropolitan Life, which at that time provided life insurance for a mutual assistance and social

insurance to working class families.<sup>191</sup> Policies covered poor wageworkers and their families, including newly emancipated slaves,<sup>192</sup> women and children.<sup>193</sup> Industrial insurance agents typically sold policies door-to-door in an assigned geographical area or “debit,” and collected premiums of a few cents each week to cover each insured member of the household.<sup>194</sup> Rates or benefits varied by age<sup>195</sup> and policies were issued with few restrictions or requirements.<sup>196</sup>

This less restrictive approach differed from the underwriting practices then in effect for ordinary life insurance. Early ordinary life policies issued by the John Hancock Mutual Insurance company, for example, contained restrictions not found in its industrial policies relating to employment in hazardous occupations, such as mining, powder manufacturing, or working on railroad trains and steamboats.<sup>197</sup> Although women remained a relatively small market for most ordinary life insurance companies until the mid-twentieth century,<sup>198</sup> approximately half of those insured by major industrial insurance companies in the late nineteenth and early twentieth centuries were female,<sup>199</sup> about the same

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organization serving German immigrants, the Hildise Bund, began selling policies on the English Prudential model several years later. MARQUIS JAMES, *THE METROPOLITAN LIFE, A STUDY IN BUSINESS GROWTH* 43-44, 61, 73-93 (1947).

191. See, e.g., *id.* at 61, 73-74.

192. *Id.* at 338 (discussing coverage of newly emancipated slaves by Metropolitan and Prudential in the 1870s and early 1880s).

193. HOFFMAN, *supra* note 187, at 79-83 (noting that of Prudential’s first thousand applications for industrial insurance coverage in 1875-76, about one third were on lives of children under the age of ten, one third to cover adult males, and one third to cover adult females).

194. DAVIS, *supra* note 183, at 7.

195. Frederick L. Hoffman, *Industrial Insurance*, 26 *ANNALS AM. ACAD. POL. & SOC. SCI.* 103, 116-18 (1905).

196. Industrial policies were approved on the basis of less detailed applicant information than ordinary insurance, and generally without medical examinations unless recommended by the soliciting agent. MCGILL, *supra* note 187, at 712-13. Although early industrial insurance policies contained some restrictive standard terms, those restrictions were relaxed over time. See DAVIS, *supra* note 183, at 9-10 (discussing the elimination of restrictive clauses in early industrial policies); HOFFMAN, *supra* note 187, at 229; KELLER, *supra* note 38, at 55.

197. See *HISTORICAL SKETCH OF THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, A HALF CENTURY COMPLETED, 1862-1912*, at 69-71 (1912).

198. See *INSTITUTE OF LIFE INSURANCE FACT BOOK 16* (1954) (observing that “[w]hile life insurance has been written on the lives of women from the start of the business, it is only in the past generation that women have bought policies in any appreciable volume”). The *Fact Book* reports that of the aggregate life insurance in force at the end of 1953, women owned \$23.8 billion or 13% of total regular ordinary life insurance, \$8.4 billion or 12% of the total regular group insurance, and \$17.3 billion or 46% of total industrial insurance in force. *Id.* By comparison, during the decade beginning in 1840, less than five percent of New York Life and Trust Insurance Company’s new policyholders were women, and during 1844 to 1850, only two percent of New England Mutual Life Insurance Company’s policyholders were female. MURPHY, *supra* note 12, at 178-79 tbls. 1 & 2, 182 tbl.3.

199. See LOUIS I. DUBLIN, EDWIN W. KOPF & GEORGE H. VAN BUREN, *MORTALITY STATISTICS OF INSURED WAGE-EARNERS AND THEIR FAMILIES: EXPERIENCE OF THE METROPOLITAN LIFE INSURANCE COMPANY INDUSTRIAL DEPARTMENT, 1911 TO 1916, IN THE UNITED STATES AND CANADA* 4 tbl.1 (1919) [hereinafter DUBLIN ET AL., *MORTALITY STATISTICS*] (reporting that nearly half, or 47.8% of Metropolitan’s insured lives were white females and 6.8% were “colored” females); HOFFMAN, *supra* note 187, at 306 (reporting that 48.8 percent of the total number of decedents in the industrial experience of Prudential during 1891-1898 were females, compared to the sex distribution of the total mortality in the United States reported by the census of 1890 of 47.8 percent females); See also LOUIS I. DUBLIN ET

proportion as in the general population. The majority of women insured by industrial policies worked as housekeepers; however, these policies also covered dressmakers, seamstresses, clerks, nurses, saleswomen, milliners, silk workers, book-binders, storekeepers, stenographers, musicians, and artists.<sup>200</sup>

By contrast, insurance companies sold ordinary life insurance primarily to middle class men as a means of protecting their wives and children from economic insecurity in the event of the premature death of the primary breadwinner. Unlike the practices at that time in the ordinary insurance market,<sup>201</sup> insurance companies such as Prudential and Metropolitan Life charged gender-neutral rates for industrial insurance coverage despite the companies' experience showing differences in mortality rates when policyholders were classified by gender.

For example, the industrial mortality experience for Prudential policyholders at the end of the nineteenth century, reported in the combined categories of gender and race, was more favorable (i.e., it demonstrated a lesser average mortality) for white women ages twenty-five through fifty-four than for white men at the same ages.<sup>202</sup> An early twentieth-century mortality study conducted by Metropolitan Life found greater mortality of white males than white females at all ages.<sup>203</sup> Beginning with the age period of twenty to twenty-four years, white male mortality exceeded white female mortality by over thirteen percent; between twenty-five and thirty-four years, thirty-eight percent; between thirty-five and forty-four years, "the maximum point of excess in the mortality of white males over that of white females, namely, over seventy-two percent."<sup>204</sup> The difference between white male and white female mortality lessened at higher ages but never dropped below twelve percent.<sup>205</sup>

Thus, although industrial company mortality experience showed evidence of greater average mortality rates for white men as compared to white women at all ages, these companies did not adopt gender-distinct rates or benefits in

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AL., THE MORTALITY EXPERIENCE OF INDUSTRIAL POLICYHOLDERS, 1916-1920, at 5 (1923) [hereinafter DUBLIN ET AL., MORTALITY EXPERIENCE] (compiling mortality statistics from Prudential, John Hancock, Metropolitan Life, the Life Insurance Company of Virginia, and Colonial Life Insurance Company of America).

200. HOFFMAN, *supra* note 187, at 306 (listing occupations of white female decedents in 1897-98). For a comprehensive study of women's labor force participation and gender differences in earnings and occupation, see CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 4 (1990) (noting that the labor force participation of young, unmarried women "increased considerably with America's industrial activity and urbanization" from 1820 to 1920); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982).

201. *See infra* Part III.B.

202. HOFFMAN, *supra* note 187, at 311 (reporting Prudential's industrial mortality experience for 1891-98 and listing mortality rates for white males and females as well as the proportion of deaths at various ages).

203. DUBLIN ET AL., MORTALITY STATISTICS, *supra* note 199, at 20.

204. *Id.*

205. *Id.* at 21.

selling industrial life insurance policies. Nevertheless, industrial insurance companies generally followed the pricing practices of other life insurance companies<sup>206</sup> by charging women higher rates when they began selling ordinary insurance.<sup>207</sup>

In the absence of contrary indications, unisex rates in industrial insurance perhaps could be explained by the less restrictive risk assessment practices found in industrial insurance as compared to the ordinary insurance line of business. Significantly, however, industrial insurance companies departed from these less restrictive practices with regard to race. In the early 1880s, the major industrial life insurance companies began charging race-differentiated premiums for industrial insurance policies. In states permitting race-based rates, black men, women, and children were charged more for the same coverage than were white men, women, and children of the same ages, or received lesser coverage—at that time, typically two-thirds coverage—for the same weekly premiums.<sup>208</sup>

A Metropolitan Life study of mortality experience from 1911 to 1916 found greater mortality of black males than white males at nearly all ages.<sup>209</sup> In a pattern similar to that shown for white males and females, the death rate of black men was higher than that of black women at all ages between twenty-five and seventy-five (with lower mortality among black males than black females from ages five to twenty-four); however, the excess was never more than twenty per cent, and thus more moderate than that observed between white men and women.<sup>210</sup> If gender alone had been used to categorize the mortality data, the mortality advantage of females over males likely would have been greater than that shown by the race-categorized gender differentials. Despite

206. See PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL INSURANCE COMPANY OF AMERICA: INSTRUCTIONS TO AGENTS, DESCRIPTION OF PLANS, PREMIUM RATES BY AGES, ETC. FOR 1895, at 8 (providing for “an extra premium of \$5 per \$1000 annually” for women until the age of 50); PRUDENTIAL INSURANCE COMPANY OF AMERICA, RATES AND INSTRUCTIONS TO SPECIAL ORDINARY AGENTS 1897, at 7 (same, but only until the age of 48). The extra premium amount was not included in the Ordinary Rate Book and Instructions to Agents for 1908 and 1917, and the Ordinary Rate Book and Instructions to Agents for 1922 specifically stated on page 378 that “[n]o extra premium is charged on account of the sex of the insured.”

207. KELLER, *supra* note 38, at 21. By the turn of the century, the Prudential and Metropolitan had rapidly growing ordinary and intermediate life departments “which appealed with great success to a lower middle class market untouched by the Big Three.” *Id.* at 12-14 (referring to the Mutual Life Insurance Company of New York, Equitable, and New York Life as the three big companies at that time in the ordinary insurance market).

208. Heen, *supra* note 27, at 375.

209. See DUBLIN ET AL., MORTALITY STATISTICS, *supra* note 199, at 15. The difference between mortality rates for black and white males was highest for ages fifteen to twenty-four years, during which black male mortality rates were more than double those of white men. *Id.* at 16. For males between twenty-five and thirty-four years old, black mortality rates were fifty-four percent in excess of those for white males; between thirty-five and forty-four years, twenty percent in excess; between forty-five and sixty-four years, sixteen to seventeen percent in excess; between sixty-five and seventy-four years, nearly six percent in excess; and after age seventy-five white male mortality rates exceeded their black counterparts. *Id.* at 16 tbl.7.

210. *Id.* at 21-22.

experience showing comparable or greater mortality rate differentials when industrial policyholders at various ages were classified by gender as opposed to race, however, industrial insurance companies did not adopt gender-differentiated premiums or benefits.

Instead, white men remained the “norm” rather than being classified as “substandard” for rating purposes. Despite men’s greater average mortality risk when compared to women, men other than black men were not treated as “substandard” risks or charged higher rates for life insurance.<sup>211</sup>

In sum, in industrial insurance markets, insurance companies distinguished between white families and black families after the end of Reconstruction, but not between men and women with regard to industrial insurance coverage, rates, or benefits. This left black men with less economic protection for their families, and thus in both symbolic and practical terms less “mastery” in their homes, despite the recognition after the Civil War of their equality of contract under law. In those working class industrial insurance markets, therefore, race played a more prominent role than gender in the insurance pricing practices adopted from the end of Reconstruction to the modern civil rights era. The role played by race in this market paralleled the role played by gender distinctions in the market for life annuities, where equality in the marketplace challenged the status hierarchies or traditional dependencies of the household. The inconsistency of practice between working class and middle class insurance markets highlights the role that pricing distinctions played in reinforcing both gender and race status relationships.

By the beginning of the twentieth century, as observed by Louis Brandeis in his Progressive Era study of industrial insurance, industrial policies constituted a large proportion of life insurance policies then outstanding.<sup>212</sup> Social reformers like Brandeis sharply criticized the marketing practices<sup>213</sup> and high cost of industrial insurance. Brandeis argued that industrial insurance placed an undue burden on working people through high management expenses, high lapse rates, and premiums double those payable for any given amount of coverage acquired through ordinary life insurance policies. Brandeis urged the establishment of “savings bank life insurance” as an alternative to industrial insurance.<sup>214</sup>

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211. In other words their gender, in the absence of other factors, did not place them in a substandard risk classification.

212. Before being appointed to the Supreme Court of the United States, Louis Brandeis proposed legislative reforms aimed at industrial insurance. Louis D. Brandeis, *Wage-Earners' Life Insurance*, *COLLIER'S: THE NAT'L WKLY.*, Sept. 15, 1906, reprinted in ALPHEUS THOMAS MASON, *THE BRANDEIS WAY: A CASE STUDY IN THE WORKING OF DEMOCRACY* 311 app. 2, 312 (1938).

213. See, e.g., WILBY HEARD, *CONFESSIONS OF AN INDUSTRIAL INSURANCE AGENT* 14 (1911) (observing that the “policies are generally taken out by women, who are easy victims, owing mostly to their lack of worldly knowledge”).

214. Brandeis, *supra* note 212, at 314-15; see, e.g., MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 155, 163, 165-80 (2009).

The industrial insurance companies defended their practices against this criticism, pointing to improvements in the policy contract:

The Industrial contract, or policy, of today is a very different document from the policy issued in 1875. The Industrial policy now provides for paid-up insurance after three years, for additional benefits after five years, for cash dividends after fifteen years, and for cash surrender values after twenty years. There are no restrictions as to hazardous occupations, residence, and death from suicide, consumption, heart disease, etc. Improvements in the policy contract have been made retroactive to existing policy holders.<sup>215</sup>

In addition, these companies argued that industrial insurance permitted millions of wage-earners who would not be acceptable risks for other types of life insurance coverage to make a start toward economic security,<sup>216</sup> leading eventually to other forms of savings or to the purchase of ordinary insurance coverage sufficient to carry the family through hard times.<sup>217</sup>

Industrial insurance remained an important form of life insurance for low-income wage earners until the mid-twentieth century, when the business began to decline.<sup>218</sup> In the mid-twentieth century, the increased wages of workers led to an expanding market of potential policyholders for ordinary insurance as well as a gradual merging of individual industrial insurance customers into the employee group life insurance market, in which life insurance coverage is purchased by employers as a benefit for their workers.<sup>219</sup> As incomes improved for the wage-earning working classes, the major industrial life insurance companies increasingly aimed their individual policy marketing efforts at new members of the middle class.<sup>220</sup>

### *B. Ordinary Life Insurance, 1870s to 1890s: Higher Rates for Women*

After the Civil War, as markets for ordinary insurance expanded and included greater numbers of women as potential customers, some life insurance

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215. John F. Dryden, President, The Prudential Insurance Co. of America, Statement made to Select Committee of the New Jersey Senate Appointed to Investigate Life Insurance: Industrial Insurance 24 (July 19, 1906).

216. *Id.* at 12, 32.

217. HOFFMAN, *supra* note 187, at 284-91.

218. Despite its importance in proportion to overall numbers of policy holders, industrial insurance remained a small proportion of the dollar amount of insurance in force. KELLER, *supra* note 38, at 286 tbl. 11.

219. *See, e.g.*, KLEIN, *supra* note 38, at 16-52; MCGILL, *supra* note 187, at 715.

220. *See, e.g.*, MCGILL, *supra* note 187, at 715-16.

companies began declining to insure female risks<sup>221</sup> and many of those accepting such risks charged women higher rates based on perceived greater mortality risks resulting from childbirth.<sup>222</sup> These types of life insurance practices had also appeared in Great Britain during this time period.<sup>223</sup> Although British associations of actuaries collected information in the 1860s on female customers, no British company made use of it, and according to Alborn, “[t]he newly standard Healthy Males [mortality] table consigned women to statistical limbo in which extra premiums were set more or less arbitrarily based on a combination of medical opinion, actuarial guesswork, and haggling.”<sup>224</sup>

In Great Britain, these insurance pricing practices coincided with a more general concern about maternal mortality.<sup>225</sup> Although national data on maternal deaths first became available in Great Britain in the mid-nineteenth century,<sup>226</sup> in the United States, by contrast, national vital statistics did not become available until well into the twentieth century due to the incompleteness of birth and death registrations.<sup>227</sup> Nevertheless, American practices tended to echo those of British companies despite, or perhaps because of, deficiencies in American mortality data.

In the early 1870s, Alexander Delmar, director of the United States Census, criticized the life insurance industry’s assumptions regarding women’s greater mortality as unfounded, pointing out that “insurance companies are incorrect in assuming that women, during their child-bearing period, are subject to greater risk of death than men during the parallel period of life.”<sup>228</sup> In response, an industry spokesman acknowledged that women did on average live longer than men but then pointed to the adverse mortality experience of the smaller group of women who sought life insurance.<sup>229</sup> Insurance companies maintained that

221. MURPHY, *supra* note 12, at 107-08; HAROLD F. WILLIAMSON & ORANGE A. SMALLEY, *NORTHWESTERN MUTUAL LIFE: A CENTURY OF TRUSTEESHIP* 74 (1957) (reporting that Northwestern Mutual Life began to decline female risks in 1876).

222. See, e.g., CLOUGH, *supra* note 79, at 85.

223. ALBORN, *supra* note 12, at 117.

224. *Id.* (referring to the Healthy Males table, adopted in 1869, and the practice, depending on the company, of excluding women, charging them extra during their child-bearing years, or charging unisex rates). In the United States, a study of American policyholder mortality, which had been inspired by an earlier British study, resulted eventually in the American Experience Table of 1868. *Id.* at 111.

225. LOUDON, *supra* note 34, at 234, 235. According to this study, peaks in maternal mortality in 1874 and 1893 in Great Britain correlated with deaths from puerperal fever which reflected “changes in streptococcal virulence in the community” and the transfer of streptococci to lying-in mothers. *Id.* at 237-38.

226. Detailed national data on maternal deaths first became available in England and Wales in 1850, and later in Scotland and Ireland. *Id.* at 234.

227. *Id.* at 265-95.

228. MURPHY, *supra* note 12, at 44 (quoting Alexander Delmar’s statement as reported in *May Women Insure?*, N.Y. TIMES, Feb. 25, 1871, at 8).

229. *Id.*; see also WILLIAMSON & SMALLEY, *supra* note 221, at 74 (attributing the differences in risk not to differences in life expectancy but to “a high proportion of ‘self-selected’ risks among women.”).

their female policyholders experienced a mortality rate much worse than that of women in the general population.<sup>230</sup>

Some in the insurance business hypothesized that this difference arose from the difficulty of getting an adequate personal examination due to the “delicacy necessary in such cases,” the greater knowledge of the husband of the wife’s condition, the lack of pecuniary interest, or selection against the industry by less healthy risks.<sup>231</sup> A report written in 1872 for the New York Life Insurance and Trust Company, however, “suggested that the ‘repugnance’ of companies to insure females was based upon an erroneous opinion that the mortality rate for women under fifty (before menopause) was higher than that for men.”<sup>232</sup>

At that time, ordinary life insurance companies covering female risks typically had a very small percentage of policies covering women<sup>233</sup> and imposed surcharges on women of child-bearing age. Mutual Life Insurance Company of New York, for example, charged women of childbearing age an extra premium of one-half of one percent of the amount insured.<sup>234</sup> At least one other company countered the trend and advertised that they insured women at the same rate as men.<sup>235</sup>

By the end of the century, however, this trend had reversed itself, mirroring broader social and cultural developments immediately prior to the Progressive Era.<sup>236</sup> The majority of companies began to charge the same rates for male and female risks, but with restrictions on policy amounts and duration.<sup>237</sup> About a quarter of insurance companies retained an extra premium for women’s policies<sup>238</sup> and a few still declined female risks.<sup>239</sup> Many of these restrictions were removed over time as experience showed that the “ancient life insurance tradition” or “old belief” was “entirely untrue or at least greatly

230. MURPHY, *supra* note 12, at 43; *see also* 1 BULEY, *supra* note 86, at 398-99 n.130.

231. MURPHY, *supra* note 12, at 43.

232. ANITA RAPONE, *THE GUARDIAN LIFE INSURANCE COMPANY, 1860-1920: A HISTORY OF A GERMAN-AMERICAN ENTERPRISE* 34-35, 89 (1987) (describing mortality tables constructed by John Frederic Entz showing that women’s life expectancy exceeded men’s at age 37 or 38, and noting that the Germania Life Insurance Company—renamed Guardian Life during the World War I period—dropped the extra premium on women’s ordinary life policies in the late 1890s).

233. MURPHY, *supra* note 12, at 44.

234. CLOUGH, *supra* note 79, at 85 (referring to policies in 1858, 1865, and 1886); *see also* Paul F. Clark, John Hancock Mutual Life Insurance Company, A Ninetieth Anniversary Address, at 10 (Apr. 1, 1952) (stating that in the 1880s, John Hancock “took a dim view of female risks” and that the “actuary reported that such risks were not desirable and the extra premium of one-half of one per cent charged none too high” because of excess mortality among women between ages 25 and 35).

235. MURPHY, *supra* note 12, at 42.

236. *See, e.g.*, ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES: THE INTELLECTUAL ROOTS OF MODERN FEMINISM* (1982) (discussing Progressive Era empirical research that questioned then-dominant assumptions about gender difference).

237. Sharon Ann Murphy, *Security in an Uncertain World: Life Insurance and the Emergence of Modern America*, at 111 (Jan. 2005) (unpublished Ph.D. dissertation, University of Virginia) (on file with University of Virginia library).

238. *Id.*

239. *Id.* (listing Mutual Benefit of New Jersey, Michigan Mutual, and Northwestern Life).

exaggerated.”<sup>240</sup> Even as late as the mid-twentieth century, however, the amount of life insurance coverage available to married women<sup>241</sup> sometimes still depended upon the amount sold to her husband.<sup>242</sup>

### *C. Life Annuities: Higher Rates for Women*

As discussed earlier, at the recommendation of Elizur Wright and the company's finance committee, the Massachusetts Hospital Life Insurance Company led the way in adopting gender-distinct rates for life annuities in the antebellum period, based on gender-distinct mortality tables constructed by John Finlaison, of the British government's National Debt Office.<sup>243</sup> In contrast to the increasingly competitive environment in the life insurance business, MHL did not experience much competition in its annuity business from the antebellum to the post-Civil War periods.<sup>244</sup> Gerald White has pointed out that “[l]ife annuities, which had been the least profitable part of the company's business prior to 1838,” showed a profit in all but eleven of the forty years from 1838 to 1878.<sup>245</sup> Life annuities became a bigger part of MHL's business by the end of the nineteenth century (despite the fact that no special attempt was made to sell them), increasing fivefold in number since 1877 and producing about five percent of the company's total fund for investment.<sup>246</sup> Life annuities still covered more women's lives than men's lives, in a ratio of about four to one.<sup>247</sup>

In 1881, to ensure that this increased business would remain profitable, MHL began to apply women's life annuity rates to men, increasing rates for the smaller number of men who purchased annuities.<sup>248</sup> However, in 1893, after consulting with Elizur Wright's son Walter, who then served as actuary of the New England Mutual Life Insurance Company, MHL revived the use of

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240. CLOUGH, *supra* note 79, at 290. These restrictions were gradually removed by Mutual Life and “by 1921 most of the selection restrictions on women were removed, and the two sexes began to be underwritten on nearly the same basis.” *Id.*

241. In addition, some health or disability coverage was difficult or impossible for women to obtain. Janet Sydlaske, Comment, *Gender Classifications in the Insurance Industry*, 75 COLUM. L. REV. 1381, 1383-86 (1975).

242. JOSEPH B. MACLEAN, LIFE INSURANCE 263 (9th ed. 1962) (noting that “[m]any companies limit the amount of insurance on a dependent married woman to some proportion of the insurance carried by the husband on his own life” and that “[a]ll companies underwrite this business strictly.”); *see also* LOUIS I. DUBLIN, A FAMILY OF THIRTY MILLION: THE STORY OF THE METROPOLITAN LIFE INSURANCE COMPANY 105, 131 (1943) (recounting further restrictions placed in the 1930s on “the writing of insurance on housewives and other dependents, in relation to the amount in force on the head of the family”).

243. *See supra* Part II.B.

244. WHITE, *supra* note 89, at 85, 84.

245. *Id.* at 85 (stating that the company realized profits during these forty years of approximately \$111,000 for annuities and \$88,000 for life insurance).

246. *Id.* at 114-15.

247. *Id.* at 114.

248. *Id.* at 114-15. Minutes of the Board of Directors of Mass. Hosp. Life Insurance Co. (May 4, 1881), Massachusetts Hospital Life Insurance Company Collection, AA-1, Case 1. Baker Library Historical Collections, Harvard Business School.

separate tables for men and women and increased rates for purchasers at higher age levels.<sup>249</sup> After an extensive survey of the company's annuity experience by Walter Wright in 1897, MHL's finance committee recommended the development of new tables for men and women that would conform more closely to those recently adopted by several leading New York insurance companies.<sup>250</sup> In addition, the company finally lowered the interest rate assumptions it had used since the 1820s<sup>251</sup> and raised rates, especially at higher ages, to reflect significantly lowered mortality rates at those ages.<sup>252</sup>

The company's new male and female mortality tables for its annuity business were informed by the experience of fifteen American companies, a survey of which was reported in the 1890s.<sup>253</sup> This survey included nearly equal numbers of male and female annuitants; however, because the aggregate foreign annuity business of the American life insurance companies exceeded their domestic annuity business, about three-fourths of the lives surveyed were European.<sup>254</sup>

In 1899, Emory McClintock of the Mutual Life Insurance Company of New York published adjusted male and female tables based on this survey. McClintock compared the American companies' experience against the more extensive survey of British lives that formed the basis of updated male and female annuity tables presented by A. J. Finlaison in 1883 and published by the House of Commons in 1884, as corroborated by more recent data from France.<sup>255</sup> McClintock noted that the American survey, with its large proportion of recently purchased annuities, indicated the "effect of self-selection in reducing the rate of mortality" but also indicated a "somewhat greater vitality

249. WHITE, *supra* note 89, at 115.

250. *Id.* Minutes of the Board of Directors of Mass. Hosp. Life Insurance Co. (Dec. 8, 1897 and Jan. 5, 1898), Massachusetts Hospital Life Insurance Company Collection, AA-1, Case 1. Baker Library Historical Collections, Harvard Business School.

251. WHITE, *supra* note 89, at 115 (explaining that the firm substituted a three and one half percent yield used for the four percent yield that had been used by the company in determining rates since the days of its first actuary, Nathaniel Bowditch, who served from 1823 until his death in 1838). A leading life insurance text published in 1967 noted that "[u]ntil recent years, companies attempted to hedge future improvements in annuitant mortality through the use of an unrealistically low interest assumption in the premium formula"—specifically, through rates substantially lower than those used in the calculation of life insurance premiums. The text went on to explain that "the effectiveness of this technique can be judged by the fact that an interest margin of 1/4 per cent is capable of absorbing a general reduction in mortality of 6 or 7 per cent." Competition among companies had "increasingly caused the companies to adopt interest assumptions much closer to their actual investment experience." MCGILL, *supra* note 187, at 104.

252. WHITE, *supra* note 89, at 115.

253. The survey results were reported by Rufus Weeks of the New York Life Insurance Company at the Society of Actuaries meetings in 1892 and updated in 1894. *With Figures and Signs: Actuaries Meet and Discuss Points in Their Business*, N.Y. TIMES, May 1, 1896, at 9.

254. *Id.*

255. Emory M'Clintock, *Special Tables for the Estimation of Mortality Among Annuitants*, Vol. VI, No. 21, DECENNIAL NUMBER, PAPERS AND TRANSACTIONS, SOCIETY OF ACTUARIES 13 (May 18-19, 1899) (noting that two-thirds of the 30,788 British annuitant lives were women and that the survey of the fifteen American companies included 4365 males and 4821 females).

on the whole, which would seem to be the result of the improving physical conditions of modern life.”<sup>256</sup> He also observed that “[m]en still young do not generally purchase annuities for themselves, and that those for whom annuities are bought by others are not necessarily good risks,” and thus, it was reasonable to suppose that the mortality among men under sixty “would continue to be rather heavy” and that “there is no reason why rates should not be made accordingly.”<sup>257</sup> In the early twentieth century, McClintock’s male and female annuitant mortality tables became accepted as an industry standard for the valuation of reserves for life annuities in America.<sup>258</sup>

The demand for annuity products grew slowly during the late nineteenth and early twentieth century as multi-generational households became less prevalent, and grew more quickly during the rest of the twentieth century.<sup>259</sup> For example, in 1910 individual annuities formed only a small part of the business of the Equitable Life Assurance Society, a company organized in 1859 by Henry Baldwin Hyde in New York City; they became a progressively larger share of Equitable’s business (as measured by premium receipts) over the next thirty-five years, and constituted forty percent of the company’s total receipts by 1945.<sup>260</sup> A big player in annuity markets, Equitable charged gender-distinct rates in this line of business.<sup>261</sup>

The big industrial life insurance companies, despite charging unisex rates for industrial life insurance coverage, followed the general industry practice of gender-distinct pricing for annuities. Metropolitan Life adopted gender-based pricing for annuities in 1907, after the standardization of annuity tables for valuation purposes. According to a company history, these new rates “embraced separate tables for males and females—a much more equitable arrangement, in view of the demonstrated superiority in the longevity of female annuitants.”<sup>262</sup> When the John Hancock Company pursued the annuity market in 1922, the company charged gender-distinct rates.<sup>263</sup> That same year,

256. *Id.* at 13-14.

257. *Id.* at 14.

258. Many states, including New York, incorporated McClintock’s annuity tables as a valuation standard in their state insurance laws. *See, e.g.,* *New York Life Ins. Co. v. Edwards*, 271 U.S. 109, 120 (1926).

259. *See generally* James M. Poterba, *A Brief History of Annuity Markets*, in *THE ROLE OF ANNUITY MARKETS IN FINANCING RETIREMENT* 26 (Jeffrey R. Brown et al. eds., 2001).

260. In 1925, only four and one-half percent of the Equitable Life Assurance Society’s premium receipts were for annuities; by 1930, annuity receipts constituted eleven percent; in 1935, thirty-two percent; in 1945, forty percent of all premium receipts. 2 BULEY, *supra* note 86, at 1154. Equitable’s “individual annuities numbered about 4000 in 1910 but by the end of 1947, the number had increased to 307,894. . . during the same period the annual income at maturity under individual annuities in force rose from about \$1,500,000 to \$136,470,345.” *Id.* at 1153.

261. Equitable applied a mortality table for annuity contracts based on the annuitant’s age and sex. *Id.* at 1261.

262. HALEY FISKE & RAYMOND V. CARPENTER, *AN EPOCH IN LIFE INSURANCE, TWENTY-FIVE YEARS OF ADMINISTRATION OF THE METROPOLITAN LIFE INSURANCE COMPANY* 49-50 (1917).

263. JOHN HANCOCK MUTUAL LIFE INSURANCE CO., *supra* note 181, at 41.

Prudential's rate books and instructions to agents contained sex-differentiated annuity rate tables.<sup>264</sup>

In summary, by the time women gained the right to vote in the 1920s, higher prices for women in the annuity market had become a well-established commercial practice. Most companies at that time charged unisex rates for life insurance coverage but imposed higher rates for women seeking annuity income protection during their lives.

#### *D. Post-Civil War Pricing Patterns Reinforced Separate Spheres Ideology*

As set forth at the end of Part II, gender-distinct pricing practices, with higher rates for women's lifetime annuities, first appeared in elite and middle class markets during the antebellum period as gender roles were being challenged on legal, social, and political fronts. After the Civil War, the ideology of separate spheres, although challenged by some woman's rights activists, became even more entrenched in law and custom. For working class women, however, the separation between home and marketplace blurred in certain respects as increasing numbers of states recognized the right to wage earnings for those married women<sup>265</sup> whose husbands were unable to provide fully for their support.<sup>266</sup>

The intellectual underpinnings of gender ideology also shifted from the antebellum years to the period following the Civil War and up to 1920, as did the social issues of most concern to the elite and middle-class men and women who purchased ordinary life insurance and annuity products. A few key issues, briefly summarized below, serve as examples of how prevailing legal, scientific, and cultural views about gender difference developed during that time and of the impact of those views more generally on the roles and opportunities available to women.

As mentioned in Part I, studies of patterns of civil rights reform by legal historians have shown that civil rights struggles sometimes create feedback that may transform former status hierarchies into more private, modernized forms.<sup>267</sup> As Reva Siegel has pointed out, "[C]ivil rights reform does not simply abolish a status regime; but in important respects, it modernizes the rules and rhetoric through which status regimes are enforced and justified."<sup>268</sup> After the Civil War, for example, the U.S. Supreme Court narrowly interpreted

264. PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, ORDINARY RATE BOOK AND INSTRUCTIONS TO AGENTS 344-47 (1922).

265. Siegel, *supra* note 25, at 2130-31, 2168-96.

266. STANLEY, *supra* note 18, at 175-217.

267. See discussion *supra* text accompanying notes 24-25.

268. Reva Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996) (examining the evolution of domestic assault law from a law of marital prerogative to a law of marital privacy).

the national citizenship rights of former slaves. It distinguished between the political rights of citizenship and private associational affinities,<sup>269</sup> ushering in the Jim Crow era of state-sanctioned racial segregation until the mid-twentieth century.

The Court also narrowly interpreted the national citizenship rights of women, upholding states' denial of suffrage<sup>270</sup> and exclusion of women from the legal profession<sup>271</sup> in rulings that reflected prevailing notions of separate spheres for men and women. When the U.S. Supreme Court held that states could deny women admission to the bar without abridging the privileges and immunities of citizenship protected by the Fourteenth Amendment, for example, the concurring opinion by U.S. Supreme Court Justice Bradley observed that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."<sup>272</sup> Justice Bradley noted with approval the importance given by the state court to Bradwell's incapacity under coverture to enter into express or implied contracts with clients.<sup>273</sup>

Although woman's rights activists continued to advocate for equality of the marriage contract after the Civil War,<sup>274</sup> distinctions between the affection and maternal nurturing of the home and the business-like freedom and equality of contract in the marketplace were defined and elaborated during this period. In the early twentieth century, women's groups achieved certain legal reforms including protective labor legislation,<sup>275</sup> mothers' pensions,<sup>276</sup> and later suffrage,<sup>277</sup> in part by extending the ideology of women's separate spheres of moral and domestic influence into formerly foreclosed public, political, and economic realms.

269. *Plessy v. Ferguson*, 163 U.S. 537, 544, 551 (1896); *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the Fourteenth Amendment protected only "privileges or immunities" conferred by the United States and not those of state citizenship).

270. *Minor v. Happersett*, 88 U.S. 162 (1874) (holding that Missouri's refusal to allow Virginia Minor to register to vote did not violate her rights as a citizen under the Privileges and Immunities Clause of the Fourteenth Amendment). See, e.g., LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 92-123 (1998) (describing the campaign of the women's rights movement in the 1870s to test women's voting rights under the Fourteenth Amendment).

271. *Bradwell v. State of Illinois*, 83 U.S. 130 (1872) (upholding the state's exclusion of women from the practice of law).

272. *Id.* at 141.

273. *Id.* (observing that "[t]his very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.").

274. See, e.g., Siegel, *supra* note 52, at 1146-89.

275. *Mueller v. Oregon*, 208 U.S. 412, 421-23 (1907).

276. Sometimes referred to as "widows' pensions," mothers' pensions were enacted by twenty state legislatures in 1911-13, and by forty states by 1920. They authorized local governmental authorities to make payments to poor widowed mothers of dependent children to cover at least part of the cost of raising such children in their own private homes. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 424 (1992).

277. U.S. CONST. amend. XIX.

In upholding state legislation protecting women workers, for example, the Court emphasized “woman’s physical structure and performance of maternal functions,” noting that “the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race,” placing her “in a class by herself;” thus, “legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.”<sup>278</sup> This language reflects the view that women’s reproductive and maternal functions should be issues of social concern. Related debates during the post-Civil-War period of woman’s rights activism illustrate the congruence between dominant social and cultural gender norms and the pricing practices introduced by the insurance industry for women of child-bearing age.

After the Civil War, separate spheres ideology began to emphasize evolutionary differences and women’s specialized biological roles in childbirth and childrearing. Physical anthropologists for years had measured cranial capacities and brain weights to show how the mental capacity of the sexes differed.<sup>279</sup> These measurements showed lower brain weights and cranial capacity for females than for the average male European brain.<sup>280</sup> In the 1870s, ideas about gender difference were increasingly influenced by evolutionary theory and social Darwinism. A decade after the publication of Darwin’s *On the Origin of Species*<sup>281</sup> and shortly after publication of his *Descent of Man*,<sup>282</sup> middle-class Americans debated the effect of biological difference on women’s social roles and intellectual capacities.<sup>283</sup>

For example, when a group of Bostonian reformers advocated the admission of women to Harvard, the ensuing debate focused sharply on women’s biological limitations and reproductive role.<sup>284</sup> Dr. Edward Clarke, a

278. *Mueller*, 208 U.S. at 421-23.

279. Cranial capacity measurements had also been performed for several decades in an attempt to isolate racial differences. STEVEN JAY GOULD, *THE MISMEASUREMENT OF MAN* (1981) (describing scientific racism in the years prior to the Civil War); see also AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* 231-54 (1993) (discussing nineteenth-century scientific contributions to ideologies about race).

280. ALEXANDER BAIN, *MIND AND BODY: THE THEORIES OF THEIR RELATION* 19-20 (1873) (comparing the weight of 49.5 ounces for the average European male brain to 44 ounces for the female brain).

281. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION; OR, THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (1859).

282. CHARLES DARWIN, *DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 35-38 (1871).

283. For some forty years between the publication of Darwin’s *Origin of the Species* and the development of modern genetics, the “exact nature of sex-differentiation and its psychic accompaniment was a subject of intense, though inclusive, debate.” Jill Conway, *Stereotypes of Femininity in a Theory of Sexual Evolution*, 14 *VICTORIAN STUD.* 47, 47 (1970) (discussing the influence of the thought of Spencer, Comte, and Geddes on English and North American sociology). Conway quotes Spencer’s view that “sex-differences could best be understood by assuming ‘a somewhat earlier-arrest of individual evolution in women than in men; necessitated by the reservation of vital power to meet the cost of reproduction.’” *Id.* at 48, 61 n.2 (quoting Spencer’s *The Study of Sociology*, which was first published in serial form in England and the United States in 1872).

284. ROSENBERG, *supra* note 236, at 4-5 (noting that attempts to define sex differences “suddenly crystallized into a clear exposition of women’s physical limitations”).

member of Harvard's Board of Overseers and a former member of its medical faculty, responded to these reform proposals with the influential argument that young women's physical health would be damaged by the intellectual rigors of higher education and that opening up higher education to women would have a destructive effect on American society as a whole.<sup>285</sup> He argued that the mental strain of college would seriously threaten the development of a young woman's reproductive organs.<sup>286</sup> Those young women who ignored that basic fact of physiology risked nervous collapse and sterility.<sup>287</sup> In addition, arguing from the assumption that higher civilization brought greater specialization, Clarke claimed that the divergence of male and female social roles properly represented specialization in the realm of sex in which women had their own sphere of activity.<sup>288</sup>

At about the same time, some middle-class women were asserting the idea of voluntary motherhood,<sup>289</sup> with women like Elizabeth Cady Stanton urging women to assert control over their own reproductive capacity in marriage.<sup>290</sup> During the debate over voluntary motherhood, the nineteenth-century campaign to criminalize abortion, as described by Reva Siegel, "offered a new way of regulating wives' obligations that was distinct from, but in important respects consistent with, the traditional body of marital status law being reformed in the post Civil War period."<sup>291</sup> The campaign provided a new, physiological way of reasoning about wives' obligations, deriving women's duties from "facts about the female body" rather than from her husband as her representative in the social state, and thus defined women's roles as a status conferred by "nature rather than by the social state."<sup>292</sup>

This emphasis on the maternal role of elite and middle-class women, on their physiological suitability for reproduction and on their susceptibility to nervous disorders and vulnerability in childbirth, was reflected in commercial practice as well as in legal decisions.<sup>293</sup> As discussed above, the insurance

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285. EDWARD CLARKE, *SEX IN EDUCATION; OR, A FAIR CHANCE FOR THE GIRLS* 21-23 (1873) [hereinafter CLARKE, *SEX IN EDUCATION*]; see also EDWARD CLARKE, *THE BUILDING OF A BRAIN* (1874) [hereinafter CLARKE, *THE BUILDING OF A BRAIN*].

286. ROSENBERG, *supra* note 236, at 7-9 (discussing the influence of Darwin on Clarke's views).

287. CLARKE, *SEX IN EDUCATION* *supra* note 285, at 40, 54.

288. CLARKE, *THE BUILDING OF A BRAIN*, *supra* note 285, at 79-84 (arguing that these differences supported the development of separate educational programs for men and women and that women should study less than young men).

289. LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 104-11 (1976).

290. *Id.* at 104-09; see also WILLIAM LEACH, *TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY* 82-84 (1980).

291. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 321 (1992).

292. *Id.*

293. For a discussion of the influence of medical thought in the 1870s and 1880s regarding conditions known as neurasthenia and hysteria on the development of tort law in this period, and its connection to the societal view of middle- and upper-class women as frail and often unfit for their roles

industry mirrored and underscored this emphasis on women's maternal role by adopting ordinary life insurance surcharges and coverage restrictions on women of childbearing age, once again borrowing such gender-distinct rate differentials from Great Britain despite differences in American experience. When that emphasis declined at the turn of the century, those practices gradually disappeared in ordinary life insurance markets.

#### IV. CONCLUSION: LOOKING TOWARD THE SECOND WAVE

Insurance companies resolved the theoretical and practical conflict between equality of contract in the marketplace and the traditional dependencies of the home through the selective adoption of gender-distinct pricing. As shown by inconsistencies in the use of risk assessment in the pricing of products, gender-based pricing practices did not result from even-handed application of actuarial methodology and principles. Nor can they be explained fully by the characteristics of different markets for life insurance or by variations in the mortality experiences of policyholders over time. Although those factors had an impact on the practices that emerged, the origins of gender-based pricing instead suggest the operation of powerful social and cultural norms.

When differentiated by gender, insurance contract pricing reflected the categorization of women as different in nature from men, or alternatively, of lesser economic value apart from their husbands. Separate mortality tables categorized by gender first appeared in the antebellum period, when anti-slavery and woman's rights activists challenged the dominant gender ideology of separate spheres for men and women, and shortly after the enactment of insurance-related modifications to the common law doctrine of marital unity. The selective use of these tables resulted in unfavorable rates or lower annual annuity payments for women, coinciding, not by happenstance, with broader changes in marital status law and highly contentious national debates about the proper role of women in American society.

Significantly, gender-distinct mortality tables and rates first appeared in insurance contracts designed to provide income support for financially inexperienced and dependent family members in products used to fund marriage settlements, payments as substitutes for dower rights, or lifetime support for widows or the elderly. Higher prices or lower benefits for coverage of women's lives were thus adopted for products used to provide financial support independent of or as a substitute for marital rights. By adopting gender-differentiated contract terms for these products, companies translated into new, modernized form the marital status and dependency relationships previously

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as childbearers and childraisers, see Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright*, 88 MICH. L. REV. 814, 824-26 (1990).

enforced under the common law of coverture for married women and dower for widows. The pricing of life annuities remained gender-differentiated, with separate tables and higher rates (or lower annual benefits) for women, as that market expanded during the twentieth century. Gender-distinct mortality rates for annuities became entrenched by the time women won the right to vote, when suffrage was achieved at least in part through an expansion of separate spheres ideology into formerly foreclosed political realms. They have remained a feature of the annuity market outside of the employment setting up to the present time.

Gender-based coverage restrictions and higher prices for life insurance coverage of women's lives also began to appear following the Civil War. Surcharges for women of child-bearing age focused on women's reproductive capacities at a time when a broader set of legislative changes reduced the role of the husband as the married woman's legal representative in the marketplace. Women's specialized biological roles in childbirth and child nurturing became a special concern for society as a whole, with increased attention paid to women's reproductive role. In both symbolic and in practical economic terms, therefore, gender-differentiated pricing practices tempered the freedom and equality of contract for married women recognized by the expanding state statutory exceptions to coverture by emphasizing women's biological difference from men.

When not differentiated by gender, insurance contract pricing reflected the status of men as providers, who during life were legally obligated to support their dependent wives and children. Thus, men's lives tended to be used as a unisex measuring standard for ordinary life insurance products that provided benefits to dependents upon the family breadwinner's death. The pricing of industrial insurance, a newly developed individual life insurance product aimed at the working poor, remained gender-neutral but became race-distinct despite evidence of mortality differentials when policyholders were classified either by race or by sex.

Gender-distinct mortality tables, if consistently utilized for contract pricing purposes, could have supported higher prices or lower benefits for men as "substandard" risks in the sale of industrial life insurance, where men and women comprised close to an equal portion of covered lives and men's average mortality exceeded women's mortality rates at nearly all ages. However, in that working class market, unisex rates prevailed despite the favorable, lower mortality rates of female insured lives. These "unisex" pricing policies reinforced the traditional notion of men as the primary "providers" for their families, particularly in working class households where women's wages were sometimes necessary to sustain the family. On the other hand, as I have explored elsewhere, race-based rates adopted in that market reflected and reinforced post-Reconstruction views about racial superiority and inferiority,

and resulted in less financial security for black families than for white families.<sup>294</sup> Thus, in an economic context threatening to white men's mastery in the home, industrial insurance pricing differentiated on the basis of race rather than gender, reinforcing along both racial and gender lines the notion of greater "mastery" for white men in their homes.

Lower favorable rates for women for ordinary life insurance, the mirror image of higher rates charged to women for life annuities, generally did not begin appearing in ordinary insurance markets until the late 1950s and early 1960s.<sup>295</sup> In the late 1970s and early 1980s, proposed federal legislation to ban sex discrimination in insurance<sup>296</sup> failed at about the same time<sup>297</sup> that the Equal Rights Amendment, passed by Congress in 1972,<sup>298</sup> failed to gain ratification by the requisite number of states.<sup>299</sup>

Developments during the "second wave" of women's rights reforms, which are beyond the scope of this article, raise many questions that merit future investigation. For example, why did the rationalization and expansion of gender-distinct insurance pricing follow soon after race-distinct mortality tables

294. Heen, *supra* note 27.

295. For example, in 1958, the Equitable Life Assurance Society adopted lower premiums on all plans of life insurance for women in policies of \$10,000 and over. 2 BULEY, *supra* note 86, at 1261-62; *see also* MACLEAN, *supra* note 242, at 263 (observing that "[p]ractically all companies now have lower rates for women"). Rather than develop separate tables reflecting the mortality experience of women, companies utilized the updated mortality rates of the 1958 Commissioners Standard Ordinary Mortality Table, and applied a simple three-year age differential for women. Under a three-year age setback, a company would sell insurance to a thirty-five-year-old woman at the premium rates applied to a thirty-two-year-old man without the need to separately calculate non-forfeiture values, policy reserves, and dividends. *Id.* at 8, 106, 109; *see also* MCGILL, *supra* note 190, at 158-59 (discussing the development of the 1958 Commissioners Standard Ordinary Mortality Table).

296. *See, e.g.*, H.R. 100, 96th Cong. (1979). H.R. 100, known as the Nondiscrimination in Insurance Act, was reintroduced in each Congress through 1985, keeping its bill number H.R. 100 through 1983. A similar Senate nondiscrimination bill, the Fair Insurance Practices Act, S. 2204, was reported to the full Senate from the Committee on Commerce, Science, and Transportation in December 1982. S. REP. NO. 97-671 (1982).

297. Although the 1983 version of H.R. 100 was reported out of the Subcommittee on Commerce, Transportation and Tourism to the full House Committee on Energy and Commerce in April 1983, and reported out of the full committee in March 1984, the bill died before reaching the floor. LIBRARY OF CONGRESS, *Bill Summary & Status—98th Congress (1983-1984)—H.R. 100*.

298. H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

299. H.R.J. Res. 638, 95th Cong. 92 Stat. 3799 (1978); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 & n.2 (1979) (describing the vote by Congress in 1978, with three states short of the required thirty-eight affirmative votes, to extend the original 1979 deadline until June 30, 1982). By 1982, only thirty-five of the required thirty-eight states had approved the Equal Rights Amendment. *See, e.g.*, Dana Canady, *Advocates of Equal Rights Amendment Resume Their Fight*, N.Y. TIMES, May 4, 2003, § 1, at 41 (describing ongoing efforts to revive the ERA ratification effort). Some scholars have argued that the social and legal changes since its reintroduction in 1972 produced a "de facto" ERA in equal protection jurisprudence. *See, e.g.*, Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002); *see also* Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009) (describing the feminist debate over reviving the ratification effort); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004) (describing and discussing the dual legal strategy of ERA ratification efforts and litigation under the Fourteenth Amendment).

and rates were discontinued? How did improving mortality for both men and women affect the pricing decisions made by the insurance industry? How did entry of more married women into the wage labor market during that time contribute to the change? How did the framework for regulation of the insurance industry influence the use of gender by the industry for pricing and valuation purposes? How, if at all, did political factors, including state-by-state ratification debates over the Equal Rights Amendment, contribute to the timing of the shift from unisex rates to favorable rates for women for ordinary life insurance?

In any investigation of these and other questions, the antebellum origins and selective adoption of gender-distinct rates during the “first wave” of woman’s rights activism provide important historical context for understanding the outcome of second wave debates. Past patterns and influences suggest that gender-based insurance classifications proved difficult for second wave women’s rights activists to dislodge because of the relationship of insurance to family dependency and security, the rhetorical neutrality of actuarial language, and the strength of underlying ideologies of gender.

In America, as married women’s capacity to enter into contracts apart from their husbands became recognized in law, different contract rates for men and women provided a means to reinforce the notion of fixed “natural” gender difference. By reflecting traditional gender status hierarchies and dependency relationships in the pricing policies adopted, these differentials tempered the law’s recognition of women’s equality of contract in the marketplace.