The Gendered Origins of the *Lumley* Doctrine: Binding Men's Consciences and Women's Fidelity

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INTRODUCTION

In the familiar case of *Lumley v. Wagner*, the English Court of Equity held that although opera singer Johanna Wagner could not be ordered to perform her contract, she would be enjoined from singing at any competing music hall for the term of the contract.¹ *Lumley* is usually lauded in first year contracts courses as a just and fair decision, one that illustrates the proper distinction between equitable orders that force performance (unworkable and unjust) and equitable orders that prevent performance (sometimes workable, usually practical, and not necessarily unjust).²

Contracts classes, however, rarely consider the central labor issue: whether an injunction preventing an employee from quitting and working elsewhere violates the American tradition of free labor and the right to quit employment.³

† Professor of Law, University of Iowa College of Law. This Article is dedicated to the memory of Professor Mary Joe Frug. This Article was inspired in part by her work on the feminist reading of contracts casebooks. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985). I feel particularly privileged to have had the benefit of her encouragement and her perceptive comments on an early draft of this work. An early version of this piece was delivered as part of the Schouler Distinguished Lectures at Johns Hopkins University. I would like to thank the audience participants for their comments. I would further like to thank several readers for giving me the insights of their perspectives on this work: Eric Andersen, Martha Chamallas, Betsy Clark, Pat Cooper, Matt Finken, Lucinda Finley, Herb Hovenkamp, Linda Kerber, Johannes Ledolter, Marc Linder, Jean Love, Clyde Summers, and Chris Tomlins. To each of these readers I owe a special and individual debt of gratitude. Kris Matsumoto provided truly outstanding research assistance, and the public services librarians of the University of Iowa Law Library were extraordinarily resourceful. Finally, I would like to thank the trustees and contributors of the Fund for Labor Relations Studies for their continuing support of this research.

1. 1 DeG., M. & G. 604, 619, 42 Eng. Rep. 687, 693 (Ch. 1852).

2. For some of the recent scholarship on the merits of specific performance and injunction, see Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984).

3. The American tradition of free labor is documented in such works as ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970); ROBERT STEINFELD, *THE INVENTION OF FREE LABOR—THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE 1350-1870* (forthcoming 1991); William Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

In American employment law, the *Lumley* rule was a regressive development.⁴ The beneficial side of the rule, that the opera singer would not be ordered to perform, was already secured by the Thirteenth Amendment.⁵ Before *Lumley* took hold in American courts, employers had considerably less leverage to compel the continued service of employees under contract.⁶ With the *Lumley* rule in effect, employers could shut employees out of work unless they returned to work for them for the remainder of the employment contract, a term which sometimes lasted several years.⁷ An employer holding the power of an injunction over an employee could dictate the terms on which that employee would be free to work elsewhere.

The *Lumley* rule's regressive effect was expressly denounced by a leading American jurist at its first introduction in the labor emancipatory era following the Civil War;⁸ yet it quiescently attained the status of the dominant common law rule in American courts by the 1890's. How did the rule of *Lumley v. Wagner* come to be incorporated into the canon of rules pertaining to equitable intervention in cases of departing employees? Why, of all the nineteenth-century opinions on the subject, was *Lumley*, rather than other rulings decided by equally eminent American judges, constructed into the canon of law?

The answer appears to be related to the gendered context in which the rule was examined at the time that American courts constructed the canon. Suits involving the services of women constituted the core of cases and provided the central contextual focus in which the rule was examined. Many more actresses than actors were sued under this cause of action.⁹ Indeed, in the nineteenth century, all of the prominent cases in this line involved the services of women, and only women performers were subjected to permanent injunctions against performing elsewhere for the duration of the contract.¹⁰ In the corpus of report-

4. For description of the earlier American rule, see *infra* Part I.A; cf. Robert S. Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235 (1921) (arguing that *Lumley* rule violates 13th Amendment's prohibition on involuntary servitude).

5. While *Lumley v. Wagner* was decided in 1852 in England, it was not noticed by American courts until considerably later. See *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865). After the enactment of the 13th Amendment in 1865, specific performance of labor contracts was unconstitutional. *VanderVelde*, *supra* note 3, at 489-90. So by the time *Lumley* was considered by American courts, the rule was unnecessary to guarantee that benefit to employees. See *infra* notes 92-99 and accompanying text.

6. See *infra* Part I.

7. For example, actress Fanny Morant Smith was in the first year of a three-year contract when she was enjoined. *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874).

8. See *infra* Part I.A.3.

9. For statistics, see *infra* note 265.

10. *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); *McCaull v. Braham*, 16 F. 37 (C.C.S.D.N.Y. 1883); *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *Edwards v. Fitzgerald* (N.Y. Super. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910); see also *Canary v. Russell*, 30 N.Y.S. 122 (Sup. Ct. 1894) (actress conceded court's ability to enjoin her, but contested extent of term).

ed cases, no male performer was ever permanently enjoined from quitting and performing elsewhere during the entire nineteenth century.¹¹

The fact that suits over women dominate this line of cases appears to be more than a coincidence. On no other topic of employment litigation, save the tort of seduction, do women figure so prominently in the leading cases. This concentration of women litigants is anomalous in the nineteenth century, an era when women were unlikely to be parties to any employment litigation. Both legal and cultural constraints discouraged women from working for wages. If they were married, the doctrine of coverture submerged women's legal identity under their husbands'. Thus, it is indeed unusual to find that on a gender-neutral legal issue like an employee's right to quit, women's cases would so considerably outnumber men's cases in a profession where women worked alongside men. Moreover, it is unusual that these women's cases would be raised to establish the standard.

In this Article, I offer a tentative explanation of this phenomenon: that the *Lumley* rule's reception in the United States was facilitated by the fact that the majority of cases that employers won were cases involving women. I have chosen the term "gendered" to describe this phenomenon because the term

11. A methodological point should be made here. Rather than relying upon a sample, I have attempted to include every employment case citing the *Lumley* rule. To generate this battery of cases, every American citation of the *Lumley* case was checked. Only cases that dealt with contracts for employment and only cases where the employer sought to enjoin the employee were considered as part of the set. Cases that dealt with equitable powers generally, equitable enforcement of land contracts, protection of trade secrets, or rights to an exclusive supply of a commercial product were excluded from the relevant battery of cases.

Among the 19th-century employment cases, most cases came from the theater, and the only set of cases that included both men and women defendant-employees were those concerning the theatrical profession. Although in the late 19th century, employers in other fields of work, such as professional baseball and specialized retail sales, also attempted to use the *Lumley* rule to control their employees, all of those cases involved men and all of them failed to result in injunctions for the terms of the contracts. See *infra* Part I.B.4.

Cases involving covenants not to compete, although in some sense related to the *Lumley* rule and posing parallel concerns regarding free labor, were not included in the set for three reasons. First, their legal origin was distinct. Much of it was based on a tradition of apprenticeship, whereby the apprentice learned the secrets of the master in exchange for service for a period of years and a promise that the apprentice would not set up shop in competition with the master in the same vicinity at the end of the apprenticeship. W.J. RORABAUGH, *THE CRAFT APPRENTICE* 33 (1986). In this respect, the custom functioned to protect trade secrets that could not be protected by other means. The other legal origin was noncompetition covenants that attached to the sale of a business or the sale of a property. These two types of provisions certainly had an impact on the tradition of free labor, but they were distinguishable from the *Lumley* type of injunction because they enjoined use of a *res* as property rather than an employee as property. See *infra* note 345-50 and accompanying text.

Second, in the cases where a negative covenant was the sole or primary purpose of the contract, the factual circumstances generally involved two providers of the same service seeking to divide up that business territory between themselves. In these cases, the issue of the power of an employer over an employee is not usually presented. Third, for the most part these cases were recognized as a separate and distinct line of cases. See *infra* note 49 and accompanying text. There are a few exceptions, however, where the citations crossover. See e.g., *Philadelphia Base-Ball Club v. Lajoie*, 10 Pa. D. 309, 310-11 (1901), *rev'd sub nom.* *Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902) (employment case citing to trade secret and other noncompetition covenant cases).

covers a broad range of gender-specific elements that recur in this line of cases.¹² These include sexist behavior, sex role typing, unequal treatment, charged language of a gender-specific nature, and sexual harassment. However, the pattern is complex. The phenomenon was not a simple one of misogyny or sexism, and it did not appear uniformly in every case involving a woman employee.¹³ Deeper cultural constructions of the role of women in the public workplace, particularly the very public workplace of the stage,¹⁴ explain the phenomenon better than would attributions of sexism to the few key individuals involved. A woman appearing in public on the stage posed a particular challenge to the dominant norm of the Victorian Era that women were supposed to remain in the privacy of the home.

I maintain that, unlike male actors, nineteenth-century women performers were less likely to be viewed as free and independent employees. Nineteenth-century women were generally perceived as relationally bound¹⁵ to men. In this line of cases, that perception of women manifested itself in the need to bind actresses to their male theater managers. Moreover, in the view of the dominant culture, women performers were more likely to be perceived as subordinate than

12. Analysis of similarly recurring gender-specific elements illuminates other areas of the law. Such analysis contributes to the feminist effort to realize the place of women's experience in supposedly gender-neutral legal doctrines. See, e.g., Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990) (outlining role of mothers' claims in development of tort law's nonrecognition of emotional harms causing physical damage); Lucinda L. Finley, *A Break in the Silence: Including Women's Issues in a Tort Course*, 1 YALE J.L. & FEMINISM 41 (1989); Frug, *supra* note 7.

13. In some cases, there is no evidence that the woman litigant was disadvantaged or subjected to gendered treatment. See, e.g., *Depol v. Sohlke*, 7 Robertson's Pr. 280 (N.Y. Super. Ct. 1867) (decided on border of change of judicial attitude between *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865), and *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); see also *Rice v. D'Arville*, 162 Mass. 559 (1895) (refusing to enjoin woman singer who was owed several thousand dollars for previous performances).

14. CLAUDIA D. JOHNSON, *AMERICAN ACTRESS—PERSPECTIVE ON THE NINETEENTH CENTURY* 3-78 (1984); MARY P. RYAN, *WOMEN IN PUBLIC—BETWEEN BANNERS AND BALLOTS, 1825-1880* (1990) (discussing social limitations on women appearing in public places). For development of this point, see *infra* notes 129-38 and accompanying text.

15. The use of the term "relationally bound" has been used increasingly to describe socially expected and judicially enforced obligations, privileges, and behaviors that surpass and sometimes contravene the express terms of written contracts. With respect to contracts, see generally IAN MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Ian Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

The term is also used by Professor Mary Ann Glendon. MARY A. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981). She writes: "[T]he role of contract is confined to an even narrower range in the employment relationship. The mutual rights and duties of the parties tend to be fixed by law as much as, if not more than, by individual or collective bargaining." *Id.* at 219. Harper and Estreicher use "relational" to describe social understandings that are implicit in contractual relationships and override or supplement the written contract. For example, they discuss the implicit promise or expectation in employment relationships that employers will not discriminate against workers on the basis of age. SAMUEL ESTREICHER & MICHAEL C. HARPER, *THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP* 377 (1989).

The term "relational contract" seems particularly useful in contracts of employment and may suggest that socially derived statuses are more influential in defining employment relationships and determining legal outcomes than are the actual written terms of the contract or more formalistic contract methodology, such as resolving contract ambiguity by inquiring into the meetings of the minds of the parties. This suggests that private contracting, particularly with respect to employment contracts, is not a truly voluntary means of private ordering, but rather susceptible to public norms about ostensibly "private" behavior.

were their male counterparts.¹⁶ The decisions in this line of cases reflect larger "belief systems out of which knowledge is constructed, [belief systems that] place constraints on thought [and] that have real consequences for the behavior of individuals who live within them."¹⁷ This conceptualization of women in the nineteenth century paved the way for the adoption of the *Lumley* rule in America.

The story that emerges is one of reversal of a legal rule due in large part to the increasing presence of women in the acting profession. When *Lumley* first appeared in the United States, the cultural repulsion to anything that even hinted of slavery led to its unequivocal rejection.¹⁸ But later in the century, the cultural aversion to mastery had lessened and no longer seemed to apply to men's domination of women in particular. In the later cases, courts were harsher upon women defendants who attempted to leave their employment than they were in the few parallel cases involving men. And, in the later cases, courts were harsher upon women than they had been earlier in the century. By the end of the century, the courts' subjugation of actresses to the control of theater managers surpassed even the language of their contracts and became an incident of a status classification constructed largely by the courts, rather than the consequence of any voluntary agreement between the parties.¹⁹

Although no court articulated gender as a factor influencing its decision,²⁰ the tone of the opinions as well as the pattern of results demonstrates that the courts of New York, where the core cases were litigated, were unable to ignore

16. Interview with Kim Marra, theater historian, University of Iowa (Sept. 13, 1991). Professor Marra has traced the 20th-century Hollywood phenomenon of male movie moguls controlling the lives and careers of film actresses to the gendered employment relations of the New York stage in the late 19th century. See Kim Marra, "The Sisterhood of Sweetness and Light": Gender Production in American Acting Styles and Theatre Historiography (Aug. 1991) (unpublished manuscript, on file with author) (illustrating use of property rhetoric and marriage rhetoric in male managers' descriptions of their leading ladies).

17. ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 1 (1990).

18. See *infra* Part I.A.3; see also RORABAUGH, *supra* note 11 (documenting decline of apprenticeships over course of 19th century); STEINFELD, *supra* note 3 (documenting decline of indentured servants over course of late 18th and 19th centuries). On the general subject of 19th-century American trends with regard to labor, see DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862-1872* (1981); SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850* (1984). Montgomery also documents portions of the wage-slavery debate that argued for improved working terms and conditions by analogizing the poor conditions of working class individuals to slavery. MONTGOMERY, *supra*, at 30.

19. See discussion of *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892); and *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), *cited in* *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910); *infra* notes 212-40 and accompanying text.

20. These 19th-century cases differ from contemporary laws and customs that explicitly excluded women from various businesses and professions. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (barring woman from practicing law on gender grounds). In exclusion cases, gender discrimination was explicitly articulated, discussed, and elaborated. In the actress cases presented here, however, no one argued for the exclusion of women from the stage, perhaps because it was not in the interests of the theater owners, actors, or actresses. The disparate treatment was channeled instead into subordinating the women by tying them to theater owners' control. Hence, gender considerations are much more submerged in the judicial texts.

differential cultural constructions of women's proper behavior as reflected in the larger society²¹ and in other legal rules.²² Women's attempts to control their worklives and to assert their agency and independence by terminating employment that they no longer found desirable was no more to be tolerated than the emerging trend of women's attempts to divorce their husbands.²³ Although courts deciding employment cases spoke of "binding men's consciences," they rarely did so when presented with male defendants.²⁴ The courts appeared more willing and even eager to sanction what they perceived as women's infidelity to their male employers.

In this Article, I first provide a comprehensive chronological examination of the cases in different periods of the nineteenth century. The purpose of this chronology is to highlight the free labor principle's subtle transformation through different decades and to highlight gender representation and the social construction of gender during different periods. The two themes of labor autonomy and gender construction are cross-indexed in the cases. The analysis discusses gender not only as an element of social relationships, but also as "a primary way of signifying relationships of power."²⁵

Second, I provide a broader analytic framework for understanding the phenomenon of *Lumley's* adoption by exploring the significance of the concept of women's infidelity. I explore notions of women's place and women's infidelity in the nineteenth-century legal culture, and I attempt to separate the gender-coded factors of plaintiffs' and defendants' behaviors that gave rise to the litigation in the nineteenth-century theater culture.

The historical developments traced in this Article are important for several reasons. First, a comprehensive chronological examination of these cases

21. See *infra* Parts I.B, II.A.

22. See *infra* notes 293-313 and accompanying text.

23. MARY S. JONES, AN HISTORICAL GEOGRAPHY OF CHANGING DIVORCE LAW IN THE UNITED STATES 32 (1978).

24. For the list of men's cases that did not result in permanent injunctions, see *infra* notes 242, 251, 259. The only published opinions binding male employees to their employers involved preliminary injunctions: *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872); *American Ass'n Base-Ball Club v. Pickett*, 8 Pa. C. 232 (C.P. 1890). Neither of these cases resulted in a permanent injunction for the term of the contract.

25. JOAN W. SCOTT, GENDER AND THE POLITICS OF HISTORY 42 (1988).

contributes to the legal history of working women.²⁶ For the most part, few cases involving the legal rights of working women were litigated by women themselves.²⁷ What we can know of the *legal* history of working women must be extrapolated from the glimpses we get from cases such as these.

Acting was one of the few professions open to women in the nineteenth century.²⁸ Actresses vastly outnumbered professional women in most other fields.²⁹ Thus, these cases represent the best evidence of nineteenth-century legal treatment of relatively independent, professional working women. In certain respects, the status of actresses was the highest working women could hope to attain. No other profession in the nineteenth century offered women greater autonomy and income. The freer atmosphere of the theater community allowed women to enjoy lifestyle privileges and liberties forbidden to other middle class American women.

In other respects, actresses were a population at risk. Outside of the theater community, members of the acting profession, particularly actresses, were viewed with suspicion. In the words of historian Claudia Johnson:

Because of the religious objections to the theater in the nineteenth century, an actress was pulled in antipodal directions, for at the same time that she was excoriated, she was afforded in the theater one of the very few opportunities not only to earn independence and a living wage but also, ironically, to gain a measure of self-respect. Above all,

26. One excellent recent work that examines the legal history of working women in the 19th century is Amy D. Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988) (examining "earnings" laws enacted by Republican-dominated state legislatures that entitled wives to keep fruits of their labor). Several other works on the general subject of women as wage earners in the 19th century make reference to 19th-century laws without explicitly studying the laws themselves. See AMERICA'S WORKING WOMEN (Rosalyn Baxandall et al. eds., 1976); LOIS W. BANNER, WOMEN IN MODERN AMERICA: A BRIEF HISTORY (2d ed. 1984); BARBARA HARRIS, BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY (1978); SUSAN E. KENNEDY, IF ALL WE DID WAS TO WEEP AT HOME: A HISTORY OF WHITE WORKING-CLASS WOMEN IN AMERICA (1979); ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982); BARBARA M. WERTHEIMER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA (1977); WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY, 1675 TO 1929 (W. Elliot Brownlee & Mary M. Brownlee eds., 1976).

27. Most of what we know about this legal history comes from cases in which women were explicitly barred from participating in a particular profession, see, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (barring woman from practicing law on gender grounds), or from cases challenging social legislation that explicitly defined employment rights and privileges along gender lines. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (wage and hour legislation for women as a class). The cases described in this Article are different because women's participation in 19th-century theater was taken for granted, see *supra* note 20, and because women were the litigants themselves. Thus, there is greater authenticity of working women's voices in these legal texts than in those in which legislators prescribed women's interests, see, e.g., *Adkins*, 261 U.S. 525, or employers sued each other over women's services, see, e.g., *Bouvier Bros. v. Macauley*, 15 S.W. 60 (Ky. 1891).

28. JOHNSON, *supra* note 14, at 50.

29. JOSEPH A. HILL, WOMEN IN GAINFUL OCCUPATIONS, 1870 TO 1920 (1929). For 1870, Hill lists 692 actresses, 67 women clergy, 24 women dentists, 35 editors and reporters, 5 lawyers, 159 literary and scientific persons, and 527 physicians and other healers. *Id.* at 42. The two professions containing the largest numbers of women were teachers and professors, with 84,047, and musicians and teachers of music, with 5753. *Id.*

this disparaged profession gave her, if she were ambitious and talented, the possibility of economic and professional equality with men which she could find nowhere else.³⁰

To discover that actresses were more constrained by the courts than were actors is to demonstrate the bounds of their employment liberty. To discover that actresses were more constrained than actors is to illustrate that access to a profession on terms basically parallel to those offered men does not guarantee full equality of privileges and liberties. The developments in this Article tell a cautionary tale of women seeking and gaining greater independence in a profession.

Second, these developments are particularly important because the *Lumley* rule gained such prominence and eventually came to apply to *all* professional performers. The historical pattern suggests that gender played an important role in building *Lumley* into a legal canon. As a result, one can examine how a legal rule originally accepted in the heavily gendered context of actresses' cases eventually came to subordinate male performers to their employers as well. The point is not only that, in keeping with prevailing cultural biases, some courts and employers accorded actresses disparate treatment based on gender. Rather, gender was a catalyst that transformed this aspect of the legal status of an entire class of professional working people.³¹ What *Lumley* wrought came to apply to all manner of employed people: actors, actresses, dancers, singers, musicians, radio commentators, booking agents, baseball players, boxers, jockeys, public school music teachers, artists, inventors, retail sales people, and managers.³² Courts of equity no longer viewed employees under contract as partners or free laborers; instead, they were seen as legally subordinate to their employers.

Third, this social history of a prominent remedies rule contributes to the ongoing debate over the proper use of equitable powers.³³ It demonstrates that an employer's ability to enjoin valuable employees from moving to other jobs has been a contested issue of labor policy for well over a century.³⁴ Moreover,

30. JOHNSON, *supra* note 14, at 37.

31. See *infra* Parts II.B, II.C.

32. See David Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CAL. L. REV. 18, 19-23 (1954) (citing cases applying *Lumley*); see also *George A. Kessler & Co. v. Chappelle*, 77 N.Y.S. 285 (App. Div. 1902) (champagne salesman); *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (1897) (jewelry salesman); *Burney v. Ryle*, 17 S.E. 986 (Ga. 1893) (insurance company manager); *Strobridge Lithographing Co. v. Crane*, 12 N.Y.S. 898 (Sup. Ct. 1890) (lithographic sketch artist); *Wollensak v. Briggs*, 20 Ill. App. 50 (1886) (inventor).

33. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990); *supra* note 2 (listing articles).

34. Professor Laycock correctly identifies the American tradition of free labor as the policy behind the general prohibition on enforcement of labor contracts, a policy which is independent of the adequacy of legal remedy. As he writes:

The substantive policy in favor of free labor has nothing to do with the adequacy of the legal remedy. . . . [W]e deny specific relief because it would be a more effective remedy than we are willing to give. Indeed, the disappointed employer rarely gets any remedy at all. For reasons

in examining a legal rule such as this within the framework of gender, we must be concerned with more than simply the courts' actions; we must explore the gendered conduct of the litigants that gave rise to the disputes. Examining the social context in which the law developed allows us to isolate some of the factors that precipitated these disputes and requires us to consider whether the legal response to them was appropriate. Questions such as why male managers sued women more often than they sued men, and why more women resisted or attempted to quit in the first place, must be examined before we can decide whether the *Lumley* rule is an appropriate legal response to disputes that fit this pattern.

I. THE CASE HISTORIES

The nineteenth-century employment cases can be divided into roughly three periods. In the early period, 1800-1860, equitable courts refused to intervene on behalf of employers who attempted to sue for specific performance of performers' contracts. In the second period, 1860-1890, two shifts occurred as the English *Lumley* rule struggled to take root in hostile soil. First, although suits involving men had predominated during the first half of the century, beginning around 1860, suits against women were brought with far greater frequency than suits against men. Second, in 1874, near the end of Reconstruction, the first American court actually enforced the *Lumley* rule.

The third period is marked by the publication of John W. Pomeroy's second edition of *Specific Performance* in 1897.³⁵ This treatise, as well as other similar treatises,³⁶ had a tremendous impact in disseminating legal rules in an

of cultural attitude and of constitutional right, we fear over-enforcement of promises to labor. Laycock, *supra* note 2, at 746.

What is sometimes missed by subsuming an analysis of employment contracts (or remedies) in a general study of contracts (or remedies) is that employment operates under policies distinct from those at work in the commercial market as a whole. Employment contracts and policies are distinct because:

(1) Employment serves the important social function of distributing resources to individuals who otherwise would be dependent on government welfare or private charities for their means of living.

(2) Employers and employees rarely occupy equal power positions; usually the former (and only occasionally the latter) dictates the basic terms of the employment relation.

(3) One's ability to work and to sell one's labor in the market is, for most individuals in American society, the most significant resource that they own and control.

(4) Not only is work a means of self-realization and self-fulfillment, it is a source of one's views about one's identity, social standing, and social worth.

(5) For most individuals, one's work is one of the most important factors in shaping one's life experience, since employed individuals spend most of their waking hours working. Work, for those who can get it, organizes their lives.

35. JOHN N. POMEROY, *SPECIFIC PERFORMANCE OF CONTRACTS* (New York, Banks & Bros. 2d ed. 1897).

36. I have somewhat arbitrarily chosen *Pomeroy's Second* to mark the end of the period and the close of the century. Other treatise writers of the period also featured *Lumley* in their treatments of equitable intervention in employment contracts, but with different emphases. Horace Wood's influential treatise seized upon one tangential dimension of the *Lumley* ruling, the effect of limited liability clauses. HORACE WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* 310 (San Francisco, Bancroft-Whitney Co. 2d ed. 1886). Wood gave *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853), and the subject of the

era when few courts or lawyers had access to legal libraries or other means of researching precedent.³⁷ After 1900, the canon's edifice was fully constructed, if only freshly set, in stone. Following the canon's construction, cases tended to cite Pomeroy as the standard, accepting without examination the treatise's judgment that *Lumley* was the most significant case of the century.³⁸ After 1900, the free labor tradition surfaced only sporadically in cases and only as a counterpoint to the established *Lumley* rule. The relatively high proportion of suits involving women continued, but after 1900, men were enjoined as well as women.³⁹

A. *The Cases of the First Period: Equity Courts' Non-Intervention in a Man's World*

During the colonial and revolutionary periods of American history, there were no reported instances of employers restricting the mobility of an individual retained under general employment contracts of the sort involved in the *Lumley* cases.⁴⁰ Personal service contracts such as apprenticeships and indentures were, of course, another matter, and they could be enforced in a variety of ways, including specific performance. For those contracts, an employer held a quasi-

action for enticement, discussed *infra* at note 84 and accompanying text, more extensive treatment. WOOD, *supra*, at 452-65.

In his 1896 treatise on persons and domestic relations, Walter C. Tiffany referred to *Lumley* in much the same way that Pomeroy did. WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 477 (St. Paul, Minn., West Publishing Co. 1896). Tiffany's section on the subject does not seem to have had as great an impact on subsequent American common law decisions as Pomeroy's did, at least not in terms of citation in later cases.

37. For cases citing Pomeroy, see *Shubert Theatrical Co. v. Rath*, 271 F. 827, 831 (2d Cir. 1921); *Hammond v. Georgian Co.*, 65 S.E. 124, 125 (Ga. 1909); *Burney v. Ryle*, 17 S.E. 986, 987 (Ga. 1893); *Cain v. Garner*, 185 S.W. 122, 124 (Ky. 1916); *American League Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6, 8 (1914); *Stone Cleaning & Painting Union v. Russell*, 77 N.Y.S. 1049, 1050 (1902); *Universal Talking-Mach. Co. v. English*, 69 N.Y.S. 813, 814 (1901); *W.J. Johnston Co. v. Hunt*, 21 N.Y.S. 314, 315 (Sup. Ct. 1892), *aff'd*, 37 N.E. 564 (N.Y. 1894); *Strobridge Lithographing Co. v. Crane*, 12 N.Y.S. 898, 899 (Sup. Ct. 1891); *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890); *Cort v. Lassard & Lucifer*, 18 Or. 221, 227 (1889); *Philadelphia Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902).

The effect of 19th-century treatises in influencing the course of the developing common law in American states is best evidenced by the acceptance of the employment-at-will rule after it was first formulated in Wood's treatise. WOOD, *supra* note 36, at 272. For a discussion of the influence of Wood's treatise in bringing about this rule, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); see also GLENDON, *supra* note 15, at 159-60.

38. See *Shubert Theatrical Co.*, 271 F. 827; *Burney*, 17 S.E. 986; *Cain*, 185 S.W. 122.

39. See *infra* Part II.C.

40. Professor Richard Morris writes:

There are no instances in the colonial and Revolutionary periods of these legal remedies having been employed for the breach of other than personal-service contracts. There was no attempt to enlarge the scope of the remedy to include contracts of employment in general, as in the later British decision of *Lumley v. Gye*, where status in the true sense was not involved, but the court expanded the remedies available for disturbing someone's trade or business.

RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 433 (1946).

property right in an employee's services in much the same way that a master held a property right in a slave.⁴¹

In the early nineteenth century, American courts decided six general employment cases and regularly borrowed from four additional British decisions.⁴² Eight out of the ten cases concerned the services of white men,⁴³ primarily actors and opera singers, but also a playwright, an office clerk, and a circus giant. In these cases, the respective employers unsuccessfully asked the courts for specific performance of the employment contracts. In only one of these cases, *Morris v. Colman*,⁴⁴ did a court actually grant any equitable relief. That case set the pre-*Lumley* standard for when equitable intervention was appropriate in contracts for services.

The distinguishing feature of *Morris* was the equality of the legal relationship between the playwright and the theater. The two parties were characterized as equal partners: Colman's creative contribution to the partnership, in writing plays, was considered equally important to Morris' contribution of capital. "[I]n partnership engagements," the court stated, "a covenant, that the partners shall not carry on for their private benefit that particular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course."⁴⁵ Presumably, the court would have equally enjoined either of the partners from competing with the partnership—Colman from writing for another theater, Morris from opening another playhouse. Morris may have had claims on the commitment of Colman's labor, but Colman had reciprocal claims on the commitment of capital controlled by Morris. Injunctions, and even specific performance, could be used to bind partners together, but the power was mutual and reciprocal.

41. See *id.* at 411-34 (discussing master's quasi-proprietary interest in services of his servant and legal remedies available to master to protect his interest in those services); see also STEINFELD, *supra* note 3, at 66-73.

42. *Burton v. Marshall*, 4 Gill 487 (Md. 1846) (actress); *Barnum v. Randall*, 2 W. L.J. 96 (N.Y. Ch. 1844) (suit against Randall the Giant and his wife); *Hamblin v. Dinneford*, 2 Edw. Ch. 528 (N.Y. 1835) (male comedian); *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264 (N.Y. 1833) (male opera singer); *Sanquirico v. Benedetti*, 1 Barb. 315 (N.Y. Sup. Ct. 1847) (male opera singer); *Delavan v. Macarte*, 4 W. L.J. 555 (Ohio C.P. 1847) (woman equestrian). The British cases were: *Kimberley v. Jennings*, 58 Eng. Rep. 621 (1836) (male clerk, traveling bookkeeper); *Kemble v. Kean*, 58 Eng. Rep. 619 (Ch. 1829) (actor); *Clarke v. Price*, 37 Eng. Rep. 270 (Ch. 1819) (male court reporter); *Morris v. Colman*, 34 Eng. Rep. 382 (Ch. 1812) (male playwright). American courts tended to cite both British and American cases without distinguishing between them.

43. I have assumed all the litigants in these cases were white. This assumption is consistent with relevant statistical surveys on the wage-earning labor force. See, e.g., HILL, *supra* note 29, at 164-87 (detailing women engaged in wage labor by race and by place of birth). This assumption is also consistent with the tendency of courts in the 19th century to mention the employee's race if the employee was not white and the ethnic origin if not native-born. See, e.g., *In re Clark*, 1 Blackf. 139 (Ind. Sup. Ct. 1848) (woman identified in name of case as "woman of color"); *Hayes v. Willio*, 4 Daly's Rep. 259, 260 (N.Y.C.P. 1872) (court mentions defendant's contract was negotiated in England and that he "thereafter came to this country").

44. 34 Eng. Rep. 382 (Ch. 1812).

45. *Id.* at 383.

In none of the remaining nine cases did the court enjoin the employee from performing his or (in two cases) her unique services for another employer.⁴⁶ As one court put it, equity will not enforce a "hard bargain."⁴⁷ One defendant argued that he could not be enjoined from quitting and working for another firm expressly because he was *merely an employee* and not a partner. The court concurred: "Nothing could be more harsh towards a young man dealing with great traders than that he should be allowed to enter into an agreement which placed him so entirely in their power."⁴⁸

The opinions of this period viewed employment contracts as a whole.⁴⁹ The *Lumley* line of cases involved primary agreements to perform where covenants not to work elsewhere were incidental to the primary agreements. The covenant not to perform for another firm is described as one that merely guards the "active" covenant of promised performance for the employer.⁵⁰ This covenant could be enforced while the primary contract was still in effect and while the professional was still providing services, but not as a separate and independent covenant when other aspects of the contract could not or would not be carried through.

Equity courts of this period stated that they would not enforce part of a contract if they could not enforce all of the contract.⁵¹ They did not pick and choose between a contract's clauses based on their enforceability. Once an employee repudiated a contract, the theater or other hiring firm was left to its remedies of damages at law. Characteristic of the opinions during this period is the reasoning that specific performance cannot issue absent a partnership;

46. In some cases, however, legal devices to restrain the defendants temporarily were ordered. For example, a preliminary injunction and *ne exeat* were initially granted against Randall the Giant and his wife, but they were dissolved on appeal. *Barnum v. Randall*, 2 W. L.J. 96 (N.Y. Ch. 1844).

47. *Kimberley v. Jennings*, 58 Eng. Rep. 621, 625, 626 (1836).

48. *Id.* at 625; see also *Hamblin v. Dinneford*, 2 Edw. Ch. 528, 529 (N.Y. 1835).

49. In this respect, these cases are distinguishable from a separate line of cases involving covenants not to compete. The courts recognized that these 10 cases involved employment contracts whose primary objective was professional services, rather than cases where the primary agreement was a covenant not to compete. See *Gillis v. Hall*, 2 Brewster's Rep. 342 (Pa. C.P. 1870) (one partner sold out to other with promise not to use name or manufacture similar items); *William Rogers Mfg. Co. v. Rogers*, 20 A. 467 (Conn. 1890) (suit to enjoin traveling sales manager familiar with customer list); *Chain Belt Co. v. Von Spreckelsen*, 94 N.W. 78 (Wis. 1903) (suit to enjoin expert machinist who allegedly had learned valuable trade secrets while employed by plaintiff). These employment contract cases are also distinguishable from contracts to prevent an act, such as the ringing of a church bell, or from the promise given by a nephew to an uncle not to go into a certain profession. See JOHN N. POMEROY, *SPECIFIC PERFORMANCE OF CONTRACTS* 32 (New York, Banks & Bros. 1st ed. 1879) (listing cases).

50.

[W]here the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this Court, and it is only guarded by a negative provision, this Court will leave the parties altogether to a Court of law, and will not give partial relief by enforcing only a negative stipulation.

Kemble v. Kean, 58 Eng. Rep. 619, 621 (Ch. 1829).

51. *Clarke v. Price*, 37 Eng. Rep. 270, 273 (Ch. 1819) ("[I]f this contract is one which the Court will not carry into execution, the Court cannot indirectly enforce it, by restraining [the defendant] from doing some other act."); *Hamblin v. Dinneford*, 2 Edw. Ch. 528, 533 (N.Y. 1835) (explaining "only relief it could give would be to restrain actor . . . but this would leave the positive part of the agreement untouched").

therefore, the court will not attempt to produce indirectly a result that it cannot achieve directly.⁵²

As artisans under contract, these working individuals occupied a niche between the higher status of partners and the lower status of indentured servants, apprentices, and slaves. In the higher status, either partner could be ordered to continue the partnership, and the relationship was characterized as one of equality and reciprocity.⁵³ In the lower status, the relationship was expressly unequal and marked by the formalities of indenture and bondage.

Unlike the strata above and the strata below, the contractual relationships of these talented or skilled tradesmen could not be specifically enforced, nor could they be enjoined from quitting and going elsewhere. The relationships between these free individuals were easily created and fairly easily dissolved.⁵⁴ Once one of the parties to the relationship chose to repudiate the contract, he was free to go his own way, subject only to the limitation of possible damages for breach of the agreement.

1. *Attending to the Women*

Three American cases involving women performers straddled the 1856 British decision of *Lumley v. Wagner* and the American Civil War. These cases—*Burton, Burke & Wife v. Marshall* in 1846,⁵⁵ *Delavan v. Macarte & Wife* in 1847,⁵⁶ and *Ford v. Jermon* in 1865⁵⁷—are significant in that the courts refused to countenance employers' attempts to obtain orders preventing

52. Unlike the later period, the opinions of this period did not grapple seriously with the issue of equitable power. In these cases, the slippage between what the court "could" do and what it "should" do was fluid and nonspecific.

53. In *Clarke v. Price*, the court noted that lack of mutuality was another attribute distinguishing partnerships from these types of contracts for services. 37 Eng. Rep. at 273.

54. Even in these early cases, however, there are subtle differences in the treatment of employees whose demographic characteristics were not white, male, and American-born. Individuals who did not fit this mold were more likely to be sued even without a negative covenant in the contract. See, e.g., *Barnum v. Randall & Wife*, 2 W. L.J. 96 (N.Y. Ch. 1844) (suit to enjoin Randall the Scotch Giant and wife; Randall's Scotch origin is specifically mentioned in *Delavan v. Macarte & Wife*, 4 W. L.J. 555, 557 (Ohio C.P. 1847); Randall's condition as a giant would also have set him apart from the norm); *Delavan v. Macarte*, 4 W. L.J. at 555-56 (foreign, woman equestrian); *Burton v. Marshall*, 4 Gill 487 (Md. Ct. App. 1846) (actress).

The representation of these "other" categories of individuals in the cases may have been innocuous. Many theater performers had come from the stages of Europe, so immigrants may simply have constituted a higher percentage of the theatrical population. Moreover, as immigrants without a permanent residence, they may have been considered more apt to skip the jurisdiction and evade accountability for damages. See, e.g., *Delavan v. Macarte & Wife*, 4 W. L.J. at 556 (allegation of defendant's alien status in complaint). On the other hand, since contracts for these performances were often made in Europe, their situations were somewhat analogous to the contracts of indenture of immigrants who could be held for the period of their indenture. See *Hahn v. Concordia Soc'y*, 42 Md. 460 (1875); *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872).

During the first period, the courts did not hold even these performers to their performance contracts, although in cases involving these "other" performers, courts were more apt to express a willingness in spirit. See *infra* text accompanying note 61.

55. 4 Gill 487 (Md. Ct. App. 1846).

56. 4 W. L.J. 555 (Ohio C.P. 1847).

57. 6 Phila. 6 (Dist. Ct. 1865).

the actresses from quitting and performing elsewhere. The first two opinions demonstrate a marked sympathy to the circumstances of the women performers. All three stand in stark contrast to the generally punitive judicial treatment of actresses later in the century.⁵⁸

Burton v. Marshall was the earliest American case involving the services of a woman performer. Because the actress, Margaret Burke, was a married woman, the principal defendant in the case was her husband. As a married woman, Margaret Burke was classified as a *femme couvert*.⁵⁹ Under coverture, she was disabled from entering contracts; instead, her husband was the party to the contract for *her* services.

In many respects this case parallels the other cases of the first period, with Margaret Burke's husband occupying a role parallel to that of the male defendants in the other cases. Like them, Mr. Burke stood on an equal footing with the theater managers in his ability to repudiate the contract and refuse to order his wife to return to the first theater.

In other respects, however, this case is distinctive. This theater manager attempted to constrain Margaret Burke under a contract that contained no negative covenant. He attempted to gain equitable control over Margaret Burke on the strength of her employment contract alone. That the theater even attempted to secure an injunction in her case is curious because no previous court had agreed to interfere in an actor's decision to quit.⁶⁰ On what basis could this theater, faced with negative precedent in the actors' cases where exclusive clauses were present in the contracts, have expected a court to impose additional restrictions on a contract for Margaret Burke's services? On what grounds could this theater have sought specific performance against a woman who was not bound by the formalities of indenture, apprenticeship, or slavery?

One explanation is that despite the fact that there were no cases actually ordering specific performance of actors, the courts sometimes sent ambiguous messages in their opinions. In 1833, for example, one court said, somewhat facetiously: "Upon the merits of the case, I suppose it must be conceded that the complainant is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird that can sing and will not sing must be made to sing."⁶¹ Nonetheless, the court did not order the singer to perform.

58. See discussion of women's cases after *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874), *infra* Part I.B.2-3.

59. See generally JAMES SCHOUER, A TREATISE ON THE LAW OF HUSBAND AND WIFE (Boston, Little, Brown & Co. 1882) [hereinafter SCHOUER, HUSBAND AND WIFE]; JAMES SCHOUER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS (Boston, Little, Brown & Co. 2d ed. 1874).

60. See cases listed *supra* note 42. The partnership case of *Morris v. Colman*, 334 Eng. Rep. 382 (Ch. 1812) was the only case in which anyone was enjoined from quitting. See *supra* text accompanying notes 44-45 (discussing case).

61. *De Rivafinoli v. Corsetti*, 4 Paige Ch. 264, 269 (N.Y. 1833).

Another explanation is that the theater managers may not have considered Margaret Burke to be entitled to the same degree of independence that characterized the professional men in the other cases. Under the predominant legal conception of the day, private life was ordered in households in which the free male head of the household held a right and privilege of patrimony over all those residing therein and dependent upon him. This included his wife, his children, his servants, and, where the relationship existed, his slaves.⁶²

[The master] was given, in varying degrees, legal jurisdiction or control over them. This jurisdiction included rights to their services, and even, in certain cases, rights to chastise or confine them. . . . On the one hand, the law imposed on heads of household duties to support and protect their dependents. On the other hand, it extended to them varying degrees of control over their persons and energies.⁶³

Although legal and social differences existed between the different members of the master's household,⁶⁴ the master's right to direct and control the labors of all members of his household, and his right to enjoy and profit from the fruits of their labors was essentially similar.⁶⁵

As a wage-earning, married woman, Margaret Burke served two masters, her husband and the theater manager. The dispute between them over whether she should stay with the original theater owner or go to the second employer, as her husband directed, had less to do with her free choice of labor than it did

62. Blackstone's *Commentaries* listed master and servant, husband and wife, and parent and child as parallel relations under the Law of Persons as the three great relations in private life. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410 (Oxford, Clarendon Press 1765). Blackstone's *Commentaries* were reprinted every three to five years in the 19th century, both in the United States and in England. See, e.g., WILLIAM BLACKSTONE, A NEW EDITION WITH PRACTICAL NOTES BY CHRISTIAN, ARCHBOLD, AND CHITTY, TOGETHER WITH ADDITIONAL NOTES AND REFERENCES BY A GENTLEMAN OF THE NEW YORK BAR (Philadelphia, John Grigg 1827, republished New York, E. Duychinck 1830).

63. Robert Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 344-45 (1989).

64. A master's slave existed in his household in a parallel legal relationship to others with the significant exceptions, first, that slaves were explicitly property rather than quasi-property, and second, that slaves could assert no legal rights against the master, such as claims for support.

65. As Professor Amy Stanley wrote:

The common law rule of coverture . . . made [husband and wife] one person at law, creating an "indissoluble connexion" that submerged the legal identity of the wife in her husband. Like slavery, marriage was a relation of domination and dependence, premised on reciprocal exchange; the law bound the wife to serve and obey her husband in return for his support and protection. Marriage stripped her of the essential right of freedom—the right to possess her own person. Accordingly, she also lost the fundamental rights derived from self-ownership, the rights to make contracts, to acquire property, and to control her own labor and its proceeds. . . . "Whatever she earns," [the jurist Theophilus Parsons] wrote, "she earns as his servant, and for him; for, in law, her time and her labor, as well as her money, are his property. . . . [H]e is the stronger, she is the weaker; all that she has is his." In marriage, concluded another interpreter of the law, the husband "bought" his wife's earnings; since she was under his command, "she can have no will of her own."

Stanley, *supra* note 26, at 477 (footnotes omitted).

with the competing hierarchies of her masters' conflicting directives. Like the other dependents in the master's household, a woman under coverture occupied a diminished status of limited autonomy and independence. In this respect, Margaret Burke's position was quite unlike that of the free, professional men involved in the other cases. Margaret Burke was not free to make her own contracts. She did not even have a right to her own earnings.⁶⁶ She was subordinated to all of the parties in the lawsuit, including her husband.

The law allowed masters to regain the services of other persons of diminished autonomy. Compelled service in the United States still existed for significant numbers of workers, such as indentured servants, apprentices, and slaves.⁶⁷ The Constitution contained an enforceable clause permitting laborers who breached employment contracts and fled to other states to be extradited to their home state for whatever punishments or sanctions the home state allowed.⁶⁸ Most of the actual enforcement under fugitive labor statutes fell upon fugitive slaves or apprentices. Nevertheless, like slaves, youths, and apprentices, women—particularly married women—were often perceived in their social station as subservient individuals. In their legal station, they were similarly disabled from self-ownership and control of their own energies and services.

The suit against Margaret Burke's husband parallels suits brought by masters against apprentices' fathers to resecure the services of underage apprentices.⁶⁹ Perhaps for this reason, her employers had the temerity to sue for specific performance and injunction, in the absence of an exclusivity clause, when all the previous precedent ran against them, and despite the fact that she was not bound to them under the formalities of bondage.⁷⁰

The judge did not share the theater's view of Margaret Burke. In the judge's eyes, her subordinated position appeared to have the opposite effect; her low station evoked the court's sympathy even more poignantly than the

66. *Id.*

67. STEINFELD, *supra* note 3, at 129. For important categories of laborers, compelled performance by corporal means was a feature of the American employment law landscape. *Id.*

68. Article IV provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIII.

69. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 52, at 78 (Albany, New York, J.D. Parsons, Jr. 1877).

70. One of the circumstances of *Burke* tying it to the prewar debates over slavery was that the theater's lawyer, arguing to compel Mrs. Burke's return to her employer, was Reverdy Johnson, the same attorney who later obtained the infamous decision in *Dred Scott*, which ordered the return of Dred Scott and his wife to their former slave master. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 399 (1857). Although Mrs. Burke's threatened subordination to her "master" was not as total and violent as the Scotts' subordination as slaves, Reverdy Johnson's personal involvement in both cases exhibits the same impulse of binding working people, whether slave or free, to their masters.

other cases of this early period.⁷¹ The Maryland court seemed to give closer attention to Margaret Burke's circumstances as a working person. The court stated that she was entitled to the right to earn her own bread. It reasoned that if she were to be enjoined from performing, "she must either beg her bread, or be incarcerated within the walls of a public prison."⁷² "Is it not unjust," the court asked rhetorically, that "she may be stripped of all means of subsistence, or be consigned to loathsome imprisonment in jail?"⁷³

Burke was the first case in this line in which a court directly confronted the life necessity that impels a person to work. Because none of the other courts came close to ordering an injunction, they need not have paused to ponder the effect on the individual of being enjoined from working. Yet when confronted with the multifaceted subordination of Mrs. Burke (employee-servant, female, and married, hence *femme couvert*), the Maryland court responded sympathetically by offering her protection from need and recoiled at the inhumanity of reducing her to a beggar as a consequence of the plaintiff's request.

Delavan v. Macarte & Wife,⁷⁴ decided in Ohio in 1847, followed the same pattern as *Burke*. Mrs. Macarte, "one of the most celebrated equestrians in the United States,"⁷⁵ was retained by Delavan under a written contract to give traveling performances for a year. As in *Burke*, Mrs. Macarte's husband was the party to the contract and the contract did not contain a negative covenant. The complaint alleged that the contract with Mrs. Macarte was of great pecuniary importance to them, that the circus owner had spent over two thousand dollars preparing bills announcing her performances, and that the Macartes had left and joined "Spalding's Monster Circus," which was traveling just ahead of the Delavan circus.⁷⁶ The complaint further alleged that "the defendants were aliens, without any permanent locality, and without property within the reach of law or execution," and that their actions "would produce great and irreparable injury to plaintiffs."⁷⁷ The defendants, for their part, alleged as their reason for leaving that "the conduct of [Mr. Delavan] in many respects had rendered Mrs. Macarte[,] especially, very uncomfortable and unhappy."⁷⁸ The court's opinion was brief. Citing a few of the earlier cases, it simply stated, "[E]quity will not interfere by injunction to enforce a contract for personal services. It certainly seems to be a high stretch of power to interfere with a person in following his ordinary and regular business, upon an application for an injunction."⁷⁹

71. *But see supra* notes 47-48 and accompanying text.

72. *Burton v. Marshall*, 4 Gill 487, 491 (Md. Ct. App. 1846).

73. *Id.* at 492.

74. 4 W. L.J. 555 (Ohio C.P. 1847).

75. *Id.* at 556.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 558.

2. *A Decision From Across the Water: Lumley's Spécial Significance for American Law*

The *Lumley* case had particular significance for the American tradition of free labor. In *Lumley v. Wagner*,⁸⁰ the English Court of Equity for the first time subjected a professional performer to her employer's control for the term of the contract. Soprano Johanna Wagner was enjoined from appearing anywhere on the London stage, rather than simply held to damages for breach of contract.⁸¹ In one respect, *Lumley* was only a small step from *Morris v. Colman*'s notion of reciprocal commitment. Johanna Wagner's contract did contain a reciprocal clause securing the singing role exclusively to Madame Wagner.⁸² Should Benjamin Lumley have offered anyone else the part, Johanna Wagner could have sued, and possibly enjoined, the theater.

In other respects, however, the case was a break with the past. *Lumley v. Wagner* was actually one of two cases, based on the same incident, that played an important role in imposing conditions on an employee's right to quit. In the related case, *Lumley v. Gye*,⁸³ Benjamin Lumley sued the rival theater that enticed Madame Wagner away. He sued under the partially statutory, partially common law, cause of action for enticement, which allowed an individual who had an interest in the services of another to sue anyone who interfered with the

80. 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

81. I have not included later English cases in this study for two reasons. First, since conceptions about gender are culturally contingent, and vary somewhat from location to location (even within the United States during the 19th century), one would be mistaken to assume that the gender construction in England was the same as it was in the United States. Second, free labor as conceptualized in the United States in the 19th century was greatly influenced by events that were particular to the American experience: the American Revolution; indentured servitude, see STEINFELD, *supra* note 3, at 67-71, 122-23; indentured immigration, see BERNARD BAILYN, *VOYAGERS TO THE WEST: A PASSAGE IN THE PEOPLES OF AMERICA ON THE EVE OF THE REVOLUTION* (1986); and slavery and the Civil War, see FONER, *supra* note 3; ERIC FONER, *RECONSTRUCTION—AMERICA'S UNFINISHED REVOLUTION: 1863-1877* (1988); VanderVelde, *supra* note 3.

To the extent that many of the points I make here can be generalized to working individuals different from the conventional litigant (i.e., not white, adult, free, male, and native born), it is impossible not to notice the chauvinistic language of the English Court of Chancery as the judge addressed German Johanna Wagner who had just arrived in England: "The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other." *Lumley*, 1 DeG., M. & G. at 618, 42 Eng. Rep. at 693 (emphasis added). This interpretation is corroborated by the plaintiff's own account of the matter, in which he refers to the "unsteadiness of purpose inherent in the Teutonic nature" and relates an incident preceding the case in which a letter maligning England, written by Johanna Wagner's guardian, became public and excited nationalistic indignation. BENJAMIN LUMLEY, *REMINISCENCES OF THE OPERA* 331, 332-33 (London, Hurst & Blackett 1864).

82. 1 DeG., M. & G. at 605, 42 Eng. Rep. at 688. The clause binding Johanna Wagner was added to the contract after the contract was signed, whereas the clause binding Benjamin Lumley appeared in the original agreement. *Id.* The fact that Lumley's clause was unsupported by additional consideration would have given Wagner a legal argument that the clause was invalid. This argument was not advanced by the parties, however.

83. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

employee's services by enticing the employee away from his or her contract.⁸⁴ Naturally, a rival employer, who hired the departing employee, fell within the scope of potential defendants to these actions.

The lineage of enticement actions is significant in that the cause of action originated in conditions of compulsory labor. One historical antecedent of enticement actions was the English medieval statute of Laborers and Artificers, which required compulsory service of menial laborers and which was brought to the American colonies in various forms.⁸⁵ The other significant antecedent was the multitude of cases seeking recovery of runaway slaves and indentured servants.⁸⁶

When the English courts ruled against Johanna Wagner in both cases, they legitimated the employer's use of enticement actions and injunctions to control a class of workers: the professional class under general employment contracts, who had never before been subject to either type of employer control. Historically, only menial laborers had been subject to these actions. Taken together, the effect of these two causes of action was to impose legal and equitable constraints on a performer's election to quit employment. The injunction prevented the performer from using her talents and skills elsewhere. The enticement action discouraged demand for currently employed performers. In essence, these sanctions increased the employer's leverage over employees contemplating quitting. In Johanna Wagner's case, even though the original contract term was only for three months, the combined effect of these suits kept her off the London stage for four years.⁸⁷

The importation of the *Lumley* rule to the United States could not have occurred at a less auspicious time. Nineteenth-century Americans prided themselves on their resistance to the labor class designations said to abound in Europe.⁸⁸ Writing about the American post-Revolutionary decades, Professor Robert Steinfeld stated:

84. For an interesting discussion of this case, see MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW 71-74* (1989). For discussion of enticement actions in general, see C.B. Labatt, *Enticement and Harboring of Servants*, in *7 COMMENTARIES ON THE LAW OF MASTER AND SERVANT, INCLUDING THE MODERN LAWS ON WORKMEN'S COMPENSATION, ARBITRATION, EMPLOYER'S LIABILITY, ETC. RELATION AND CONTRACT 8015-94* (2d ed. 1913); WOOD, *supra* note 36, at 443, 452-465.

85. See LINDER, *supra* note 84, at 45-55.

86. MORRIS, *supra* note 40, at 419-20, 432.

87. 20 *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* 145 (Stanley Sadie ed., 1980).

88. For example, there are repeated references deploring the low status of European workers in the Congressional debates over the 13th Amendment. See, e.g. CONG. GLOBE, 38th Cong., 1st Sess. 1319 (Mar. 28, 1864) (comments of Sen. Henry Wilson); CONG. GLOBE, 38th Cong., 2d Sess. 201 (Jan. 10, 1865) (comments of Rep. McBride) (insisting, "[w]hen an American citizen enters a foreign land and sees the degradation to which the downtrodden masses are subjected by their kingly rulers, his soul revolts at the injustice"); CONG. GLOBE, 38th Cong., 1st Sess. 2955 (June 14, 1864) (comments of Rep. Kellogg) (criticizing forces that "would degrade the laboring classes to a condition below that of the peasantry of Europe" and "the social and political distinctions which prevailed in the governments of the Old World"). For further evidence of contemporaneous Americans' pride in being spared from European labor class designations, see 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 215-25 (Henry Reeve trans., New York, J. & H.G. Langley 4th ed. 1841); MONTGOMERY, *supra* note 18, at 73; STEINFELD, *supra* note 3, at 126-28.

In these years, men and women who were employed by others began to insist that they were the equals of their employers. They grew less and less willing to submit to the traditional hierarchical forms of subordination. . . . Increasingly, they challenged practices embodied in traditional master-servant relations as a slavery unfit for freeborn Americans.⁸⁹

Mid-century American labor interests were struggling to ensure universal recognition of "the dignity of the laboring man" and his equality with his employer.⁹⁰ Labor interests also sought to change some of the inequities of the colonial master-servant relation inherited from the British common law by arguing against the very terms "master" and "servant," and in favor of the newer, more progressive language, "employer" and "employee."⁹¹

In the American context, the sanctions legitimated by the two *Lumley* cases presented a particularly significant obstacle to employees because they burdened the constitutionally guaranteed right to quit employment.⁹² *Lumley* appeared before American courts at precisely the same time that the Civil War brought the issue of slavery, and the concomitant right to be free from mastery, before the American people.⁹³

Presumably, the most widely acknowledged right conferred by the Thirteenth Amendment was the right of an employee to quit.⁹⁴ The right to quit is the antithesis of slavery. Being able to quit is the minimal means of guarding against unduly oppressive labor conditions and is fundamental to controlling one's person and one's labor.⁹⁵ If employees can be barred from working elsewhere under injunctions held by their former employers, they continue to be subject to their former employers' control. Thus, a *Lumley* injunction impinges upon the exercise of their constitutional right to quit.⁹⁶

The problematic relationship between the two types of *Lumley* actions and the abolition of slavery was more than theoretical. Considerable discussion of the right to be free from an employer's control occurred in the Reconstruction debates.⁹⁷ In the context of considering the rights of the newly emancipated

89. STEINFELD, *supra* note 3, at 123.

90. VanderVelde, *supra* note 3, at 445-48, 459-85.

91. See, e.g., *Johnson v. Bruner*, 6 Phila. 554, 555 (Dist. Ct. 1868) ("The relation between the plaintiff's son and the defendant was that of servant and master; employer and employee, in the language so much in vogue at the present day.") Although some courts, such as this one, recognized the pejorative connotation of "master and servant," treatise writers continued to use the terms throughout the 19th century. See, e.g., WOOD, *supra* note 36. For a more extensive discussion of the resistance of working people to the appellation "servant," see STEINFELD, *supra* note 3, at 126-29.

92. U.S. CONST. amend. XIII, § 1.

93. VanderVelde, *supra* note 3, at 459-95.

94. *Bailey v. Alabama*, 219 U.S. 219 (1911); see also *infra* note 95.

95. *Pollock v. Williams*, 322 U.S. 4, 18 (1944) ("But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers."); *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905); ALEXANDER BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 888-907 (1984).

96. Stevens, *supra* note 4.

97. VanderVelde, *supra* note 3, at 487-95.

freedmen, the Reconstruction Congressmen repeatedly expressed their desire to guarantee that working people be able to quit their jobs and seek new employment without their former employers' permission. The notion of former masters being able to enjoin freedmen from seeking new employers was antithetical to the Reconstruction Congress' concept of free labor.⁹⁸

In the nineteenth century then, the two common law causes of action that had the most impact in continuing to bind unwilling employees to their employers and in conditioning the right to quit are epitomized in *Lumley v. Wagner* and *Lumley v. Gye*—injunctions against employees and enticement actions against competing employers who would hire them. That these two cases gained acceptance in the United States for use against professional performers under contract represents a legal development counter to other free labor reforms occurring at the time.⁹⁹ In the century that witnessed the abolition of slavery and the disappearance of apprenticeship and other forms of bound labor, the scope of employers' equitable power against contract employees actually expanded.

3. *The Free Labor Concept in Full Bloom*

Ford v. Jermon,¹⁰⁰ which expressly rejected the *Lumley* rule, is perhaps the most significant American case of the early period. *Ford* is the first American case in this line of employment injunctions decided after the Civil War, after the enactment of the Thirteenth Amendment, and after the *Lumley v. Wagner* decision. Second, *Ford v. Jermon* is the first case in this line in which an American working woman was sued in her own name. As a widow, Mrs. Jermon had no husband; the doctrine of coverture was inapplicable. Perhaps because no man stood as a party principal protecting Mrs. Jermon's interests, the court went further to protect her interests. Third, and most importantly, the free labor principle was the basis of the decision. The *Ford v. Jermon* opinion unambiguously affirmed Mrs. Jermon's independence and her right to be free from her employer's control, based on the distinctively American principle of free labor.

Few scholars have noted this case, despite the fact that its principal parties were quite prominent. The defendant, Mrs. Jermon, was a member of a famous Philadelphia theater family.¹⁰¹ The plaintiff, John Ford, was the owner and

98. The Reconstruction debates spoke directly to laws that attempted to order specific performance, sanctioned employers for enticing away another master's former slaves, or subjected the freedmen to their master's control. *Id.*

99. See, e.g., RORABAUGH, *supra* note 11, at 16-75 (describing disappearance of apprenticeships); STEINFELD, *supra* note 3 (describing disappearance of indentured servitude).

100. 6 Phila. 6 (Dist. Ct. 1865).

101. The only historical references to an actress with a name like "Jermon" acting in the Philadelphia area are to Mrs. Jane Andrews Germon and to her unmarried daughter, Effie Germon. Telephone interview with Geraldine Duclow, Director of the Theater Collection, Philadelphia Free Library (Apr. 1990). Mrs. Germon and her daughter were members of a well-known acting family. T. ALLSTON BROWN, HISTORY

manager of several theaters, including Ford's Theater, where Lincoln would be shot later the same year.¹⁰² The judge, John Innis Clark Hare, was an eminent jurist of the day. He was one of the authors of a well-known series entitled *Leading American Cases*, and he lectured on contracts at the University of Pennsylvania Law School. Consistent with his ruling in *Ford v. Jermon*, Judge Hare never mentioned *Lumley* in his coverage of important contracts cases in either his book or his lecture notes.¹⁰³

Judge Hare's opinion illustrates several aspects of the influence of the national debate on the abolition of slavery. In 1865, the nation had just adopted the Thirteenth Amendment to the Constitution.¹⁰⁴ The prolonged national debate over slavery, leading to the Civil War, had culminated in the Emancipation Proclamation and the Thirteenth Amendment. The free labor theme reverberated through Judge Hare's opinion.

Mrs. Jermon, who had contracted to perform a play, decided, for her own unstated reasons, not to go through with the performance. Her contract contained clauses providing both that she would perform on Ford's stages and that she would not appear for any other competing theater for the season's duration.

In his complaint, Ford initially requested an order compelling Mrs. Jermon to perform the play.¹⁰⁵ Judge Hare concluded that it would be inequitable to force the actress to perform her labor contract. Judge Hare's reasons for why courts should not attempt to force an unwilling performer before the public generally tracked the policy reasons against specific performance listed in *Lumley*. In addressing the request for an injunction barring Mrs. Jermon from performing at other theaters, Judge Hare emphasized that the very policies for not compelling performance explained why no injunction should issue.¹⁰⁶ It would be harsh to compel obedience by imprisonment, and it would be difficult, if not impossible, to evaluate the quality of obedience when a performer reluctantly consented to appear. Hare explained: "I am unable to see that these difficulties are likely to be less, because the mode of compulsion is the indirect one of obliging the actor to remain idle until necessity forces him to comply."¹⁰⁷

OF THE AMERICAN STAGE 142 (1969).

102. Ford appears to be the same John Thomas Ford, owner-manager of the Ford Theater in Washington, D.C. Telephone interview with Geraldine Duclow, *supra* note 101. Ford was also the manager of the Holiday Theater in Baltimore and the Academy of Music in Philadelphia. JOHNSON, *supra* note 14, at 57.

103. AMERICAN LEADING CASES (J.I. Clark Hare & H.B. Wallace eds., 5th ed. 1871); J.I. Clark Hare, Notes of a course of Lectures on Contracts, delivered at University of Pennsylvania Law School, 1881-82 (on file with the author); J.I. Clark Hare, Notes of a course of Lectures on Contracts, delivered at University of Pennsylvania Law School, 1884-85 (on file with the author).

104. This measure finally passed the House of Representatives on January 31, 1865. CONG. GLOBE, 38th Cong., 2d Sess. 531 (Jan. 31, 1865).

105. 6 Phila. 6 (Dist. Ct. 1865). The request was withdrawn before trial. The plaintiff did not seek damages against Mrs. Jermon.

106. *Id.* at 6-7.

107. *Id.* at 7.

Moreover, Judge Hare saw in the request for an injunction the attempt to force Mrs. Jermon back to her employer by her need to earn her living.

We are asked to say that Mrs. Jermon shall not play at all, unless she will consent to play for the complainant; are we also to declare that she shall not sing? shall not earn her bread by writing or by her needle? To debar her from one pursuit would be vain and futile, unless she were also excluded from others, that might, so far as we can tell, be more profitable.¹⁰⁸

Embedded in this argument was a recognition of the significance of “earning one’s bread” by one’s chosen trade. Judge Hare questioned why the actress should be compelled indirectly to come to terms with a theater owner for whom she now refused to work. He rhetorically questioned to what lengths the court should go in keeping her to a contract that had the effect of preventing her from earning her daily bread?

Judge Hare also predicted that forcing employees back to their employers would spread to other types of trades: “Are such decrees to be made solely with reference to actors, or shall lawyers be held to their clients, mechanics to their employers, and servants to their masters, by the same process[?]”¹⁰⁹ The emphasis was not on the court’s powerlessness to enforce an order, but on the underlying importance of protecting the right of the employee to quit and to pursue her trade elsewhere.

Finally, Judge Hare articulated the free labor principle in relationship to slavery.

Is it not obvious that a contract for personal services thus enforced would be but a mitigated form of slavery, in which the party would have lost the right to dispose of himself as a free agent, and be, for a greater or less length of time, subject to the control of another?¹¹⁰

These statements must be understood in the context of the free labor agenda that gained political prominence in the Free Soil Party and the newly founded Republican Party.¹¹¹ One precept of this political movement was the right of all working people to be free agents and not to be subject to the control of another.¹¹² The Republicans saw a link between the abolition of slavery and

108. *Id.* at 6.

109. *Id.*

110. *Id.*

111. FONER, *supra* note 3, at 124-33; JOHN MAYFIELD, REHEARSAL FOR REPUBLICANISM: FREE SOIL AND THE POLITICS OF ANTISLAVERY (1980); JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 55 (1988).

112. VanderVelde, *supra* note 3, at 447-48, 490-94.

greater employment liberties for all workers.¹¹³ They firmly believed that employees should be the equals of their employers.¹¹⁴

Judge Hare viewed the distinction that the English Court of Chancery had drawn in *Lumley*, between equitable orders that compel and those that prevent performance, as exalting form over substance. According to Judge Hare both equitable orders had the same purpose or effect. Similarly, the terms of the contract were not the relevant issue. It would do theater managers no good to come up with stronger language in future contracts because it was the substance of the provisions, the fact that the individual "would have lost the right to dispose of himself as a free agent, and be, for a greater or less length of time, subject to the control of another," that was objectionable.¹¹⁵

By looking beyond the form of the contract to its intended effect, Judge Hare acknowledged that the parties had unequal bargaining power and that "the sympathies of mankind would be all with the weaker party."¹¹⁶ He effectively neutralized any argument that the actress should be enjoined because she had voluntarily contracted for such a result. The court viewed the injunction request as a grudge suit, an attempt to cut off her ability to earn a living elsewhere, without necessarily obtaining for the plaintiff the benefit of her performance.¹¹⁷

The free labor principle was asserted to shield a professional actress from her employer's attempt to enjoin her. This particular employment context was one in which the performer presumably had somewhat greater bargaining power than the average working class individual and the greater legal status of a written contract.¹¹⁸ Notwithstanding her relatively greater status than most employees, she still had to work to eat. The free labor principle came to her aid as a means of analyzing her relative powerlessness with respect to Ford.¹¹⁹ The court squarely considered the consequences of an injunction for her autonomy from Ford and for her ability to earn a living. Significantly, the court

113. In the words of one of their spokesmen, Carl Schurz, the Republican party was not just "the anti-slavery party," it was "the party of free labor." *Id.* at 445-48. This free labor principle animated many of the contemporary debates over the abolition of slavery. *Id.*

114. *Id.*

115. 6 Phila. 6, 7 (Dist. Ct. 1865).

116. *Id.*

117.

For if the case is not one in which the respondent ought to be compelled to perform her agreement directly, it cannot be right to substitute an indirect method of compulsion, more injurious to her and less beneficial to the complainant than a positive command that she should appear on the stage and act the parts assigned to her.

Id. at 6-7.

118. Both her status as a member of a prominent theater family and as a professional employee under contract gave Mrs. Jermon greater employment freedom than most employees. Most working class employees labored without written contracts and had no job security at all. Her services were more unique than the average laborer's; though not a star, she was a prominent actress. Telephone interview with Geraldine Duclow, *supra* note 101. Presumably she would have had greater opportunity to bargain for contract provisions, than would, for example, contemporary factory workers. JOHNSON, *supra* note 14, at 57.

119. Ford was relatively powerful among theater managers.

never asked her to produce or justify her reasons for quitting.¹²⁰ It was her right.

Moreover, the court considered the precedential consequences for other employees. If Mrs. Jermon was enjoined, that type of employer prerogative might then spread to affect other service providers.¹²¹ Thus, in Judge Hare's eyes, Mrs. Jermon was not just a poor widow to be excused or pitied, she was a representative of an entire class of service providers, a class that spanned the constituency of the Republican Party, from lawyers to mechanics to servants.¹²² Not only were Judge Hare's instincts the instincts of a Republican free labor adherent, but he allowed a woman to be a representative of their class interests and analogized from her situation to theirs. If she were subordinated to her employer, others too would be at risk. The fact that the defendant was a woman was not a sufficient reason to deny her free agency.

Ford v. Jermon is an interesting and noteworthy case because, from a perspective of compartmentalized labor statuses, one would not have expected the court to analogize the defendant's circumstances to slavery—taking the analogy across gender lines,¹²³ across race lines, and across class lines. Before the Civil War the compartmentalization of separate labor statuses—one for slaves and another for nonslave laborers—could be considered complete and intact. But with the emancipation of the slaves, the edges of the compartmentalized labor system were coming unraveled.¹²⁴ The oppression of slaves was in many ways a unique situation. The experiences and legal consequences of former slaves were different from those of a white actress like Mrs. Jermon. But that makes Judge Hare's opinion all the more remarkable. He saw the interests of working people as unified in this respect: Mrs. Jermon had a right to be free from the mastery of Ford.

120. Compare this to decisions in later cases in which judges required reasons of women performers and tended to discredit those they proffered. *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910); *infra* Part I.B.3 (discussing *Edwards*); *Duff v. Russell*, 14 N.Y.S. 134, 137 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *infra* Part I.B.2 (discussing *Duff*); *Daly v. Smith*, 49 How. Pr. (n.s.) 150, 166 (N.Y. Super. Ct. 1874); *infra* Part I.B.1 (discussing *Daly*). This feature of the men's cases is discussed *infra* Part I.B.4.

121. See *supra* text accompanying note 109.

122. The significance of Judge Hare's references to lawyers, mechanics, and servants is to be read in the context of parallel phases in then-contemporary Republican rhetoric. FONER, *supra* note 3, at 15 (1970); HAROLD HYMAN, *THE RADICAL REPUBLICANS AND RECONSTRUCTION, 1861-1870* (1967); MCPHERSON, *supra* note 111, at 170, 197-98. The anti-Republican Confederate leadership referred to the "laboring millions of the free States"—the Republican constituency—as the "mud-sills of society," "pauper banditti," and "greasy mechanics and filthy operatives." The Republicans used this name-calling to their advantage in the 1860 Presidential election by proudly rallying behind the Republican candidate with banners that said "Mudsills and greasy mechanics for Lincoln." HYMAN, *supra*, at 42.

123. The contemporary popular image of slaves was masculine. *Dred Scott's* wife and daughters were also enslaved by the Supreme Court's ruling, but the case focused almost exclusively on him. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For evidence of the masculine image of slaves in the Reconstruction debates, see *infra* note 298.

124. VanderVelde, *supra* note 3, at 500-03.

B. *The Cases of the Second Period: Binding Women's Fidelity and Contracting Their Freedom to Quit*

During the second period, both the status of women and the status of the acting profession were changing. In the early part of the century, acting was considered a suspect profession; actors were characterized as drunkards and actresses as harlots by the religious establishment.¹²⁵ Actresses were particularly susceptible to being mistaken for prostitutes because the theater was one of the few public places that prostitutes could enter to ply their trade. Many theaters reserved their third tiers for prostitutes.¹²⁶ The presence of prostitutes in the theater perpetuated the negative image of the acting profession. But, by mid-century, prostitutes were swept out of the elite theaters to make the theater acceptable for the bourgeoisie to attend in mixed company.¹²⁷ Between 1870 and 1880, the status of the acting profession began to improve markedly.¹²⁸

During the second period, women were coming into their own in the theater. Broadway was expanding and flourishing, and the American theater was becoming big business. As never before, women were performing more openly in public, forming theater companies, designing careers, commanding top billings and top dollars, and heading up touring companies. There were opportunities for income, travel, independence, and autonomy.

Outside the theater, however, the Victorian ideology was prescribing a stricter code of propriety and conduct for middle class women than that of earlier decades. The notion that a woman's life should be limited to hearth and home became more and more generally accepted.¹²⁹ According to historian

125. JOHNSON, *supra* note 14, at 3-35 (detailing opposition of American clergy to theater).

126. Records indicate that most theaters followed the practice. *Id.* at 13.

127. *Id.* at 15; RYAN, *supra* note 14, at 79-80 ("The first public den of male sociability to be sexually integrated was the theater. Before ladies could gather there, however, the prostitutes had to be banished.").

128. JOHNSON, *supra* note 14, at 11-12.

129. The nature, dimensions, and origins of this ideology have been detailed by historians such as Nancy Cott, Barbara Welter, and Sarah Eisenstein. Welter coined the influential idea of "the cult of true womanhood," which she described in a 1966 article, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966), reprinted in BARBARA WELTER, *DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY* 21-41 (1976).

In *The Bonds of Womanhood*, Professor Cott examined the contours of white, middle class women's experience in New England. She detailed "the social derivation of a concept of 'womanhood' rooted in the experience of Yankee middle class mothers but applied to the female sex as a whole." NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 17 (1977). Cott demonstrated the significance of the idea of "true womanhood" and its correlate, the "cult of domesticity," as separating women and men into distinct spheres of activity.

Historian Sarah Eisenstein wrote about the origin of the Victorian construction of women:

In the colonial period, the women of the urban middle class, and of the small, independent farmer class, were evaluated in terms of a variety of models—Puritan goodwife and helpmeet, frontier settler, partner/assistant to the urban draftsman or merchant—all roles which put a premium on usefulness, competence, and full social activity. The Lady was a model only for the wives and daughters of the upper classes or aristocracy.

By the end of the eighteenth and the beginning of the nineteenth centuries, however, the Lady had begun to be generalized into a model for all women. [T]he image of the Lady began to supplant [older notions] as a description of woman's proper nature and behavior. The

Barbara Welter, "The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors and society, could be divided into four cardinal virtues—piety, purity, submissiveness and domesticity. Put them all together and they spelled mother, daughter, sister, wife—woman."¹³⁰ Historian Mary Ryan adds, "[W]omen were conscripted into a code of public conduct which prescribed that they present themselves as 'ladies' outside the home."¹³¹ When women did not comport themselves according to the strictures of propriety, the standard reproach was to label them prostitutes.¹³²

It is important to emphasize that although this ideology had a pervasive influence in shaping attitudes about women generally, it was a white, middle class ideology. As an ideology, it was a simplification of life with terms that were regularly contradicted by the everyday experiences of working class women.¹³³ "These ideas had not developed out of the situation of working class women, nor were they consistent with it, yet they informed the ideology of the period so thoroughly that they dominated prevailing attitudes toward working women, and shaped the terms in which those women interpreted their own experience."¹³⁴ To the extent that Victorian ideology recognized women as working outside the home at all, it was expected that their working station would be temporary and transitional.¹³⁵ Women were denied access to most professions and many trades, and they customarily earned less than men, even in factories. Women who sought to work for wages outside the home met with numerous obstacles ranging from social disapproval to legal and economic sanctions.

These two contrary trends placed the actress in a precarious position. In the words of historian Claudia Johnson, the late nineteenth-century actress "was able to anticipate professional rewards which few other women in the age enjoyed, but only at considerable sacrifice of intangibles precious to nineteenth-century women—personal esteem and social acceptability."¹³⁶

standards of gentility, associated until then with aristocratic women, became confounded with those of propriety and sexual regularity, on the one hand, and femininity itself, on the other, until the image of the lady became coextensive with that of respectable womanhood.

SARAH EISENSTEIN, *GIVE US BREAD BUT GIVE US ROSES* 62-63 (1983) (footnote omitted).

130. WELTER, *supra* note 129, at 21.

131. RYAN, *supra* note 14, at 3

132. *Id.* at 3-5.

133. Nancy A. Hewitt, *Beyond the Search for Sisterhood: American Women's History in the 1980s*, in *UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN'S HISTORY 1* (Ellen C. Dubois & Vicki L. Ruiz eds., 1990) (detailing complexity of 19th-century women's experiences).

134. EISENSTEIN, *supra* note 129, at 55.

135. *Id.* at 74-76; see also KENNEDY, *supra* note 26, at 1 (Part One entitled, "she must be Married, Because She Don't Work . . ."). Pursuant to the notion that working was a temporary, transitional period which would end when the woman married and had her own family, many school systems prohibited women from continuing to teach once they married. BANNER, *supra* note 26, at 12.

136. JOHNSON, *supra* note 14, at 4.

By the very act of performing in public, actresses defied the social norm that the place for women was in the home, and that the proper roles of women were as faithful mothers, wives, and daughters, obligated to serve. Moreover, actresses appeared in a mode of dress that violated the expectations of the piety of "true womanhood." In an era when women were sensitive, if not oversensitive, to the norms of modesty and some even put skirts on the legs of their pianos, Lillian Russell appeared in public in tights.¹³⁷

[T]he actress, it was thought, had little claim on modesty. Her work required her to be in close association with men: she had to change costumes frequently in the same general backstage area with men; she often had to travel with men when shows went on tour; and on stage she would play love scenes with men. Untenably immodest behavior was demanded of the actress on stage. She was seen dispensing "lascivious smiles, wanton glances, and dubious compliments."¹³⁸

As a result, despite the banishment of prostitutes from the theaters, actresses as a group were still apt to be characterized as fallen women.

Their precarious social position was reflected in their legal position. Female performers were being sued for specific performance and injunction in greater numbers than were men during the period. They were also less able to make clean breaks from their employment contracts with only liability for damages. After 1860, cases involving women performers dominated the litigation: Annetta Galetti, Auguste Sohlke, Fanny Morant, Loie Fuller, and most importantly, Lillian Russell, who appears in three of the major reported cases of the period, but whose memoirs disclose that she was involved in many similar disputes.¹³⁹

The canon of negative injunction was based on *Daly v. Smith* and two cases involving Lillian Russell, but the broader litigation base included a number of other cases, most of which involved women performers. During this critical period when American courts were deliberating whether they would exercise any equitable jurisdiction over quitting performers, there were roughly twice as many cases involving actresses as cases involving actors.¹⁴⁰ In the cases

137. EISENSTEIN, *supra* note 129, at 59. At the Columbian Exposition where Lillian Russell appeared, one reporter noted the paradox of women's attitudes towards fashion: "[W]omen had a great desire to be free from the bondage of skirts but would rather die in long skirts than let the world know they had legs." BANNER, *supra* note 26, at 25 (quoting 9 ARENA 305 (1893)).

138. JOHNSON, *supra* note 14, at 30.

139. Butler v. Galletti, 21 How. Pr. 465 (N.Y. Super. Ct. 1861); DePol v. Sohlke, 7 Robertson's Pr. 280 (N.Y. Super. Ct. 1867); Daly v. Smith, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); Hoyt v. Fuller, 19 N.Y.S. 962 (Super. Ct. 1892); McCaull v. Braham, 16 F. 37 (C.C.S.D.N.Y. 1883); Duff v. Russell, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); Canary v. Russell, 30 N.Y.S. 122 (Sup. Ct. 1894); see also PARKER MORRELL, LILLIAN RUSSELL: THE ERA OF PLUSH 58-66 (1940).

140. From 1860 to 1900, 17 cases were recorded where theatrical performers were sued by male theater managers. Of these 17, 12 involved female performers and 5 involved male performers. Butler v. Galletti, 21 How. Pr. 465 (N.Y. Super. Ct. 1861) (female danseuse); Ford v. Jermon, 6 Phila. 6 (Dist. Ct. 1865) (actress); DePol v. Sohlke, 7 Robertson's Pr. 280 (N.Y. Super. Ct. 1867) (female danseuse); Hayes v. Willio,

involving actors, no permanent injunction for the term of the contract was ever issued; the only equitable orders ever granted against actors were preliminary injunctions, and none survived appeal.¹⁴¹

Significantly, the *only* cases during the entire century that permanently enjoined performers from appearing elsewhere for the duration of the contract term were five cases involving women performers.¹⁴² The contracts at issue in these cases often ran for several years, so the effect of an injunction could have been a serious impairment of the defendant's career and her ability to work. Although three of the cases involved women of considerable stature in the theater, two enjoined far less powerful and financially independent women performers.¹⁴³ Moreover, in three of the five cases, the courts enjoined actresses even when the contracts did not contain any negative covenants or

11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871) (male performer), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872); Daly v. Smith, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874) (actress); Hahn v. Concordia Soc'y, 42 Md. 460 (1875) (male performer); McCaull v. Braham, 16 F. 37 (C.C.S.D.N.Y. 1883) (female performer); Mapleson v. Del Puente, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883) (male opera singer); Mapleson v. LaBache (N.Y. Super. Ct. 1883) (female singer), *reprinted in* Mapleson v. Del Puente, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883); Cort v. Lassard & Lucifer, 18 Or. 221 (1889) (acrobats, gender not specified, but probably male); Hill v. Haberkorn, 6 N.Y.S. 474 (Sup. Ct. 1889) (female performer); Pratt v. Montegriffo, 10 N.Y.S. 903 (Sup. Ct. 1890) (male opera singer); Duff v. Russell, 14 N.Y.S. 134 (Super. Ct. 1891) (actress), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); Hoyt v. Fuller, 19 N.Y.S. 962 (Super. Ct. 1892) (female danseuse); Canary v. Russell, 30 N.Y.S. 122 (Sup. Ct. 1894) (actress); Rice v. D'Arville, 162 Mass. 559 (1895) (female opera singer); Edwards v. Fitzgerald (N.Y. Sup. Ct. 1895) (female dancer), *cited in* Hammerstein v. Sylvia, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910).

There was a single case in which a female head of an acting company sued a male actor. Carter v. Ferguson, 12 N.Y.S. 580 (Sup. Ct. 1890). In addition, there were several parallel suits involving men in professions other than the theater. Wollensak v. Briggs, 20 Ill. App. 50 (1886) (male machine inventor); Strobridge Lithographing Co. v. Crane, 12 N.Y.S. 898 (Sup. Ct. 1890) (male lithographic sketch artist); Sternberg v. O'Brien, 48 N.J. Eq. 370 (1891) (male debt collector in installment clothing business); W.J. Johnston Co. v. Hunt, 21 N.Y.S. 314 (Sup. Ct. 1892) (advertising man), *aff'd*, 37 N.E. 564 (N.Y. 1894); Burney v. Ryle, 17 S.E. 986 (Ga. 1893) (male insurance company manager). These suits are without female parallel in the 19th century. For the most part, women were not present in any of these occupations during the 19th century in anything but trace numbers. *See generally* HILL, *supra* note 29.

Other suits that parallel this line of cases were brought against baseball players—again, all male populations. For a listing of these cases, see *infra* note 259. For a discussion of the men's cases, see *supra* Part I.B.4.

141. Of these, only Hayes v. Willio, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872), left a written opinion. I acknowledge the methodological difficulty in classifying the results in some of these cases. I have counted a case as resulting in an injunction only if the final recorded opinion in the case actually ordered the defendant enjoined for the term of the contract or sustained the exercise of the lower court's injunction. Several of the men's cases and most of the women's cases make reference to injunctive orders equivalent to temporary restraining orders. These orders were not counted as injunctions *for the term of the contract* unless they were sustained in the last written opinion in the case. In certain cases it is difficult from the record to distinguish between temporary restraining orders, preliminary injunctions of some duration, and permanent injunctions for the term of the contract.

142. Daly v. Smith, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); McCaull v. Braham, 16 F. 37 (C.C.S.D.N.Y. 1883); Hoyt v. Fuller, 19 N.Y.S. 962 (Super. Ct. 1892); Duff v. Russell, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); Edwards v. Fitzgerald (N.Y. Sup. Ct. 1895), *cited in* Hammerstein v. Sylvia, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910); *see also* Canary v. Russell, 30 N.Y.S. 122 (Sup. Ct. 1894) (defendant could perform elsewhere during summer season not covered by contract, but was enjoined from performing elsewhere during period covered by plaintiffs' contract).

143. *Edwards v. Fitzgerald*; *Hoyt*, 19 N.Y.S. 962.

clauses pertaining to an exclusive right to their services.¹⁴⁴ These opinions indicate the courts' willingness to surpass even the language of the contracts in fashioning for the actresses a status subservient to their male employers' control. The essence of the courts' rulings was: if the lady's employer could not have her services, no one could.

1. *Hayes v. Willio and Daly v. Smith: The Daly Brothers Chart A New Course for American Law*

The 1871 opinion in *Hayes v. Willio*¹⁴⁵ illustrates the beginnings of a change in judicial attitude regarding the free labor implications of holding performers to their contracts of employment. By the early 1870's, the momentum of Reconstruction reforms had begun to diminish.¹⁴⁶ Moreover, American courts were less sensitive to certain incidents of mastery in employment relationships and more concerned with protecting the aggregation of capital. The lower court decision in *Hayes v. Willio* was the only reported case in which a court actually decided against a male performer.¹⁴⁷ Although the injunction was only preliminary, and the decision was quickly reversed on appeal, the case laid the basis for the actress cases that followed.

The case is interesting for three reasons. First, the author of the lower court opinion, Judge Joseph Francis Daly, could not really be said to be neutral on this issue; he was deeply involved in theater management himself. Second, Daly's opinion marks the ascendancy of the capital interest as a policy element influencing the rule of decision. And third, the court of appeals beat a hasty retreat when confronted with Judge Daly's injunctive order restraining the defendant's employment and his personal liberty.

The opinion's author, Judge Joseph Francis Daly, collaborated closely throughout his life with his famous brother, Augustin Daly, who was the manager of one of the major theaters of the time. Judge Daly was in some sense his theater-manager brother's alter ego.¹⁴⁸ He had served as his brother's lawyer before being appointed to the bench.¹⁴⁹ The two brothers met

144. *Edwards v. Fitzgerald*; *Hoyt*, 19 N.Y.S. 962; *Duff*, 14 N.Y.S. 134.

145. 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872).

146. *See, e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

147. *But see* *American Ass'n Base-Ball Club v. Pickett*, 8 Pa. C. 232 (C.P. 1890) (court granted preliminary injunction against baseball player's playing baseball commercially). This case played no role in forming the American canon because it was not necessarily viewed as good law even within Pennsylvania, and it was only cited once in subsequent cases. *See Philadelphia Base-Ball Club v. Lajoie*, 10 Pa. D. 309, 313 (1901), *rev'd sub nom. Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902).

148. Historian Marvin Felheim portrays Judge Joseph Francis Daly as completely devoted to his older brother, Augustin. MARVIN FELHEIM, *THE THEATER OF AUGUSTIN DALY* 9, 15, 19 (1956). In his later years, Judge Daly wrote a biography of his brother. JOSEPH F. DALY, *THE LIFE OF AUGUSTIN DALY* (1917) (portraying his brother as a genius of the theater).

149. *See, e.g.*, *Daly v. Palmer*, 6 Blatchford 256, 257 (S.D.N.Y. 1868) (listing Joseph F. Daly as attorney for plaintiff).

every day to discuss details of the theater's management, including Judge Daly's specific instructions for dealing with actors. When the brothers could not meet they sent each other notes. In one such note, Judge Daly wrote that "the actors don't get lazy nor saucy nor treacherous, if you keep them well at work," and he also advised his brother, "you can do without stars."¹⁵⁰ Given this degree of involvement in his brother's affairs, it is not surprising that Judge Daly was able to elaborate so expansively and protectively upon the efforts of theater managers.¹⁵¹ In fact, at the time he wrote the opinion, Judge Daly was also consoling his brother Augustin, whose own acting company was beleaguered by the first of a series of desertions.¹⁵²

Not surprisingly then, Judge Daly's opinion emphasized the efforts of theater managers, the capital that theater managers have at stake, and the competitive nature of their business in relation to other theaters. He wrote language that would be seized upon in the next decision:

[W]hen theatrical managers with large capital invested in their business, making contracts with performers of attractive talents, and relying upon such contracts to carry on the business of their theaters, are suddenly deserted by the performers in the middle of their season, the resort to actions at law for damages must fail to afford adequate compensation. It is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him an injury. It is as much his right, if he have a contract to that effect, that no other establishment shall have the services of his performers, as that he shall have them himself.¹⁵³

This statement established a new legally cognizable interest—that of depriving other establishments of the services of performers. It also identified a new relationship as the critical interest in the situation, the competitive position of the plaintiff theater as compared to other theaters. No longer was the primary balancing of equities between the employee and the theater. Instead, the competitive rivalry between one theater and another was considered the crucial interest to be protected and the interest that tipped the scales.

Moreover, in this passage, the free labor principle was inverted. According to Judge Daly, the actor's desire to quit threatened to deprive the theater manager of "the fruits of *his* diligence and enterprise," rather than the reverse.

150. FELHEIM, *supra* note 148, at 15.

151. Judge Daly later became financially involved in his brother's theater as well. FELHEIM, *supra* note 148, at 25.

152. *Id.* at 19.

153. *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167, 176 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872). This language was repeated practically verbatim two years later in *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874), discussed *infra* notes 159-89.

The free labor principle—the rights to the fruits of one's labor¹⁵⁴—had from its inception appealed to both small entrepreneurs as well as laborers;¹⁵⁵ in this case, the free labor principle came to the aid of capital in its disputes with labor and its rivalries with other capital interests.

As for fairness to the performer, Judge Daly stated without elaboration that there was no hardship in enjoining the performer because every man expects to be held to his agreement.¹⁵⁶ Willio was sent to jail on a *ne exeat* order.

On appeal the decision was reversed by the New York Court of Common Pleas, sitting as a three-judge panel. The court determined that the agreement Willio originally made with a talent scout to accept employment with Hayes, if the agent could procure it, did not allow Hayes any enforcement rights as an employer.¹⁵⁷ This irregularity of agency gave the appeals court a reason to reverse the preliminary injunction against Willio, freeing him from jail and from an injunction against performing elsewhere.¹⁵⁸ Notwithstanding the reversal on other grounds, Judge Daly's lower court opinion became the basis for the legal cases that were to follow.

The permanent injunction threatened in *Hayes v. Willio* was actualized in *Daly v. Smith*, a case involving Judge Daly's brother, Augustin, and an actress in Augustin's company.¹⁵⁹ *Daly v. Smith* marked the first time an American court issued an equitable order permanently preventing a highly skilled performer from repudiating her contract, paying damages, and leaving. The opinion in *Daly v. Smith*, decided in 1874, was as biting in spirit toward the notion of her free agency as the opinion in *Ford v. Jermon* was magnanimous.

The case involved Fanny Morant Smith, "a distinguished actress, and a great artistic acquisition,"¹⁶⁰ who was also a wealthy woman and financially able to contemplate buying her way out of her contract. Mrs. Smith had decided that remaining with Augustin Daly was injurious to her career. A previous theater season had been canceled early without warning, leaving her without work,¹⁶¹ and she complained that her roles as a character actress cast her

154. For a discussion of the significance of the term "fruits of one's labor," see VanderVelde, *supra* note 3, at 473-74.

155. FONER, *supra* note 3, at 15.

156. 11 Abb. Pr. (n.s.) at 176.

157. This holding is somewhat dubious because from the facts presented, the talent scout could have been viewed as the agent either of Hayes or of Willio. If the scout had been viewed as the agent of Hayes, Hayes would have had the rights of an employer. The facts are contradictory because the scout first represented that he was in London for the purpose of engaging artists for Hayes, but then disclaimed that he had the authority to engage Willio for Hayes. 4 Daly's Rep. at 259-60.

158. *Willio* was the last case in the line in which the harshness of jail appeared to be a factor influencing the court's decision.

159. 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874).

160. *Id.* at 161.

161. First, during the 1873-74 season, when she had been under a similar contract with Daly, he had closed the season four weeks early without warning. Under the contract, she had received only 30% of her pay (\$150) rather than the \$500 she would have received had the season continued to its scheduled end. The theater's closure so late in the season also had prevented her from obtaining any other roles or compensation for the remainder of the season. *Id.* at 164.

below her talents. Although she had signed on for another three years, she had come to believe that Daly's true motive was not to produce her, but to keep her off the stage and away from rival theaters. Realizing her mistake, she approached Daly about getting out of the contract and posted a \$20,000 surety bond against any damages for breach of contract.

No previous performer had raised this kind of claim, and it cast Mrs. Smith as a serious careerist instead of a worker simply plying her trade to earn her daily bread. It is not surprising that a wealthy actress like Mrs. Smith (or, in the later cases, Lillian Russell) did not evoke the court's sympathies in the way that Mrs. Jermon or Margaret Burke had. Mrs. Smith was not in danger of starving if she were foreclosed from acting. And yet, her wealth did not guarantee that she receive the evenhanded application of the usual legal rules. The court did not allow her the benefit of leaving her employer by paying off the breach of contract with damages. Moreover, the court gave no heed to her claim that she had a legitimate career interest in being free from continued professional association with Daly.

Mrs. Smith's concerns about Augustin Daly may have been well founded. Augustin Daly was called "The Autocrat of the Stage."¹⁶² Modern historians consider him the most dictatorial of all the nineteenth-century theater managers, and his dictatorial fervor was most frequently directed at women in his company.¹⁶³ Augustin Daly prized obedience over most other virtues, particularly in women.¹⁶⁴ Fanny Morant Smith was the sixth major actress to attempt to leave his company in two years.¹⁶⁵ This string of desertions by women performers caused Augustin Daly (and his brother Judge Daly) considerable consternation.¹⁶⁶ In his own theater records, Augustin Daly used the language of matrimony to describe the actresses' departures, writing that they had "annulled" their contracts.¹⁶⁷

In *Daly v. Smith*, Judge Freedman drew heavily on Judge Daly's reversed opinion in the prior case. The judge's sympathies favored the theater manager's capital interest from the outset. Judge Freedman stated that he could conceive

162. GLENN HUGHES, *A HISTORY OF THE AMERICAN THEATRE 1700-1950*, at 231 (1951).

163. Interview with Kim Marra, *supra* note 16.

164. FELHEIM, *supra* note 148, at 32-33. In fact, obedience was so important to Daly that he posted rules of behavior for his company, attempting to control both their personal and professional lives. If any such rule was broken, Daly would fine the offender. For example, "[t]here were fines for being late, for making the stage wait, for lack of courtesy." *Id.* at 33. Daly "insisted that the ladies and gentlemen of the company should not appear conspicuously in public places." *Id.* at 32. He was especially interested in eradicating any "Bohemian tendencies." *Id.* As one of his contemporaries explained, "[h]e treated his artists as puppets in his scheme of *mise en scene* [sic]." *Id.* at 33. Another complained that Daly forbade his artists from doing "divers [sic] other things held to be the proud privileges of the sons of freedom." *Id.* at 32.

165. *Id.* at 19-20.

166. As Felheim explains, when the actresses would misbehave or leave the company, "it was Joseph who had to reconcile Augustin." *Id.* at 19. Joseph consoled him with the following note: "The public may ask: why do Daly's actresses all leave him? . . . The Answer: Because they are not Happy The duty of a manager is to pay his actresses largely, furnish them dresses and make them Happy!" *Id.* at 20.

167. *Id.* at 19.

of no reason why contracts for theatrical performances should stand upon a different footing than other contracts involving the exercise of intellectual faculties; why actors and actresses should, by the law of contracts, be treated as a specially privileged class, or why theatrical managers, who have to rely upon their contracts with performers of attractive talents . . . should, with the large capital necessarily invested in their business, be left completely at the mercy of their performers.¹⁶⁸

By framing the issue in this way, Judge Freedman followed Judge Daly's lead and reversed two of the customary equities between performers and managers. First, he redirected all the equities of unequal power to run in favor of the unfortunate theater owner, rather than the "shrewd" Mrs. Smith.¹⁶⁹ Second, he characterized the right to quit without intervention of a court of equity as a special privilege or preferred status claimed by actors and actresses to which other litigants were not entitled. Naturally, this characterization suggested an intention to strip actors and actresses of an unwarranted special privilege.¹⁷⁰

Judge Freedman continued by expressing regret that he could not order performance of the contract:

I am of the opinion that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that whenever the court has not proper jurisdiction to enforce the whole engagement, *it should, like in all other cases, operate to bind their consciences, at least as far as they can be bound, to a true and faithful performance.*¹⁷¹

This passage paraphrases a similar statement in *Lumley*¹⁷² about binding consciences, but Judge Freedman made two significant departures. Unlike *Lumley*, which had delicately stated that binding consciences contributed to the "wholesome tendency" to maintain good faith, Judge Freedman was concerned with the maintenance of the employer's capital, or more specifically, the income earned by the capital. Moreover, Freedman's belief that a court of equity should bind a performer to a contract as far as they can be bound diametrically op-

168. *Daly v. Smith*, 49 How. Pr. (n.s.) 150, 160 (N.Y. Super. Ct. 1874).

169. *Id.* at 164.

170. Judge Freedman never identified which cases prevented individuals from working for competitors after they quit. In fact, most of the cases that he could have used to illustrate this point involved apprentices or the protection of real property or intellectual property, such as trade secrets, trademarks, or copyrights. See distinction made at notes 11, 49 *supra*.

171. 49 How. Pr. (n.s.) at 160 (emphasis added).

172. *Lumley v. Wagner*, 1 DeG., M. & G. 604, 619, 42 Eng. Rep. 687, 693 (Ch. 1852) ("bind men's consciences").

posed the statement in *Ford v. Jermon* that equity ought not compel performance either directly or indirectly.¹⁷³

Secondly, Judge Freedman introduced the word "faithful" in describing the actress' duty, asserting that "persons should be held to a true and *faithful* performance of their engagements." This evoked the notion that employees ought to be faithful to their employers, a notion not present in *Lumley*.¹⁷⁴ Judge Freedman portrayed Mrs. Smith's attempt to quit as untrue and unfaithful. The term "faithful" conveys meanings in addition to faithfulness to a contract or to the performance of a play. The term "faithful" also connotes a deeper obligation founded on an interpersonal bond, an obligation that extends beyond the contract's terms. Servants were said to owe a duty of fidelity to the master that was not reciprocal to any duty of faithfulness the master owed them.¹⁷⁵ When employees sued employers for breach of contract, courts customarily used the language of breach, but not the language of faithfulness.¹⁷⁶ By using the rhetoric of fidelity the court placed the employee one step below her employer.

In justifying the use of equitable power to restrain Mrs. Smith, Judge Freedman ignored her willingness to pay damages for breach. The usual justification for equitable intervention was that the plaintiff is unable to obtain adequate relief at law.¹⁷⁷ But Judge Freedman questioned why a theater manager must seek his remedy at law and take the chance of proving his damages to a jury. And how would the manager benefit, the judge asked, if the defendant were wholly insolvent?¹⁷⁸

This argument was interesting for three reasons. First, it represents a shift in judicial attitude about a performer's need to work to eat. When confronted with the possible insolvency of Margaret Burke and Mrs. Jermon, earlier courts paled at the notion of depriving them of their livelihood by equitable orders.¹⁷⁹ In this case, the hypothetically insolvent performer led Judge Freedman to worry instead that the theater manager would go uncompensated.

173. 6 Phila. 6, 6-7 (Dist. Ct. 1865) ("[I]f or if the case is not one in which the respondent ought to be compelled to perform her agreement directly, it cannot be right to substitute an indirect method of compulsion, more injurious to her and less beneficial to the complainant . . .").

174. *Lumley* spoke of maintaining "good faith," 1 DeG., M. & G. at 619, 42 Eng. Rep. at 693, whereas *Daly* spoke of "faithful performance," 49 How. Pr. (n.s.) at 160. The distinction may be slight, but it is significant when describing the exercise of a right to quit. Quitting would not be considered a breach of an implied covenant of good faith and fair dealing, but it may be considered not being faithful to the enterprise. This interpretation of the word reaches its culmination in the later case of *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910), discussed *infra* note 240 and accompanying text.

175. TIFFANY, *supra* note 36, at 480 (stating rule that servant owes master duty of fidelity).

176. See, e.g., *Howard v. Daly*, 61 N.Y. 362 (1875).

177. See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 42 (Boston, Little, Brown & Co. 13th ed. 1886).

178. *Daly v. Smith*, 49 How. Pr. (n.s.) 150, 161 (N.Y. Super. Ct. 1874).

179. See *supra* text accompanying notes 71-73, 107-08.

Second, Judge Freedman's hypothetical was counterfactual. There was little chance Augustin Daly would go uncompensated; Mrs. Smith stood ready to pay. Judge Freedman dismissed the uncontroverted fact of her \$20,000 real estate surety with the simple statement that "even if true, [these facts] are quite unimportant."¹⁸⁰ By abstracting the inquiry from the actual facts of the case, Judge Freedman was able to ignore the fact that Mrs. Smith could satisfy almost any claim for damages the theater manager could bring.

Third, there is further irony in characterizing the plaintiff's possibility of obtaining an adequate remedy from the jury as "chancy." Judge Freedman appeared not to have trusted the jury to see the equities the same way that he did, even though he described the equities as running so clearly in favor of the theater manager. Judge Freedman thus felt the need to protect the theater manager even from the jury.¹⁸¹

Borrowing Judge Daly's language from *Hayes v. Willio*, Judge Freedman reiterated the view that "performers, by carrying their services to other establishments, deprive [the manager] of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him irreparable injury."¹⁸² Like Judge Daly had, Judge Freedman focused on the theater manager's interests rather than on those of the actress. He emphasized the threat to the manager of an actress quitting and pursuing her career elsewhere instead of considering the requested injunction as threatening to deprive an actress of the fruits of *her* diligence and enterprise and *her* interest in advancing a career. He structured his inquiry in this case in order for Mrs. Smith to lose. By reserving consideration of the actress's equities to the end, Judge Freedman shifted the burden of rebutting the presumption in favor of an injunction to Mrs. Smith.¹⁸³

When Judge Freedman did consider Mrs. Smith's defense that Daly was acting in bad faith and that remaining with Daly would injure her reputation, he dismissed it emphatically, calling it "too preposterous to raise an equity in her behalf." He considered her claims insincere, stating that her allegations seemed to "owe their origin to an afterthought . . . produced by a desire on her part to find some excuse for breaking her engagement."¹⁸⁴ According to the judge, since Mrs. Smith was a "shrewd lady of great business capacity and mature age and judgment," he found it "safe to assume" that "she made the

180. *Daly*, 49 How. Pr. (n.s.) at 163.

181. Notably, in *Lumley v. Gye*, when Benjamin Lumley successfully sued the rival theater manager for damages, the jury returned a verdict for the plaintiff but "refused all damages." LUMLEY, *supra* note 81, at 333; see also ZECHARIAH CHAFFEE, JR. & EDWARD D. RE, CASES AND MATERIALS ON EQUITY 280 (1958).

182. *Daly*, 49 How. Pr. (n.s.) at 161.

183. Had Judge Freedman considered Mrs. Smith's equities at the outset, he would have proceeded from such countervailing equitable principles as "One must do equity to seek equity," "One must approach equity with clean hands," and "Harsh contracts will not be enforced"—equitable principles that would have kept the burden of proving the need for an injunction more squarely on the party seeking the injunction.

184. *Daly*, 49 How. Pr. (n.s.) at 165.

best bargain for herself that could be got under the circumstances.”¹⁸⁵ Judge Freedman simply refused to take seriously Mrs. Smith’s arguments or her attempts to get out of a contract she found burdensome.

The new equities and interests that the court was willing to credit to Augustin Daly were not applied equally to Mrs. Smith. The judge did not require the theater to provide “particulars” supporting its claim that rivalry would be increased or that a jury would not take these issues fully into account in assessing damages. He did not notice that Mrs. Smith’s midseason withdrawal closely tracked the theater’s midseason cancellation the year before. Each party’s interests were similarly injured by the other’s withdrawal. Only their remedies were different.¹⁸⁶ Judge Freedman refused to direct the theater to its remedy at law. While he was willing to hold that the theater would meet with irreparable commercial injury if Mrs. Smith was not enjoined, he failed to recognize that his own order placed Mrs. Smith in similar danger. For an actress to be kept off the stage for the three-year term of the contract could be equally commercially disastrous.

Although *Daly v. Smith* was later called the most significant American case to adopt the *Lumley* rule,¹⁸⁷ on closer examination, the opinion seems legally suspect. Not only were some of its arguments contrived, but the opinion itself appears to have been ghost written by the plaintiff’s brother and partner, Judge Daly. How much Judge Daly influenced Judge Freedman is unknown. Certainly, it was not improper for Judge Freedman to use crucial language from Judge Daly’s overturned opinion in *Hayes v. Willio*. But it was likely that Augustin Daly prevailed upon his brother to wield what influence he could on his fellow judge. Augustin Daly is known to have enticed another actress to break her contracts with other theaters by boasting “waive [your other contracts] you know my brother is Judge Daly and he has the power to effect your release.”¹⁸⁸

For someone in Mrs. Smith’s position, however, there was no way out. She could bargain with the theater owner, but only on the terms he set. If Daly chose to end her career, she could do nothing about it.¹⁸⁹ The court neither

185. *Id.* at 164. Mrs. Smith’s so-called “shrewd” ability to negotiate the contract was probably no greater than the theater manager’s. If she had been able to negotiate for the contingency of the theater attempting to harm her career, so too, could the theater have further clarified the purposes of the exclusivity clause. As written, the exclusivity clause could have been read as intended to bar her performance elsewhere only while she continued to be willing to enjoy the other benefits of the contract by continuing to perform. This factual situation was presented in *McCaull v. Braham*, discussed *infra* text accompanying notes 194–206.

186. Under the contract, Mrs. Smith would get a fraction of her wages for the canceled season, but presumably, wages were not that important to her. Historians believe she left for the reasons she specified in the court papers, not for money. GERALD BORDMAN, *THE OXFORD COMPANION TO AMERICAN THEATRE* 486 (1984).

187. William D. Lewis, *Two Questions in Specific Performance*, 49 AM. L. REG., 319, 323 (1901).

188. Lillian Russell, *Lillian Russell’s Reminiscences* (pt. 2), COSMOPOLITAN, Mar. 1922, at 126.

189. After winning the lawsuit, Augustin Daly “had only to pay her one fourth quarter of her regular salary in order to keep her inactive.” FELHEIM, *supra* note 148, at 20. After winning the legal point,

recognized her interest in preserving her career nor allowed her to pay damages for her breach.

2. *Lillian Russell*

One actress' litigation fate seemed to shape and reinforce judicial and public attitudes regarding the breach of employment contracts by women. Lillian Russell's losses in two major cases during the next decade reinforced the rule adopted in *Daly v. Smith*. By 1897, on the authority of Fanny Morant Smith's case and one of Lillian Russell's suits, Pomeroy's *Specific Performance* could state that the English rule of *Lumley v. Wagner* was followed in the United States.¹⁹⁰ More importantly, the opinion in one of Lillian Russell's cases indicated that something beyond the abstract application of a capital-protective legal rule was at work. The opinion in the second case carried *Lumley's* rationale to the point of legal absurdity.

Lillian Russell, both as a popular symbol and as an individual, was the ideal foil for reinforcing this more restrictive legal rule concerning the freedom of women performers.¹⁹¹ She was a larger-than-life symbol of American femininity in the American consciousness. Her face adorned cigar boxes, and her voice was chosen for the first publicized long distance telephone conversation to demonstrate Alexander Graham Bell's new invention; the cable was laid from her dressing room on Broadway to the White House. She was the woman who made all men swoon, America's sweetheart, the major attraction of the Columbian Exposition of 1893. Her public presence was feminine *non plus ultra*, sweet, gracious, youthful, and, above all, submissive. She never played serious roles. At a critical juncture in her career she deliberately elected to confine her singing talents to light operettas rather than attempt serious opera. In the realm of light comic operas, she was immensely popular at the box office and could command salaries unheard of previously.

Despite her popularity as an actress, she belonged to a suspect profession, and both her private and professional life were major topics of the gossip newspapers. Although billed as America's sweetheart, the public still considered her scandalous and risqué. Russell appeared on the stage wearing tights and décolleté costumes. She fully enjoyed the independence that her fame and power gave her. She smoked cigars and played poker in her home with the

Augustin Daly released her. Little is known about his motives except that his attention at the time seemed to be visited instead on the next actress who was preparing to quit his company. *Id.*

190. POMEROY, *supra* note 35, at 31 & n.2. Pomeroy also cited Judge Daly's lower court opinion in *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872).

191. The biographical details in this section are drawn from JOHN BURKE, *DUET IN DIAMONDS: THE FLAMBOYANT SAGA OF LILLIAN RUSSELL AND DIAMOND JIM BRADY IN AMERICA'S GILDED AGE* (1972); MORRELL, *supra* note 139; and the somewhat rosy, autobiographical account in Lillian Russell, *Lillian Russell's Reminiscences* (pts. 1-8), *COSMOPOLITAN*, Feb. 1922, at 13, Mar. 1922, at 25, Apr. 1922, at 23, May 1922, at 69, June 1922, at 81, July 1922, at 93, Aug. 1922, at 80, Sept. 1922, at 73.

shades drawn. For exercise, she rode her famous diamond-studded bicycle in Central Park. She was the daughter of a well-known feminist suffragette and editorial writer, who was also the first woman to run for Mayor of New York City.¹⁹² As a result of her very unconventional lifestyle, she was snubbed by high society.¹⁹³ But most importantly, Lillian Russell broke off her four unhappy marriages and her unhappy contracts with equally innocent abandon.

Russell's habit of breaking off contracts led to *McCaull v. Braham*¹⁹⁴ and *Duff v. Russell*,¹⁹⁵ litigation that spanned a decade.¹⁹⁶ The press covered these cases closely, reporting on each of her depositions, occasionally on her testimony, but much more often on what she wore, and her gracious, light, and submissive demeanor.¹⁹⁷

Russell's first experience in court occurred early in her career. The theater production covered by the contract was her first hit, and, as a young actress,

192. In *Lilian [sic] Russell Enjoined—The Trouble Between Her and John M'Caull, of the Bijou Opera House*, N.Y. TIMES, Mar. 4, 1883, at 9, one of her litigating employers, Colonel McCaull, blamed Lillian's assertiveness on her mother's influence. Her mother was also featured in a later article describing Russell's matrimonial difficulties. *Too Much Mother-In-Law: Lillian Russell and Edward Solomon Not Now in Harmony*, N.Y. TIMES, Apr. 2, 1886, at 8.

193. On one highly publicized occasion, she was publicly refused entry to the V.I.P. gallery at the Chicago Race Track, only to have the press and public create such a stir as she was seated in the regular galleries that the race had to be delayed. She was also the most famous person not invited to the Duke of Windsor's dinner to celebrate the Chicago Exposition. One newspaper article covering a similar snubbing incident by social denizens reported:

Mr. Van Alen's bold and unconventional move . . . of introducing an opera bouffe singer such as Miss Lillian Russell at the musicale given at his handsome granite palace . . . set the tongues of the gossips wagging at a tremendous rate, and society has almost been divided into two hostile camps in consequence of Miss Russell's appearance, which certainly was quiet and ladylike enough to have entitled both host and singer to a freedom from attack and comment. Many virtuous matrons, however, refused to let their daughters attend.

Society Topics of the Week, N.Y. TIMES, Sept. 14, 1890, at 10. In a similar vein, see *Jealous of Lillian Russell: The Wives of Club Members Object to Her Presence in Washington Park*, N.Y. TIMES, July 26, 1893, at 1 (criticizing hypocrisy of barring Lillian Russell from club on grounds that she was famous actress because famous actors were admitted to membership).

194. 16 F. 37 (C.C.S.D.N.Y. 1883). Lillian Russell was sued under her then married name, Mrs. Helen Braham.

195. 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892).

196. Lillian Russell was also involved in a third reported suit. *Canary v. Russell*, 30 N.Y.S. 122 (Sup. Ct. 1894). The plaintiffs, Canary and Lederer, brought suit against Lillian Russell to enjoin her from performing at other theaters after she gave notice of refusal to work. She had refused to perform during the second year of a two-year contract, which engaged her services from November to June of the first year and October to June of the second, but did not mention the summer months. The contract also contained a negative covenant for the "continuance of this agreement." *Id.* at 123. By the time of this case, Lillian Russell had lost on the *Lumley* issue twice before. Thus, it is not surprising that she did not challenge the court's injunctive power. Instead she argued that the covenant did not cover the summer months. The court conceded as much but continued the injunction as modified pending trial. The injunction was dissolved when Russell agreed to pay a monetary settlement. *Canary v. Russell*, 31 N.Y.S. 291 (1894).

197. See, e.g., *Poor Lillian Russell: Smiling When She Tried to Frown: Telling How She Lives in Delightful Poverty on \$200 a Week, And Can't Live on Less*, N.Y. TIMES, June 3, 1887, at 6. The article states:

The lady tried hard to look angry at the persistent lawyer, but utterly failed. Her face became wreathed in smiles when the occasion demanded frowns, and several times she bit her lips to restrain the laughter which threatened to issue therefrom. She was attired in black satin, with a heavily beaded wrap, and her yellow curls looked as though they were effervescing from the natty little black bonnet, all trimmed with pale pink ribbons and feathers.

she had not yet developed widespread popularity or a strong box office draw. Over the course of the play's run, her contract was revised several times to raise her salary.¹⁹⁸ Lillian Russell was sued not because she would not perform for the plaintiff theater, but because she proposed to sing at other engagements on off-nights.¹⁹⁹ Since Lillian Russell was not seeking to repudiate the contract, but merely to retain her ability to perform outside of scheduled performances under the contract, the issue of her right to quit was not squarely presented in *McCaull v. Braham*. Nonetheless, this case was used as precedent in later cases where employees did seek to quit.²⁰⁰

The theater manager, Colonel McCaull, sought to enjoin her from performing *anywhere* without his consent.²⁰¹ McCaull, who had begun his career as an attorney for Ford's Theater,²⁰² had drafted an iron-clad contract with three different clauses spelling out the theater's desire to maintain exclusive control over Russell's singing engagements. One of the clauses stipulated that she would forfeit either a week's salary or the entire contract, at McCaull's option, if she sang at a competing theater during the season.²⁰³ Another stated that McCaull would have additional rights to pursue remedies notwithstanding the forfeiture clause. The only serious legal issue the court saw was whether the forfeiture clause constituted a liquidated damages provision or an additional penalty.²⁰⁴ The court took the latter position.

In contrast with the *Jermom* court,²⁰⁵ the *McCaull* court never considered whether it should look beyond the language of the well-drafted contract to the substantive effect on the young actress. In interpreting the language of the agreement, the *McCaull* court did not evaluate who had the upper hand in drafting the contract's terms. Not only did the court enforce the exclusivity clause by ordering an injunction, even when the defendant's performance for the plaintiff theater would continue undisturbed, it enforced the forfeiture as a special penalty in addition to the injunction, rather than as a provision for liquidated damages. The court used the difficulty in evaluating damages for breach to justify invoking its equitable powers.²⁰⁶

198. *McCaull*, 16 F. at 39.

199. There was some evidence that she had proposed to break off her contract to enter another engagement, but the basis of the lawsuit against her was that she wished to perform a series of Sunday concerts, none of which would have interfered with her performance schedule. *Lillian [sic] Russell Enjoined—The Trouble Between Her and John M'Caull, of the Bijou Opera House*, *supra* note 192.

200. *Keith v. Kellerman*, 169 F. 196, 200 (C.C.S.D.N.Y. 1909); *Mission Indep. Sch. Dist. v. Diserens*, 188 S.W.2d 568 (Tex. 1945); *see also* citation in POMEROY, *supra* note 35, at 32 n.1.

201. *Id.*

202. *Five Years A Manager: Col. M'Caull's Experience with Comic Opera*, N.Y. TIMES, Aug. 16, 1885, at 3.

203. *McCaull v. Braham*, 16 F. 37, 38 (C.C.S.D.N.Y. 1883).

204. 16 F. at 40.

205. *See supra* text accompanying notes 116-17.

206. For a contrary approach in a man's case, *see* discussion of *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883), *infra* text accompanying notes 245-47.

When the second case arose eight years later, Lillian Russell's position as the preeminent female performer had been established. By that time, she had broken off dozens of contracts. In one instance, she fled to England while her managers issued legal summons and press statements about her dishonorable conduct,²⁰⁷ only to return several months later to these same managers' welcoming arms greeting her as a "prodigal daughter."²⁰⁸ Her lawyers had also learned not to let her sign exclusivity clauses. Her ability to set her own terms was described in the published words of one of her attorneys: "When you want to engage Miss Russell, she'll tell you."²⁰⁹ Managers knew that they had to assume risks if they wanted to cast Lillian Russell. One manager stated, "She has broken various other engagements in London. I shan't be surprised if she breaks mine. I hope she won't, though."²¹⁰ In this instance, the performer clearly had the upper hand and reflected that power in favorable contract language, and the capital interests quite willingly took the risks of her nonperformance.

One would not have expected the same actress represented by the same attorneys to fall under an equitable injunction again. After all, in 1887, Lillian Russell had been quoted in the press as saying that she never signed contracts with conditions in them.²¹¹ One certainly would not have anticipated that the second time a manager sued to enjoin her, it would be assigned to Judge Freedman, the same judge who had decided *Daly v. Smith*.

In *Duff v. Russell*,²¹² Judge Freedman actually set new precedent. He ignored the language of the contract and turned the equitable rules into parodies of themselves. The basic justification for issuing negative injunctions was first, that injunctions were necessary because legal damages were inadequate and

207. Her theater managers were so determined to control her that one manager followed her to London seeking a writ of injunction against her performing there. He was quoted as saying:

Miss Russell has killed herself in this country by her escapade with Mr. Solomon. She is of no earthly use to [us] in the future, and my only object in getting the injunction out against her in London was to show her that the American law was powerful even in England, and that when she made an engagement in this country we could hold her to it across the sea.

The Law After Lillian Russell: What Her American Managers Think of Her, N.Y. TIMES, July 29, 1883, at 12.

208. The same theater manager who later dissolved the injunction he had won against her in London was interviewed heralding her return:

Dear little woman! She looks better than ever. She made one of the most disastrous tours of the Continent I ever heard of. She doesn't repine. She's as cheerful as ever, and breaks her engagements in the same charming manner she always did.

....

... She's impetuous, you know, and at the last moment says, "I won't play. I don't want to," and she doesn't.

News of A Prodigal Daughter—Mr. Brooks Talks Glibly about Lillian Russell and Ristori, N.Y. TIMES, Aug. 5, 1884, at 5.

209. *Poor Lillian Russell—Smiling When She Tried to Frown—Telling How She Lives in Delightful Poverty on \$200 a Week, and Can't Live on Less*, *supra* note 197.

210. *Id.*

211. *Id.*

212. *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892).

could not be accurately estimated, and second, that the parties had bargained for an express negative stipulation in the contract.²¹³ Without an express clause limited as to time and place, the general rule was that no injunction could issue.²¹⁴ In *Duff v. Russell*, Judge Freedman bent both of these conditions out of shape in order to enjoin Lillian Russell.

Before trial, the parties reached a stipulated agreement about the amount of damages. They agreed that Russell would be allowed to go ahead with the rival performance, but if the injunction was deemed valid at trial, Russell would pay Duff \$2000. Clearly, the damages in this case could be estimated. But Judge Freedman gave no more heed to the condition that injunctions should only issue when there was no adequate remedy at law here than he did when deciding *Daly v. Smith*. He stated the facts of the agreement concerning damages and then, as if in parody, ruled that an injunction was appropriate because damages could not be determined.²¹⁵

The second distortion occurred with regard to the contract language. Unlike her contract with McCaull, Russell's contract with Duff did not contain a negative covenant of any kind.²¹⁶ The absence of such a covenant did not give Judge Freedman pause, however; he was prepared to imply one. He stated:

[A]s was shown in *Daly v. Smith*, . . . the court is bound *to look to the substance, and not to the form, of the contract*. As the defendant had agreed to appear in seven performances in each week (exclusive of Sundays) which the plaintiff's company might give in New York, it was not possible for her to perform elsewhere in New York without a violation of her contract with the plaintiff, and a negative clause was unnecessary to secure to the plaintiff exclusively the services of defendant.²¹⁷

It did not occur to Judge Freedman that if the defendant sought to get out of a contract that lacked an exclusivity clause, it made no difference whether the contract called for seven performances a week or two. Nothing in the contract specified that she should not perform elsewhere, either while the engagement continued or if, and when, she quit.

Having logically eviscerated the *Lumley* rule, Judge Freedman proceeded to admonish Russell for not performing her contract. He dissected her reasons for refusing to continue with the performances and labeled them all as pretexts.²¹⁸ He exhibited an almost prurient interest in Lillian Russell's reasons

213. See *Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

214. This was true even for covenants not to compete when proprietors sold their businesses. See *Gillis v. Hall*, 2 Brewster's Rep. 342 (Pa. C.P. 1870).

215. *Duff*, 14 N.Y.S. at 136.

216. *Id.*

217. *Id.* at 136 (emphasis added).

218. *Id.* at 137-38.

for quitting by devoting the majority of the opinion to them. In no comparable case involving a male performer did a court ever examine the performer's reasons for quitting as intently as Judge Freedman did in *Daly v. Smith* and *Duff v. Russell*.²¹⁹

The more important point, however, is that if, in fact, performers had a right to quit, there was no reason for the court to inquire into their motivations. It should have been sufficient that the performer wished to be free of her contract and stood ready to be sued for damages in an amount already specified by the parties. It should have been unnecessary for her to offer any excuse at all. Instead, Judge Freedman once again shifted the burden of proof to the performer to produce an airtight, fully justifiable excuse in order to avoid an injunction, even though this time the contract did not provide a basis for an injunction.

Lillian Russell's stated reason for desiring to get out from her contract, the reason that attracted so much of Judge Freedman's attention, was that Duff insisted on her wearing tights in her performances during the winter season in Chicago. Although she had worn tights during the summer performances in New York, performing only in tights during Chicago's cold winters had given her a series of colds, harming her voice. As in *Daly v. Smith*, Judge Freedman's empathy ran only to the manager. His foremost (and first mentioned) concern was not for her health, but for the theater manager's expense. If Ms. Russell did not appear in tights, some twenty to thirty chorus girls' costumes would also need changing at considerable expense to the manager.²²⁰ As for her claim of endangered health, Judge Freedman stated:

The defendant undoubtedly at several times caught cold; but the real cause has not been proved. When, in answer to her claims that the cold was caused by the wearing of tights, she was advised by her own physicians, who, however, were not informed of the fact that she wore them only for about 10 minutes during each performance, that she should wear something underneath them which would protect her, she refused at once . . . because, in her judgment, it would ruin her outlines to do so. If she had done so, and had made an honest attempt to convince the plaintiff that the wearing of tights, for ever so short a time, seriously affected her health or voice, it is reasonable to suppose that the plaintiff, who had a direct interest in her appearing as often

219. Compare *Hahn v. Concordia Soc'y*, 42 Md. 460 (1875) and *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883) (both described *infra* Part I.B.4) with *Daly v. Smith*, 49 How. Pr. (n.s.) (150 N.Y. Super. Ct. 1874) and *Duff*, 14 N.Y.S. 134. But see *Pratt v. Montegriffo*, 10 N.Y.S. 903 (Sup. Ct. 1890) (concluding that male tenor had good reasons for breaking off contract because theater had breached agreement by insufficiently promoting and advertising his career).

220. *Duff*, 14 N.Y.S. at 137-38.

as possible, would have met her half way. She made no such attempt.²²¹

The fact that Ms. Russell had explored other plans to perform, in one case with the possibility that she would wear tights in New York, was considered inexcusable, and Judge Freedman cited this as the real reason for her breaking off her contract. Her health claims were dismissed as pretextual.

In evaluating her excuse for breaking off the contract, Judge Freedman gave the manager's goodwill every benefit of the doubt and did not take any of Lillian Russell's factual claims or legal arguments seriously. At one point, Judge Freedman observed that if she had wished to avoid wearing tights in the winter she could have provided for that condition in the contract.²²² Clearly, Judge Freedman's desire to adhere to the written text was unequally applied as he paid no attention to the conspicuous absence of the otherwise standard exclusivity clause. Lillian Russell's attorneys, stung before by a case like this, had, no doubt, intentionally deleted language that could be read to curtail an actress' right to quit contracts that became objectionable.

What prompted James Duff to sue Lillian Russell? As absorbed as Judge Freedman was with Lillian Russell's refusal to wear tights, he never probed Duff's reasons for bringing suit. A limerick published in a contemporary New York newspaper provides some insight.

There was a young lady named Russell
Who wouldn't wear tights 'neath her bustle
'Cause it gave her a cold
where it cannot be told
And she and Jim Duff had a tussle.

Then, Jimmy, the young man, he sued her
Rather tough for a person who'd wooed her
But you can't quite explain
The regrets in the brain
Of a man who finds out he don't suit her.²²³

The celebrated case ended in a monetary settlement.

221. *Id.* at 137.

222. *Id.*

223. MORRELL, *supra* note 139, at 86.

3. *The Nineteenth Century's Last Decades: Binding Women as a Consequence of Their Uniqueness Rather Than Their Consent*

With the canon constructed, American courts continued to press the *Lumley* rule even further to prevent women from breaking off their employment contracts. What followed were cases that expanded on *Duff v. Russell* and enjoined women from performing elsewhere, even when the contract failed to include a negative covenant, and even when the employee was not a superstar. This expansion on the *Lumley* rule occurred primarily in cases involving women.²²⁴ This tendency suggests that the strength of the cultural impulse to subordinate women surpassed even the formal limits of the language of their contracts.

In *Hoyt v. Fuller*²²⁵ and *Edwards v. Fitzgerald*,²²⁶ New York courts issued injunctions preventing the women defendants from performing at other theaters despite the lack of negative clauses in their contracts. Moreover, the defendants in these cases were not well paid, were not featured as starring attractions, and were less famous than Fanny Morant Smith. These women were held in a subservient employment status constructed largely by the courts, rather than by the terms of their contracts.

Loie Fuller created a new dance, the Serpentine Dance. As a performing artist, she was a self-made woman.²²⁷ She designed her dance, her sets, and her costumes to create a particular effect.²²⁸ Under her contract with Hoyt, she appeared on the stage to dance for only a few minutes as a part of a much longer production.²²⁹ This contract never conveyed to Hoyt the exclusive rights to the Serpentine Dance. In fact, Fuller had attempted to copyright it and defend it against imitators.²³⁰ Nonetheless, her vigilance in keeping the dance her own was turned to her disadvantage; instead of securing her ownership rights, it demonstrated her uniqueness. On the strength of her uniqueness, the court ruled that if she performed the dance elsewhere, it would result in irreparable harm to the theater. Once again, in a woman's case, the court declared a negative covenant was not necessary for a theater to enjoin the performer.

Moreover, Fuller's contract lacked mutuality: the theater could terminate her services on short notice, but the contract did not provide a way for her to

224. *But see* *Montague v. Flockton*, 16 L.R.-Eq. 189 (Ch. 1873) (Eng.) (*Lumley* rule applied in man's case in which contract contained no negative covenant). *Montague* was short-lived even in England, *Whitwood Chem. Co. v. Hardman*, 2 Ch. 416, 427, 430 (1891) (overruling *Montague*), and had little effect on the development of American law since it was rarely cited in the United States. For the proposition that performers could be enjoined even without a negative clause in the contract, American cases cited *Duff v. Russell* instead. *See, e.g., Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892).

225. 19 N.Y.S. 962.

226. (N.Y. Sup. Ct. 1895), *cited in* *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910).

227. "La Loie" *Talks of Her Art*, N.Y. TIMES, Mar. 1, 1896, at 10.

228. *Miss Fuller's New Dance*, N.Y. TIMES, Jan. 24, 1896, at 2.

229. *Id.*

230. *Hoyt v. Fuller*, 19 N.Y.S. 962, 962 (Super. Ct. 1892).

terminate her relationship with the theater.²³¹ As an equitable principle, mutuality was supposed to be a precondition to equitable intervention.²³² This argument had been used successfully by baseball players to get out of contracts that attempted to bind the players to the team but allowed teams to release the players on short notice.²³³

The *Fuller* court had several options. It could have found the lack of an exclusivity clause to be a material defect to a suit in equity. It could have refused to enforce the contract at all because of the lack of mutuality. It could have reformulated the bargain to allow Loie Fuller to terminate the contract on terms equal to those on which she could be terminated. The court chose none of these options. Instead, the court held that "the defendant cannot complain of that [condition] after obtaining employment on the strength of that special condition"²³⁴ and enjoined her from dancing elsewhere.

*Edwards v. Fitzgerald*²³⁵ further highlighted the significance of gender under the *Lumley* rule. Cissy Fitzgerald, a dancer who received only an extremely modest salary, was restrained, despite the absence of any contract provision. Fitzgerald appeared as a "Gaiety Girl" in a dance revue.²³⁶ The court restrained her, stating that although "[h]er talents may not be so exceptional as to render it impossible to replace her . . . [,] [s]he has a charm peculiar to herself. . . . The plaintiff would undoubtedly find it difficult to procure a substitute who would be likely to produce a similar impression. . . ."²³⁷ In this turn of language, the court expanded the definition of uniqueness. For Fitzgerald to be unique did not mean that she was exceptional or irreplaceable. The court conceded that she was not. It meant simply that no one else could be found who looked or moved exactly like her or who could produce *the same charm or impression*. The social construction of women, much more than of men, valued them for their appearance, charm, or femininity. Every woman, particularly actresses and dancers, was encouraged to distinguish herself by her looks or her grace. According to the *Edwards* court's reasoning, the dancer's charms were a commercial commodity in which the theater owner had an enforceable legal interest. The court had disintegrated her person into attributes commercially owned by the plaintiff theater by virtue of her employment contract.²³⁸ Her attractiveness was not a feature inherent in her personhood,

231. *Id.*

232. POMEROY, *supra* note 49, at 6.

233. See baseball cases listed *infra* note 259.

234. 19 N.Y.S. at 962.

235. The opinion in *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895) was only reported at Hammerstein v. Sylva, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910).

236. The Gaiety Girls were a chorus line that was the theatrical precursor of the Ziegfield Follies. Cissy Fitzgerald had begun to seize publicity and attract such a following that Edwards had begun to bill her as "The Gaiety Girl." See *Cissy Fitzgerald's Lost Gold*, N.Y. TIMES, Feb. 28, 1895, at 5.

237. *Id.*

238. See SCOTT, *supra* note 25, at 34 (noting that domination sometimes comes in form of sexual objectification of women by men). Admittedly any employee's value to the employer is subject to the risk of disintegration and objectification. For example, a manual laborer may be considered simply "a hand."

but rather a measure of the theater's interest and a constraint on her right to quit.

As a result of *Edwards'* interpretation of uniqueness, almost any woman performer, except the most indistinguishable member of a background chorus, was susceptible to injunction, notwithstanding the lack of contract language. Any woman performer who the judge might find had a charm "peculiar to herself" could be considered *sui generis* and was vulnerable to the *Lumley* rule.

Ms. Fitzgerald had come with the revue from London to New York. She wished to stay in New York, but Edwards planned to send her on a long tour to the West and Australia. In a manner reminiscent of earlier actresses' cases, the judge characterized her reasons for wishing to quit as "flimsy in the extreme."²³⁹ His final words emphasized the newly constructed theme of one-sided fidelity: "Is it not apparent that the success of the [producer's] entire enterprise is dependent upon the *fidelity* of his employ[ee]s, and—if that be wanting—upon the assurance that desertion will be checked by the strong arm of the law?"²⁴⁰ The *Lumley* rule had become an instrument to enforce a performer's fidelity to her employer.

4. *The Men's Cases*

The men's cases were far fewer in number than the women's were.²⁴¹ Most of the male performers won on appeal, if not in the first instance. In the men's cases, actor Moritz Hahn, baritone Giuseppe Del Puente, acrobats Lassard and Lucifer, actor William Ferguson, tenor Agostino Montegriffo, and even performer Henry Willio, who was initially enjoined and then released, all successfully defended themselves against their theater managers' attempts to enjoin them.²⁴² In fact, the first permanent injunction of a male performer of any kind was that of a baseball player, Napoleon Lajoie,²⁴³ which did not occur until 1902, almost thirty years after the decision in *Daly v. Smith* and fifty years after *Lumley*.

The men's cases generally were not resolved by repudiating the *Lumley* rule, but instead were decided by excusing the male performer from the opera-

In this respect, the rhetorical disintegration of the employee's attributes and the objectification of those attributes always undermines the individual's personhood. Objectification of the employee inherently renders him or her more vulnerable to being seen as property. When the objectification is, as here, of a woman's charm or impression, the effort seems to cut even closer to elements of personhood that are intrinsically one's own, one's self-expression and one's sexuality.

239. *Id.*

240. *Id.* (emphasis added).

241. See *infra* note 265.

242. *Hahn v. Concordia Soc'y*, 42 Md. 460 (1875); *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883); *Cort v. Lassard & Lucifer*, 18 Or. 221 (1889) (Oregon court ruled in favor of two defendant acrobats on grounds that they were neither unique nor of any special merit); *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890); *Pratt v. Montegriffo*, 10 N.Y.S. 903 (Sup. Ct. 1890); *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872).

243. *Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902).

tion of the rule through one of a number of exceptions. For example, in 1875, in *Hahn v. Concordia Society*,²⁴⁴ an actor who was the featured performer was able to cancel his performance for the plaintiff and proceed to another theater by paying the fine as a liquidated damages amount.

In 1883, in *Mapleson v. Del Puente*,²⁴⁵ the court ruled in favor of the male defendant on every legal issue he raised. The defendant boldly stated that he was offered more money elsewhere. He produced affidavits from different managers stating that by the custom of the trade an artist was allowed to be released from a contract upon payment of a penalty. Consistent with the Maryland court's interpretation in *Hahn*, the New York court held that a contract provision requiring the actor to pay a fine was a liquidated damages clause. It noted that the theater had procured a substitute for the defendant. It also interpreted the portion of the exclusivity clause that said, "during the present engagement," not to include days of the week other than those on which the defendant was scheduled to perform, despite the fact that his engagement spanned the entire season from October through April. Finally, on the issue of whether the defendant's financial ability to pay mattered, the court reasoned, "the possible inability of defendant to respond in damages is a danger attending all demands and does not of itself authorize the issuing of an injunction"²⁴⁶ In short, Giuseppe Del Puente won on every legal ground he raised, most of which would later be rejected by other New York courts in the actresses' cases.²⁴⁷

In 1890, in *Pratt v. Montegriffo*,²⁴⁸ the court released the defendant opera singer, "a tenor of repute," from further performance of his contract because the manager had violated the contract by failing to advertise and promote the defendant as well as it had promoted another tenor. The court's respectful treatment of the particulars of Montegriffo's reputational interests contrasted with the dismissive treatment of Fanny Morant Smith's claims by an earlier New York court.²⁴⁹ Here the court explicitly recognized that damage to Montegriffo's reputation was a justifiable ground for him to go elsewhere. Certainly, it is possible to distinguish this case from Mrs. Smith's—the tenor did have a contract clause specifically covering advertising and promotion. Nonetheless, the court's tone was strikingly different. It described the career

244. 42 Md. 460 (1875).

245. 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883).

246. *Id.*

247. On the issue of the industry custom of releasing artists from their obligations on payment of penalty, compare *McCauill v. Braham*, 16 F. 37 (C.C.S.D.N.Y. 1883). On the issue of interpreting terms providing for the scheduled performance days of present engagement, compare *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892). On the issue of the significance of defendant's inability to pay, compare *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874).

248. 10 N.Y.S. 903 (Sup. Ct. 1890).

249. See discussion of *Daly*, *supra* Part I.B.1.

interest in being prominently featured as a "matter of pride" to the defendant.²⁵⁰

Although the greatest concentration of the men's cases involved theatrical performers, some cases involved men in other trades.²⁵¹ Noteworthy among those were the baseball players' cases which litigated the closely related issue of the player reserve system. The baseball disputes followed a slightly different pattern than the theater cases, however, because the lawsuits tended to respond to collective action taken by the players.²⁵² In these cases, almost all the baseball players avoided injunction. In fact, *American Association Base-Ball Club v. Pickett*²⁵³ was the only reported nineteenth-century baseball player's case where an American court, this time a Pennsylvania county court, issued a preliminary injunction against a baseball player. Because the case was not appealed, it was also the only nineteenth-century case against a male defendant of any vocation in which the preliminary injunction was allowed to stand. The case made virtually no contribution to the *Lumley* canon,²⁵⁴ and it was not played out on the grand public stage as were Lillian Russell's cases.

Pickett is worth examining, however, because it contains some of the elements of the women's cases. In constructing Pickett's loss, the court used the language of "master and servant" to subordinate him to his employer. It cited *Daly v. Smith* and replicated several of the earlier case's arguments. Like *Daly*, the court concluded that ballplayers seeking to evade their engagements had no reason to be treated differently from other persons. And, like *Daly*, it expressed the opinion that managers should not be left at the mercy of their players. The court labeled Pickett's refusal to play an "ingratitude," especially because the club had continued to pay his salary while he was sick.²⁵⁵ It concluded: "While we cannot punish him for his ingratitude, we can restrain him from deriving any benefit from his breach of contract."²⁵⁶ The notion that Pickett should be grateful for his contract and his master's kindness evokes a master-servant relationship. The court's willingness to cast him as a servant to

250. *Pratt*, 10 N.Y.S. 903, 906.

251. *Wollensak v. Briggs*, 20 Ill. App. 50 (1886) (male inventor); *Strobridge Lithographing Co. v. Crane*, 12 N.Y.S. 898 (Sup. Ct. 1890) (male lithographic sketch artist); *Sternberg v. O'Brien*, 48 N.J. Eq. 370 (1891) (male debt collector in installment clothing business); *W.J. Johnston Co. v. Hunt*, 21 N.Y.S. 314 (Sup. Ct. 1892) (advertising man), *aff'd*, 37 N.E. 564 (N.Y. 1894); *Burney v. Ryle*, 17 S.E. 986 (Ga. 1893) (male insurance company manager); *George A. Kessler & Co. v. Chappelle*, 77 N.Y.S. 285 (App. Div. 1902) (champagne salesman); *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (1897) (young jewelry salesman). None of these individuals were enjoined.

252. Gary P. Hailey, *Baseball and the Law*, in *TOTAL BASEBALL*, 642, 642-43 (John Thorn & Pete Palmer eds., 1989). This means that the suits were not statistically independent events.

253. 8 Pa. C. 232 (C.P. 1890). Pickett refused to play for Kansas City because its membership had been transferred from the American Association to the Western Association and because some of his fellow teammates had been released.

254. The only citation of *Pickett* in the one hundred years since it was decided was the lower court opinion in *Philadelphia Base-Ball Club v. Lajoie*, 10 Pa. D 309, 313 (1901), *rev'd sub nom.* *Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902).

255. *Pickett*, 8 Pa. C. at 233.

256. *Id.*

the ball club is confirmed by its later language. To Pickett's refusal to play because many of his teammates' contracts had been terminated, the court stated: "The right of selection and employment is one of the exclusive rights of the employer, unless the rule which requires *servants* to obey their *masters*, is to be disregarded in base-ball matters."²⁵⁷

On the other hand, the court indicated that its injunction against Pickett did not unduly restrain either his personal or employment liberty. The court implied that it was not taking away his means of earning a living: "He [Pickett] will not be condemned to idleness, but he will be prevented from playing baseball as a business, unless he plays for plaintiff."²⁵⁸ By implication, Pickett could seek some other line of honest work and continue playing baseball for fun.

Although *Pickett* never surfaced in the canon, its existence illustrates that by 1890, men were not completely immune from injunctive control by their employers and that the seeds of *Daly v. Smith* had begun to sprout. Nevertheless, the preliminary injunction ruling in Pickett's case ran counter to the dominant trend of denying injunctions in men's cases.²⁵⁹

From a gender perspective, the most interesting of the men's cases is one in which both traditional gender roles were reversed. In 1890, Louise Dudley Carter formed her own theater company, retained William Ferguson and, when he left, commenced suit against him to restrain him from breaking his contract to perform services exclusively for her company.²⁶⁰ The court ruled against Carter despite the contract language and despite Carter's allegations that Ferguson was unique and could not be replaced. It seized upon the fact that Ferguson was not a leading man and received only third billing after Carter and others as the reason why he was not bound by his negative covenant.²⁶¹ This ruling contrasts with *Hoyt v. Fuller* and *Edwards v. Fitzgerald*. The fact that Loie Fuller and Cissy Fitzgerald were not the featured performers was never recognized as evidence of their lack of uniqueness. Moreover, in ruling that Ferguson was not unique, the court took great pains to avoid insult to his reputation. It explained:

Now, it is in no wise derogatory to the defendant in this case to say that he is not shown to be an actor of special, unique or extraordinary

257. *Id.* at 233-34 (emphasis added). With a rare citation to the English case of *Montague v. Flockton* discussed at note 224 *supra*, the Philadelphia county court enjoined Pickett, even in the absence of an exclusivity clause in the contract.

258. *Pickett*, 8 Pa. C. at 233.

259. See cases listed *supra* note 242; *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, (C.C.S.D.N.Y. 1890); *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (Sup. Ct. 1890); *Columbus Base Ball Club v. Reiley*, 11 Ohio Dec. 272 (C.P. 1891); *Philadelphia Ball Club v. Hallman*, 8 Pa. C. 57 (C.P. 1890); *Harrisburg Base-Ball Club v. Athletic Assn.*, 8 Pa. C. 337 (1890); *Allegheny Base-Ball Club v. Bennett*, 14 F. 257 (W.D. Pa. 1882); *Arena Athletic Club v. McPartland*, 41 N.Y. App. Div. 352 (1899) (boxers not enjoined).

260. *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890).

261. *Id.* at 581.

qualifications. His own counsel on this appeal expressly asserts that the defendant is not a star or attraction of the company, or even a prominent member thereof. However capable an actor the defendant may be, he has not yet achieved distinction.²⁶²

The talent and box office draw of these male defendants may not have matched that of superstar Lillian Russell. But many, if not most, of them were at least as attractive talents as Fanny Morant Smith. Certainly, most of them were as valuable theatrical attractions as midlevel women performers like Loie Fuller and Cissy Fitzgerald. It must be concluded then that uniqueness was neither an objective determinant nor a gender-neutral legal criterion. Instead, it was an artifact of subjective social understanding, and in these cases one that could be deployed most easily to the disadvantage of performing women.

II. THE INFLUENCE OF GENDER IN THE LEGAL TEXTS

A close reading of the case histories suggests that the gender ratios reflected in the case results were not purely coincidental. Simply put, without the women's cases, there would have been no *Lumley* rule in the United States in the nineteenth century. Moreover, not only did women performers lose more cases than men did, women performers were sued more often than men were. One may argue that in time the *Lumley* rule would have been accepted in America in any case. The free labor sentiment certainly was in decline at the end of the nineteenth century, even in cases involving men;²⁶³ the women's cases may only have hastened its arrival. But even in this scenario, gender played a role in facilitating the acceptance of a rule that had, at its core, the use of equitable compulsion to hold people to their employer's consent. Actresses, due to their precarious social position in a highly gendered society, served as a lightning rod for these forces to touch down.

This is not to suggest that gender was the only factor in canonizing the *Lumley* rule. Clearly, legal formalism, legal preferences for capital over labor, and class stratification were all at work in the late nineteenth century, and all contributed to the conditions for the American acceptance of the *Lumley* rule. However, the distribution of results along gender lines cannot be explained adequately by reasons such as preferences for capital over labor or differences in labor markets.²⁶⁴

262. *Id.*

263. See, e.g., *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

264. If the major cases resulted from simple preferences for capital over labor interests, theaters would have prevailed over performers regardless of gender. If gender were not a factor, male performers would have been sued and enjoined in roughly the same numbers as female performers. Actors who attempted to quit mid-contract would have posed as much of a threat to the protection of capital as would actresses. However, the statistics do not reflect even rough equality. See *infra* note 265. Permanent injunctions were

In order to demonstrate the thesis that gender was a significant factor in the adoption of the *Lumley* rule, I present three types of proofs. First, statistically, the lopsidedness of the numbers indicates a gender bias within the system.²⁶⁵ Since the total number of cases is fairly small, however, and statistics must always be interpreted within a context anyway, statistics alone cannot constitute sufficient proof.

The second type of proof is a twofold endogenous one that is based on the quality of the language and the argument of the cases themselves. First, some of the women's cases evince a subtly gendered rhetoric. Second, the application of legal doctrine in some cases is inconsistent with the doctrine itself—stretching one way to bind women and the other way to release men.²⁶⁶ Certainly, the courts were grappling with the formulation and scope of application of a new common law rule regarding the relevance of mutuality and the

only issued in cases involving women performers, and the three high profile cases all involved women.

Differences in labor markets for women and for men performers do not provide an objective explanation for the phenomenon either. Most theater companies hired men and women in equal numbers, and in casting, men and women usually were paired. JOHNSON, *supra* note 14, at 50-51.

265. The two-way table below illustrates the courts' differential treatment of male and female performers over the period 1860-1900.

<i>Injunctions for the Period 1860-1900</i>		
	Actresses	Actors
enjoined	5 (6)	0
not enjoined	7 (6)	6
sued	12	6

The proportion of actresses enjoined, five out of 12 is 41.7%. It is difficult to classify the case of *Canary v. Russell*, 30 N.Y.S. 122 (Sup. Ct. 1894), described at note 196, *supra*. The numbers in parentheses count *Canary* as an injunction. If *Canary* is so counted, the proportion of actresses enjoined is six out of 12, or 50%. Either assessment varies markedly from that of actors, which is zero out of six or 0%.

To guard against reading too much into small numbers, one may assess whether these observed differences are statistically significant. Ronald A. Fisher developed a test to examine the equality of two rates such as this. RONALD A. FISHER, *STATISTICAL METHODS AND SCIENTIFIC INFERENCE* 111 (1956). Using hypergeometric probabilities, one finds that, under the assumption of equality of these rates in the population, a sample outcome like the one produced by these cases has a probability of 0.0924, or, counting an additional injunction, a probability still lower of 0.0498. Cf. GERALD J. LIEBERMAN & DONALD B. OWEN, *TABLES OF THE HYPERGEOMETRIC DISTRIBUTION* 1-11, 48 (1961). In other words, a finding that five out of 12 actresses, or six out of 12 actresses were enjoined, while none of the six actors were, is a rather unlikely event. For further discussion of the applications of statistical test procedures and an interpretation of probability values in the law, see DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 9 (1980).

These numbers hover at the border of clear statistical significance; usually, one would like a probability value of less than 0.10 or 0.05, which these numbers are. Moreover, the comparison in this table is based on the "whole universe" of reported cases; no sampling is involved. Statistical tests are usually used to guard against sample fluctuations. Nevertheless, one may argue that tests and estimates that are based on the "whole universe" are useful anyway. *Id.* § 9.320.

This analysis does not include the influence of gender on the statistical probability of being sued, however. To assess the statistical significance of gender in theater owners' propensity to sue, one would need data on the incidence of breach of contract independent of the incidence of *suit* for breach of contract. These numbers are unavailable. Nevertheless, it is possible that women did quit more often than men (for reasons explored *infra* Part II.D) and were sued with the same propensity as men, or it is possible that women quit as often as men, but were sued more often. For behavioral analysis of the theater manager's decision to sue, see *infra* Part II.D.

266. See *infra* text accompanying notes 273-85.

content of "uniqueness," but while doing so they found it easiest to apply the restrictions against women.

The third type of proof is exogenous and arises from the dominant social construction of gender in the United States in the later nineteenth century. This proof shows that the treatment of these women litigants essentially conformed to the dominant cultural ideology of a woman's proper place.²⁶⁷ It demonstrates that these case results fit neatly within the space constructed for the socially approved treatment of women and that thematic parallels existed between the gender alignments in these cases and broader cultural trends. The later period cases, in particular, pattern themselves on the social construction of middle class women.

This type of argument implicitly contends that the judges did not rule in these cases out of idiosyncratic, personal desires to subjugate women litigants. Instead, they produced results which conformed to dominant patterns of thought; they produced results to which the society would be receptive. Judge Freedman's opinion in *Daly v. Smith* was considered the major American case on the subject,²⁶⁸ and his decision in *Duff v. Russell* was affirmed without a written opinion.²⁶⁹ The judges themselves may have been wholly unconscious of the impact of gender in their decisionmaking. Nonetheless, unconscious factors are often the most influential, precisely because they are so pervasive in the culture and because the decisionmaker has internalized the norms so completely as to be unaware of their effect on his decision.

In this same battery of cases, one can appreciate the influence of gender by examining an instance in which all the matrices of causality were not aligned. Consider manager Louise Dudley Carter's unsuccessful attempt to enjoin William Ferguson.²⁷⁰ The matrices of relative social standing between management and employee, of preferences for capital over labor, as well as the influence of legal formalism and the negative connotation attached to breaking one's contract and one's word should have mandated that Ferguson be enjoined. He was not. The malleability of the "uniqueness" criteria under the *Lumley* rule exempted him from the dictates of the negative covenant in his contract.²⁷¹ The one matrix not in alignment was gender. Historian Claudia Johnson tells us it was expected that women would be the subordinates, that they would be "inevitably under someone else's supervision. It was the rare situation, almost freakish, to find a woman in a position of financial or political leadership, or to find one working with any degree of independence."²⁷² Her characterization makes the *Carter v. Ferguson* result understandable.

267. See *supra* text accompanying notes 129-38; Part II.A.

268. See Lewis, *supra* note 187, at 323.

269. *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. N.Y. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892).

270. *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890).

271. For discussion of *Carter*, see *supra* text accompanying notes 260-62.

272. JOHNSON, *supra* note 14, at 46.

When all the matrices were in alignment, the subjugation of women was more pronounced. That actresses would be accorded diminished status as employees was entirely consonant with the Victorian subjugation of these performers as women, especially as women who worked or performed in public. Their status as employees and their status as women combined to create conditions in which women performers were subjugated to their employers more often and to a greater degree than the legal limitations of their contracts would otherwise have allowed.

When examined collectively, the women's cases demonstrate that judges treated women defendants differently than their male counterparts. In cases involving women performers, the legal reasoning was frequently distorted,²⁷³ essential preconditions were dismissed as irrelevant,²⁷⁴ burdens of proof were reversed,²⁷⁵ and counterfactual circumstances were assumed in order to justify the issuance of injunctions.²⁷⁶ By contrast, in cases involving men, the legal reasoning was consistently stretched to allow male performers greater latitude in breaking their contracts.²⁷⁷

The malleability of the legal doctrine was manifested in three ways. First, when male performers argued that they were leaving because the theater managers had breached agreements, their reasons were taken seriously and found to justify departure. Women, by contrast, were never excused from the operation of strict contract language,²⁷⁸ and their reasons for wishing to quit were usually found to be unjustified.²⁷⁹ Their reasons were labeled pretexts and described by such adjectives as "flimsy in the extreme" and "preposterous."²⁸⁰

Second, the doctrine of mutuality was disparately applied in the cases of male and female performers. The lack of mutuality in contracts, that denied baseball players the right to quit while the team managers possessed the right to release players, was found to preclude injunctions against most male baseball

273. See, e.g., *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874) (discussed *supra* Part I.B.1); *Duff*, 14 N.Y.S. 134 (discussed *supra* Part I.B.2); *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892) (discussed *supra* Part I.B.3).

274. See, e.g., *Duff* (describing treatment of quantifiability of damages and necessity of negative covenant, *supra* Part I.B.2); *Hoyt*, 19 N.Y.S. 962 (discussing issue of mutuality and negative covenant as precondition, *supra* Part I.B.3).

275. See, e.g., *Daly*, 49 How. Pr. (n.s.) 150 (discussed *supra* Part I.B.1).

276. See, e.g., *id.* (describing creation of hypothetically insolvent defendant, *supra* Part I.B.1).

277. See men's cases described *supra* Part I.B.4.

278. But see the early second period cases, *Butler v. Galetti*, 21 How. Pr. 465 (N.Y. Super. Ct. 1861); *Depol v. Sohlke*, 7 Robertson's Pr. 280 (N.Y. Super. Ct. 1867).

279. But see *Rice v. D'Arville*, 162 Mass. 559 (1895) (defendant was still owed thousands of dollars for past performances).

280. Some of these adjectives were simply part of the court's rhetoric in constructing a loser to support the "fairness" of its decision. See *American Ass'n Base-Ball v. Pickett*, 8 Pa. C. 232 (C.P. 1890) (discussed *supra* Part I.B.4). But such an observation simply returns us to the inquiry into why women were more often losers in these contests.

players.²⁸¹ In contrast, when this same argument was raised in Loie Fuller's case, the lack of mutuality was dismissed as irrelevant.²⁸²

Third, the specific language in men's contracts was deemed material if it could be interpreted to avoid issuing an injunction and deemed nonbinding if it could not.²⁸³ Women, on the other hand, were repeatedly held to their employers, even in the absence of the requisite contract language.²⁸⁴ The courts were willing to presume an intention on the part of the women's employers to bind them. Indeed, in *Edwards v. Fitzgerald*, the court invoked a definition of uniqueness that applied to virtually any attractive woman.²⁸⁵

As a whole, the characterization of the women defendants in the opinions traded upon gender. Each case in the canon deployed image and legend in the course of constructing the woman defendant's loss. In creating the image of an individual, gender, like race, has been one of the most important signifiers in American culture.²⁸⁶ The *Lumley* rule's acceptability to judges could not help but be influenced by the female images of the actress-defendants before them. The power of an image is in its ability to hold the audience's attention and to fasten in the mind of the reader the suitability of the case resolution, rather than the logic of the abstract rule. The power of an image allows readers, sometimes even learned readers, to ignore unevenly deployed legal exceptions and excuses when the result seems fitting. To the dominant society to whom the judges were accountable, actresses' images were those of appropriately subordinate individuals. Women were persons who, even in the late nineteenth century, did not have full legal rights; persons who were expected to be faithful, obedient, modest, and closeted in the home; and persons who should not defy their contracts or their masters' orders by going to perform at other theaters. Enjoining an actress may have been less problematic for the judge than letting her go.

281. See cases listed *supra* note 259. One must be cautious in drawing inferences from the baseball cases. Because all baseball players of the era were male, these cases alone cannot be used to test a hypothesis of differential treatment. Moreover, the baseball cases had no effect on the acceptance of the *Lumley* rule into the canon. Most of the baseball cases occurred too late for the publication of Pomeroy's *Second Edition*. Finally, comparisons between the theater and exhibition baseball in the 19th century should be made with some care because baseball as a business and the labor market for baseball players were not as standardized, developed, and capital intensive as was the theater.

282. *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892) (discussed *supra* Part I.B.3).

283. See *Burney v. Ryle*, 17 S.E. 986 (Ga. 1893); *Strobridge Lithographing v. Crane*, 12 N.Y.S. 898 (Sup. Ct. 1890); *Sternberg v. O'Brien*, 48 N.J. Eq. 370 (1891); *W.J. Johnson v. Hunt*, 21 N.Y.S. 314 (Sup. Ct. 1892), *aff'd*, 37 N.E. 564 (N.Y. 1894). The absence of mutuality in baseball contracts was grounds for allowing baseball players to be free from the operation of the reserve clause in the early cases. *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (Sup. Ct. 1890); *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198 (C.C.S.D.N.Y. 1890); *Philadelphia Ball Club v. Hallman*, 8 Pa. C. 57 (C.P. 1890).

284. *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892); *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910).

285. See *supra* notes 235-37 and accompanying text.

286. SCOTT, *supra* note 25, at 43-44.

Because late nineteenth-century society imposed cultural bounds on the roles open to women, it was unthinkable that women could be fully *free* laborers,²⁸⁷ as fellow or equal partners engaged in a joint enterprise with the theaters. The image of the independent, yeoman-free laborer was distinctly masculine.²⁸⁸ Masterless men may have been exalted in the earlier Republican ideology of self-reliance, but masterless women, or women who chose for themselves between two masters, were an inherently suspect group.²⁸⁹ The social construction of gender in the Victorian ideology precluded the image of working women as independent, self-owned, free agents. This culturally constructed barrier to contemplating women as autonomous parties, who legitimately pursued their own career interests, independent of socially imposed relational obligations to male theater managers, contributed to the acceptability of the *Lumley* rule as a legal barrier.

When male performers broke their contracts, their decisions rarely engendered a personal response either from their employers or the judges.²⁹⁰ In fact, the judges strained to avoid casting aspersions on male defendants, who were classified as less than unique or exceptional.²⁹¹ Male performers were characterized simply as having broken their contracts; they could be sued for damages or not, but they were never permanently enjoined. Women were relationally bound to their employers; men were free agents.

A. *Gender in the Nineteenth-Century Legal Culture*

Obviously, women performers swam against the current in violation of several of the norms of Victorian ideology. What was particularly significant about the behavior of actresses in this line of cases is that they did not seek to get out of their contracts for socially approved reasons: in order to marry, to bear children, or to retire to the privacy of the home. These actresses sought to be free of their contracts in order to reenter the public stage under terms or conditions that they found more desirable. When they chose to leave one theater's employ for another, their actions played into the stereotype of actresses, as unfaithful, duplicitous, loose women.

The Victorian stereotype goes quite far in explaining the *Lumley* line of cases in the legal culture. This idealized social construction was manifested in the legal rules governing marriage. Women were expected to marry. Once under

287. KESSLER-HARRIS, *supra* note 26, at 51.

288. WILENTZ, *supra* note 18, at 248-50; MONTGOMERY, *supra* note 18, at 14-44.

289. See, e.g., BANNER, *supra* note 26, at 12.

290. See *infra* notes 386-87 and accompanying text. But see *American Ass'n Base-Ball v. Pickett*, 8 Pa. C. 232 (C.P. 1890).

291. Compare the language in *Strobridge Lithographing v. Crane*, 12 N.Y.S. 898, 899 (Sup. Ct. 1890) (man ruled not unique), and *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890) (man ruled not unique), with the language in *Hammerstein v. Sylva*, 124 N.Y.S. 535 (Sup. Ct. 1910), *rev'd sub nom. Hammerstein v. Mann*, 122 N.Y.S. 276, 278 (App. Div.) 1910 (woman characterized as "but a singer of stock parts").

their husbands' mastery, they legally owed them domestic services.²⁹² It is conceivable that when resolving disputes between a female actress and a male theater manager, judges were influenced by the prevailing cultural model of male-dominant, monogamous fidelity and, when the actress threatened to terminate that relationship, by the legal model of divorce.

As I have described,²⁹³ the legal construction of the marital relationship was closely related to that of the employment relationship. The law of baron and femme shared the same root origin with the law of master and servant. Standard nineteenth-century legal treatises on domestic relations contained chapters on husband and wife next to chapters on master and servant.²⁹⁴ In the early part of the century, servants, who were generally presumed to live in the masters' households, owed a duty of obedience and service to their masters comparable to the duty owed by wives, children, and slaves. This concept of an employer's dominion over *his household* continued to influence the law of employment relations into the later part of the nineteenth century.²⁹⁵

Despite the hopes of nineteenth-century feminists,²⁹⁶ efforts to break the household model's hold on women were particularly unsuccessful. During the Reconstruction debates, for example, there was considerable argument over whether the Thirteenth Amendment's ban on involuntary servitude also applied to wives' servitude to their husbands.²⁹⁷ An argument made to break the household analogy with respect to slaves was that freeing slaves was necessary "to return to them their manhood," a phrase that notably omitted the emancipa-

292. SCHOULER, HUSBAND AND WIFE, *supra* note 59, § 67, at 101-02.

293. See *supra* notes 62-68 and accompanying text.

294. See, e.g., IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (Boston, Boston Book Co. 1890); JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS (Boston, Little, Brown & Co. 5th ed. 1895); TIFFANY, *supra* note 36, at 488. For an excellent analytical description of the history of this classification, see GLENDON, *supra* note 15, at 143-48.

295. For example, the domestic analogy of women and servants within the household expanded to encompass railroad workers who were not living within the railroad company's household. See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884) (establishing "employment at will" rule in case involving railroad company's threat to discharge any railroad worker who bought goods at Payne's store by analogizing railroad workers to domestic servants' purchasing goods for their master). Professor Matthew Finkin points out that this analogy extends a subordinate social status to mass industrial employment:

There were over one million domestic servants in the labor market of 1880, largely female and predominantly black or immigrant. . . . An employer of a domestic servant had the prerogative to dictate to the servant where to shop or with whom to associate, as an extension of authority over the household. Thus the *Payne* majority merely translates the extant law of the status of servant into mass industrial employment.

MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 15 (1989).

296. ISRAEL KUGLER, FROM LADIES TO WOMEN: THE ORGANIZED STRUGGLE FOR WOMEN'S RIGHTS IN THE RECONSTRUCTION ERA (1987); see also Stanley, *supra* note 26. Professor Betsy Clark has speculated that the lack of emancipatory reforms in the workplace for women may have resulted in part because 19th-century feminists did not place the issue as high on their agenda as they placed domestic reforms. Letter from Betsy Clark, Law Professor, Boston University, to author (May 1991) (on file with author).

297. VanderVelde, *supra* note 3, at 454-59.

tion of women, whether wives or servants, slave or free.²⁹⁸ The Reconstruction Congress viewed slave women in relation to men and never afforded them the full range of rights and benefits accorded to freedmen.²⁹⁹ Breaking the household model as it applied to women's employment was particularly difficult because the images of the husband as "master" and the employer as "master" could be evoked by the same word.³⁰⁰

Of the legal models available to a nineteenth-century judge, there is no model that tracks the *Lumley* rule's methodological and remedial structure more closely than does divorce law. During this era in New York,³⁰¹ where most

298. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 2979 (June 14, 1864) (statement of Rep. Farnsworth) ("[T]his nation at least has recognized the manhood of the negro. It did that when it put on him the uniform of a soldier of the Republic."); see also CONG. GLOBE, 38th Cong., 2d Sess. 193 (Jan. 9, 1865) (statement of Rep. Kasson) (listing among great rights shared by white and black men rights of husband to his wife and of father to his child). The particular contexts in which these references to men, manhood, husbands, and fathers are mentioned are too often gendered in their particularity to suggest a reading that the speakers were simply following a convention that use of the masculine automatically included the feminine.

299. The history of slave women's emancipation differed from that of slave men's. Slave women never fully received the voting and civil rights accorded freedmen after emancipation. Moreover, some slave women were emancipated under an argument made by the Reconstruction Congress that slave men who had fought for the Union army and had been emancipated by virtue of their military involvement, should also have the benefit of emancipation of their relatives who could not serve in the army. This would encompass old men, children, and women of any age. FONER, *supra* note 81, at 8 n.14. Slave women did not necessarily view their right to emancipation in this relational cast, however. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 44-46 (1984) (discussing slave women's viewpoints).

300. In English, "master" and "mistress" carry quite different popular connotations. Scholars of German women's history make a similar point. See Lyndal Roper, *The common man, 'the common good,' 'common women': gender and meaning in the German Reformation commune*, 12 SOC. HIST. 1, 1-2 (1987) (describing how "common man" stood for community's representative and "Reformation hero," while "common woman" signified "prostitutes who by symbol or tradition would have been excluded from the commune"). Scholars of French women's history have pointed to the significance of gender in both imagery and language in the period of the French Revolution. The references to the female as a political or public figure are overwhelmingly negative. See DORINDA OUTRAM, *THE BODY AND THE FRENCH REVOLUTION: SEX, CLASS, AND POLITICAL CULTURE* 87, 125-26, 154 (1989) (revolution committed to antifeminine rhetoric and women seeking public authority characterized as unchaste); LYNN HUNT, *POLITICS, CULTURE, AND CLASS IN THE FRENCH REVOLUTION* (1984) (post-Revolution decline in use of female figures and association of female with socioeconomic backwardness).

301. In New York State, divorces were notoriously difficult to obtain. RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 443-45 (1988).

The most striking exception to the liberal and liberalizing approaches to divorce law and policy in the Northeast was New York State. It was striking because it diverged markedly in a conservative direction and because the restrictive divorce law enacted there in the late eighteenth century remained substantially unchanged for almost two centuries. This 1787 law specified adultery as the sole ground for divorce and gives the impression of being legislation designed to deal with adultery rather than with marriage per se . . . The strongly punitive tenor of the law was reflected in its absolute prohibition of remarriage on the part of the guilty party.

Id. at 443-44 (footnotes omitted); see also MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 344 n.39 (1985) (describing the legal ban on remarriage as new prohibition aimed at further discouraging the casual custom of remarrying without formal divorce). Only 143 divorces were granted in New York City in 1875. "Seventy-eight of the absolute divorces were obtained by women, and 14 limited divorces . . . against 51 obtained by men." N.Y. TIMES, Jan. 3, 1876, at 8.

of the cases occurred, most divorce decrees entailed orders barring remarriage.³⁰² Marital infidelity was the principal ground for a divorce. The bar on remarriage was motivated by the belief that allowing wrongdoers to remarry rewarded them for their adultery.³⁰³

Functionally, the bar on remarriage paralleled the distinction drawn by the *Lumley* rule between specific performance and a negative injunction. These divorces relieved the parties of the obligation to cohabit and relieved wives from the obligation to provide domestic services.³⁰⁴ American courts would not and could not force cohabitation,³⁰⁵ but they could and did forbid the remarriage of the unfaithful party to anyone else.³⁰⁶ The *Lumley* rule split the burdens imposed on the performer accused of unfaithfulness in *exactly* the same way that divorce law split the burdens imposed on the unfaithful spouse. Unfaithful women performers could be prevented from performing for any employer for the term of the contract, just as unfaithful wives could be prevented from remarrying for life.

There were procedural parallels as well. The cause of action to protect an employer's interest in his employee was virtually identical to the cause of action to protect a husband's interest in his wife's services.³⁰⁷ In England, the first step in obtaining a divorce was an enticement action against the third-party interferer, a suit that was identical both in name as well as form to the enticement action that employers could bring against rival employers. A successful enticement action would be followed by a divorce action brought directly against the spouse.³⁰⁸

It would not be surprising then if New York judges, who were most apt to observe women litigants who attempted to sever their relationships to men primarily in divorce proceedings, responded to women's attempts to break off

302. PHILLIPS, *supra* note 301. For a discussion of the controversy surrounding the subject of remarriage after divorce, see WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 36-43, 84-87 (1967).

303. See sources cite *supra* note 302.

304. Divorces relieved husbands of the obligation to provide financial support for their wives. Forms of maintenance and other legal measures to prevent the divorcee from being left totally destitute were major issues of the 19th-century divorce reform. Telephone conversation with Professor Dirk Hartog, University of Wisconsin Law School (Nov. 10, 1991).

305. An American treatise did report English cases in which suits for "enforcing cohabitation and a common residence" and for the restitution of conjugal rights were maintained. It noted, however, that English law was not clearly established on the enforceability of these rights. TIFFANY, *supra* note 36, at 51.

306. This bar could be avoided by going to a state where divorce laws were more liberal. One of Lillian Russell's divorces entailed such a decree, causing her to elope to New Jersey, a state that did not recognize the conditions against remarriage imposed in her New York divorce. MORRELL, *supra* note 139, at 141.

307. See PHILLIPS, *supra* note 301, at 347-48. Significantly, one of the principal cases used as precedent in *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853), to justify the extension of the enticement action to opera singer Johanna Wagner was a case allowing a husband to pursue an enticement action against someone who had interfered with his wife's services to him. *Winsmore v. Greenbank*, Y.B. 19 Geo. II c.p. 577 (1802).

308. MARY POOVEY, *UNEVEN DEVELOPMENTS* 51-88 (1988).

their employment contracts in the same way.³⁰⁹ At times and places in American history when divorces were unobtainable, women had simply run away; advertisements for runaway wives were posted in newspapers next to those for runaway slaves and apprentices.³¹⁰ The law did not necessarily order runaway wives recaptured and delivered to their husbands, but it did stand by and allow husbands to force their return.³¹¹ Divorce in New York in the late nineteenth century meant only the liberty to remain legally separate from one's spouse, not the liberty to begin again.³¹² Given the strength of the analogy between the legal frameworks for marriage and for employment, it would be more surprising if judges could have ignored these parallels. Just as nineteenth-century judges tended to be far more harsh on women charged with marital infidelity than on men,³¹³ so too, they appear to have been more harsh on women whose actions were perceived as employment infidelity.

B. Abstracting the Gender Factor

Because the *Lumley* rule was invariably stated in neutral terms, the common law rule could be abstracted from its gendered context and applied to men.³¹⁴ The rule was recited with declarative authority in treatises like Pomeroy's and in cases involving men before it was ever actually applied to men.³¹⁵

309. Judge Freedman decided a divorce case granting a divorce *a mensa et thoro* the same day he decided *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874). *Law Reports*, N.Y. TIMES, Sept. 11, 1874, at 2.

310. Jan Kurth, *Wayward Wenches and Wives: Runaway Women in the Hudson Valley, N.Y., 1785-1830*, 1 NAT'L WOMEN'S STUD. ASS'N J. 199 (1988-89) (examining 80 advertisements for runaway wives in comparison to advertisements for runaway slave men and women). Many of the advertisements for runaway wives simply gave notice that the husband would no longer be accountable for her debts since she had left his "bed and board." *Id.*

311. In 1867 Tapping Reeve wrote: "This seems to be settled, that, if a wife elope and go away from her husband without cause, that the husband may seize upon her person and bring her home; and it is said that he may imprison her to prevent her going off with an adulterer . . ." TAPPING REEVE, *THE LAW OF BARON AND FEMME* 142 (Albany, N.Y., William Gould & Son 3d ed. 1867). By 1896, Tiffany acknowledged that although the "text books gave the right to restrain his wife's person, the limits of the doctrine were very shadowy and undefined." He suggested that American courts would not allow husbands to restrain their wives for the purposes of cohabitation, but only for certain limited reasons. TIFFANY, *supra* note 36, at 50-52.

312. The *New York Times* printed several articles on attempts at divorce reform. One reported: "The bill to amend the Divorce laws of the State, by allowing the guilty party to marry again during the lifetime of the injured person, came to a disastrous end in the Assembly." *State Affairs at Albany*, N.Y. TIMES, May 10, 1878, at 1; see also *The State Legislature*, N.Y. TIMES, Feb. 20, 1878, at 4.

313. ROBERT L. GRISWOLD, *ADULTERY AND DIVORCE IN VICTORIAN AMERICA, 1800-1900* (1986) (Institute for Legal Studies Working Paper).

314. *Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902) (negative injunction citing Pomeroy enforced against male baseball player). So complete was the abstraction from the gendered context that even Pomeroy referred to Mrs. Jermon's case as "the contract of an actor." POMEROY, *supra* note 35, at 383. In another case telling the *Lumley* story, a judge referred to opera singer Johanna Wagner as "he." *H. W. Gossard Co. v. Crosby*, 109 N.W. 483, 486 (Iowa 1906).

315. POMEROY, *supra* note 35, at 31; EDWARD FRY & WILLIAM D. RAWLINS, *ON SPECIFIC PERFORMANCE OF CONTRACTS* §§ 833-846, 1120, at 370-76, 492 (London, Stevens & Sons, Ltd. 2d ed. 1881). The *Lumley* rule received different treatment in Fry's treatise. In the third edition, the editor wrote:

In his 1879 treatise, Pomeroy featured the *Lumley* case and other English developments.³¹⁶ He professed not to understand the free labor sentiment that lay at the base of the American reluctance to order injunctions: "The American courts, which exhibit a *strange disinclination* to apply the preventive remedy of injunction to any enlarged uses, have not hitherto followed these modern English authorities, and refuse to enforce the performance of such personal contracts, either negatively or affirmatively."³¹⁷

In a later section on "contracts for personal services," Pomeroy reiterated *Lumley's* primacy. He described the law in England and America before *Lumley*, including a citation to *Ford v. Jermon*,³¹⁸ but he ended by repeating the English position, that "[t]he [earlier] doctrine has, however, been completely overthrown or abandoned in the English courts."³¹⁹ He failed to mention that the rule was less authoritative in the United States. By characterizing the American tradition of free labor as a "strange disinclination," by featuring the English rule repeatedly, and by emphasizing that in England the earlier rule had been "completely overthrown or abandoned," without detailing the contrary American rulings after *Lumley*,³²⁰ Pomeroy lent his imprimatur to the English rule and implied that American courts lagged behind their English counterparts.³²¹

As anti-free-labor sentiments began to make inroads into the legal conceptualization of the employment relationship, a rule that might have been seen as governing only New York actresses in the late nineteenth century became the canon for the entire class of unique employees under contract. Following the

It does not appear, however, that the doctrine of *Lumley v. Wagner* has been received in this country. Cases of this nature relate to personal acts, and, although there may be cases in which damages are an inadequate relief, and a specific performance will alone answer the complete ends of justice, yet equity will only interfere where the question has reference to property of some kind.

EDWARD FRY, SPECIFIC PERFORMANCE OF CONTRACTS 413 n.1 (Albany, N.Y., Weare C. Little & Co. 3d Am. ed. 1884). The editor overlooked *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874), and *McCaull v. Braham*, 16 F. 37 (C.C.S.D.N.Y. 1883); see also 2 STORY, *supra* note 175, at 34-35, 42, 261 (advancing *Lumley* rule on grounds of inadequacy of remedy at law).

316. POMEROY, *supra* note 49, at 31-32, 382-84.

317. *Id.* at 32 (emphasis added).

318. *Id.* at 383 n.1 (citing *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865)).

319. *Id.* at 384.

320. See *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865); *Burney v. Ryle*, 17 S.E. 986 (Ga. 1893); *Sternberg v. O'Brien*, 48 N.J. Eq. 370 (1891).

321. Pomeroy's second edition, published in 1897, repeated the sections of his earlier treatise verbatim with one slight addition. This time, at the end of the citations to American cases, Pomeroy wrote: "The more recent American cases are in general accord with the English rule." POMEROY, *supra* note 35, at 32 n.1. Pomeroy cited a melange of cases for this proposition, only a few of which referred to general employment contracts. He failed to distinguish those employment cases in which the rule actually resulted in an injunction from those cases in which the rule was articulated but not applied. The American cases on point cited as enforcing an injunction are *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874), and *McCaull v. Braham*, 16 F. 37 (C.C.S.D.N.Y. 1883). *Cort v. Lassard & Lucifer*, 18 Or. 221 (1889), a case that did not result in an injunction, is cited erroneously for the proposition that "such a negative clause is not a necessary prerequisite to the exercise of the jurisdiction." The only other employment cases cited are *Hayes v. Willio*, 4 Daly's Rep. 259 (N.Y.C.P. 1872), in which the preliminary injunction was reversed on appeal, and *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198 (C.C.S.D.N.Y. 1890), which did not result in an injunction.

common law method of deriving rules from cases, the gendered context of these cases was stripped away. The three American judicial applications of *Lumley* built the decisional base.³²² Later courts could state that there was no question as to the rule to be applied, nor any need to reconsider the policies underlying the rule.³²³ In this way, gender served as a catalyst for a rule that subordinated all professional employees to the mastery of their employers.

C. *Sealing Their Fates*

As the controlling American rule,³²⁴ *Lumley* subordinated employees by legitimating the issuance of injunctions against them. The threat of injunction could be used to control an employee's autonomy as well.³²⁵ In fact, by the century's end, theater employees were sometimes forced to sign standardized contracts stipulating that they were unique, which gave employers automatic control over the disposition of their labor under the *Lumley* rule.³²⁶

The first high profile case to apply the *Lumley* rule to men was *Philadelphia Ball Club v. Lajoie*.³²⁷ In *Lajoie*, the Pennsylvania Supreme Court cited *Pomeroy* and reversed a lower court ruling denying an injunction.³²⁸ However, the same month that *Lajoie* was decided, a Missouri court reaffirmed a baseball player's right to quit based on his personal liberty. These split decisions reflect regional differences in how American courts felt about enjoining baseball players. Strikingly, the Missouri court's decision in *American Base Ball & Athletic Exhibition Co. v. Harper*³²⁹ was based on a reading of the section of the Missouri Constitution that bans slavery and involuntary servitude.³³⁰ In a glowing preamble, the court described the constitutional guarantees of personal liberty. Then it declared:

322. See *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); *McCaull v. Braham*, 16 F. 37 (C.C.S.D.N.Y. 1883); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892).

323. See cases listed *supra* note 38.

324. *POMEROY*, *supra* note 35, at 384.

325. See *infra* notes 392-93 and accompanying text.

326. *Dockstader v. Reed*, 106 N.Y.S. 795 (App. Div. 1907).

The contract which the defendant signed is the usual unique one which theatrical managers often demand from actors whom they employ, and in it the defendant confessed that the services which he was to render were "special, unique, and extraordinary," and admitted that he could not be replaced; and agreed that in the event of its breach the plaintiff would suffer irreparable injury which could not be ascertained or estimated in an action at law, and consented that an injunction might be issued against him restraining him from rendering services for any other person.

Id. at 796.

327. 54 CENT. L.J. 446 (Pa. 1902).

328. *Id.* at 447.

329. 54 CENT. L.J. 449 (St. Louis Cir. Ct. 1902).

330. *Id.* at 451. The court also sympathetically portrayed the ballplayer's plight as "bound as with bands of steel for the entire contractual period." *Id.* at 450. It found lack of mutuality in the contract's termination clause, because "plaintiff could terminate it at will, and it would be useless then to dissolve the injunction, for it would not place defendant back in the position from which it removed him, and he would be left without employment." *Id.*

It is the wish and pleasure of the defendant to serve his present employer. In doing this he exercises the right of choosing his own associates and serving whom he sees fit, going at his own pleasure, following his chosen occupation and enjoying the gains of his own industry. These are the natural rights of free men, and go to make up the "liberty" which the constitutional provisions in question guarantee and protect. And it would seem that they are rights which cannot be bartered away by either contract or consent One may, by contracting to render personal services to another, lay himself liable in money damages to his contractee in case he does not carry out his agreement; but can he be deprived of the rights or liberties given by the state and federal constitution? Can any such penalty be imposed for the breaches of a contract? And if not, would it be depriving him of the rights vouchsafed him by the constitution to restrain him from serving his present employer?³³¹

The spread of the *Lumley* rule from the New York actress cases to cases involving men, to other jurisdictions, and to other professions generated criticism. *Lajoie* and *Harper* were printed back-to-back in the *Central Law Journal*³³² with a critical commentary on the cases by the editor:

The question is really this: Has not one who has made a contract by which his services are promised to another for a certain term and who before the end of that term discovers that he has made a bad bargain or circumstances have so changed that his work has become obnoxious or he finds that he can earn a larger compensation elsewhere, a right to leave the service upon compensating the master for the damage done to him for the breach. In other words, can he not elect to perform or pay damages Should a court of equity force the servant to remain in the service or remain idle? [I]f [the legal remedy is inadequate] it must be because of the master's neglect in not exacting proper security for the complete performance of the agreement, for to say that the damages cannot be assessed in money is absurd.³³³

331. *Id.* at 451.

332. *Id.*

333. *Id.* at 454. Other contemporary law review articles picked up on these currents. Those that focused exclusively on equitable jurisprudence seemed unconcerned with the effect of injunctions on the defendant employees. Lewis, *supra* note 187, at 319; Sidney W. Solomon, *Enforcement by Injunction of Theatrical Contracts for Personal Services*, 74 CENT. L.J. 117 (1912); Note, *Right to Break a Contract*, 16 MICH. L. REV. 106 (1916-17); Barry Gilbert, *Some Old Problems in a Modern Guise*, 4 CAL. L. REV. 114 (1916). Those that focused on employment contracts reacted as the editor of the *Central Law Journal* did, commenting that the rule should provide the employee with the choice to remain or pay damages. *See also* Stevens, *supra* note 4, at 235; George L. Clark, *Implications of Lumley v. Wagner*, 17 COLUM. L. REV. 687 (1917). Others criticized the correctness of the *Lumley* rule on its own terms. Clarence D. Ashley, *Specific Performance by Injunction*, 6 COLUM. L. REV. 82, 92 (1906).

After *Lajoie*, employers continued to bring a remarkably high proportion of cases against actresses and other wage-earning women, but now they also brought and won cases against men.³³⁴ Later courts recognized the free labor policy only sporadically. The free labor tradition was relegated to a minority position that opposed the established rule.³³⁵ When the policy resurfaced in

334. *George A. Kessler & Co. v. Chappelle*, 77 N.Y.S. 285 (App. Div. 1902) (refusing to enjoin ordinary champagne salesman); *Shubert v. Angeles*, 80 N.Y.S. 146 (1903) (preliminarily enjoining actress from using her talent as mimic); *Rabinovich v. Reith*, 120 Ill. App. 409, 417 (1905) (refusing to enjoin woman milliner because she did not cause sufficient damage to employer to outweigh her right to work); *H.W. Gossard Co. v. Crosby*, 109 N.W. 483 (Iowa 1906) (rejecting *Lumley* and *Daly* and refusing to enjoin traveling corset saleswoman); *Lawrence v. Dixey*, 119 A.D. 295 (N.Y. App. Div. 1907) (refusing to enjoin actor because contract lacked mutuality); *Dockstader v. Reed*, 106 N.Y.S. 795 (App. Div. 1907) (refusing to enjoin actor because contract lacked mutuality and actor not unique); *Keith v. Kellermann*, 169 F. 196 (C.C.S.D.N.Y. 1909) (enjoining female acrobat); *Ziegfeld v. Norworth*, 118 N.Y.S. 1151 (App. Div. 1909) (mem.) (enjoining actress and actor); *Hammerstein v. Sylva*, 124 N.Y.S. 535 (Sup. Ct. 1910) (enjoining opera singer), *rev'd sub nom.* *Hammerstein v. Mann*, 122 N.Y.S. 276 (App. Div. 1910) (actress not enjoined as nonunique); *Comstock v. Lopokowa*, 190 F. 599 (C.C.S.D.N.Y. 1911) (enjoining male and female Russian ballet dancers).

335. Justice Oliver Wendell Holmes' involvement in a parallel case illustrates that influential jurist's lack of understanding of the American tradition of free labor. While Justice Holmes was on the Massachusetts Supreme Judicial Court, he considered a preliminary injunction in the case of *Rice v. D'Arville* (Mass. Suffolk Equity Session, 1894). Holmes wrote:

It is agreed on all hands that a court of equity will not attempt to compel a singer to perform a contract to sing. . . . If this is so . . . there is no sufficient justification for saying to an artist that although I will not put him in prison if he refuses to keep his contract, I will prevent him from earning his living otherwise, as a more indirect means of compelling him to do the same thing. I do not quite see why, if an equitable remedy is to be given for the purpose of making an artist keep his contract, the usual remedy should not be given, and the whole of it; why, if I say, 'If you do not sing for the plaintiff you shall not sing elsewhere.' I should not say, 'If you do not sing for the plaintiff you shall go to prison.' I think the later English judges are quite alive to the force of these considerations, and simply bow to the authority of *Lumley v. Wagner*, which, of course, does not bind me.

Quoted in Note, Lumley v. Wagner Denied, 8 HARV. L. REV. 172 (1894). Nonetheless, Holmes denied the injunction based on the administrative difficulty of determining whether "the artist was in good faith and really [had] given the other party the benefit of the talents for which he was engaged." *Id.* at 172-73.

Holmes' decision not to enjoin the actress is extraordinary in light of his later use of the same argument—that indirect compulsion and direct compulsion are one and the same—to justify upholding an Alabama statute that imprisoned a Southern black man for quitting his job as an agricultural worker. *Bailey v. Alabama*, 219 U.S. 219 (1911). In that case Justice Holmes dissented from the U.S. Supreme Court decision that the Alabama peonage statute constituted involuntary servitude. He reasoned:

Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.

Also the power of the States to make a breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be a crime at all, it may be made a crime with all the consequences usually attached to crime. There is produced a sort of illusion if a contract to labor ends in compulsory labor in a prison. But compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the State has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. *Id.* at 246-47. Thus, Justice Holmes found it easier to uphold an Alabama statute that bound a Southern black agricultural worker to compulsory servitude than to overcome the administrative difficulties in compelling a white female opera singer to sing.

In a contemporaneous note on *Rice v. D'Arville*, the student supplied the reason Justice Holmes missed:

later cases, it did so with little acknowledgement of the earlier free labor tradition articulated by Judge Hare in *Ford v. Jermon*.³³⁶

The case of another woman performer sealed the fate of performers as relegated to a servant class in relation to their managers. In *Keith v. Kellerman*,³³⁷ the court ruled that in cases of ambiguity of contract, a relationship between a performer and a producer is not a partnership, but a status relationship of master and servant.³³⁸ Annette Kellerman, a "trick and fancy diver" and dancer, had an arrangement to perform a one-woman show with Benjamin Keith as her producer. Kellerman argued that she should be freed from her contract based on a legal argument that turned on whether she was an employee or a partner of Keith.³³⁹ The contract at issue split the profits equally between them and described them as "manager" and "performer," rather than employer and employee. In response to her claim of partnership, the court reasoned:

Doing personal service because one is ordered to under the pains and penalties which a court of equity can inflict, seems dangerously like temporary slavery. And might not a court well say, "This is too much to give, whether or not we can do it"

Note, *supra*, at 173.

336. 6 Phila. 6 (Dist. Ct. 1865). The Missouri Court in *Harper* expressed the belief that the issue of personal liberty had never been raised in earlier cases. *Harper*, 54 CENT. L.J. at 451.

The free labor policy resurfaced in three cases involving the services of middle class employees who were engaged in less extraordinary occupations than acting: a milliner, a debt collector, and a traveling saleswoman. In *Rabinovich v. Reith*, 120 Ill. App. 409 (1905), the plaintiff sought to enjoin a milliner from working for another employer despite the absence of an exclusivity clause in her contract. In denying the request, the court said:

The effect of making permanent the injunction prayed for would be to compel her to go back to appellants under relations now strained to the uttermost, or else to remain idle; and thus, if dependent upon her labor for a support, she must beg her bread or live upon the charity of friends. . . . When we reflect that among the most valuable rights one possesses is the right to labor, and that this right is also a public duty, it is manifest that by reversing this decree we would destroy more than we would preserve, and would do more injustice than justice. We will not abridge the right to labor unless the one restrained, if permitted to labor, would irreparably damage another, or by fair contract has bound himself not to engage in a definite employment for a certain length of time.

Id. at 417; see also *H.W. Gossard Co. v. Crosby*, 109 N.W. 483 (Iowa 1906) (refusing to follow *Lumley and Daly* in case of corset saleswoman); *Sternberg v. O'Brien*, 48 N.J. Eq. 370 (1891) (denying injunction whose only purpose would be "to oppress" defendant).

337. 169 F. 196 (C.C.S.D.N.Y. 1909).

338. The nature of the influence of master-servant law on 19th- and 20th-century employment contracts is currently the subject of some debate. See JAMES ATLESON, *VALUES AND ASSUMPTIONS IN LABOR LAW* 11-16 (1983) (arguing that expectations and obligations carried over from master-servant producing fusion with new contract based concepts); PHILLIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 122-37 (1969) (examining legal foundations of managerial authority, employee rights, and public interest as historical blend of master-servant and other legal conceptualizations); Christopher L. Tomlins, *The Ties That Bind: Master and Servant in Massachusetts, 1800-1850*, 30 LAB. HIST. 193, 196-227 (1989) (arguing that employment contract was wholly new legal phenomenon encompassing "relationships previously outside the master/servant ambit").

339. Annette Kellerman actually had two contracts with Benjamin Keith. One, she conceded, cast her as an employee; while the other, she argued, cast her as a partner. Based on this dual status, she argued the bill was "multifarious because [it] includ[ed] two contracts of a different nature." *Keith*, 169 F. at 199.

While it is true that the sharing of profits is a most distinctive feature of partnerships, such sharing in the case of contracts . . . for personal services is generally a method of measuring compensation. The real test of partnership is whether the parties are jointly interested as principals and may bind each other by their acts or engagements within the scope of the enterprise.³⁴⁰

The court concluded that *precisely because* Kellerman would be unable to bind Keith, the contract had to be one of employment, and accordingly, Kellerman could be enjoined.³⁴¹ In every respect this decision is the opposite of the earlier American rule, that employees could not be enjoined because they were merely employees³⁴² and that among freely contracting parties, only partners could be enjoined because only they could mutually and reciprocally bind each other.³⁴³ Reflecting this shift in status, the *Federal Reporter* filed the case under the heading, "Master and Servant," which had for some time regained acceptability as the nomenclature for employment relationships.³⁴⁴

In the process of canonizing this new rule, highly regarded professional performers lost a measure of liberty once available under the earlier partnership rule that required a mutual commitment by both parties to justify equitable intervention.³⁴⁵ With the adoption of the *Lumley* rule, courts increasingly failed to examine the mutuality of the contract. Although the employee could be enjoined from working elsewhere if she breached, the employer could escape by merely paying damages in the amount of wages if he breached.³⁴⁶ Thus, employers customarily held a *property* interest in their valuable employees;

340. *Id.*

341. *Id.* at 200.

342. See *Hamblin v. Dinneford*, 2 Ed. Ch. 529, 533 (N.Y. Ch. 1835) ("This is a mere matter between employer and employed. The parties must be left to law."); see also *supra* Part I.A.

343. *Id.* (citing *Morris v. Colman*, 34 Eng. Rep. 382 (Ch. 1812)).

344. *Keith*, 169 F. at 196. The attitude of the bench and bar toward parties to employment-contract litigation is reflected by the classification of these cases in legal research material. The *Century Digest*, published by West from 1897 to 1904, covered cases from 1658 to 1896 and classified almost all aspects of the employer-employee relation under the main heading "Master and Servant." 34 AMERICAN DIGEST CENTURY EDITION 402-2063 (1902) Although other digests were published in the 19th century, the *Century Digest* was the most comprehensive. By 1887, West was reporting the cases of every state and the federal system. MORRIS COHEN ET AL., *HOW TO FIND THE LAW* 19 (9th ed. 1989). As a result, legal researchers in every jurisdiction would encounter the "Master and Servant" classification in employment contract litigation, perpetuating the notion that in employment contract disputes, the parties stood not as equals, but in a dominant/servient relation. By characterizing the contractual relationship of performers as that of master and servant, employees were formally consigned to an unequal status arrangement.

345. *Morris v. Colman*, 34 Eng. Rep. 382 (Ch. 1812), discussed *supra* Part I.A.

346. See, e.g., *Kennicott v. Leavitt*, 37 Ill. App. 435 (1890) (asserting interest in position as manager of New Windsor Theatre and in theater lease could not get plaintiff equitable relief against theater producer who had dismissed him because legal remedies were adequate); *Healy v. Allen*, 38 La. Ann. 876 (1886) (asserting interest in his post as sexton of cemeteries could not get plaintiff equitable remedies against church administrator who replaced him, in part because legal remedies were adequate). In theory, of course, an employee could bargain for a negative covenant binding the employer not to hire a substitute employee for the term of the contract. As a practical matter, such provisions are extremely rare. But see *infra* note 32 (discussing Johanna Wagner's contract).

employees held only a *liability* interest in their employer's nonperformance of contract.³⁴⁷ The mutuality issue became simply whether each had some remedy for breach, not whether the remedies were equal, proportional, or directly reciprocal.

Equitable courts generally discounted employees' arguments that they had suffered irreparable injury when they lost the opportunity to perform their chosen work due to their employer's breach.³⁴⁸ Accordingly, employees were not recognized as holding legally cognizable interests in enterprises or in their careers. This disadvantaged certain performers, because to be owned but not to be allowed to perform could ruin a career.³⁴⁹ As a result of the *Lumley* rule, these unique, professional performers were relegated to the status of employees, expected to be exclusively devoted to their employers, but having no reciprocal claim on their employers for exclusive dedication to them. Contract employees could not expect to make mutual, reciprocal claims on their employers as playwright Colman and even Johanna Wagner could have done.³⁵⁰

Although the employer's interest in preserving capital against loss could have been protected by other legal measures, the courts chose the method that stopped the employee in her tracks. The courts made no serious attempt to assess whether the employer's commercial loss could be adequately remedied by damages.³⁵¹ The primary means of avoiding an injunction was to show that one's services were not unique, and therefore not indispensable to the employer. But here, too, the rule favored employers because it only allowed the employee's release if the employer's need for the employee's services was met.³⁵² The court's inquiry hinged on the employer's right to a continuing

347. See MORRIS, *supra* note 40, at 411-34. This distinction is also based on Calabresi and Melamed's analysis of liability and property rules. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Calabresi and Melamed recognize that a property rule is a higher order rule than a liability rule is. Property rules recognize the importance of the property holder's consent to sell the property, or the injunction, only at the price set by the property owner or not at all. One might contend that the *Lumley* rule provides a "contract" remedy and thus is not a property or liability rule, subject to Calabresi and Melamed's classification scheme. This objection does not recognize that there are really only four legal responses available for all legal claims: (1) a court can find the legal claim not cognizable; (2) a court can award damages to either plaintiff or defendant; (3) a court can grant equitable relief; or (4) a court can send the parties to some other authoritative decisionmaker, such as an arbitrator or special master. Calabresi and Melamed classify categories (1) and (2) as liability rules, which include employees' contractual claims of breach at common law, and classify category (3) as a property rule, which covers employers' contractual claims. Category (4) is inapposite here.

348. See cases listed *supra* note 346; see also *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874), discussed *supra* Part I.B.1.

349. For example, it is acknowledged that Johanna Wagner never regained the acclaim in England that she would have enjoyed by performing earlier. Four years had passed by the time she was able to make her London debut, and tastes had changed. See LUMLEY, *supra* note 81.

350. See *supra* text accompanying notes 44-45, 82.

351. See *supra* Part I.B.1-2 (describing *Daly v. Smith* and *Duff v. Russell*).

352. Cf. ATLESON, *supra* note 338, at 25 (discussing how Supreme Court decisions on subject of collective bargaining favor assuring employers dependable supply of employees rather than protecting employees' organizational rights).

supply of labor services, rather than on the employee's need to be free from an employer's control that may have become objectionable. Whether the contract exhibited true mutuality, and whether the unique employee had to work to eat (and thus was especially subject to the coercive effect of an injunction), were no longer part of the equity court's deliberation.³⁵³ On the other hand, the injunction would be refused if the employer could obtain a fungible substitute. In this way, ordinary wage earners were let off the hook, not because they had a right to work or a right to quit and move on, but because they were merely ordinary.

Courts came to construe the term "uniqueness" to include less uniquely talented individuals and thus brought these individuals within their injunctive powers.³⁵⁴ Lillian Russell was a star, who was truly unique to the world stage in the nineteenth century. Later courts, however, acceded to the claims of employers that more ordinary employees valuable to them were also legally "unique." Lajoie's case was not so straightforward. Both the lower court and the supreme court agreed he was a "great second baseman" but only the Pennsylvania Supreme Court considered the performer sufficiently unique to enjoin.³⁵⁵ Presumably, the team's best player in every position could be considered "unique." Vaudeville players were enjoined by the specific type of act they performed if the exact routine could not be easily replaced.³⁵⁶ Often courts would look to the self-serving promotion hype of the performers' own agents or the theater managers to determine whether the performers were unique.³⁵⁷ As specialties proliferated, more and more employees could be characterized as "unique."

Given that the rule was originally justified by the supposed difficulties courts confronted in assessing damages accurately, the result is ironic. The *Lumley* rule substituted inexactness in determining whether the employee was unique for inexactness in assessing damages. When the rule's inexactness was

353. For example, Cissy Fitzgerald's extremely modest salary was irrelevant in swaying the court. See *supra* text accompanying note 236 (discussing *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910)).

354. *Mission Indep. Sch. Dist. v. Diserens*, 188 S.W.2d 568 (Tex. 1945) (enjoining public school music teacher from teaching in another public school).

355. The lower court characterized him as "expert," having a "great reputation as a second baseman," and observed that "his withdrawal from the team would weaken it, as would the withdrawal of any good player, . . . but something more than this is required to bring the case within the principle of *Lumley v. Wagner*." *Philadelphia Base-Ball Club v. Lajoie*, 10 Pa. D. 309, 313 (1901), *rev'd sub nom. Philadelphia Ball Club v. Lajoie*, 54 CENT. L.J. 446 (Pa. Sup. Ct. 1902). In fact, Lajoie was an excellent ballplayer, led the league that year in most statistical categories, and was later inducted into the Baseball Hall of Fame. THE BASEBALL PLAYERS 595 (Mike Shatzkin ed. 1991). The Pennsylvania Supreme Court held a higher opinion of his talent, stating, "[H]e may not be the sun in the baseball firmament, but he is certainly a bright particular star." *Lajoie*, 54 CENT. L.J. at 447.

356. *Winter Garden Co. v. Smith*, 282 F. 166; *Harry Hastings Attractions v. Howard*, 196 N.Y.S. 228 (1922) (burlesque comedian); *Shubert Theatrical Co. v. Gallagher*, 201 N.Y.S. 577 (App. Div. 1923) (vaudeville actor); see also *Mission Indep. Sch. Dist.*, 188 S.W.2d 568 (enjoining public school music teacher from teaching in another public school).

357. See *Winter Garden Co.*, 282 F. 166; *Harry Hastings Attractions*, 196 N.Y.S. 228; *Shubert Theatrical Co.*, 201 N.Y.S. 577.

formulated in terms of the personal attributes of the employee, all manner of subjective judgments about the perceived identity of the individual—and the social construction of that identity³⁵⁸—could enter the decision. For example, the rule could trade more easily on gender.³⁵⁹

D. *The Core Cross-Gender Dispute*

No discussion of gender in this line of cases would be complete without considering whether gender played a role in the creation of these disputes. The core issue is not simply why courts ruled the way they did, but why more women performers wished to quit and why their male employers sued to enjoin them—especially in greater numbers than men?

Women's historians and feminist legal scholars have demonstrated the value of considering women's experiences, and men's experiences in dealing with women, as a means of historiography.³⁶⁰ This body of work encourages us to listen to women's voices.³⁶¹ Moreover, if history looks different when women's voices are heard and when women's testimony is believed,³⁶² then

358. SCOTT, *supra* note 25, at 43-44 (describing four ways that gender identities are socially constructed); see also *id.* at 29-30 (acknowledging possibilities for parallel analyses of race and class).

359. See, for example, the court's treatment of Cissy Fitzgerald, described *supra* Part I.B.3, and the employer's description of Ms. Crosby, *H.W. Gossard v. Crosby*, 109 N.W. 483 (Iowa 1906), described *infra* text accompanying note 385.

360. In attempting to generalize about the nature of an interpersonal conflict from a pattern of similar historical incidents, I am drawing on a tradition already developed by other historians. See, e.g., CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* (1985); KESSLER-HARRIS, *supra* note 17; KESSLER-HARRIS, *supra* note 26.

In her methodological essay, Professor Smith-Rosenberg wrote:

Incorporating women's experiences into our social analysis involves far more than adding another factor to our interpretation and thus correcting an admittedly glaring oversight. It forces us to reconsider our understanding of the most fundamental ordering of social relations, institutions and power arrangements within the society we study.

But how can we effectively integrate women into social analysis? By inverting the questions we customarily ask, Joan Scott argues. Feminist historians, concerned with the ways social arrangements and the distribution of power affected women, Scott continues, have ironically maintained the centrality of male decisions and institutions within their analytic schemas. They thus kept women as but one variable within a larger (male) picture. By asking, instead, what the particular conformation of gender in a society tells us about the society that so constructed gender, we will make women and gender central to social analysis.

Hearing Women's Words: A Feminist Reconstruction of History, in SMITH-ROSENBERG, *supra*, at 19.

361. *Id.*, *passim*.

362. In an effort to listen to the women's voices in these disputes, I acknowledge that I am giving weight to some reports and factual allegations that were disputed by the women's employers as well as some that were contrary to the judges' later fact findings. This methodology is problematic in legal scholarship because (1) we customarily accept litigants' assertions only when they are uncontested or uncontroverted, and (2) we doubt judicial fact-findings only when they are clearly erroneous.

By giving women's claims the benefit of the doubt, it is possible, perhaps inevitable, that I have taken as true, some claims that, in fact, were not true. Where available, I have checked for independent corroborating historical sources. Nonetheless, there is no other way to consider whether these women's stories as a group reveal consistent patterns. The judges in several of the key cases have been shown to have been biased against the defendants, and hence, their fact-findings are not likely to have been reliable.

women's experiences in the situations that give rise to litigation should be considered in assessing the appropriateness of the legal response.

The women in these cases gave a variety of reasons for wishing to quit. A few quit for money, either for higher wages elsewhere³⁶³ or because they had not been paid.³⁶⁴ Some quit to seek more satisfying work or greater control of their performances, their presentation, or their careers.³⁶⁵ In still other cases, women quit because they found their present circumstances objectionable.³⁶⁶ In general, women alleged less often that they quit for money and more often that they quit for more satisfying work opportunities or because they disliked their circumstances.³⁶⁷

Managers' motives are less apparent from the texts because plaintiffs were not called upon to give reasons why they chose to sue. No doubt, most of the employers involved in this line of cases were disappointed commercially. But unless the actress changed her mind, an injunction would not allow the theater manager to recoup his losses; an action for damages would. Surprisingly, employers rarely made claims for damages in these disputes.³⁶⁸ This lack of resort to actions for legal damages suggests that economic losses may not have been foremost on the theater managers' minds.³⁶⁹ Indeed, the remarkable feature of these cases is the evidence that something more was at stake for the plaintiffs than simply their commercial interest in profits. Perhaps, the explanation for the phenomenon of more women's cases than men's may, in fact, be found in behavior that was not commercially rational at all.³⁷⁰

363. *DePol v. Sohlke*, 7 Robertson's Pr. 280 (N.Y. Super. Ct. 1867).

364. *Rice v. D'Arville*, 162 Mass. 559 (1895).

365. *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *Canary v. Russell*, 30 N.Y.S. 122 (Sup. Ct. 1894); *Hoyt v. Fuller*, 19 N.Y.S. 962 (Super. Ct. 1892).

366. *Delavan v. Macarte & Wife*, 4 W. L.J. 555 (Ohio C.P. 1847); *Daly v. Smith*; *Duff v. Russell*; *Rice v. D'Arville*, 162 Mass. 559 (alleging, in addition to not having been paid, play was not proper vehicle for her talents); *H.W. Gossard Co. v. Crosby*, 109 N.W. 483 (Iowa 1906); *Hammerstein v. Sylva*, 124 N.Y.S. 535 (Sup. Ct. 1910), *rev'd sub nom. Hammerstein v. Mann*, 122 N.Y.S. 276 (App. Div. 1910).

367. It is difficult to determine whether this comported with some objective reality or whether giving these reasons was considered more socially acceptable. Men allege that they quit for more money in *Hayes v. Willio*, 11 Abb. Pr. (n.s.) 167 (N.Y.C.P. 1871), *rev'd on other grounds*, 4 Daly's Rep. 259 (N.Y.C.P. 1872); and *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144 (N.Y. Super. Ct. 1883). Of the later period cases, only the male opera singer in *Pratt v. Montegriffo*, 10 N.Y.S. 903 (Sup. Ct. 1890), alleged unsatisfactory circumstances for leaving employment. Most men gave no reason for quitting at all.

368. *But see H.W. Gossard Co. v. Crosby*, 109 N.W. 483, 485 (Iowa 1906) (demanding \$10,000 in damages and injunction against traveling saleswoman). I have been unable to find evidence of any enticement action for damages arising out of any of these disputes, as, for example, *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853), arose out of the same incident as *Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852). *See supra* Part I.A.2. On several occasions, managers did dissolve injunctions with the payment of money, however. *See Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *Canary v. Russell*, 30 N.Y.S. 122 (Sup. Ct. 1894).

369. On the other hand, plaintiffs may have believed damages actions would have been unsuccessful. *See supra* note 181.

370. For illustration, consider the early 20th-century example of *Hammerstein v. Sylva*, 124 N.Y.S. 535 (Sup. Ct. 1910), *rev'd sub nom. Hammerstein v. Mann*, 122 N.Y.S. 276 (App. Div. 1910). What motivated Oscar Hammerstein and his son to sue to enjoin French singer Marguerita Sylva? As an opera singer, Sylva's commercial value to Hammerstein was minimal. The court agreed that Hammerstein already

As judges would have been influenced by currents in the legal culture, theater managers probably responded to currents in theater culture. Although women's conduct was a frequent subject of nineteenth-century drama, one particular image of a woman performer and the impresario who directed her met with instant popularity as soon as it appeared late in the nineteenth century. The popularity of *Trilby* in the New York theater community seems quite telling as it depicted the relationship between the maestro Svengali and the beautiful Trilby, whom he held in his hypnotic power.³⁷¹ Modern theater historians have used the *Trilby* paradigm to characterize the relationship of theater managers such as Augustin Daly to their actresses.³⁷² Although *Trilby* appeared too late to have influenced theater managers to sue, the immediate acclaim it received has been viewed by historians as evidence of how fitting the story was to conditions already existing in the New York theater.³⁷³ In *Trilby*, the maestro Svengali hypnotizes the beautiful, but tone-deaf, Trilby to sing as no woman had ever sung. Trilby is obedient to Svengali's every command. Svengali falls in love with his creation and marries her.

Like Svengali, theater managers may have become emotionally invested in their relationships with the key women they employed. In contracting for a woman's exclusive services, some theater managers may have viewed the woman's contract more as a marriage bond than as a purely commercial relationship. Augustin Daly, for example, viewed his relationships to his

employed numerous artists who could have performed her singing roles. *Id.* Nevertheless, Hammerstein pursued this woman for over five months through a trial and an appeal.

Three explanations come to mind. First, since Sylva was an actress at a moderate salary, it might have been less expensive to force her to return than to replace her. The difference in salaries, however, is exactly the kind of damages that would have been easily quantifiable. Alternatively, Hammerstein could have captured some portion of an increase in her value if she performed elsewhere at a higher salary. There is no evidence in the case, however, that she left for a higher salary, and the court's characterization of her as a singer of "stock parts" makes it seem unlikely that she would have been able to command one. Her return, or even a negotiated settlement giving Hammerstein more money, seemed unlikely, given her relative standing in the labor market and the animosity the parties appear to have felt toward each other.

Second, as the employer of numerous performers, Hammerstein may have pursued Sylva in order to deter other employees who may have been contemplating quitting. There is some evidence that this was Augustin Daly's motive in suing Mrs. Smith, the sixth actress to quit his company. *See supra* Part I.B.1. In Hammerstein's case, no evidence exists for such an explanation, but such a decision would have been strategically rational. Hammerstein may have been maneuvering for a rule that would establish or reinforce his managerial prerogative over his employees. *See generally* SELZNICK, *supra* note 338, for a discussion of master-servant law as securing managerial prerogatives.

Third, there may have been something special about Sylva that caused Hammerstein to pursue her. There is evidence in the opinion that the singer thought Hammerstein and his son were too controlling and too personally involved in her private affairs. Sylva alleged, among other things, that Hammerstein's son engaged in "insulting conduct" and accused her of having improper relations with men. 124 N.Y.S. at 536. During the course of the litigation, Sylva divorced the husband from whom she was separated and married another man. These fragments viewed collectively suggest that the dispute between Hammerstein and Sylva may have turned on issues more personal than commercial.

371. GEORGE DU MAURIER, *TRILBY* (London, Osgood, McIlvaine & Co. 1st ed. 1894). The second edition of "Thrilly", as it was called on Broadway, opened in 1895. *Second Edition of "Thrilly,"* N.Y. TIMES, June 13, 1895, at 13.

372. FELHEIM, *supra* note 148, at 42-43; Marra, *supra* note 16, at 12.

373. Interview with Kim Marra, *supra* note 16.

actresses as idealized platonic marriages.³⁷⁴ Alternatively, theater managers may have been emotionally invested in their actresses as prize acquisitions.

The Svengali paradigm perpetuated the notion that the manager created the actress's talent; hence, she was his property, the fruit of his labor, his trophy. Accordingly, he could be expected to assert a property interest when she was stolen or spirited away. The myth gave no credit to the woman for ownership of her own innate talents or for the degree to which she cultivated her talents herself. Loie Fuller, for example, was extremely exacting in designing and perfecting her performances, but she was treated neither by her employer nor by the court as a self-made woman. In contrast, this Svengali image could not have been deployed to Louise Dudley Carter's advantage in recapturing William Ferguson, even if he had been a leading man. The image assigned gendered roles that could not be easily reversed.³⁷⁵

In several of the cases, there is evidence that the manager seemed to have bonded with the actress.³⁷⁶ This is not to say that men did not bond with other men in certain circumstances, for example, as mentor to protégé, but the nature of that bond, so far as the records reveal, was substantially different.³⁷⁷ The departure of a valuable woman employee may have been more of an affront than was the departure of a man. Women were expected to be obedient and subordinate.³⁷⁸ A woman's decision to leave her employer, especially for a competitor, may have seemed more like a betrayal and threatened what the manager felt were his legitimate prerogatives. To protect his prerogatives, the manager may have been more likely to seek revenge by lawsuit. The possibility

374. See *supra* text accompanying note 16.

375. Instead Louise Dudley Carter was portrayed in the contemporary writings as the product of yet another man, theater producer David Belasco, who was credited with turning her life around after a highly publicized, "scandalous" divorce. ETHAN MORDDEN, *THE AMERICAN THEATRE* 42-43 (1981) (describing Belasco as Pygmalion).

376. In the single case of a woman manager suing a male actor, Louise Dudley Carter lost the suit on the theory that the actor was fungible. *Carter v. Ferguson*, 12 N.Y.S. 580 (Sup. Ct. 1890). Louise Dudley Carter's pursuit of the actor could also have been motivated by a bonding, either possessiveness or a sexual attraction. However, here the court would not assist her attempt to maintain control over him.

377. Among the men's cases, the animus driving employers to sue may have included a mentor's desire to capture a young rising talent. See *Strobridge Lithographing Co. v. Crane*, 12 N.Y.S. 898 (Sup. Ct. 1890) (reversing injunction prohibiting defendant from working as lithographic designer due to violation of employment contract). The court in this case puzzled over the reasons for the employer bringing suit: [Defendant's employment] called for nothing peculiar or individual to him. . . . Much of this was purely mechanical, but, even with regard to the higher branches of the art, there was nothing uncommon in the defendant's qualifications. He is simply a talented and rising young member of the guild of lithographic sketchers. His name adds no special value to the good work he does, and his withdrawal entailed no serious loss upon the plaintiffs. Indeed, there is no proof that his place cannot be adequately filled. . . . Nor is there any proof of damage or of actual injury. The plaintiff is an Ohio corporation, doing business in Cincinnati. Whether it transacts business in this city does not appear. . . . How the plaintiff in Cincinnati will be irreparably injured unless the defendant is enjoined from working . . . in New York is not apparent.

Id. at 899-900; see also *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432 (1897) (young male jewelry salesman sued for leaving his employer). See also *infra* notes 386-87. One could also expect homosexual bonding to have occurred; there is, however, no clear evidence of it in any of these cases.

378. See *supra* notes 129-32 and accompanying text.

that an actress' departure would be a public event, announced in advertisements, covered in the press, and subject to public commentary, would only have amplified his injury. The more public the departure, the higher the stakes would have been for the theater manager.

For example, when Lillian Russell eloped and fled to London, her American managers pursued her to England with legal actions. One told the press that "my only object in getting the injunction out against her in London was to show her that the American law was powerful even in England, and that when she made an engagement in this country we could hold her to it across the sea."³⁷⁹ These theater managers had no credible claim that Lillian Russell performing in London would affect their box office receipts in New York. Nor could they force her to return. And yet, they made the extraordinary effort solely to teach her a lesson and to demonstrate their control over her.

Furthermore, if theater managers held these expectations of women performers' obedience and loyalty, they could well have become overreaching in their dictates and actually have triggered actresses' desires to leave. A few of the cases provide evidence of this. In some cases, there is evidence that actual sexual animus played a role. The most explicit is that of the spurned romantic overtures of the plaintiff in *Duff v. Russell*.³⁸⁰ In addition, the equestrian Mrs. Macarte and her husband quit Delavan's circus, according to the court papers, because "the conduct" of the circus owner "had rendered Mrs. Macarte, especially, very uncomfortable and unhappy."³⁸¹ One would not expect evidence of sexual harassment to be fully disclosed in the sexually repressive Victorian era. The fact that any evidence of this kind surfaced is surprising since matters of a sexual nature were unlikely to be discussed at all in nineteenth-century court records.³⁸²

In one case that lacked direct evidence of sexual harassment, the unique qualities of the departing woman were described in terms of her sex appeal and

379. *The Law After Lillian Russell: What Her American Managers Think of Her*, *supra* note 207, at 12.

380. 14 N.Y.S. 134 (Super. Ct. 1891), *aff'd*, 31 N.E. 622 (N.Y. Ct. App. 1892); *see also supra* Part I.B.2.

381. *Delavan v. Macarte & Wife*, 4 W. L.J. 555, 556 (Ohio C.P. 1847).

382. Consider for example, *Drayton v. Reid*, 5 Daly's Rep. 442 (N.Y.C.P. 1874), in which a discharged actress under contract challenged her dismissal. The court upheld the dismissal on grounds of her indecent and immoral conduct but refused to state in the opinion what she had done, because it said, she committed acts "too gross and disgusting to be described." *Id.* at 444.

Evidence of sexually harassing conduct is most often found in actresses' memoirs rather than in court records. *See, e.g., Lillian Russell's Reminiscences*, *supra* note 188; MORRELL, *supra* note 139, at 68. When Lillian Russell refused to meet Mr. Gilbert of Gilbert and Sullivan at his private hotel in the late evening hours for so-called "private rehearsals," Gilbert told her, "You beard me! You dare to beard me! Send your solicitor to me at once! Someone else will play your part." *Id.* at 68. Her performance in the show was canceled. *Id.* Similarly, it would not have been surprising if an actress did not wait to be fired for refusing her employer's advances, but instead chose to quit when her employer's unwelcome advances made her uncomfortable.

charisma.³⁸³ In the case of *H.W. Gossard Co. v. Crosby*,³⁸⁴ the defendant was retained by the Gossard firm as a traveling saleswoman and demonstrator of fishbone corsets. She left Gossard because she was being asked to travel with a man who was a stranger to her. Gossard sued to enjoin her from selling another firm's corsets. Ms. Crosby's sex appeal is described in the Victorian language of the day. According to the employer:

[Her services] call for a person of high mental culture and refinement, of *strong and pleasing individuality, good address, prepossessing appearance, striking physical development, possessing a knowledge of physical culture*, and ability as a lecturer as well as the quality of high-class salesmanship, which characteristics, accomplishments, knowledge, attainments, and qualifications, were and are possessed by the defendant in a marked degree and which are rarely found in women.³⁸⁵

Evidence of this degree of bonding is much rarer in parallel cases between male managers and their male employees.³⁸⁶ Arguments in those cases usually revolved around whether the defecting salesmen had taken confidential trade secrets or customer lists with them.³⁸⁷ The salesmen were sued because they had taken some property or useful information to a rival employer. In Ms. Crosby's case, the coveted loss was her person, her being.³⁸⁸

Other cases demonstrate that the actresses did not like the conditions in which they were ordered to perform or the way they were ordered to present themselves. Lillian Russell's rejected suitor made her wear tights in circumstances to which she objected.³⁸⁹ Fanny Morant Smith's notoriously autocratic manager had driven away five actresses before her; he cast her in character roles which she believed were below her talents as a leading lady.³⁹⁰ Cissy Fitzgerald, having traveled with her manager from London to New York, did not wish to be sent still further to San Francisco and Australia. Ms. Crosby did not wish to be required to travel with a man who was a stranger to her. Several

383. See also *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910) (discussed *supra* Part I.B.3).

384. *H.W. Gossard Co. v. Crosby*, 109 N.W. 483 (Iowa 1906).

385. *Id.* at 484 (emphasis added).

386. For the most part there is no similar language in cases involving male salesmen who had left their firms' employ. The man's case that comes closest to *H.W. Gossard Co. v. Crosby* in its allegations about the personal characteristics of the male defendant is *E. Jaccard Jewelry v. O'Brien*, 70 Mo. App. 432 (1897). However, the plaintiff jewelry company's allegations were considerably milder. Plaintiff alleged the uniqueness of defendant by citing his "pleasing address and prompt attention to business." *Id.* at 434.

387. See, e.g., *William Rogers Mfg. Co. v. Rogers*, 20 A. 467 (Conn. 1890) (traveling sales manager who gained familiarity of customer list); *Chain Belt Co. v. Von Spreckelsen*, 94 N.W. 78 (Wis. 1903) (plaintiff alleged that employee had learned valuable trade secrets while in his employ).

388. See also discussion of *Edwards v. Fitzgerald* (N.Y. Sup. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910), *supra* Part I.B.3. See *supra* text accompanying notes 220-23.

389. She may have been embarrassed, but she complained only of the colds she kept catching.

390. See *supra* Part I.B.1.

incidents entail theater managers' objections to men whom the actresses wished to marry.³⁹¹ This pattern of testimony suggests that at least some of these women had legitimate grievances against their working conditions.

The woman employee may have found the workplace a more inhospitable environment because of her gender, or she may simply have had a lower threshold of tolerance for accepting the dictates of her employer when they touched her person too closely. Thus, it is conceivable that the right to quit is especially important to women and to members of other groups who have been historically subject to domination, exploitation, discrimination, and harassment. In this respect, other employees may also need to reserve a private space of personhood separate from their employers' control, and they may need to exit if the employer violates those boundaries, circumstances which are presented more acutely in some of the women's cases.

This evidence raises important issues of employee satisfaction, privacy, and autonomy. The employee's right to quit is her protection against employer abuses. The ability to threaten to quit gives her voice greater authority in raising grievances, and in resisting unfair demands or uncomfortable situations.³⁹² Uncomfortable incidents may have prompted actresses to seek greater distance from their employers by seeking the protection of positions elsewhere.³⁹³ Being able to reestablish oneself in a new job provides the employee with a place of refuge from distressing circumstances. Certainly in these contexts, giving employers the threat or power of injunction over the actresses' future employment once they had repudiated their contracts accorded them an undue advantage. Moreover, the very conduct of a male employer pursuing a woman who wished to repudiate an employment contract at some point crosses the professional line and could constitute harassment. Even a dispute that began over money could become engendered under the right conditions.

If male employers bonded more closely to important women they employed, and if the actions of women in quitting engendered stronger feelings on the employer's part, then women may have found themselves more often in circumstances from which they needed to exit and to exit quickly and cleanly. Applied in these circumstances, the *Lumley* rule has the unfortunate effect of tying the individual in greatest need of independence to her employer's continuing consent. Certainly any lawsuit can be used for harassment, and the

391. See *infra* note 393 (listing incidents).

392. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 82 (1970).

393. Several of the actresses married soon after breaking with their employers. See, e.g., *The Law After Lillian Russell: What Her American Managers Think of Her*, *supra* note 207, at 12 (discussing Lillian Russell's flight to England with new husband, Edward Solomon); *Loie Fuller May Marry*, N.Y. TIMES, Feb. 25, 1893, at 3; *Suit Against Loie Fuller*, N.Y. TIMES, May 18, 1893, at 9; *Rumor Says Loie Fuller is to Wed*, N.Y. TIMES, Sept. 5, 1894, at 9; *Theatrical Gossip*, N.Y. TIMES, June 13, 1895, at 13; *Hammerstein v. Sylva*, 124 N.Y.S. 535 (Sup. Ct. 1910), *rev'd sub nom.* *Hammerstein v. Mann*, 122 N.Y.S. 276 (App. Div. 1910). Could these impending marriages explain the friction between the employers and their women employees, or alternatively, could the unsettling nature of the disputes have hastened the marriages?

judges did not always uphold plaintiffs' sometimes overreaching claims,³⁹⁴ but the rule of negative injunction over a former employee seems particularly susceptible to abuse. When the employee simply wants to get out of the employment relationship and get on with her life, it is cold comfort if the court only later finds in her favor.

CONCLUSION

Perhaps it is not surprising to find discrimination against actresses in this line of nineteenth-century cases. After all, during the nineteenth century, the Supreme Court itself openly upheld the exclusion of women from the legal profession based on the ideology of domesticity.³⁹⁵ Given that social climate, it is not surprising that more subtle forms of discrimination against women would flourish as well.

What is more remarkable about this particular history is the evidence that gender discrimination created the pathway for the adoption of a more regressive legal rule. The ground first eroded under women, and subsequently free laboring men lost parity with their employers. Once women were enjoined, their cases served as the linchpin of precedent for extending this rule to other working people. Thus, culturally constructed attitudes about gender subordination had real consequences, not only for the lives and legal rights of these actresses, but also for the development of law as a whole. In this instance, unarticulated gender biases appear to have influenced the selection of legal rules for the treatment of all other employees under similarly restrictive contracts, even for free white working men.

Examining a history such as this raises several questions about the present. Recognizing that *Lumley* was a contested issue of employment policy and knowing the circumstances of its adoption undermines one's belief in the rule's presumptive legitimacy. That the *Lumley* rule's origins were suspect may not be sufficient grounds to abandon the rule. To the contrary, one might think that a rule that has survived for one hundred years in American law has proved its usefulness. Its survival, however, is no greater reason to exonerate it than its origins are to indict it. One must examine how the rule works in context.

A major benefit of examining context and history is that they shed light on our own time. We may be able to see patterns in the light of history that we are unable to perceive with the limited consciousness of our own experiences. As the late nineteenth century shaped present assumptions about the employment relation, so too, it has shaped many of our basic assumptions about gender and the appropriate roles of men and women in society, in the household, and

394. See e.g., *Hammerstein v. Sylva*.

395. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

in the workplace.³⁹⁶ If we were able to step back and comprehend the full scope of contemporary disputes, would we observe the same patterns taking shape, now as then? In occupations in which women coexist with men, do more women become caught in restrictive rules such as *Lumley*?³⁹⁷ If this phenomenon continues to be the norm, does it continue to be explained by expectations of gender domination in the workplace? Do the forms continue to replicate themselves?

Seeing a rule in its broader context poses the ethical question of whether the law's response to a pattern of disputes was the appropriate one. An ethically responsible legal rule must take into account the private injustices that flourish in its wake. As an issue of employment policy, the *Lumley* rule prescribes a certain legal setting between the related matters of employees' abilities to exit when dissatisfied with working conditions, their exercise of voice to raise issues of dissatisfaction, and their loyalty.³⁹⁸ By limiting employees' abilities to exit to substitute employment opportunities, the rule necessarily dampens the authority of employees' voices in raising and resolving grievances.³⁹⁹ As a consequence, the rule has the potential to condone or actually to invite employer abuses. Given what we now know about the linkage of exit, voice, and loyalty from the classic work of Alfred O. Hirschman, it is not surprising that the *Lumley* rule was adopted in the name of loyalty. The rule was justified in the name of enforcing loyalty, of "binding men's consciences"⁴⁰⁰ and of assuring that "the strong arm of the law" provided a check on the fidelity of an enterprise's employees.⁴⁰¹

Finally, history offers us the freedom to imagine other futures, other possibilities for rules whose acceptance has become habit. Imagine a rule formulated upon the norm of these working women's experiences. Imagine a rule formulated on understanding that employment contracts are agreements in principle, subject to modification and adjustment, but reserving always to the employee a private sphere of autonomy guarded by the employee's right to exit. Such a policy would assure employees a greater voice in the conditions under

396. See KESSLER-HARRIS, *supra* note 26, at vii-ix (using public comments made by recent President explaining why his wife had abandoned her career to illustrate close connection between 19th- and 20th-century views about women working).

397. There were no people of color in the cases to which the *Lumley* rule was applied in the 19th century. Nonetheless, it cannot go without saying that the analysis developed here raises the question of whether people of color were more likely to be caught in restrictive rules such as *Lumley* once they entered this particular employment market. For cases applying the *Lumley* rule to African-American performers in the 20th century, see *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player Louis Armstrong); *Fox v. Williams*, 52 Cal. Rptr. 896 (1966) (comedian Redd Foxx); *Beverly Glen Music v. Warner Communications*, 224 Cal. Rptr. 260 (1986) (singer Anita Baker in related cause of action for enticement).

398. HIRSCHMAN, *supra* note 392.

399. *Id.*

400. *Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852); *Daly v. Smith*, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874).

401. *Edwards v. Fitzgerald* (N.Y. Super. Ct. 1895), cited in *Hammerstein v. Sylva*, 124 N.Y.S. 535, 539-40 n.1 (Sup. Ct. 1910).

which they work.⁴⁰² The loyalty that the employer received would be the loyalty that the employer earned in its continuing dealings with employees, rather than a loyalty enforced by the courts upon contracts that were often more standardized than the products of negotiated consent.

Most individuals enter into employment contracts with hopes and dreams. Few enter with the end of the relationship clearly in mind.⁴⁰³ Still fewer anticipate that their employer will be able to prevent them from working elsewhere should they wish to leave. Would employees willingly enter employment relationships that so compromised their satisfaction, their personal autonomy, and maybe even their dignity if the situation unexpectedly deteriorated? Or would they enter these relationships only if they had no real choice, if they were impelled by necessity to work, and if they were unable to influence the terms? Perhaps they would remain, despite unsatisfactory working conditions, only for the income or for love of the work, if the alternative was not to be able to do the work at all. But that is a far cry from the American ideal of free labor.

402. HIRSCHMAN, *supra* note 392.

403. An employee could reasonably read an exclusivity clause in a contract as merely supplementary to the primary contract for performance, meaning only that she agreed to refrain from engaging in other performances that interfered with her contract as long as she was satisfied in her work. If employees had this expectation of contractual terms, it would undermine the appeal to fairness implicit in the argument that the employee had voluntarily consented to an injunction from working elsewhere when she tries to quit. Viewed this way, the *Lumley* rule looks more like a rule imposed on employees, despite their expectations, for the benefit of employers, than it looks like a fair device for enforcing private agreements.