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THE CRISIS OF CHILD CUSTODY: A HISTORY OF THE BIRTH OF FAMILY LAW IN ENGLAND

DANAYA C. WRIGHT*

*Ask—may the victim of a hasty vow
Ne'er seek release nor remedy? Ah no!
A maiden once enclosed in nuptial ties
Must wear her fetters till she sins or dies;
And suffer as she may, within these bounds,
No cure for sorrows and no balm for wounds.
Such finished torture England's code can boast;
A formal framework, which at woman's cost,
Flings a disguise o'er ruthless tyranny,
And drugs men's conscience with a special tie.¹*

—Harriet Grote (1853)

* Associate Professor of Law at the University of Florida's Levin College of Law. This article has been a very long time in the making. It began in the spring of 1991, in a legal history seminar taught by Bill Nelson at New York University, who then read multiple versions of it over the next ten years. It evolved during my graduate work at Johns Hopkins University where I had the invaluable assistance of Judith Walkowitz, Frances Ferguson, Sue Hemberger, and Joel Grossman. I presented this material a number of times to faculty workshops at Indiana University at Indianapolis, New York University, and the University of Florida. I owe a huge debt to my Florida colleagues and thank the deans for their financial assistance through summer research grants. I also want to thank my Indiana colleagues: Elizabeth DeCoux, Florence Roisman, David Papke, Dan Cole, and Michael Heise. A draft of this article was selected by a number of judges to participate in the First Annual Stanford-Yale Junior Faculty Forum. I want to thank those readers as well, including Robert Weisberg, Robert Ferguson, Robin West, Bill Eskridge, Ron Gilson, and Alan Schwartz. I owe a huge debt of gratitude to Dirk Hartog who has encouraged me, prodded me, and ultimately sent me off to stand on my own. Greg Alexander has also read and encouraged my work and been a great mentor. I have to thank Kendal Broad and Liz Fakazis for their patience through this work and I drink a toast to the perspicacious Norma Basch. And finally, I dedicate this article to the memory of June Starr, a wonderful scholar, a delightful friend, a dedicated mentor, and a profound inspiration.

¹ Harriet Grote, Lines Suggested by More than one Recent Domestic History, in Collected Papers in Prose and Verse, 1842-62, at 281-82 (1862); see also Philippa Levine, 'So Few Prizes and So Many Blanks': Marriage and Feminism in Later Nineteenth-Century England, 28 J. Brit. Stud. 150, 166 (1989).

I. INTRODUCTION

In 1856 the House of Lords engaged in extensive debates over the introduction of a bill that would reform the law of divorce in England.² Numerous critics of the law complained that the cost and complexities of jurisdiction foreclosed the remedy to the poor, while many women complained that the dual standards for obtaining a divorce were unfair to women. To get a divorce, a husband (and it was only husbands) had to bring a criminal conversation action against his wife's lover and get an award of damages, obtain a legal separation in the ecclesiastical courts, then petition both Houses of Parliament for a separate bill of divorce allowing him to remarry.³ The total cost could easily surpass £1,000. A woman

² 142 Hansards 401, 1968 (1856); 143 Hansards 230 (1856). During the course of that debate, Lord Campbell recounted a legal anecdote that was probably familiar to many members of that august body. As Campbell narrated:

In a case tried before Mr. Justice Maule, the prisoner, being convicted of bigamy, was called upon to say why sentence should not be passed upon him. He then said, "My wife was unfaithful; she robbed me and ran away with another man, and I thought I might take another wife." The reply of the learned Judge was—"You are quite wrong in supposing that. You ought to have brought an action for criminal conversation; that action would have been tried before one of Her Majesty's Judges at the assizes; you would probably have recovered damages, and then you should have instituted a suit in the ecclesiastical court for a divorce *à mensâ et thoro*. Having got that divorce, you should have petitioned the House of Lords for a divorce *à vinculo*, and should have appeared by counsel at the bar of their Lordships' House. Then, if the Bill passed it would have gone down to the House of Commons; the same evidence would possibly be repeated there; and if the Royal assent had been given after that, you might have married again. The whole proceeding would not have cost you more than £1,000." "Ah, my Lord," replied the man, "I never was worth a 1,000 pence in all my life." The Judge's answer was, "That is the law, and you must submit to it." Who could wonder that the man should return, "That is hard measure to us who are poor people, and cannot resort to the remedy which the law has afforded to the rich."

142 Hansards 1985 (daily ed. June 26, 1856).

³ In England the equivalent of a legal separation, without the right to remarry, was available through the ecclesiastical courts on a number of grounds, including cruelty, adultery by either party, or a combination of the two. This was entitled a divorce *à mensâ et thoro* and could include separation for homosexuality (under the rubric of cruelty) and perhaps desertion as well. A divorce with the right to remarry was available only by act of Parliament and required that the parties previously obtained a legal separation in the ecclesiastical courts as well as a recovery of damages in a criminal conversation action before the petition could be filed. See Lawrence Stone, *Road to Divorce: England 1530-1987* 324 (1990) [hereinafter Stone, *Road to Divorce*]. The Parliamentary divorce was available only on the grounds of adultery by the wife and served primarily to protect childless aristocrats who wanted a new wife in the hopes of generating an heir, or members of the nobility whose errant wives threatened to insert spurious offspring into the family.

generally could not get a divorce, nor could she sue her husband's mistress for alienation of his affections.⁴ She could only obtain a legal separation in the ecclesiastical court that gave her no right to remarry, and any alimony order out of the ecclesiastical court was unenforceable without a petition for enforcement in the Royal Courts.

It was not unexpected, therefore, that during a period of intense law reform, Britons would challenge the unwieldy and uneven laws of divorce.⁵ In the 1856-57 debates, Parliament focused primarily on two issues: simplifying the process in order to make justice available to a wider class of litigants and equalizing the rights of husbands and wives to seek absolute divorce. In the end, a bill was passed in 1857, to take effect January 1, 1858, establishing a unitary court with jurisdiction over all matrimonial matters, thus expanding the court's availability to a greater percentage of the population,⁶ though still not bringing justice to the poor who could not afford the fees or the trip to London where the court sat. Furthermore, in a compromise between those who wanted the law to imitate the Scottish law of divorce granting both husbands and wives equal rights to seek divorce, and those who wanted to entirely foreclose the possibility to wives, the final bill granted husbands the right to an absolute divorce upon evidence of mere adultery by their wives, but wives needed to prove aggravated adultery to petition for the same remedy.⁷ This law stood relatively unchanged until 1937 when desertion, cruelty, habitual drunkenness, and incurable insanity were added as fault bases that stood alone.⁸

The only wives who obtained Parliamentary divorces proved aggravated adultery, general adultery, and incest on the part of their husbands. *Id.* at 192-93. The cost of a Parliamentary divorce was exorbitant, even as high as £5,000. *Id.* at 354-57. Divorce in Scotland proceeded on a very different premise, the equality of the husband and wife to seek divorce on the same grounds of adultery, cruelty, or desertion. *Id.* at 349-51.

⁴ In the 150 years from 1701 to 1857, 320 parliamentary divorces were granted to husbands, and only 2 to wives. *Id.* tbl. 10.1, at 432. During that period 8 women petitioned for parliamentary divorce and only 2 were accepted, while 330 men in Great Britain and 39 in India petitioned for divorce and 320 were accepted.

⁵ England went through significant law reform in the nineteenth century, primarily in commercial and criminal law. See David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain (1989); Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England (1983).

⁶ An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., c. 85.

⁷ *Id.* §27 (defining aggravated adultery as incestuous adultery; bigamy with adultery; rape, sodomy or bestiality with adultery; cruelty with adultery; or adultery with desertion for two years).

⁸ Matrimonial Causes Act, 1 Edw. 8 & 1 Geo. 6, c. 57 (1937); Stone, Road to Divorce, *supra* note 3, at 397-401.

The 1857 bill also included a provision granting the new court jurisdiction to make interim and final orders regarding the custody of any children of the marriage. The bill further provided that upon receiving a judicial separation,⁹ a wife's property, wages, and inheritances would be held to her own private use as if she were a *feme sole*.¹⁰ The bill effectively combined the jurisdiction of the ecclesiastical courts over marital disputes with the jurisdiction of the law courts over property, the jurisdiction of Parliament over absolute divorces, and the jurisdiction of the equity courts over custody of children and equitable estates, locating them all in a new court operating as a wing of the probate courts with appeal to a bench of at least three justices from the Court of Arches, the Queen's Bench, Common Pleas, the Admiralty Court, and the Chancery.¹¹

This divorce reform bill has been identified by scholars as critical in improving the status of women.¹² It has been credited with the institutionalization of domesticity and separate spheres.¹³ It arguably was the legal origin of a dedicated family law.¹⁴ It can be seen as an important precursor to modern alternative dispute resolution and mediation practices

⁹ The judicial separation was a legally sanctioned separation replacing the divorce *à mensâ et thoro* in the ecclesiastical courts. Remarriage was not allowed in either instance. 20 & 21 Vict., c. 85, §7.

¹⁰ Under the law of coverture, a woman who married lost ownership of all her personal property to her husband, who also acquired a life interest and complete control over her real property. She could not sue or be sued, enter into a contract, or own her own wages in opposition to her husband. See 1 William Blackstone, *Commentaries* 422-42 (George Sharswood ed., Childs 1862).

¹¹ 20 & 21 Vict., c. 85, §12.

¹² Lee Holcombe referred to the Act as

a landmark in the history of English law. Seen in the context of the broad movement for legal reform in the nineteenth century, it was the first major step taken to eliminate conflicting jurisdictions and rival courts. As such, it anticipated the great reform carried through by the Judicature Act of 1873. Seen from the point of view of the nineteenth century women's movement, the Divorce Act was equally important, for it represented a significant step in the direction of women's emancipation, especially with respect to their property rights.

Holcombe, *supra* note 5, at 103; see also Lawrence Stone, *The Family, Sex, and Marriage in England: 1500-1800*, at 668 (abr. ed. 1977) [hereinafter Stone, *Family, Sex, and Marriage*]; *A Century of Family Law: 1857-1957* (R.H. Graveson & F.R. Crane eds., 1957) [hereinafter *A Century of Family Law*]; Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*, at 47-8 (1989).

¹³ See generally Steven Mintz, *A Prison of Expectations: The Family in Victorian Culture* (1983); Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* 498-507 (1988).

¹⁴ *A Century of Family Law*, *supra* note 12; S.M. Cretney, *Principles of Family Law* 3 (4th ed. 1984); P.M. Bromley, *Family Law* 1-6 (5th ed. 1976).

because it provided a less antagonistic tribunal than traditional adversarial courts.¹⁵ Historians of the period accept the reform as a logical, positive step in providing greater protections to women and children, because the creation of a special, dedicated matrimonial causes court recognized the family as a communal, integrated aggregate of interrelated interests.¹⁶ When women have no protections in either their public or private capacities, reform giving them some limited protections within the private sphere is easily seen as an improvement.

Yet few historians have explored the interrelationship between the general social pressure for protecting the domestic sphere and the complex institutional and jurisdictional constraints that had to be dealt with in creating a legal or judicial solution to the inequities in divorce law. A few historians have examined the political climate of the 1850s to see what might have spawned such an important legal reform. It was a critical stage in the women's movement and in the expanding role of women in the marketplace caused by industrialization.¹⁷ It also followed the disastrous Crimean war and the well-known missionary work of Florence Nightingale, a woman whose war activities challenged the common notion that women should stay safely in the home.¹⁸ As Lee Holcombe suggests, this was a decade of law reform that included both external societal pressure to protect the rights of women and internal pressure to reexamine the intricate and arcane proceedings of both chancery and common law courts.¹⁹ Much has been written on this period, the growing women's movement, and the social ideology of separate spheres that relegated women to a private, domestic world, while men operated in and from a public, commercial world.²⁰ From the separation of public and private spheres and the rise of the cult of domesticity, it seems a small step to a separate set of laws and a separate court system for family disputes. Historians have overlooked, however, the

¹⁵ John Eekelaar, Family Law and Social Policy 53-63 (2d ed. 1984).

¹⁶ Susan Maidment, Child Custody and Divorce 116-26 (1984).

¹⁷ Louise A. Tilly & Joan W. Scott, Women, Work, and Family (1978); Ivy Pinchbeck, Women Workers and the Industrial Revolution: 1750-1850 (1969). However, it was not as tumultuous as the period preceding the 1832 reform bill or the second reform bill of 1867. Holcombe, *supra* note 5, at 49-50.

¹⁸ Nancy Boyd, Three Victorian Women Who Changed Their World: Josephine Butler, Octavia Hill, Florence Nightingale 167-234 (1982).

¹⁹ Holcombe, *supra* note 5, at 50.

²⁰ Linda K. Kerber, Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History, 75 *J. Am. Hist.* 9 (1988); Stone, Family, Sex, and Marriage, *supra* note 12; Peter Laslett, The Family as a Public and Private Institution: An Historical Perspective, 35 *J. Marriage & Fam.* 480 (1973); Christopher Lasch, Haven in a Heartless World: The Family Besieged (1977); Ann Dally, Inventing Motherhood: The Consequences of an Ideal (1982).

role that child custody disputes played in divorce reform.²¹ The first inter-spousal custody case of a wife suing her husband for custody of their infant child occurred a mere fifty years before this radical institutional change, though property and divorce disputes had been treated in a relatively consistent manner for centuries. These custody cases were profoundly unsettling to the courts, for they challenged the very core of coverture, the legal fiction of the unity of husband and wife.²² From within the legal rules and mechanisms of the chancery, these inter-spousal custody cases put such pressure on the equity courts that the internal pressure for reform equaled or exceeded the pressure for reform outside the law.

Without denying the profound importance of women activists, of ideological and social beliefs in a changing role for women, and of the pressures imposed by industrialization, I believe an especially important catalyst for the new court and the new law that came out of it was the handful of extremely difficult and unsettling custody cases that had begun to appear after the turn of the nineteenth century. Few people realize that it was not until the late nineteenth century that mothers began obtaining custody in sufficient numbers and the law began to express something like maternal rights to children.²³ It is almost unthinkable today to imagine divorce occurring without any legal attention to custody of the children of the marriage. But unlike the law of divorce and property, the law of inter-spousal custody was relatively new.²⁴ In attempting to solve the difficulties posed by the custody cases, the courts forced Parliament to come up with a new solution—a unified family law court—that continues to serve as the model for legal resolution of family breakdowns today. Out of the court grew a new set of doctrines we have come to call family law, doctrines that many believe have perpetuated women's subordinate status.²⁵ I suggest that

²¹ See Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law under Patriarchy*, 17 *Law & Hist. Rev.* 247 (1999) for a discussion of English custody law until 1839. See also Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 *Colum. L. Rev.* 1344 (1999).

²² Coverture was the term used for the period of marriage in which a wife's legal existence disappeared, or was "covered" by that of her husband. As the marital unit was seen as a single legal entity, defined and represented by the husband, the wife's legal rights were suspended during the period of coverture. Blackstone's definition is the most commonly used statement of the legal status of married women. See 1 Blackstone, *supra* note 10, at 441.

²³ See Maidment, *supra* note 16.

²⁴ Because coverture was so strict, and resort to legal remedies relatively rare, mothers and fathers just had not fought over their children before the nineteenth century. But as the fights began, they posed very difficult issues for the courts, and ultimately had a profound impact on the rest of the law of domestic relations.

²⁵ Katherine O'Donovan, *Family Law Matters* (1993); Maidment, *supra* note 16, at 5; *A Century of Family Law*, *supra* note 12, at 382, 386-90.

the court most importantly failed to reflect the type of change advocated by nineteenth-century women reformers. Moreover, the new court and the law that evolved from it appear not to have adequately addressed either the class or gender biases that preoccupied the minds of the legislators.²⁶

In analyzing legal change, it is important to examine both the internal constraints of legal institutions as well as the external social pressures that spurred the change. It is also important to examine the context in which parties turn away from informal mechanisms and enter a court to resolve family disputes. In this article I give a history of the parental disputes over custody that made it to the courts from the early eighteenth century until nearly thirty years after the 1857 divorce reform. In doing so, I examine the cases, relevant legislation, the political writings about the issue of custody, and the law's role in determining a mother's rights to her children. I also look briefly at writings by women, both reformers and novelists, about the relationship of law to motherhood and child rearing. I cover three basic periods: 1700 to 1839 when the first legislation was passed giving mothers a right to petition for custody of their children, 1839 to 1857 when the divorce courts were created and given the power to make interim and final custody orders as part of their divorce and separation powers, and 1857 to the late 1880s when further reform in guardianship, custody, married women's property, and divorce occurred. Although I view in this article the 1857 divorce reform as the pivotal change in the law of coverture and custody, the Custody of Infants Act that was passed in 1839 was terribly important, not for what it accomplished, but for what it did not accomplish. Much time is spent analyzing the social context of that reform and the unsatisfactory way it was implemented. Its failure, in many ways, spurred the 1857 reform.

In looking at these materials, I focus on three different perspectives: the institutional aspects and constraints of the multiple jurisdictions, the sociological aspect of changing attitudes toward women, and the legal aspects of the substantive doctrines that eventually became what we now call family law. I suggest that the rising tide of inter-spousal custody cases placed such a strain on the chancery courts, both procedurally and doctrinally, that reform was necessary. However, the reform that occurred was dictated not by the needs or wishes of the female litigants but rather by the institutional constraints of the multiple jurisdictions and the explosive potential of these cases on the law of coverture. My overarching conclusion is that the family law that became possible by virtue of the new, unified

²⁶ This history follows in a long line of studies that have reevaluated the meaning of law reforms from a different perspective, usually the perspective of subordinated groups. This perspective reveals that the reform may have made many people worse off, frustrated future reforms, and had unintended consequences. See, e.g. Reva Seigel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor*, 103 *Yale L.J.* 1073 (1994); Eileen Spring, *Law, Land & Family: Aristocratic Inheritance in England, 1300 to 1800* (1993).

court perpetuates most of the substantive legal disabilities of women, is not the manner of reform sought by the women advocates of the period, and is crucial in maintaining patriarchal relationships within families under the guise of legal formalism.

II. INROADS AGAINST PATRIARCHY: GUARDIANSHIP AND CUSTODY, 1700-1804²⁷

The first inter-spousal custody case occurred in 1804 when Leonard Thomas De Manneville, an estranged husband, snatched his nursing daughter from the breast of his wife and she brought suit in King's Bench and Chancery for the return of the child.²⁸ It is hard to imagine that parents had not fought over custody of their children before 1804. In fact, they no doubt did fight over how their children were to be educated, what religion they would be raised in, and where they would live if the parents separated.²⁹ But under the law of coverture, wives and husbands could not

²⁷ This section and the next two sections are synopses of material that appeared in much longer form in Wright, *supra* note 21.

²⁸ R v. De Manneville, 5 East 222 (1804); De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804). A parent who wished to claim custody had two methods to follow. Anyone, principally the father, could request a writ of habeas corpus to be issued out of any of the superior courts at Westminster if his child was being held improperly by another. A child who had not reached the age of discretion (twelve for girls, fourteen for boys), would be surrendered to the father regardless of the father's bad character. *Ex parte Skinner*, 9 Moore C.P. 279 (1824). The preferences of a child over the age of discretion would be considered but by no means would control. Obviously, seeking this mode of redress meant that the petitioner had to be located near London and have adequate funds to petition the court. See also 1 MacPherson on Infants ch. 15 (1843).

The second method, equally restrictive, was to petition in Chancery, which had wide jurisdiction over infants in its right as *parens patriae*. This authority was exercised solely by the Court of Chancery which recognized, as early as 1745, its jurisdiction to consider the best interests of the child. Smith v. Smith, 26 Eng. Rep. 977 (Ch. 1745) (per Lord Hardwicke, L.C.) ("[I]t is not a profitable jurisdiction of the Crown, but for the benefit of the infants themselves."). This power, however, did not extend to deprive fathers of custody if they had not forfeited their rights through misbehavior. The court, in 1883, summarized this well-established doctrine in In re Agar-Ellis, where Bowen, L.J. claimed: "It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can." 24 Ch. D. 317 (1883) (summarizing In re Fynn, 2 DeG & Sm. 457 (1848) and In re Curtis, 28 L.J. (n.s.) Ch. 458 (1859)). The Court of Chancery could interfere with a father's rights on five basic grounds: (1) unfitness in character or conduct, (2) failure to provide support for his children, (3) lack of means to support his children, (4) by agreement (not between fathers and mothers but between fathers and third parties if the third parties had acted so that revocation would prejudice the child), and (5) if the father intended to leave the jurisdiction.

²⁹ Private separation deeds often included child custody provisions; however, those provisions generally were not enforceable to the extent they deviated from the traditional situation of the father having absolute custody and control. See Westmeath v. Westmeath, 10 Ves. 51 (Ch. 1804).

sue one another because they were deemed at law to be a single entity. Although spouses surely disagreed over who would have custody and control of their children, the law provided no forum for resolving such disputes. When Mrs. De Manneville sued her husband, however, she thought that as a mother she would have some legal entitlement to her still-nursing child. She was wrong, but perhaps she was justified in thinking the courts might protect her.

Throughout the eighteenth century, courts had adjudicated a variety of cases involving custody and guardianship of children that were not disputes between two living parents but between one parent and a third party. The cases reveal four trends: a gradual decline in the rights and prerogatives of fathers, a consistent recognition of and protection for mothers as testamentary or socage guardians,³⁰ a gradual awareness of and protection for children's interests as the courts began to interfere in aspects of childrearing and educational decision-making, and a strong willingness on the part of judges to interfere with familial life in the name of the Crown's role as *parens patriae*. These four strands reflected changing views about the origins and scope of patriarchal power and the appropriateness of legal oversight in family affairs.

The first strand of cases showed a decline in the absolutism of paternal power over children that had been articulated by the courts for centuries.³¹ In a spectacular case, the Grand Opinion of 1717, George I claimed a royal prerogative over the education, custody, and marriage of his grandchildren against the wishes of their father, the Prince of Wales.³² In the course of the debate Sergeant at Law Reynolds, citing a litany of case law, Coke on Littleton, Bracton, Justinian, Seldon on Fleta, a number of statutes, and even the Magna Carta, argued that "[t]he Guardianship of the Children of Right belongs to the Father,...and the Custody appears to belong to the Father and not to the Grandfather."³³ On the King's side,

³⁰ Guardianship in medieval England was divided into categories corresponding to the different tenures of land held by the deceased parent. By the eighteenth century most land was held in socage tenure, which is the closest equivalent to current practice. Socage guardians, therefore, are guardians of children who inherit land in socage tenure. See Wright, *supra* note 21; see also Elaine Clark, The Custody of Children in English Manor Courts, 3 *Law & Hist. Rev.* 333-48 (1985).

³¹ For general treatises on the English law of guardian and infant custody, see Charles Viner, Guardian and Ward, in 14 General Abridgment of Law and Equity 170, 170-74 (1793); William Forsyth, A Treatise on the Law Relating to the Custody of Infants (1850); 1 Blackstone, *supra* note 10, at 446-59.

³² Although this is a wild and special case, it utilized a series of legal arguments about patriarchy that raised a host of legal questions that would face the courts over the next century and a half. Control over the marriage, education, and custody of children as between mothers, fathers, and guardians would be disputed until well into the twentieth century. See discussion *infra* Part IX (on custody and marital performance).

³³ The Grand Opinion for the Prerogative Concerning the Royal Family, 401 Fortescue 909, 911 (1717) [hereinafter Grand Opinion].

however, was the ancient custom making it a crime to marry into the royal family without the crown's consent.³⁴ The issue was framed as a conflict between the royal power to control political liaisons—which “in its Nature [is] so great a Trust that it cannot by the Constitution be lodged anywhere but in the Crown”—and the Law of the Father—which is premised on “narrow Rules of private property.”³⁵ In order to reconcile the two legal doctrines, the justices resorted to a legal fiction akin to coverture, that the father and son were a political unit and therefore could not in legal fact disagree.³⁶ And as with coverture, the patriarch ultimately prevailed and the custodial rights of the father were deemed subordinate to the political rights of the king.³⁷

The Grand Opinion was followed by a series of cases in which fathers tried to get their children back after having relinquished temporary custody to third parties. In many cases, the father lost permanent custody for economic reasons that ultimately benefited his children. In 1732 a father petitioned Chancery for custody of his three daughters (and control over their inheritances) who had been raised by his recently deceased wealthy brother.³⁸ Chancellor King dismissed the father's petition as he could not give the children to their father without violating the terms of the brother's will, which he refused to do merely on a petition, because the financial consequences to the children would be great. He held that a father cannot encourage expectations in his children and then arbitrarily turn around and deprive them of those advantages.³⁹ Similarly, by accepting benefits from a will a father would be construed to have forfeited his

³⁴ It was not until 1772 that the Royal Marriages Act was passed. 12 Geo. 3, c. 11 (1772).

³⁵ Grand Opinion, *supra* note 33, at 912-13.

³⁶ As explained in Grand Opinion:

[Because] it was High Treason, by the Common Law of England (before any Statute) to compass and imagine the Death of the King's eldest Son and Heir, . . . and this Offence is called *Crimen Lese Majestatis*, a Crime that hurts the Majesty of the King himself. It follows then that as they are but one Person in Law, so in Point of Law they are supposed to have but one Will in relation to the Education, Marriage and Management of the Grandchildren; and the Prince of Wales in Point of Law is supposed in every Thing to concur with his Majesty, which quite subverts and destroys the Distinction in common Persons of Grandfather, Father and Son.

Supra note 33, at 912.

³⁷ This was not a surprising outcome but it shows an important transition as the justices attempted to spell out the basis on which paternal rights to custody were founded.

³⁸ Ex parte Hopkins, 24 Eng. Rep. 1009 (Ch. 1732).

³⁹ Forsyth, *supra* note 31, at 39.

paternal rights in favor of guardians appointed under the will.⁴⁰ Even previous noninterference with a child's expectations was deemed a sufficient "election" by the father to deny his paternal rights.⁴¹

The Court of King's Bench, under habeas corpus proceedings, would not recognize a power in the father to have his children returned to him if they were of the age of discretion or the father appeared unfit. The court might release the children from whatever custody they were wrongfully in, but it would not order the children into the custody of the father.⁴² Where a father was insolvent, the court would interfere to appoint a suitable guardian.⁴³ The court also would interfere with a father's right to determine the marriage of his child, if the potential spouse was socially or financially inferior to the child.⁴⁴

The courts also faced petitions to limit paternal rights on the basis of physical harm to children. In 1763, in Rex v. Sir DeLavel,⁴⁵ Lord Mansfield⁴⁶ of King's Bench faced a father petitioning for the return of his seventeen-year-old daughter whom he had apprenticed years earlier to a music master. The child's contract had apparently been purchased by an old libertine who, claiming to teach her music, instead made her his mistress. Because the child was over the age of discretion she was released from her indenture and allowed to reside where she chose; Mansfield would not return her to a father who allegedly had acquiesced in the arrangement.⁴⁷

Four years later Mansfield faced another custody case, this one by a father seeking to regain custody of his six-year-old child who was living

⁴⁰ Blake v. Leigh, 27 Eng. Rep. 207 (Ch. 1756).

⁴¹ Creuze v. Hunter, 30 Eng. Rep. 113 (1790) (the father was not only insolvent but had been outlawed and resided abroad); see also Ex parte Warner, 29 Eng. Rep. 799 (Ch. 1792) (the father was alleged to be an "unfit" person). However, though the court would find equitable estoppel where the father had agreed or encouraged expectations for his children by allowing them to reside elsewhere, it would find no estoppel when the other party was the mother and the child resided with her pursuant to a separation deed. Westmeath v. Westmeath, 10 Ves. 51 (Ch. 1804). The father's willful and sworn agreement to allow the mother to retain custody would not bar his suit for return, though an informal living arrangement with third parties would.

⁴² Dominus Rex v. Smith, 93 Eng. Rep. 983 (K.B. 1735).

⁴³ Wilcox v. Drake, 21 Eng. Rep. 416 (Ch. 1784).

⁴⁴ See Beaufort v. Berty, 22 Eng. Rep. 411, 580 (Ch. 1721); Roach v. Garvan, 27 Eng. Rep. 954 (Ch. 1748).

⁴⁵ 97 Eng. Rep. 913 (K.B. 1763).

⁴⁶ Lord Mansfield was a powerful liberalizing force on the bench of the royal courts and during his tenure as Chief Justice of King's Bench he dramatically modernized the law of commercial contracts and secured transactions. See Lieberman, *supra* note 5.

⁴⁷ 97 Eng. Rep. 913.

with the maternal grandfather and mother.⁴⁸ Mansfield had no difficulty in balancing the rights of the parties. “The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper,...the Court will not think it right that the child should be with him.”⁴⁹

As the century progressed, further incursions were made against father’s rights. In 1790, a father, whose financial affairs were so entangled that he was forced to reside abroad, was denied custody of his son.⁵⁰ In 1792 another father was denied custody of his children because he was in Newgate Prison for cruelty to his wife.⁵¹ Although financial arrangements were the principal reasons for interfering with fathers’ rights, by the end of the century judges spent less time trying to justify their power to interfere and more time analyzing the healthiness of the childrearing environment and the culpability of the father in not providing adequate support, abusing his children, or precipitating the mother’s separation.

The second strand of eighteenth-century cases concerned the rights of mothers to custody of their children after death of the father.⁵² In many cases a mother would be appointed guardian without court proceedings if the father had so named her in his will.⁵³ The presumption of the mother’s guardianship rights extended so far that unless explicit language identified a different testamentary guardian, the mother would prevail.⁵⁴ When a mother was named testamentary guardian, her subsequent remarriage would not terminate the guardianship unless the father’s will specifically provided for her removal under those circumstances.⁵⁵ In many of the cases before

⁴⁸ This case was defended by the mother’s father, not surprisingly, since coverture would otherwise have prevented the wife from suing out a petition against her husband in her own name.

⁴⁹ Blisset's Case, 98 Eng. Rep. 899 (K.B. 1767).

⁵⁰ Creuze v. Hunter, 30 Eng. Rep. 113 (1790).

⁵¹ Ex parte Warner, 29 Eng. Rep. 799 (Ch. 1792); see also Potts v. Norton, 24 Eng. Rep. 666 (Ch. 1792).

⁵² Mothers were not deemed automatic guardians upon death of a father. Under the 1646 Abolition of Tenures Act, fathers were given the power to designate a testamentary guardian who could entirely exclude the mother from access to her children. 12 Car. 2, c. 24, §8 (1660). By 1700, judges appeared a little uncomfortable with the absolute power of testamentary guardians to remove the mother altogether unless the guardian was explicitly given that power by the father. See Dormer v. Dormer, 23 Eng. Rep. 235 (Ch. 1679); Abramowicz, *supra* note 21.

⁵³ Ward v. St. Paul, 29 Eng. Rep. 320 (Ch. 1789); Mellish v. De Costa, 26 Eng. Rep. 405 (Ch. 1737); Dillon v. Mount-Cashell, 2 Eng. Rep. 207 (H.L. 1727).

⁵⁴ Dormer v. Dormer, 23 Eng. Rep. 235 (the father named “executors” of his will, granting them rights over the property, but the mother retained custody because no “guardian” had been appointed).

⁵⁵ Ratcliffe's Case, 76 Eng. Rep. 713 (K.B. 1592); Dillon v. Mount-Cashell, 2 Eng. Rep. 207 (H.L. 1727); See Beaufort v. Berty, 22 Eng. Rep. at 414 n.20.

the courts, mothers had been appointed guardians and were later challenged, either for remarrying or for arranging socially disadvantageous marriages for their children.⁵⁶ But these challenges were made principally in the children's interests and constituted the same arguments made against fathers who had abused their trusts. In many of the cases, lawyers and judges appeared conversant in a language of mothers' rights, by nature and nurture, and the special care they would bestow on their natural children.

Catholic mothers, or mothers who had married into the Catholic faith, were severely curtailed in their custodianships.⁵⁷ As fathers had the unilateral power to make religious, medical, and educational decisions for their children until 1973, courts were particularly unyielding on maternal rights in this area.⁵⁸ When fathers were absent, though, mothers were viewed as providing vital nurturance and care. In a case between a mother and a paternal grandfather, Lord Hardwicke agreed that "the children have a natural right to the care of their mother," as he ordered the children surrendered from the grandfather to the mother.⁵⁹

It would be inaccurate to say that the courts were especially protective of maternal rights. Yet except in cases of religion and remarriage, most mothers took over guardianship duties upon the deaths of their husbands.⁶⁰ More significant was the growing acceptance of a rhetoric of maternal nurturance and care that lawyers and judges used in considering the appropriateness of guardianship orders.

From the perspective of children we can identify a third strand in the cases, judicial reasoning that placed the interests of children higher than those of either parent. Courts regularly interfered with parents or guardians who tried to marry children to their social or economic inferiors.⁶¹ Parents or guardians often fought over educational and religious decisions for their

⁵⁶ Roach v. Garvan, 27 Eng. Rep. 954 (Ch. 1748); Eyre v. Countess of Shaftesbury, 24 Eng. Rep. 659 (Ch. 1722); Edwards & Wise, 27 Eng. Rep. 587 (Ch. 1740).

⁵⁷ Lady Teynham v. Lennard, 2 Eng. Rep. 204 (H.L. 1724). In the case of Edwards & Wise the court noted that had Mrs. Edwards been a testamentary guardian or socage guardian, instead of merely a guardian by nurture, the result might have been different. 27 Eng. Rep. 587 (Ch. 1740). See also Preston v. Ferrard, 2 Eng. Rep. 202 (H.L. 1720).

⁵⁸ Guardianship Act, 1973, c. 29, §1. See also In re Agar-Ellis, 24 Ch.D. 317 (1883) (citing late nineteenth-century cases depriving Catholic or atheistic mothers of custody); In re Besant, 11 Ch. D. 508 (1879).

⁵⁹ Mellish v. De Costa, 26 Eng. Rep. 405 (Ch. 1737).

⁶⁰ This was not the case for children whose deceased fathers held land in knight service prior to 1646. See Viner, *supra* note 31, at 160-68; Wright, *supra* note 21, at 263-67; Clark, *supra* note 30, at 333-48.

⁶¹ Roach v. Garvan, 27 Eng. Rep. 954 (Ch. 1748); Eyre v. Countess of Shaftesbury, 24 Eng. Rep. at 659; Lord Shipbrook v. Lord Hinchinbrook, 21 Eng. Rep. 383 (Ch. 1778).

children. Male guardians, in particular, fought over whether children should go to Eton or Harrow, Oxford or Cambridge, and the courts often would decide based on the child's needs and interests. In Beaufort v. Berty, the court resolved to leave the child at Westminster rather than move him to Eton, as one of his guardians requested, because it appeared that "Lord Noel was recovered in his health, and had made a considerable progress in the school, and that a new method of instructing him might retard his learning."⁶²

Furthermore, where money was an issue, the courts did not hesitate to protect children's expectations, even at the expense of parental rights.⁶³ In Creuze v. Hunter, the Chancellor "would not allow the colour of parental authority to work the ruin of his child."⁶⁴ The courts' horror at putting a child into prostitution or indoctrinating it in Catholicism made those grounds for interfering with the legal rights of parents and guardians alike.⁶⁵ Although some justices equated the father's powers to dispose of the guardianship of his children with his power to dispose of his land, that power would be interfered with if it were abused.⁶⁶ Throughout the eighteenth century judges articulated a growing rhetoric of child welfare issues as justification for interfering with traditional parental rights.

The fourth strand of cases involved the power of the crown to interfere with private rights of parents. After the Grand Opinion, the courts expressed no hesitation in interfering to protect children. With regard to the jurisdiction of King's Bench to deny the father's claim for return of his child, Lord Mansfield said in DeLavel that the true rule is "that the Court are to judge upon the circumstances of the particular cases; and to give their directions accordingly."⁶⁷ He held that the courts not only have the power to investigate the father's behavior but to interfere if deemed necessary, and he made no distinction between the law courts and Chancery. He also declared: "the power of a father over a child, however despotic the law allowed it to be in other respects as to the child, itself, was yet subordinate to the power and constitution of the state."⁶⁸

⁶² 24 Eng. Rep. 579, 580 (Ch. 1721). See also Tremain's Case, 93 Eng. Rep. 452 (K.B. 1720).

⁶³ Ex parte Hopkins, 24 Eng. Rep. 1009 (Ch. 1732); Creuze v. Hunter, 30 Eng. Rep. 113 (1790); Ex parte Warner, 29 Eng. Rep. 799 (Ch. 1792); Blake v. Leigh, 27 Eng. Rep. 207 (Ch. 1756).

⁶⁴ 30 Eng. Rep. 113 (1790).

⁶⁵ Rex v. Sir DeLavel, 97 Eng. Rep. 913 (K.B. 1763); Lady Teynham v. Lennard, 2 Eng. Rep. 204 (H.L. 1724).

⁶⁶ The court in Beaufort v. Berty explained that "by the statute of 12 Car. 2, c. 24, [a father] had as much power to dispose of the guardianship of his children as by the statute of 32 H. 8, a man hath to dispose of his lands." 22 Eng. Rep. 411 (Ch. 1721).

⁶⁷ Rex v. Sir DeLavel, 97 Eng. Rep. at 914.

⁶⁸ Blisset's Case, 98 Eng. Rep. 899, 900 (K.B. 1767).

In general, the courts justified their interference with fathers' rights on the basis of the crown's *parens patriae* jurisdiction over those who were unable to care for themselves.⁶⁹ By the mid-eighteenth century the justices of the Royal Courts uniformly attributed to the Chancellor the jurisdiction to oversee matters regarding infants by delegation of the crown's *parens patriae* powers.⁷⁰ This power arose by virtue of the crown's interest in protecting those without legal rights, like lunatics, children, and married women.

The cases that set the stage for Mrs. De Manneville's suit showed that paternal rights had been litigated in disputes between third parties and fathers had frequently lost. Mothers also won in disputes between third parties or testamentary guardians, and a fledgling best interests standard had been articulated by Lord Mansfield of King's Bench. The jurisdictional conflicts between King's Bench and Chancery ultimately led to the Chancery taking on these cases through its expanding *parens patriae* powers. As early as the mid-eighteenth century, these cases showed a judicial willingness and an available vocabulary to remove fathers from custody.⁷¹ Thus, because many women did exercise control over their

⁶⁹ However, at least a few commentators noted that the legal power in Chancery to protect lunatics, idiots, and *miserables personae*, did not extend to infants who had other protectors, namely fathers. Hargrave's comments to Coke Upon Littleton explained that the Chancellor's guardianship jurisdiction over infants was not satisfactorily justified.

Saying that his jurisdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a separate commission under the sign manual, but there is not any such to warrant the latter. The writs of ravishment of ward and de recto de custodia prove as little: for...how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian, where it happens that one is wanting?

Hargrave, Coke Upon Littleton 88b n.16 (1853). Lord Hardwicke also disapproved of comparing the court's jurisdiction over infants to that of idiots and lunatics. Ex parte Whitfield, 26 Eng. Rep. 592 (Ch. 1742).

⁷⁰ Hargrave and Butler write:

However, we must not be understood by these remarks to controvert the present legality of the jurisdiction thus exercised in Chancery over infants; our intent being simply to show that such jurisdiction is not, as far as yet appears, of ancient date; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for.

Hargrave, *supra* note 69, at 88b n. 16.

⁷¹ Some have argued that these cases reflect a trend of the bench to interfere with fathers because of greater judicial discretion offered by the 1646 Abolition of Tenures Act. See Abramowicz, *supra* note 21. Without denying that shift from fathers to judges, it is also

children, and courts were beginning to oversee patriarchal power in the few cases that were litigated, Mrs. De Manneville's belief that she had some legally recognizable interest in her children was probably not unreasonable.

The apparent willingness of the courts to interfere with fathers in the eighteenth century was, however, abruptly halted in the early decades of the nineteenth century in inter-spousal cases. When mothers and fathers began suing one another for custody of their children, the relative leniency of these eighteenth-century cases was rejected in favor of strict paternal rights that were not only a deviation from the prior century, but appeared to be more patriarchal than any period before.⁷²

III. DE MANNEVILLE V. DE MANNEVILLE: THE RISE OF THE MODERN CUSTODY DILEMMA

The De Manneville case is perhaps the epitome of the hard inter-spousal custody case; two fit parents seeking custody of a child in circumstances under which both parents have something beneficial to offer. But then, as today, courts must decide which parent will be entitled to custody even when neither is at fault with regard to the child. In 1800 Margaret Crompton married a French emigrant named Leonard Thomas De Manneville, bringing property worth £700 per year vested in a separate estate and £2000 upon her death to Mr. De Manneville, provided he survived her and had cohabited with her during her lifetime. Mr. De Manneville had a government annuity of £60 as a French alien. One child was born of the marriage in 1803. Soon afterwards, because of incompatible temperaments, Mrs. De Manneville left her husband's house with her child and returned to live with her mother. Mr. De Manneville took custody of the child from a nurse who was tending him during a short illness, but the child was returned to the mother shortly afterwards when the father was taken into custody under the Alien Act.⁷³ Upon his release, Thomas forcibly entered his mother-in-law's house where he snatched the nursing child and refused to turn him back over to his mother. Mrs. De Manneville applied to the Court of King's Bench for a writ of habeas corpus for return of the infant, but it was denied by Lord Ellenborough, who asserted that the father "is the person entitled by law to the custody of his

important to analyze the effect of that shift on women who were thereby denied legal rights. It is unclear, however, whether this trend reflected new legal doctrines or simply greater reliability in legal reporting and case superintendence. Nevertheless, although the feudal law of wardship was highly patriarchal and property-based, the majority of orphaned children remained with their mothers under the law of socage guardianship. Clark, *supra* note 30.

⁷² See Jamil S. Zainaldin, The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851, 73 Nw. U. L. Rev. 1038, 1063 (1979).

⁷³ 33 George 3, c. 4 (1793) (required registration of aliens and surrender of government passports upon request by magistrates or customs officials).

child.”⁷⁴ With no evidence of abuse, the court would not interfere with the father’s legal rights.

Mrs. De Manneville then brought suit in Chancery seeking an order of custody or, in the alternative, an order prohibiting the father from removing the child to France. In support of her petition, she presented affidavits alleging that her husband was guilty of ill usage, had threatened to carry her and the child out of the kingdom, had pressed her to make a will in his favor, was irreligious, and held Jacobin views. The attorneys for Mrs. De Manneville also argued that the child’s tender years necessitated that it remain with the mother, that the father would be unable to provide proper maintenance for the child, and that the court had jurisdiction to interfere with the power of fathers when the child’s interests so dictated.⁷⁵ Lord Eldon sympathized with the compelling nature of the mother’s claim:

I am much struck with the case,...on the one hand, a husband, endeavouring by what is called cruelty and ill usage, which undoubtedly may be most aggravated, though no blow is struck, to possess himself through the wife’s act of the property, which the parties to this settlement have been extremely careful to withdraw from his reach.

But, in denying her suit, he wrote:

I must consider the wife at present as living under circumstances, under which the law will not permit her to live....This is an application by a married woman, living in a state of actual, unauthorized, separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law.⁷⁶

Although Lord Eldon denied Mrs. De Manneville’s claim on the basis of coverture—a married woman could not bring suit against her husband without first obtaining a legal separation in the ecclesiastical court—he granted her request to order the child not be removed from England. More important, he viewed leaving the child with the father as an incentive to Mrs. De Manneville to cease living in her legally unauthorized manner, i.e. to return home to her husband where she undoubtedly belonged.

In approving the general rule that fathers have custodial rights to their children, Eldon admitted that the court’s superior power to interfere with the father’s rights included the power to give the child to his mother: “I must either give the child to the father; ...or to the mother; ...or I must take

⁷⁴ *R. v. De Manneville*, 5 East 222, 223 (1804).

⁷⁵ *De Manneville v. De Manneville*, 32 Eng. Rep. 762, 763 (Ch. 1804). See also *Powell v. Cleaver*, 29 Eng. Rep. 274 (Ch. 1789); *Creuze v. Hunter*, 30 Eng. Rep. 113 (1790).

⁷⁶ *De Manneville v. De Manneville*, 32 Eng. Rep. at 765-66.

some middle course.”⁷⁷ What he held was that the mother was unauthorized to petition for custody, though she might be authorized to have it granted her if the court otherwise was able or inclined to do so. The legal question was thus not about maternal rights but about access to the courts. Also, Eldon did not discuss what behavior on the part of the father would justify removal of his children. He acknowledged that the behavior mentioned in the affidavits was “detestable,” that the Jacobin principles being propagated would “lead to acts, against which these laws as to aliens were directly levelled [sic],” and that, although the father’s right to his child was legally recognized, he may not pursue a legal object by illegal means, as kidnapping would be. Kidnapping apparently was not deemed abuse, though habitual drunkenness and bankruptcy might be.⁷⁸ In other words, Eldon acknowledged that certain actions on the part of the father would justify judicial interference with his custodial rights, but he declined to enunciate what those actions might be or what impact on the child would be sufficiently injurious to warrant a change in custody.

De Manneville is the archetypical modern inter-spousal custody case between two arguably fit parents. Both parents had adequate financial resources to raise the child and neither could be accused of cruelty or abuse toward the child. The reasons for the couple’s separation appear to have been incompatibility of temperament more than anything else; hence, there were no grounds for separation or divorce. Most likely, the parties later separated pursuant to a private separation agreement and Mrs. DeManneville probably received custody of the child after she and her parents agreed to buy Mr. De Manneville off with a suitable annuity. The property settlement likely did not accord with contemporary property distribution agreements, but the courts’ decisions granting Mr. De Manneville custody inevitably meant that Mrs. DeManneville would have to pay dearly for custody of the child. And judging from later cases, had Mr. De Manneville reneged on the separation agreement, she would have had no power to enforce the agreement at law or in equity.⁷⁹

IV. THE LEGACY OF DE MANNEVILLE: 1804-1839

In the thirty-five years from 1804 to 1839, twelve more cases adjudicated the question of paternal forfeiture and parental rights. Seven were brought by mothers, five by other relations or third parties. Six of the mother-petitioners lost; all five of the third-party petitioners won. The only mother who won custody was unopposed because the father was in prison

⁷⁷ *Id.* at 767.

⁷⁸ See Shelley v. Westbrook, 37 Eng. Rep. 850 (Ch. 1817); see also Ex parte Hopkins, 24 Eng. Rep. 1009 (Ch. 1732).

⁷⁹ See Earl of Westmeath v. Countess of Westmeath, 162 Eng. Rep. 992 (1826).

under sentence of transportation.⁸⁰ These are all of the published cases on this issue during this period, and they are cited by judges and legislators as the principal sources of the new inter-spousal custody law.⁸¹ However, they reveal a disturbing new trend in the law and equity courts to apply different standards to custody analyses depending on who sought custody: a third party or the mother.

In one strain of cases, where third parties sought legal custody rights against fathers, the courts followed the modest welfare standard in place before De Manneville. These cases continued the long line of limitations on paternal rights originating in the eighteenth century and were based on physical, moral, or financial welfare. For instance, in the 1806 case of Whitfield v. Hales, the father was removed and a guardian appointed because he was in prison for “gross ill-treatment and cruelty” to his children.⁸² In 1817, the Romantic poet Percy Bysshe Shelley was removed from custody because of his atheism.⁸³ In 1820 Mr. Lyons was denied his petition to regain custody of his three children that he had allowed to be raised by their grandmother, under whose will they stood to inherit a considerable estate.⁸⁴ And also in 1820, a father and mother were both precluded from custody of their daughter who stood to inherit under the terms of her grandfather’s will.⁸⁵ In these early nineteenth-century cases, mothers were noticeably absent, though maternal relatives were often challenging paternal custody.⁸⁶

When mothers were the petitioners, however, they uniformly lost if the father was the opposing party, regardless of whether they satisfied the welfare standard being used in the third party cases. In cases where the mother could better provide for the child’s financial welfare, the courts would not assign custody to mothers if fathers objected. In an unnamed

⁸⁰ Ex parte Bailey (1), 49 Rev. Rep. 727 (1838) (a mother won custody against her husband’s sister because the husband had been convicted of a felony and sentenced to transportation; he did not appear or object and was incapable of caring for the child, therefore, this case did not raise the specter of family rupture through interspousal lawsuits).

⁸¹ These cases represent every case brought by a mother seeking custody against the father. They also represent every case brought by a third party against the father where the father lost. They do not represent every case brought by third parties in which the father won as these cases did not affect the issue of the father’s behavior justifying judicial interference, whether on behalf of the mother or for a third party.

⁸² Whitfield v. Hales, 33 Eng. Rep. 186, 186 (Ch. 1806).

⁸³ Shelley v. Westbrook, 37 Eng. Rep. 850 (Ch. 1817).

⁸⁴ Lyons v. Blenkin, 37 Eng. Rep. 842 (Ch. 1821).

⁸⁵ Colston v. Morris, 37 Eng. Rep. 849 (1820).

⁸⁶ Wellesley v. Duke of Beaufort, 1827 Ann. Reg. 297 (1827); Shelley v. Westbrook, 37 Eng. Rep. 850 (Ch. 1817); Colston v. Morris, 37 Eng. Rep. 849 (1820). Under the rules of coverture, only the father could be sued by a third party in a custody dispute as he was the legal head of the family.

case cited in 1820, Lord Chancellor Brougham faced a family dispute where a separated mother was using property settled in her name to support herself and her infants.⁸⁷ The mother presented a petition requesting that she be granted custody of the children so she could properly educate them in accord with their expectations. Brougham refused to grant her petition, however, on mere financial expectations. He noted that: “wherever the court had interfered against the father upon pecuniary considerations, they had been solid considerations, not merely expectations...the court would not interfere on a mere offer.”⁸⁸ Because the mother’s separate property was not settled directly on the children, their expectations would not be protected. Although the courts had removed fathers on equally tenuous property rights in Hopkins,⁸⁹ Creuze,⁹⁰ Warner,⁹¹ and Lyons,⁹² the rules of coverture that prevented a married woman from independently disposing of her property weakened a mother’s ability to use her wealth for the benefit of her children.⁹³

One reason for the more stringent rule when the mother petitioned for custody was the contract disabilities of coverture. In 1818, fourteen years after De Manneville, Emily Westmeath was prevented from contracting for custody of her two children in a separate agreement with her husband.⁹⁴ After years of dissension and physical abuse, her husband George signed two private agreements granting Emily custody of the children. But one day George detained the children after a visit. When Emily sought enforcement in Chancery, Lord Eldon refused to enforce the deed insofar as it deprived the father of his children.⁹⁵ Following the suit,

⁸⁷ Lyons v. Blenkin, 37 Eng. Rep. at 847-50.

⁸⁸ *Id.*

⁸⁹ 24 Eng. Rep. 1009 (Ch. 1732).

⁹⁰ 30 Eng. Rep. 113 (1790).

⁹¹ 29 Eng. Rep. 799 (Ch. 1792).

⁹² 37 Eng. Rep. 842 (Ch. 1821).

⁹³ Besides giving custody to the father, the Lord Chancellor also granted the father’s petition to remove the children from England, ordering that “the father should be at liberty to take the infants abroad with him, undertaking to bring them, *or such of them as should be living*, back with him.” Lyons v. Blenkin, 37 Eng. Rep. 842, 850 (Ch. 1821). The father’s rights extended so far that he could take the children abroad, thus exposing them to danger, without regard to the mother’s wishes and visitation rights or the children’s best interests. *Id.*

⁹⁴ See the discussion of the Westmeath cases in Lawrence Stone, Broken Lives: Separation and Divorce in England 1660-1857, at 284-346 (1993) [hereinafter Stone, Broken Lives]. See also Emily Westmeath, A Narrative of the Case of the Marchioness of Westmeath (1857).

⁹⁵ Earl of Westmeath v. Countess of Westmeath, 162 Eng. Rep. 992, 1035-36 (1826).

George sent the children to Ireland, where the boy died during the summer of 1819. Emily then prevailed on George to allow their daughter Rosa to return to London with her. On returning to London himself, George retained Rosa after a visit, forcing Emily once again to seek legal help, this time in Common Pleas. Justice Dallas, however, “followed ancient practice and declared that ‘the father is in point of law entitled to the custody of the child.’”⁹⁶ Both Eldon and Dallas adopted the position that fathers could not contract away their paternal rights even in favor of an innocent mother whose behavior was not responsible for the breakdown of the marriage.⁹⁷ The private separation deed had raised the specter of coverture, for Emily was not legally separated from George and therefore could not sue her husband for custody. Coverture also would prevent a wife from entering into a contract with her husband for custody or disposition of property, even when the agreements would be in the best interests of the children.

Another factor that made resolution of inter-spousal custody issues so difficult was the jurisdictional differences between the law, equity, and ecclesiastical courts in powers to hear cases and to order remedies. In 1824, Mrs. Skinner applied for a writ of habeas corpus in Common Pleas against her husband William Skinner and his mistress Anne Deverall (who were living in Horsemonger-lane Gaol) to produce their six-year-old child whom he had acquired through force and stratagem. Mrs. Skinner had legally separated from her husband because of cruelty and brutality, thus avoiding the coverture problem, and custody of the child had been placed in a third party through proceedings earlier that year in King’s Bench. Mrs. Skinner’s attorney argued that it was unreasonable for mothers of illegitimate children to be able to obtain habeas corpus for their children when mothers of legitimate children could not and that the Court of King’s Bench had jurisdiction to assign the custody of a child to any party.⁹⁸ But Chief Justice Best repudiated the jurisdiction of both King’s Bench and Common Pleas to interfere, suggesting instead that Mrs. Skinner apply to Chancery.

In declining to exercise any power to interfere, Chief Justice Best held that only where the father is unfit (and therefore the mother a potential recipient of custody) and the father does not have custody at the time of the

⁹⁶ Stone, *Broken Lives*, *supra* note 94, at 313. After the second custody case, Rosa was placed with a friend of her father, the Duke of Buckingham, and became so estranged from her mother that she saw her only a handful of times before Emily’s death in 1858.

⁹⁷ According to Susan Staves this was a relatively recent shift. Before the early nineteenth century, most provisions in these separation contracts had been upheld. In 1818 Eldon put his foot down on contracting away custody rights in the pivotal *Westmeath* case. Susan Staves, *Separate Maintenance Contracts*, 11 *Eighteenth Century Life* 78 (1987); *Married Women’s Separate Property in England: 1660-1833*, at 162-95 (1990).

⁹⁸ *Ex parte Skinner*, 27 Eng. Rep. 710 (1824). He cited Mansfield in *Blisset’s Case*, 98 Eng. Rep. 899 (K.B. 1767), as well as *Ex parte Knee*, 127 Eng. Rep. 416 (1804).

suit (so custody in a third party would be deemed per se improper) would habeas corpus be issued. He wrote:

When this case first came before me at chambers, I felt considerable difficulty, and thought that, under the circumstances, neither the father nor mother was entitled to have the custody of the child.... I was referred to Blisset's case, and it certainly is extremely strong to shew, that the power of assigning the custody of a child brought before the Court of King's Bench, was discretionary, if the father appeared to be an improper person to take it; and I therefore thought that the most prudent course would be to assign it over to the care of a third person, and which was acceded to by both its parents. But it now appears that the father has removed the child, and has the custody of it himself; and no authority has been cited, to shew that this Court has jurisdiction to take it out of such custody *for the purpose of delivering it over to the mother*.⁹⁹

After Skinner, if the child was in the custody of a third party the law courts might assert jurisdiction and give it to the mother if the father was not the best parent to have custody.¹⁰⁰ If the father already had physical custody of the child, he had to pose a danger to life and limb before he would be removed.

Despite Justice Best's assertion that the Chancery could interfere with a father's physical custody, a mere three years later the Vice Chancellor claimed that he had no jurisdiction to deprive a father of custody of his fourteen-year-old daughter even though he continued to live in adultery, for which his wife had obtained an ecclesiastical separation. This case eliminated both the coverture issue and the Chancery jurisdiction issue, leaving only the question of paternal fitness and forfeiture. The child formerly had resided with her mother, Mrs. Ball, at the consent of the father, who wrote numerous letters approving of the mother's custody. But after a visit one day, the father detained the girl and sent her to a school whose identity and location he kept secret from the mother. Refusing to interfere once the father had obtained putative custody, Vice Chancellor Hart noted, with some regret, that:

⁹⁹ Skinner, 27 Eng. Rep. at 718 (emphasis added).

¹⁰⁰ This determination was one of fitness. Fitness is different from the emerging life and limb standard. Fitness is a threshold standard, below which is abusive, but above which may be the best interests standard. Thus, while both parents may be fit, only one meets the best interests standard. While an abusive parent clearly is not entitled to custody, where both parents are fit one will still be denied custody, not because he or she is unfit, but because the other parent either has a parental right, a legal presumption, or meets the child's interests better. For an insightful discussion of the normative bases in legal determinations of fitness, see Phyllis Chesler, Mothers on Trial: The Battle for Children and Custody (1987).

Some conduct, on the part of the Father, with reference to the management and education of the Child, must be shown, to warrant an interference with his legal right; and I am bound to say that, in this Case, there does not appear to me to be sufficient cause to deprive the Father of his common-law right to the care and custody of his Child. It resolves itself into a Case for Authorities; and I must consider what has been looked upon as the Law on this point. I do not know that I have any authority to interfere. I do not know of any one Case similar to this, which would authorize my making the Order sought, in either alternative. If any could be found, I would most gladly adopt it; for, in a moral point of view, I know of no act more harsh or cruel, than depriving the Mother of proper intercourse with her Child.¹⁰¹

Because the father was fit, i.e. had not forfeited his rights by endangering the child's health or life, he was deemed to have the superior claim. With this decision the Chancery adopted the same forfeiture rule as the law courts, that once a child was in the custody of the father, only extreme ill treatment would justify removal, not simply unfitness.

By 1827 both law and equity courts had made an important distinction between their ability to give the child to the father when the child was improperly restrained by someone else (including the mother) and their ability to take the child from the father, regardless of how he obtained possession. This distinction encouraged fathers to kidnap their children, even by force, which was apparently not viewed as evidence of ill treatment.¹⁰² For if they once obtained custody, even sending the child to school would constitute a continuation of their paternal control and would require a heightened showing of ill treatment to justify interference.¹⁰³ Such was the case in 1831 when Mrs. M'Clellan removed her daughter from the school where her father had placed her. Mr. M'Clellan applied for a writ of habeas corpus in King's Bench for the return of his daughter to the school he had chosen. The attorney for the mother argued that habeas corpus could be issued only upon proof that the child was improperly restrained and that since Mr. M'Clellan had not alleged anything improper or illegal in the mother's removal of the child from school, the court should not interfere. Justice Patteson disagreed:

The law is perfectly clear as to the right of the father to the possession of his legitimate children, of whatever age they be....[T]he father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to

¹⁰¹ Ball v. Ball, 2 Sim. 35, 36-37 (1827).

¹⁰² See In re Fynn, 2 DeG. & Sm. 457 (1848).

¹⁰³ Ball v. Ball, 2 Sim. 35 (1827); In re Winscom, 71 Eng. Rep. 573 (1865).

impute any motive to the father injurious to the health or liberty of such a child.¹⁰⁴

Moreover, “there must be some force or improper restraint on the part of the father, in order to enable the Court to take it from him.”¹⁰⁵ The idea of a best interests standard, which was imputed to the Chancellor’s jurisdiction in Skinner, is nowhere to be seen. Justice Patteson remarked:

there is nothing suggested which leads one to suppose that any *ill-usage* has been exercised by the father, or by the schoolmistress with whom he wishes his child to be placed. I feel myself, therefore, bound to say that the child must be delivered up to Miss __, whom the father has named. *It might be better, as the child is in a delicate state of health, that it should be with the mother;* but we cannot make any order on that point.¹⁰⁶

Sadly, the court did not give consideration to the fact that Mrs. M’Clellan’s two other children had recently died at the same school and that the schoolmistress had relinquished care of the third to the mother because she believed the child would receive more vigilant and affectionate care from her mother than at the school.¹⁰⁷ The welfare of the child simply was not an issue. A strict forfeiture rule was evolving in inter-spousal custody cases that mandated that children would not be removed from their fathers unless they were in danger of life or limb,¹⁰⁸ and if they were not in the custody of fathers, children would be returned to them unless the father had proved himself such a danger.¹⁰⁹

¹⁰⁴ Ex parte M’Clellan, 33 Eng. Rep. 45 (1831) (referring to De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804)).

¹⁰⁵ M’Clellan, 33 Eng. Rep. 45.

¹⁰⁶ M’Clellan, 33 Eng. Rep. 45.

¹⁰⁷ See Caroline Norton, The Separation of the Mother and Child by the Law of ‘Custody of Infants’ Considered 45, 45-49 (1838) [hereinafter Norton, Separation].

¹⁰⁸ It should be remarked that ill usage, the concept underlying the judicial determination of forfeiture, continued to be the standard throughout this period. However, the actions or omissions that constituted ill usage appear to have changed. In 1767 the bankrupt Mr. Blisset was denied custody principally because he was unable to properly educate and maintain his child. His bankruptcy was seen as presumptive abandonment. Blisset’s Case, 98 Eng. Rep. 899 (K.B. 1767). Similarly, in Rex v. Sir DeLavel, the child’s physical well-being was at risk when she was put into prostitution. 97 Eng. Rep. 913 (K.B. 1763). After De Manneville there were only five cases in which fathers were removed for various forms of forfeiture. As the century progressed atheism was deemed worse than Jacobinism, and having one’s mistress travel around Europe with the family was somehow worse than supporting one’s mistress and her children on one’s estate. In only two cases was the moral quality of childrearing at issue.

¹⁰⁹ Rex v. Sir DeLavel, 97 Eng. Rep. 913; De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804); M’Clellan, 33 Eng. Rep. 45.

The different standards applied in mother-petitioner and third-party petitioner cases are strikingly highlighted in the contrast of two very similar cases from the second quarter of the nineteenth century. In 1827, Lord Eldon denied William Wellesley custody because of his loose morals and adultery.¹¹⁰ The case arose between Wellesley, nephew of the Duke of Wellington, and his deceased wife's sisters, the Misses Long, over custody of his three children. Mrs. Wellesley had brought an annuity of about £40,000 a year to the marriage and sufficient estates to raise £100,000 by mortgage, yet Mr. Wellesley's finances were in such ruinous condition that the family was forced to reside overseas for a number of years to escape creditors.¹¹¹ Throughout his marriage Mr. Wellesley maintained a long-term relationship with a woman named Mrs. Bligh who seemed to appear, as if by chance, at all the stops on their European travels. When Mrs. Wellesley discovered the affair she returned to England, taking her children with her. She died soon thereafter but enjoined her unmarried sisters to resist any attempts by Mr. Wellesley to obtain custody of the three infants. After a number of petitions for habeas corpus the case finally came before Lord Eldon for a final determination of custody. After much handwringing, Chancellor Eldon removed the father from custody because of his gross and intemperate habits. Ironically, these children were not in danger of life and limb, only of being morally corrupted—Wellesley had clearly not met the strict forfeiture standard articulated in *Skinner* and *Ball*. In spite of this, Eldon had no qualms about removing the children from a father who fled to escape his creditors, encouraged his children to lie, swear, and smoke cigars, and kept his mistress through his travels.

Yet in a virtually identical case, whose only difference was that the mother still lived and could therefore pursue the case herself, the father's moral corruption was insufficient to give the mother custody as against the father.¹¹² In this case, Henrietta Greenhill discovered that her husband was carrying on a long-term affair with a Mrs. Graham and that, at times, the two had assumed the names of Mr. and Mrs. Graham and Mr. and Mrs. Greenhill. Upon this discovery she removed with the children to her mother's house in Exeter and brought suit in the ecclesiastical courts for a separation seeking custody and alimony.¹¹³ Hoping to stop the suit, Mr.

¹¹⁰ *Wellesley v. Duke of Beaufort*, 1827 Ann. Reg. 297 (1827).

¹¹¹ Compare *Cruze v. Hunter*, 30 Eng. Rep. 113 (1790). In the earlier case, finances alone occupied the court's consideration and justified removal of the father from custody. In the later case, the adultery was the prime factor in removing the father.

¹¹² *R. v. Greenhill*, 4 L.R.-Adm. & Eccl. 624 (1836); *Greenhill v. Greenhill*, 163 Eng. Rep. 162 (1836).

¹¹³ The ecclesiastical courts did not have the power to enforce a custody award and in fact were not able to make any determination as to custody, but did have indirect powers in their alimony awards and in their findings of parental fault to tilt the scales toward one parent or the other. See Shelfoud, *A Practical Treatise on the Law of Marriage and Divorce* § 6 (1841).

Greenhill declared that if she proceeded with the separation he would demand custody of the three children. Mrs. Greenhill's response was to settle property on the children and bring a petition in Chancery to make the children wards of the court¹¹⁴ and to request that custody be granted to her, arguing that the children otherwise would be placed not with their father who was busy with his mistress, but with his vituperative mother who had refused to see her own grandchildren and had quarreled with her own son. Despite evidence that the father had so little contact with his children that he was not even recognized by one of them, the response of the vice chancellor was that:

[H]owever bad and immoral Mr. Greenhill's conduct might be, unless that conduct was brought so under the notice of the children as to render it probable that their minds would be contaminated, the Court of Chancery had *no authority to interfere* with the common law right of the father, and the vice-chancellor had not the power to order that Mrs. Greenhill should even see her children as a matter of right.¹¹⁵

Chancery, the one court that could claim jurisdiction to resolve custody disputes, declined to exercise it unless the father's behavior was so flagrantly immoral or a danger to life and limb as to constitute forfeiture.

Additionally, since Mr. Greenhill did not have possession of the children at the time of suit, according to the language of M'Clellan and De Manneville, the courts had greater discretion to choose a proper custodian than would be the case had the children been in the custody of their father at the time of suit. However, Lord Denman explained:

There is, in the first place, no doubt that, when a father has the custody of his children, he is not to be deprived of it except under particular circumstances; and those do not occur in this case; for although misconduct is imputed to Mr. Greenhill, there is nothing proved against him which has ever been held sufficient ground for removing children from their father [somehow ignoring the Wellesley case in which open adultery did justify removal]....But I think that the case ought to be decided on more general grounds; because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most

¹¹⁴ Chancery jurisdiction could not be exercised on behalf of any child unless the child was made a ward of the court. Being made a ward required that the child own property over which the court's power could reign. Without property, the court had no way to enforce its orders. See 1 Henry Maddock, A Treatise on the Principles and Practice of the High Court of Chancery 330-59 (1832); see also Edmund Robert Daniell, Chancery Forms: Forms and Precedents of Proceedings in the Chancery Division of the High Court of Justice, and on Appeal Therefrom (1885).

¹¹⁵ Norton, Separation, *supra* note 107, at 61.

helpless age. When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father.¹¹⁶

After several weeks of negotiations, orders to show cause, writs of attachment, two court orders demanding that Mrs. Greenhill turn the children over to their father, and numerous appeals, she had exhausted her legal remedies.¹¹⁷ When Mr. Greenhill refused to cooperate in a settlement to allow both parties access to the children, Mrs. Greenhill fled abroad, taking her children with her.

These cases represent the length to which De Manneville was cited or followed for the proposition that fathers had absolute paternal rights as against mothers. Although some of the cases were decided in the law courts of King's Bench or Common Pleas and others in the equity court of Chancery, the judges' assertions of different jurisdictional powers to interfere are undermined by the consistent results in all cases. R. v. De Manneville held that writs of habeas corpus were to be issued out of King's Bench, but that if the father had custody at the time of the suit the justices had no power to remove the child from the father's possession, even if the father was unfit, so long as he was not a danger to life and limb. In Greenhill, Chief Justice Denman was unwilling to entertain a best interests analysis even though the father did not have custody of the children at the time of suit, and he enunciated the rule that proper custody "undoubtedly is the custody of the father." Although the distinction as to which party had custody at the time of suit presumably still existed after Greenhill, the presumption in favor of the father was so strong that virtual abandonment, adultery, and family feuding were not sufficiently detrimental to the children to justify removal of the father from his paternal rights to custody, and hence his corresponding power to forbid any access by the mother.

Chancery, on the other hand, possessed the power to determine the "proper custody" of a child regardless of who had physical custody at the time of suit. But Ball is an oft-quoted case for the rule that Chancery would not interfere with a father's right to custody unless he exposed the children to the vices or behavior that justified his wife's separation or divorce. Thus, the court's definition of "proper custody" only secondarily considered the child's interests; it was primarily a test of the father's behavior. Wellesley shows just how far a flagrant and adulterous father could go before he lost

¹¹⁶ R. v. Greenhill, 4 L.R.-Adm. & Eccl. 624, 639-40 (1836).

¹¹⁷ Id.; Greenhill v. Greenhill, 163 Eng. Rep. 162 (1836).

his children. Significantly, of the numerous cases in which adultery was the fault of the father and the alleged basis of his unsuitability as custodian, only Mr. Wellesley lost his case. Mr. Ball, Mr. Skinner, Mr. Greenhill, and Lord Westmeath, all adulterers, won theirs. And Wellesley is the only case in which the mother was not a party to the suit.

In no case was there any mention of the quality of home life that would be provided by the mother. At no time did the justices inquire into the mother's character or fitness as custodian. While no case explicitly denied the existence of maternal rights, only one mother in an inter-spousal case was awarded custody of her children during the period between 1760 and 1840: a wife whose husband did not oppose her suit because of a criminal conviction. That case was brought by Mrs. Bailey in 1838 against her husband's sister who had obtained physical custody of her niece, presumably at the hands of her brother. The opinion occupies a mere paragraph in the reports and announces that the mother was entitled to custody of the infant because the father had "been lately convicted of felony, and was now in custody at the hulks, under sentence of transportation."¹¹⁸ But that case, like the Wellesley case, did not raise the specter of inter-spousal legal disputes.

By 1838 the courts had paid lip service to a rule about "proper" custody that sounded like a best interests test—but the rule had no teeth. It was assumed that the father knew best. This belief became so entrenched that as late as 1883 Lord Justice Bowen could state the by then well-established rule that "it is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can."¹¹⁹ The custodial issue was resolved solely as a question of the father's forfeiture of his rights. But as the cases showed, living with his mistress in debtor's prison was not sufficient, nor was a separation deed forced on the father because of physical and emotional cruelty to his wife, nor living in open adultery. Once the paternal rights had been affirmed the legal issue was resolved. If the paternal rights were denied, the next question was who should have custody of the children. Only Chancery had the jurisdiction to award custody to someone other than the father, but it was the father to whom the Chancellor would look for assistance in determining the child's best interests.

We see in these cases the creation of two separate custody standards. In inter-spousal cases fathers received custody of their children so long as they had not forfeited their paternal rights through endangerment of life and limb. In disputes between third parties and fathers, the courts

¹¹⁸ *Ex parte Bailey*, 49 Rev. Rep. 727 (1838).

¹¹⁹ *In re Agar-Ellis*, 24 Ch.D. 317 (1883) (summarizing *In re Fynn*, 2 DeG. & Sm. 457 (1848) and *In re Curtis*, 28 L.J. (n.s.) Ch. 458 (1859)).

used a much less stringent moral corruption/economic deprivation test, a modest welfare standard, and cited back to the eighteenth-century third-party cases rather than recent inter-spousal cases for their authority to do so.

These early nineteenth-century cases also continued the institutional fragmentation that characterized the eighteenth-century cases.¹²⁰ The ecclesiastical courts were deferred to in matters of marital status, and women who had not legally separated were denied access to the royal courts for custody petitions under the doctrine of coverture. Mothers who had legally separated still could not petition for custody unless they already had physical custody of their children at the time of the suit. Because both the law and equity courts denied jurisdiction to remove a child from the custody of its father unless it was in danger of life and limb, habeas corpus was ineffective against a father. Although Chancery assumed jurisdiction to make custodial decisions through its *parens patriae* powers, it would do so only for those children made wards of the court through settlement of property on the child. Married mothers often did not have the power to bind property until the married women's property acts were passed in 1870 and 1886.¹²¹ Hence, the arms of the Chancellor were still bound unless a third party could settle property on the children; otherwise, the Chancellor's jurisdiction rested on property determinations usually adjudicated in the Common Pleas. Although many judges wanted to help alleviate the situations of these mothers, they felt disabled from doing so by the institutional barriers of habeas corpus, coverture, and limited chancery jurisdiction. Not surprisingly, the response to these

¹²⁰ The law regarding custody thus resembled the law regarding separation deeds, a hodgepodge of conflicting doctrines running the gamut from jurisdiction and forfeiture to coverture and remedies. One textbook writer in 1827 summed up the disorder in the law of separations, including covenants regarding custody:

The law upon this subject stands in this very peculiar state, that if there be a covenant by which the husband engages to leave his wife free to reside where she likes, a court of equity will not enforce it, nor will it restrain the husband from violating it; that a court of [common] law will not entertain an action founded on the breach of it, though the very same court would enforce the due observance of it; and that the spiritual court may pronounce a sentence for the restitution of those very rights which the legal tribunal had declared the husband to have renounced beyond the power of revocation. These are difficulties arising from the different remedies which may be given by different jurisdictions upon the same subject matter, which, even supposing the agreement between husband and wife for separation and a separate maintenance to be perfectly valid, must introduce some embarrassment in the administration of the rights springing from such contract.

Stone, *Road to Divorce*, *supra* note 3, at 158.

¹²¹ Married Women's Property Act, 1870, 33 & 34 Vict., c. 93; Married Women's Property Act, 1882, 44 & 45 Vict., c. 21; Holcombe, *supra* note 5.

difficulties was to create strong disincentives against these cases by formulating a tougher forfeiture standard in inter-spousal disputes.

These institutional difficulties were compounded by the disabling effects of jurisdictional boundaries between the Ecclesiastical, law, and equity courts, but they were principally caused by the patriarchal doctrine of coverture that denied married women a legal identity. The private separation deed in Westmeath, for instance, raised the specter of coverture, for Emily was not legally separated from George and therefore could not sue her husband for custody. In denying enforcement of the separation deed in a later stage of the litigation, Lord Eldon was upset by the way these deeds appeared to be preempting ecclesiastical adjudication of marital separation. He said:

It comes then to this question, whether the [marriage] contract, which the law says is only to be dissolved on certain accounts, is in fact to be dissolved, not for those causes, but because the parties choose it....The law has imposed upon husband and wife duties of the most sacred nature, which one would have supposed that no court would allow them to engage not to observe....It seems strange...that if the primary object be vicious, these auxiliary provisions should be held good, and thereby that which the law objects to should be carried into effect.¹²²

It was the attempt to circumvent the ecclesiastical proceedings through private contract that prompted Lord Eldon to deny Emily's claim. In many of these cases, the custody question and the question of parental fitness, were subsumed into a question of the rights and duties the law placed on each parent as a result of their marital status, not the rights and duties arising out of biological parenting.

To think that patriarchal social attitudes underlying the law of coverture would give rise to two separate custody standards may be troubling, especially when the child's welfare is all but ignored under the inter-spousal standard. But it makes a certain amount of sense when we consider that the wife and mother was responsible for primary childcare. A stricter standard could be used when the reason for the father's custody was the mother's abdication of her childcare duties. For married couples, the wife's remaining in the marital home is what guaranteed a child's welfare. Therefore, if a woman forsook her marital duties and left her husband's roof, she would be to blame for the lapses in childcare that might befall her children, and she would be in no position to complain that the father was not as attentive to the children's welfare as she might be. The children's loss of parental care was seen as her fault, not his. Furthermore, a husband who had to care for his children single-handedly, after his wife had left him, was justifiably excused from performing childcare duties of the highest

¹²² Westmeath v. Westmeath, 37 Eng. Rep. 797, 802-03 (1821).

standard. It was only when his lapses sank to the level of endangerment of life and limb that his performance could not be excused. These social attitudes reveal a profound tension between the ideals of domesticity, the cult of true motherhood, separate spheres, womanly virtue, and the legal language of rights, duties, and coverture.

When Eldon put a brake on the court's interference with paternal rights in *De Manneville*, he was clearly concerned with the explosive potential of inter-spousal legal disputes, not with the well-established power of the courts to interfere in the personal exercise of familial power or in jurisdictional disputes between the benches. And in the next thirty-five years, fear of opening that domestic can of worms resulted in a law that was so strict and patriarchal that it went against virtually every well-established value recognized by the common law. Referring to these custody decisions, Jamil Zainaldin concluded: "the nineteenth century English judges adopted a patriarchal paradigm of family relations and applied it to the law with such force and vigor that it had the effect of creating new paternal rights, the existence of which had only been vaguely hinted at by previous judges."¹²³ Thus, just as women were reaching what Lawrence Stone and others have called a fulfillment of "domestic feminism" which had "the effect of ...redistribut(ing) authority in the family [and of the] wife ...becoming the equal of the husband in family affairs,"¹²⁴ the law had stripped them of all power to oppose their husbands in any matters concerning children. Children became a weapon to force their submission in family matters, especially surrendering separate property and tolerating the infidelities of wanton husbands.

Judicial reluctance to condone or facilitate family breakdown could not stem the tide of these cases. Litigants continued to petition for access or custody of children and reformers turned to Parliament as the only method for repairing what had come to be characterized as an unjust law. Caroline Norton, a popular society hostess, who was a victim of her husband using the custody of their children to blackmail her into surrendering separately settled property, led the attack. After reading the publicity surrounding the Greenhill case, Caroline set about convincing Parliament that English mothers needed to be saved from the tyranny of their own husbands.

V. CAROLINE NORTON AND THE CUSTODY OF INFANTS ACT: 1838-1839

Caroline Norton was a remarkable woman. Granddaughter of a renowned playwright and a close personal friend of Lord Melbourne (Prime Minister and counselor to the young Queen Victoria), she was an impetuous

¹²³ Zainaldin, *supra* note 72, at 1063 n.97.

¹²⁴ *Id.* at 1052.

and fiery advocate.¹²⁵ She had strong political views and did not hesitate to voice them in public. She wrote numerous poems, novels, and ballads from which she supported herself and her three sons through most of her life. Literary critics have scorned much of her work, historians have often brushed her influence aside in analyzing the political events of her day, and feminists have neglected her work in part because she did not strive for political equality or women's rights in the way Harriet Taylor Mill, Barbara Smith Bodichon, or Elizabeth Wolstenholme-Elmy had.¹²⁶ She did not take up the cause of poor prostitutes like Josephine Butler or tend to the injured Crimean soldiers like Florence Nightingale.¹²⁷ She was firmly ensconced in her comfortable upper-middle class life. Yet, Caroline was the single most powerful catalyst behind the Infant Custody Act because she lived, in an excruciatingly visible manner, the life of wronged motherhood. Her lawyer husband used his knowledge of the law to force her to turn property over to him, forbade her access to her children until the death of one effected a partial reconciliation, and took control of all her literary royalties and copyrights under his power to control the "marital property." Her domestic troubles were played out on the public stage in a manner that shocked the conscience while it attracted the curiosity of the well-to-do and proper circles.¹²⁸

In 1827, Caroline married George Norton, a man his biographer described as "a briefless barrister...well-made, though not tall, good-looking, with a fine ruddy complexion; but rather dull and slow and lazy, and late for everything."¹²⁹ Their later differences were attributed to their incompatible temperaments.

Indeed, it seemed as if all the differences of two opposing races and temperaments, the inherent misunderstanding of the Celt and the Saxon, lay between them, and held them apart from any real union. She, gifted, impetuous, stormy-tempered, with a reckless,

¹²⁵ See Jane Gray Perkins, The Life of the Honourable Mrs. Norton (1909); Alan Chedzoy, A Scandalous Woman: The Story of Caroline Norton (1992); Alice Acland, Caroline Norton, (1948); The Letters of Caroline Norton to Lord Melbourne (James O. Hoge & Clarke Olney eds., 1974); Kathryn Caras, "Public Complaint and Private Sorrow": The Feminism of Caroline Norton (1984) (unpublished Ph.D. dissertation, Indiana University). All of these biographies rely heavily on Norton's five published pamphlets, particularly Caroline Norton's Defense: English Laws for Women in the Nineteenth Century (Joan Huddleston ed., 1982) [hereinafter Caroline Norton's Defense].

¹²⁶ Candida Ann Lacey, Barbara Leigh Smith Bodichon and the Langham Place Group (1987); Elizabeth C. Wolstenholme-Elmy, Woman's Franchise: The Need of the Hour (1907); Phyllis Rose, Parallel Lives: Five Victorian Marriages (1983).

¹²⁷ Joseph Williamson, Josephine Butler: The Forgotten Saint (1977); Boyd, *supra* note 18, at 23-92.

¹²⁸ Chedzoy, *supra* note 125, at 98-103.

¹²⁹ *Id.* at 10.

specious tongue, with an instinct for taking the lead and getting possession of everything around her: magnanimous and generous, incapable of hoarding injuries and paying back old scores when once the first ungovernable outburst of resentment against them had subsided; and he—that dangerous mixture which is often found in dull natures, weak but excessively obstinate and suspicious when he thought he was being led, narrow-spirited, intolerant, slow-witted, yet not silent; rather with a certain power of nagging comment for everything about him that he was least able to understand; not without surface kindness and humanity, fond of children and animals, but coarse-natured and self-indulgent, with a capacity for cruelty and brutality and slow revenge, when once convinced he had been aggrieved, so unlike any quality possessed by his wife that it seemed to confuse and stun her like a blow when she found herself opposed to it. Indeed, it actually did at times take the form of a blow.¹³⁰

They quarreled almost constantly over money, especially when George lost his seat in the House of Commons in 1830 and Caroline used her influence with a close friend, the Home Secretary Lord Melbourne,¹³¹ to get him appointed to a judgeship in the Lambeth Division of the Metropolitan Police Courts, with a salary of £1000 a year. George and Caroline argued frequently and George let his violent temper get the better of him more than once, forcing Caroline to seek refuge with her family. George would then besiege her with letters begging her to return to him, abasing himself, declaring himself in the wrong, and ready to do everything in his power to make amends. Under pressure from her family she always forgave him and returned home. In early 1836, after discovering that he had misrepresented his financial state to her when they married and that they were deeply in debt, they argued about the expenses of her upcoming trip to her brother's house for Easter. George declared that the children would not accompany her and ordered the carriage unpacked. The next morning, while she was seeking advice from her sister, the children were whisked away to George's brother's estate in the North and she was prevented from virtually all contact with them again until neglectful supervision brought about the death of the youngest child six years later in 1842.

The legal battles began when George, attempting to preempt a possible divorce suit by Caroline, sued his own patron, the now Prime

¹³⁰ *Id.* at 14. Caroline was amazingly circumspect in her public criticisms of George until the 1850s when she published her English Laws for Women, which was a lengthy narrative of her life with George. This was preceded a few years earlier by a series of letters published in the Times by both George and Caroline recounting many of the more disagreeable moments in their life together. Times (London), Aug.—Sept. 1853.

¹³¹ David Cecil, Melbourne (1965).

Minister Lord Melbourne, for criminal conversation.¹³² Although his wife and the Prime Minister were friends, it seems very unlikely that there was any amorous attachment.¹³³ The much publicized trial¹³⁴ vindicated Melbourne but proved food for the insatiable scandal-mongers who thrived on malicious gossip surrounding Caroline's reputation. Having failed in his suit, George could not continue his action for divorce. Caroline was likewise unable to seek a divorce on the grounds of cruelty because a few months after their last quarrel she had returned to him, thereby condoning all his misdeeds.¹³⁵ A private separation deed was the only solution.¹³⁶

For six years George and Caroline negotiated a private separation but George refused to allow Caroline access to or custody of the children. Because she would not accept such terms, they were at a stalemate and George was excused from providing the usual alimony of one third of his income that normally would be structured into any separation.¹³⁷ Between 1836 and 1842, except for a month of regular visits while she was on unexpectedly good terms with her husband, Caroline saw her children no more than three times and always in the presence of strangers. The children

¹³² Criminal conversation was a suit by a husband against his wife's lover for alienation of his wife's affection, a necessary prelude to a divorce suit. George was desirous of obtaining a divorce, even on trumped up adultery charges, as it would relieve him from paying any maintenance for his wife's support. Also, he would be relieved of all her debts after the separation and prior to the divorce and would be able to keep the entirety of her marriage portion. See Norton v. Melbourne, 132 Eng. Rep. 335 (1836).

¹³³ See Cecil, *supra* note 131, at 266-82 (the author contemplates the question of Caroline's fidelity to George, believing the relationship remained platonic).

¹³⁴ Norton v. Melbourne, 132 Eng. Rep. 335 (1836). See also a small pamphlet entitled Extraordinary Trial: Norton v. Viscount Melbourne for Crim. Con. Damages laid at £10,000!!! published by William Marshall in 1836, which is a florid piece of journalistic prose describing the unbelievable witnesses paraded by George Norton and a shortened version of the Attorney General's four and a half hour closing speech in defense of Lord Melbourne. The trial was also publicized in great detail in the Times. Norton v. Melbourne, Law Report, Times, June 8, 1836, at 6E (announcement); Norton v. Melbourne, Law Report, Times, June 23, 1836, at 2A-4C (full text of trial).

¹³⁵ Caroline Norton, English Laws for Women in the Nineteenth Century 49 (1854) [hereinafter Norton, English Laws for Women].

¹³⁶ *Id.* at 75-80. A private separation deed was the only remedy for a couple who sought to live apart when the husband did not want to be responsible for his wife's debts, the wife wanted to be free of her husband's company, both promised not to sue to restitution of conjugal rights, and the wife wanted a guaranteed maintenance. See also Stone, Broken Lives, *supra* note 94, at 19-21.

¹³⁷ It was typical that in any divorce or separation petition, the wife's attorney would seek an order on alimony during the pendency of the proceedings, regardless of which party was at fault, due to the fact that until the separation the wife had no legal existence and could not contract or pay for her own debts. Most husbands, therefore, were willing to pay alimony even to wives they were accusing of adultery, because they would not then be likely to be responsible for any debts beyond the amount of the alimony. Perkins, *supra* note 125, at 97.

were removed to Scotland for four of those years where Caroline not only did not see them but also did not even know where they were. Throughout this period, because no settlement had been agreed upon, Caroline received no maintenance. Proceeds from her editorships and royalties from her books and poems were her sole support.

Because the law failed to provide an avenue of redress, Caroline put her literary efforts into three pamphlets criticizing the custody law as it applied to married women. Her first pamphlet was entitled Observations on the Natural Claim of a Mother to the Custody of her Young Children¹³⁸ about which she wrote:

I think there is too much fear of publicity about women; it is reckoned such a crime to be accused, and such a disgrace, that they wish nothing better than to hide themselves and say no more about it. I think it is high time that law was known, at least among the weaker sex, which gives no right to one's own flesh and blood;...God knows that if the Court judged the conduct of women by the same laws as they do that of men, and pronounced as indulgent opinions, we should be happily protected. Conceive, in one of the cases I had from the Law Reports, the mother being obliged to leave her child in the hands of the husband's mistress, and the Court saying it had no power to interfere.¹³⁹ Was there ever such a perversion of natural rights?...The fact is, in this commercial country, as it is called, the rights of property are the only rights really and efficiently protected; and the consideration of property the only one that weighs with the decision made in a court of justice.¹⁴⁰

In response to the pamphlets and Caroline's ceaseless efforts to bring the unfair state of the law to the attention of Parliament, Sergeant-at-law Talfourd, a young Whig barrister and junior counsel for the defendant in the Norton/Melbourne trial,¹⁴¹ agreed to carry a bill through the Commons that would grant mothers a right to petition for custody of their children under age seven, and access to children over age seven. Its first

¹³⁸ Caroline Norton, Observations on the Natural Claim of a Mother to the Custody of her Young Children as Affected by the Common Law Right of the Father (1837) [hereinafter Norton, Observations]. Her second and third pamphlets were entitled: The Separation of Mother and Child by the Law of 'Custody of Infants' Considered (1838) and A Plain Letter to the Lord Chancellor on the Law of Custody of Infants (1839). Both were reprinted in 1922 with introduction by Frank Altschul and under the Hon. Mrs. Norton, author.

¹³⁹ She is referring here to Ball v. Ball, 2 Sim. 35 (1827) (citation added).

¹⁴⁰ Letter From Caroline Norton to Mary Shelley, *quoted in Perkins, supra* note 125, at 133-34.

¹⁴¹ He was also counsel for Mr. Greenhill in the suit by his wife for custody of their three children in 1836.

reading was in early 1837, but due to King William's death in June of that year its second reading was postponed until the 1838 session. In May 1838 the Bill passed the Commons by 91 to 17 but was rejected by the House of Lords in August. In the summer of 1839 the bill finally passed both houses and was enacted as 2 & 3 Vict. c.54.

Despite passage of the Act in 1839, it was not until the death of one of her sons in 1842 that George stopped blocking Caroline's attempt to see her children.¹⁴² Although wealthy enough to be worth divorcing,¹⁴³ and influential enough to win the Prime Minister's protection, Caroline was not safe from her husband's cruelty and legal manipulations. Countless other women suffered similar fates because the law refused to protect a mother's claims to her children in a dispute with the father.¹⁴⁴ Custody and visitation rights to children were often withheld by husbands seeking access to a wife's separate estate.¹⁴⁵

¹⁴² The rest of Caroline's life continued to be rather stormy. In 1853 George took possession of her bank accounts and literary copyrights and royalties to which he was legally entitled despite their separation because a married woman had no rights to her own earnings or separate property until passage of the Married Women's Property Acts in 1870 and 1882. 33 & 34 Vict., c. 93 (1870); 45 & 46 Vict., c. 75 (1882). See also Holcombe, *supra* note 5.

¹⁴³ Although this may sound like a contradiction, there were strong financial reasons for seeking divorce over a separation. The husband was not only relieved from paying any maintenance, but his estate was relieved from her jointure claim, and the property she brought to the marriage would be kept by him.

¹⁴⁴ A fascinating case that never went to trial is told in the lengthy letters of a poor governess whose brother encouraged her marriage to an unsuitable husband because he stood to inherit a small sum upon her marriage. See Nelly Weeton, 1 *Journal of a Governess: 1807-1811* (Edward Hall ed., 1936); Nelly Weeton, 2 *1811-1825* (Edward Hall ed., 1939). Notably, in this case Nelly's brother was a small-town solicitor and yet represented his sister's violent husband in the separation by private deed, having drawn up the deed and refusing to allow her to read it before she signed it.

¹⁴⁵ This was acknowledged even by the members of Parliament who saw the threat of interspousal blackmail as a truly disruptive element in marital relations. "Giving to a mother the power of unrestrained intercourse with her children, would be giving her an opportunity of enlisting their support and feelings against an injured husband." (Warburton, 43 Hansards 147 (daily ed. May 23, 1838); see also Edward Sugden, 43 Hansards 143, 143-46 (daily ed. May 23, 1838); see also Stone, *Road to Divorce*, *supra* note 3.

In these struggles to force a wife to surrender to her husband control over property vested in trustees on her behalf, the three weapons that a husband had at his disposal were consistent wheedling or bullying—being 'kissed or kicked' as it was later described; the removal of the children from the house and a refusal to allow their mother any access to them; and kidnapping followed by indefinite incarceration at home or in a madhouse, sometimes, ...accompanied by physical torture. Only the last was subject to legal intervention, and then only if the wife's friends could find out where she was confined, and also obtain a writ of habeas corpus for her release.

Id. at 81.

The notoriety of the Norton marriage troubles provided fodder for both sides of the reform movement. Some opponents of the custody bill believed Caroline was using her personal connections with members of Parliament to get a bill passed just for her benefit.¹⁴⁶ Others linked her name and Sarjeant Talfourd's by making offensive insinuations about their relationship, and because of coverture Caroline could not sue for libel.¹⁴⁷ Only a husband could sue for the libel of his wife, and George had no desire to vindicate his wife's name.¹⁴⁸ While the notoriety of the injustices she faced spurred legal change,¹⁴⁹ the same notoriety, this airing of dirty laundry in public, upset lawmakers the most during the 1837 and 1838 debates.¹⁵⁰

Caroline Norton's influence was important in part because it *was* public. Her social status ensured that her private life would be made visible in the gossip columns and the fashionable drawing rooms of the day. Her close friendship with Lord Melbourne, just prior to and during his prime ministership, meant she would become a constant source of gossip and inquiry. Thus, her marital troubles received far greater notoriety than the infidelities of the anonymous Mr. Greenhill and Mr. Ball. Even court reports, published in an official and public medium, could not generate the visibility and intensity of feelings that a juicy scandal created in fashionable drawing rooms. This visibility both helped and hindered her quest for social justice. The sheer visibility called into question her merit as an abused and deserving wife because proper women shunned the public eye, and Caroline was especially criticized for manipulating public sentiment.¹⁵¹ Not only was she deemed an unworthy example for the reform movement because she was so vocal about her political views, she was deemed unworthy because she allowed her private life to be made public. Her

¹⁴⁶ Edwin Hill Handley, *Custody of Infants Bill*, 7 Brit. & For. Rev. 269 (1838); Edward Sugden, 40 Hansards 1114 (daily ed. Feb. 14, 1838); Edward Sugden, 43 Hansards 143, 143-46 (daily ed. May 23, 1838).

¹⁴⁷ Handley, *supra* note 146, at 367-78.

¹⁴⁸ Joan Huddleston, *Introduction to Caroline Norton's Defense*, *supra* note 125, at ix.

¹⁴⁹ Norton's political writings inspired Barbara Smith Bodichon's influential pamphlet on law reform: *A Brief Summary in Plain Language, of the Most Important Laws Concerning Women, Together with a Few Observations Thereon* (1854). See also Shanley, *supra* note 12.

¹⁵⁰ 42 Hansards 1050 (daily ed. May 9, 1838); 42 Hansards 1053 (daily ed. May 9, 1838).

¹⁵¹ 39 Hansards 1089 (daily ed. Dec. 14, 1837); 49 Hansards 491 (daily ed. July 18, 1839).

notoriety was the principal reason the bill was killed in the Lords when it was finally voted on in 1838.¹⁵²

The fact that Caroline Norton's story became public puts the historian in a difficult position. It was clearly influential in a way the experiences of Mrs. De Manneville, Mrs. Greenhill, and Mrs. Ball were not.¹⁵³ While her story spurred legislative change, the others changed the common law. The common law is the product of cases that retell personal life experiences. Legal categories and rules are mapped onto these life experiences, which eventually result in laws of general applicability. Thus, to move from a dozen instances of family breakdown to a set of general laws about jurisdiction, habeas corpus, inter-spousal custody, and parental rights is to take certain experiences and manipulate them into legal narratives of status relationships, rights, duties, and expectations that become public laws, which in turn create more legal categories.¹⁵⁴ Norton's own narrative revealed, like the facts of a court case, the conflict in two people's lives, in terms of both legal categories and rights, and moral categories. Hence, when Norton criticized the law for treating the mother of an illegitimate child differently than the mother of a legitimate child, she was using legalistic categories to structure a personal narrative that juxtaposed moral rights and legal rights. Her politicized narrative, mapped onto a foundation of legal norms and categories, subverted the usual process of moving from personal experience to generalized law, by critiquing the law through a narrative of personal experience. This subversion in turn called into question the processes of creating and changing law through application to individual situations. Norton's life became a legal text wherein we read how the narrative presupposed certain legal categories, criticized others, and was criticized in turn by those who call themselves lawmakers. This raises the question, is it the judge and the legislator who

¹⁵² Norton, *English Laws for Women*, *supra* note 135. Sugden, for instance, argued that despite the hardships of individual cases and the admirable intent of trying to soften the hard lot of a few women, "he believed that this general remedy would not tend to the public good." 42 Hansards 1051 (daily ed. May 9, 1838). Further that "the Legislature was bound to look to the welfare of married women as a class, and not to have regard to individual cases." 48 Hansards 160 (daily ed. June 12, 1839). Talfourd argued to the contrary that "surely all laws were made to meet particular cases" as he narrated the sad stories of Mrs. Ball, Mrs. Skinner, and Mrs. Greenhill. 43 Hansards 145 (daily ed. May 23, 1838).

¹⁵³ Perkins' biography is questionable in part because it was relatively contemporaneous.

¹⁵⁴ For instance, Mrs. De Manneville's story of her child's kidnapping is rewritten for the court as a story of paternal rights, marital relationships, and judicial jurisdiction. When those rules and categories are applied to her case, the system kicks it back out as inconceivable, incomprehensible, and therefore not a legal wrong. The result of that outcome is a rule about marital status and rights of access to courts. *De Manneville v. De Manneville*, 32 Eng. Rep. 762 (Ch. 1804).

“make” law, or is it the litigant, the person whose life is lived in the interstices of law, who makes law possible?¹⁵⁵

**VI. A HORSE WITH TWO RIDERS: MOTHERS’ RIGHTS V.
FATHERS’ RIGHTS AND THE CUSTODY OF INFANTS ACT,¹⁵⁶
1838-1839**

The bill that eventually passed in 1839 gave mothers a limited right to petition the courts for access to children over age seven, and custody of children under age seven.¹⁵⁷ This statute, called Sgt. Talfourd’s Act or the Custody of Infants Act, roused an unusually virulent outrage by opponents who called it the “Robbery of Fathers Act” and predicted that it would cause all sorts of unnatural and vicious acts. Ironically, the Act proved so ineffectual that the 1857 divorce reform would sweep it away in a burst of comprehensive legislation. Advocates and lawmakers, like Caroline Norton and Sgt. Talfourd, hoped the bill would prevent the outrageous cases of injustice that had emerged from the courts in the prior thirty-five years. The arguments of opponents and proponents that led up to passage of the Act reveal the complexities of the demands mothers were making and the institutional difficulties of recognizing mothers’ rights without taking away fathers’ rights.

Many critics dismissed the women’s rights movement, custody, and much of the debate over divorce fifteen years later, as a hopeless endeavor. As one writer put it: “[i]f two ride on a horse, one must ride behind.”¹⁵⁸ In other words, in any partnership, subordination was inevitable and the existence of paternal rights made the argument for legal rights for mothers nonsensical. But despite the conservative naysayers, by the last half of the 1830s many people saw new legislation as an important mode of redress. It certainly was not the only mode of redress. Many who argued against the proposed bill believed that friends and families of these unhappy women should use informal social and economic pressure on husbands to reconcile their differences.¹⁵⁹ Others believed the evil simply could not be avoided, through law or otherwise, because “true” women would be loathe to go public with their private disputes.¹⁶⁰

¹⁵⁵ See Michael Grossberg, Judgment for Solomon: The d’Hauteville Case and Legal Experience in Antebellum America (1996) (describing how lives change as they encounter legal categories, and similarly how legal categories change as they encounter real lives).

¹⁵⁶ 2 & 3 Vict., c. 54 (1839).

¹⁵⁷ *Id.*

¹⁵⁸ Women’s Law: Mrs. Norton’s Letter to the Queen, 23 L. Rev. 340 (1855-56).

¹⁵⁹ Handley, *supra* note 146; 43 Hansards 144 (daily ed. May 23, 1838).

¹⁶⁰ 42 Hansards 1053 (daily ed. May 9, 1838).

Inherent in the debate, however, were three assumptions: (i) that women and men were fundamentally different creatures by nature; (ii) that the nature of legal rights arose from an individualism that could not accommodate both paternal and maternal claims to children; (iii) and that family stability, defined as a heterosexual, monogamous couple and their biological offspring, was at the heart of civil society and therefore justified legal control in the domestic sphere. These assumptions continued to operate through the mid-century reforms and to influence family law into the twentieth century.

One of the recurring arguments by those who opposed changing the law to recognize maternal rights was founded on a belief that women were lustful, irrational, and nagging harpies. For example, Sir Edward Sugden,¹⁶¹ who opposed the bill in the House of Commons, noted that although there were a few situations to the contrary, “those acquainted with life must well know that there were many cases in which the faults were on the part of the wife.”¹⁶² He believed that granting these wives custody of their children would lead to separation, perjury, immorality, and social instability. “If you opened a facility to separation between husband and wife at the commencement of their union, you opened a door to divorces and to every species of immorality.”¹⁶³ For Sugden, the legal constraints on women were all that kept them from following their unyielding passions and destroying themselves and their families in the process.

He was prepared to contend that there was scarcely a case of differences in married life in which a wife did not ultimately reap the benefit of submission to her husband, and in which, after her irritated feelings had subsided, she did not thank God a thousand times that she had not obeyed the first impulse of passion, which prompted her to leave the house of her husband, where it was most for the interest and comfort of her children that they should be maintained and educated....When the wife knew that she could not have access to her children, after leaving her husband's house, she was unwilling to separate herself from him for light causes: supposing this Bill to pass into law she would argue thus: “I can now have access to my children when I please and I will separate immediately from my husband.”¹⁶⁴

Sugden's views of women were by no means uncommon. Lord Brougham, who was Chancellor from 1830 to 1834, argued in the Lords'

¹⁶¹ Sugden would later become Lord Chancellor in 1852 and seemed to take many of these views with him to the woolsack. He did not remain on the bench for even one full year.

¹⁶² 39 Hansards 1091 (daily ed. Dec. 14, 1837).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1116.

debate that remedying this evil would open the “channels through which the floods of immorality would be sure to over flow the character of the institution of marriage.”¹⁶⁵

This view of women, as incontinent, immoral, and irrational creatures, was at the heart of a virulent attack on the proposed Custody of Infants Act that appeared in the British and Foreign Review in July of 1838.¹⁶⁶ That author wrote:

*You cannot take away the least of the safeguards of domestic virtue without an injury to public morality . What madness then and atrocious wickedness it would be to take away, not merely the last, the only remaining bar against the outbreak of ever-tempting lusts, and then hope that they will afterwards restrain themselves on account of your impotent good wishes, and unheeded sermons, and vain regrets! As well might you expect, when you have unbarred the cages of so many wild beasts, that they will remain quietly in them at the wish of their keepers!...Human passions and lusts are, as it were, so many wild beasts, and every one carries about in him a den of them.... Whereas if you remove—as Sarjeant Talfourd, with his silly intemperate sentimentality would wish to persuade our legislators to remove—the bars and obstacles to their excess, you make them incontinently and inevitably the direct instruments, the very ingredients of vice. Like the horses let loose by the Spaniards in the wild delicious prairies of the new world, they will run headlong into every species of riot and untamable license.*¹⁶⁷

Because women were “wild beasts,” the custody laws quite sensibly kept out of their hands the incentive to destroy their family, an outcome the legislators believed correlated to retaining access to their children.

On the other side, women were also depicted as man’s virtuous partner and helpmate and the cult of true motherhood offered a steady stream of imagery about the self-effacing and truly nurturing mother.¹⁶⁸ Caroline Norton’s first article was based entirely upon the “natural”

¹⁶⁵ 44 Hansards 772 (daily ed. July 30, 1838).

¹⁶⁶ It is of some interest that this publication, principally devoted to the foreign issues of Polish independence, would devote almost 150 pages to an attack on this domestic and relatively insignificant bill. Not much is known about the author, Edwin Hill Handley. However the editor, John Mitchell Kemble, apparently assisted with this article, and of him we know a little more. He was the brother of the famous actress Fanny Kemble who married a Philadelphia slave-owning gentleman and was subsequently divorced and denied access to her own children. The idea that fathers, husbands, and brothers could be counted on to protect the interests of the women in their families was sadly contradicted in this case and in the case of Nelly Weeton. Weeton, *supra* note 144.

¹⁶⁷ Handley, *supra* note 146, at 280-81.

¹⁶⁸ Norton, Observations, *supra* note 138, at 50-54.

strength of the mother/child bond. In arguing against the claims of the equally loving and nurturing father, Norton believed motherhood was a unique vocation.

If it be said, that in cases where husband and wife separate, both parents being equally attached to the children, it would be an equal injustice to take them from the father's custody, in order to place them in that of the mother; I answer, that at the tender age of which alone I speak, they are not, and *necessarily cannot be*, in the custody of the father. The daily tenderness, the watchful care, the thousand offices of love, which infancy requires, cannot be supplied by *any* father, however vigilant or affectionate. The occupations of his life would alone prevent his fulfilling the petty cares which surround the cradle. He is compelled to find *other* care for them, to replace that of which he has deprived them; he is compelled either to leave them to hired female servants, or to deliver them over to some female relative. And it is in this very point that Nature speaks for the *mother*. It pronounces the protection of the father insufficient,—it pronounces the estrangement from the mother *dangerous and unnatural*, and such as must be immediately supplied by female guidance of some sort or other.¹⁶⁹

Not only were women's natures seen as uniquely fitted to the self sacrifice necessary to principal childcare, some also argued that they were more virtuous and less likely to stray from the bonds of matrimony. Innumerable novels, articles, sermons, and pedagogic manuals have placed women on a moral pedestal, their calming and righteous influence being seen as man's sole salvation.¹⁷⁰ Plenty of scholarship has centered on the contradictions inherent in an ideology of female morality and female powerlessness in the nineteenth century.¹⁷¹ The myth of female passivity, however, functioned

¹⁶⁹ *Id.* at 52. In the 1848 case *In re Fynn*, the court commented numerous times on the inconceivability that the two infant boys spent six months with their father with no female attendant of any kind, yet custody was left with the father. 2 DeG. & Sm. 457 (1848).

¹⁷⁰ A typical article in the *Edinburgh Review* claims that “[a]s the peculiar office man is to govern and defend society, that of woman is to spread virtue, affection, and gentleness through it. She has a direct interest in softening and humanizing the other sex.” Rights and Condition of Women, 73 *Edin. Rev.* 99, 110 (1841).

¹⁷¹ This tension is seen in the Madonna/whore imagery of woman as either pure and innocent or wanton and lustful. This is a common trope, juxtaposing the pure virgin with the painted harlot. All women are believed to possess the potential for both, but with sexual experience, especially unlicensed sexual experience, woman's insatiable sexual nature was believed to emerge. Marriage, therefore, is a double-edged sword—the opportunities for sexual experience are certainly increased, but it was believed that in motherhood, women would be able to subvert their lustful desires in the self-sacrifice necessary for childrearing. See Barbara Taylor, Eve and the New Jerusalem: Socialism and Feminism in the Nineteenth Century (1983); Dally, *supra* note 20.

to disable women from entering the public sphere of men and law. Women's imprisonment in the domestic sphere was portrayed as a natural result of their unique strengths. Mr. Shaw, in the Commons debates, asserted that "no woman of a delicate mind would submit to call upon a court to interfere and to exercise these powers."¹⁷² Woman's naturally timid and retiring nature would keep the "true" woman out of the courtroom because the exposure to the rough and tumble public sphere would ruin her delicacy. The pure woman would shrink from such a public display while the wanton woman, the only one who would seek to vindicate her rights in a public courtroom, undermined her claim to custody of her children by her very presence, by proving her defeminization.¹⁷³ Even Handley claimed that the influence of litigation is "deplorable and demoralizing" to women.¹⁷⁴ By defining true womanhood in terms of a private domestic character, these opponents effectively dismissed all claims for women's rights that might require articulation and protection in the public realm.¹⁷⁵

This view of women as sullied by contact with law and courts is represented in an extreme form in a Thomas de Quincey short story that appeared in 1838 in *Blackwood's Magazine* entitled *The Household Wreck*. The narrator tells of the destruction of his entire happiness by the false arrest of his angelic wife on trumped-up charges of shoplifting a piece of lace. Agnes, who any observer would see was "an exemplary model or ideal pattern for the future female sex" where "[e]very thought of artifice—of practised effect—or of haughty pretension, fled before the childlike innocence—the sweet feminine timidity—and the more than cherub loveliness of that countenance, which yet in its lineaments was noble, whilst its expression was purely gentle and confiding."¹⁷⁶ A woman so pure and beautiful was the perfect prey to the evil and lustful desires of a local tradesman who fabricated a plot to blackmail her into submitting to his desires. He falsely accused her of theft with the intention of dropping the charges if she would submit to his base desires. But when public sentiment after her arrest turned against him, he was forced to continue his

¹⁷² 42 Hansards 1115 (daily ed. May 9, 1838).

¹⁷³ This was played out most visibly in the case of Caroline Norton.

¹⁷⁴ Handley, *supra* note 146, at 301.

¹⁷⁵ Lord Lyndhurst, when he introduced the bill the second time in 1839, remarked that "it was well known that women will suffer much before they resort to a court for redress, but surely that was a good reason why redress should be given." 49 Hansards 492 (daily ed. July 18, 1839). He had noted that although resorting to a court was seen as unfeminine, it was done so out of desperation, not litigiousness. *Id.* This was opposed by Lord Wyndford who believed that granting women a reward (their children) if they petitioned the court would lead to constant litigation and renewed appeals. 44 Hansards 790 (daily ed. July 30, 1838).

¹⁷⁶ Thomas de Quincey, *The Household Wreck*, in 43 *Blackwood's Mag.* 1, 5 (1838).

prosecution of her with perjured witnesses to save his own reputation. Her innocent and guiltless nature prevented her from seeing his plot or holding firm in her position. As narrated, “this hideous scenical display and notoriety settled upon one whose very nature, constitutionally timid, recoiled with the triple agony of womanly shame—of matronly dignity—of insulted innocence, from every mode and shape of public display.”¹⁷⁷ The fabricated evidence and perjured witnesses held sway; she was declared guilty and sentenced to ten years’ hard labor. But before she could begin serving her sentence, her health deteriorated to such a state that her husband and brother believed that escape would be her only salvation. After a harrowing escape and two months closeted in a dirty hovel, she died just as the guards found their hiding place and came to reclaim her. Although the story was wildly melodramatic and sensational, the moral that the pure woman’s contact with law meant death, even if she were innocent, was remarkable. She was the archetype of the angelic wife and mother. Her false arrest and removal from her household caused her infant son to die and husband to fall into a fever from which, without her careful nursing, it took him almost two months to recover. This fever prevented him from being able to save her from the perfidious fiend and to mediate her encounter with the law.

As the narrator/husband explains, however, Agnes did fail one of her principal duties; she did not relate to her husband the entirety of the details surrounding her previous contact with the ruffian. As he writes:

Affection for me, and fear to throw me needlessly into a quarrel with a man of apparently brutal and violent nature—these considerations, as too often they do with the most upright wives, had operated to check Agnes in the perfect sincerity of her communications. She had told nothing *but* the truth—only, and fatally it turned out for us both, she had not told the *whole* truth...[B]ut certainly, as a general rule, every conscientious woman should resolve to consider her husband’s honour in the first case, and far before all other regards whatsoever; to make this the first, the second, the third law of her conduct, and his personal safety but the fourth or fifth. Yet women, and especially when the interests of children are at stake upon their husband’s safety, rarely indeed are able to take this Roman view of their duties.¹⁷⁸

¹⁷⁷ *Id.* at 25.

¹⁷⁸ *Id.* at 29. This is an interesting comment as it speaks to the power to enforce speech that is at the heart of Michel Foucault’s argument in History of Sexuality, Volume 1: An Introduction (Robert Hurley, trans., 1978). By eliciting the speech yet withholding the speaker’s authority to interpret, the husband maintains the voyeuristic position of subject while reducing his wife to object.

Had she told him of the ruffian's earlier attempts to accost her in the street, her husband's more worldly understanding would have recognized the threat and he would have stopped the plot that would destroy her life, his happiness, and his reputation. At bottom it was her fault that male sexual violence disrupts another man's domain and prevents him from protecting his weak and infantile wife.

The image of the timid and childlike Agnes unable to defend herself in the boisterous courtroom against a host of perjured witnesses and rule bound judges is profoundly unsettling, yet she was none other than the mythic Victorian woman. This innate inability to demand one's rights that marked the idealized woman is a common theme in the novels and short stories of the nineteenth century.¹⁷⁹ To think that a romanticized and highly fictionalized trope, the essential child bride, could arise in a legislative debate over the legal rights of real women and men reveals the strength of idealized stereotypes. The line between fact and fiction began to blur as the social construction of true womanhood was divorced from the rights and duties of law. The more institutions of law relied on social stereotypes, the greater the separation became between the law and the people it purported to regulate. For some legislators, an idealized view of women structured their arguments and determined their votes on an issue that affected all married women of the realm. Because the ideal woman did not need rights, real women did not need them.

This reliance on a fictional trope demonstrates a systemic contradiction inherent in the institutional parameters of separate jurisdictions. With the ecclesiastical courts making ultimate determinations of marital validity and performance, the religio-social norms of Victorian womanhood became embedded in the laws of marriage and divorce. With the law courts making determinations of property ownership based on strict settlements, jointures, pre-nuptial agreements, and common law rules of coverture, the gendering of power relations over property was occluded. With the so-called "best interests of the child" being determined in the Chancery courts under *parens patriae* jurisdiction, the language of parental rights overshadowed the reality of parental duties. The ultimate moral is that women needed men to mediate their contact with law and to be their protectors. If women failed in their duties, men would be unable to protect them. For Agnes, her failure to divulge to her husband the improper advances of the tradesman led to her downfall, not the perjury, the law, the public nature, or the misogynist behavior of men.

The nineteenth century witnessed significant changes in the literary and social atmosphere of upper and middle class women. Although the

¹⁷⁹ See Mary Wollstonecraft, *Maria: Or the Wrongs of Woman* (Norton 1975) (1798); Mary Wollstonecraft, *The Vindication of the Rights of Woman* (Penguin Books 1985) (1792); Elizabeth Gaskell, *Wives and Daughters* (1969); Anne Brontë, *The Tenant of Wildfell Hall* (Harcourt 1972) (1848).

separation of public and private spheres did not exist for most working-class women, there was a pervasive social discourse about women's domesticity and natural childrearing functions. The story of Agnes may not have reflected the real lives of many early nineteenth-century women, but it reflected a mythic ideal toward which many families strived. The separation of the domestic and public spheres was not without real consequences when it became embedded in legal doctrines and institutions. Women's greater seclusion in the domestic/private realm required legal mediation to police the boundaries of separate spheres. The law itself contributed to women's disjuncture from legal protections and legal mechanisms.¹⁸⁰ Despite a time-honored correlation of rights and duties when describing the father's legal relation to his children, this did not carry over to mothers. For mothers, access was viewed as a reward for performing their marital and parental duties, never a right. Because women had willingly entered into the bonds of matrimony and motherhood, their rights of access were dependent on remaining with their husbands. Women who separated were seen to have brought their problems on themselves. If they continued to perform their marital duties, they would not be deprived of access to their children.¹⁸¹ In this model there was no room for protecting wives who were driven out of their home by adultery or abuse.

Prior to 1839, judges rarely commented on the possible excuses a wife might put forth for leaving her husband's roof, and they believed that the woman who was driven out of her home by an abusive and tyrannical husband should not have to suffer the loss of her children too. But Handley, Sugden, and Brougham raised, for the first time in this debate, a direct connection between a woman's rights to her children and performance of her marital and domestic duties. For these legislators and commentators, there was a deep belief that the mother who was forced to flee her home was ultimately at fault, either through provocation or lack of due deference to her husband and lord. Why should she, they queried, be granted access rights to her children?

¹⁸⁰ One contested site around which this debate was argued was the legalistic realm of rights and duties. The legislators, judges, attorneys, and pamphlet writers who opposed the custody bill argued that fathers' special rights to custody of their children were necessary conditions of their duties to support and maintain them. 44 Hansards 789 (daily ed. July 30, 1838); 1 Blackstone, *supra* note 10, at 446-59. This duty extended so far that even where access by the mother might interfere with the father's educational schemes, his plans trumped whatever interest the children might have had in their mother's company. The correlation of rights and duties was most notably expounded by Blackstone, as coming out of the guardianship and wardship cases, and the natural law principles of the *parens patriae*. *Id.*

¹⁸¹ This went so far that in one case the court justified denying access to an estranged mother on the grounds that had she remained with her husband she would not be in this position, with no access to or control over her children. *Warde v. Warde*, 41 Eng. Rep. 1147 (Ch. 1849).

Handley saw rights of access as the reward for performing marital duties and the brake in a wife's temptation to neglect the role she had willingly entered into. He wrote that there is the "most intimate connection between the performance of conjugal and maternal duties;...by her own deliberate removal she will have made it *impossible* for her to perform even the least attention of duty either to her husband or to her children;...the innocent look of a little child...the thought of this will yet oftentimes recall her to her duty, and preserve her from the abyss of guilt and misery she was about to plunge into."¹⁸² For Handley, rights and duties came together when women's access to their children occurred through execution of their domestic duties within the conjugal home. Because they could not perform their maternal duties separate from their conjugal ones, and because they could not perform their maternal duties while living apart from their children, the only right they had to their children depended on remaining under their husbands' roofs. "By the law of God, the law of pure justice and reason, right and duty are correlative, coexistent and *inseparable*; and this inseparable connexion [sic] between them God himself has made to be the very *foundation* and support of all morality."¹⁸³ For Handley, therefore, any retreat by a woman from her husband's roof, for whatever reason, constituted a violation of her marital duties and justified the renunciation of her right to access.

The differential treatment of men's rights and women's rights is an important issue of the reform debate. In an article in *The Spectator*, natural rights were offered as support for granting maternal rights. "The intent of all legislation is to guard the inoffensive weak against the offending strong; and the subjects of a just government have a right to expect this protection from the legislature."¹⁸⁴ As the author of this article noted, a woman loses her civil rights upon marriage and it is the job of the legislature to return to her her natural rights. How can the legislature do that, was asked by many opponents, if doing so requires limiting in any way the rights of the father? Handley asserted that "[a]s far as [the Bill] provides relief at all, it is all on one side; and the right it gives to one party, is given only by taking it away from the other." Further, "[a] woman, therefore, by this Bill will not be enabled, as the framers of it would wish to make out, to perform the duty of a mother, but only to enjoy the rights of disturbing the eternally-established and indisputable rights of the father."¹⁸⁵ Even as the proponents wished to remedy the particular hardships these women experienced, they did not wish to give them "rights" to their children. Although rights are the currency of law, married women under coverture would own no rights, just

¹⁸² Handley, *supra* note 146, at 282-84.

¹⁸³ *Id.* at 287.

¹⁸⁴ Husbands, Wives, and Young Children, 11 *Spectator* 561 (1838).

¹⁸⁵ Handley, *supra* note 146, at 273, 289.

as they did not own their estates, their clothes, their earnings, or their children.¹⁸⁶

Arguments for reform also evidenced a tension between claims that giving women rights would open the floodgates of immorality and lead to the destruction of the family and society,¹⁸⁷ and claims that the publicity and the power of the state to intervene in a man's private life would encourage illicit behavior by bringing it to the attention of the masses and preventing husbands from using law to maintain their control over the private sphere.¹⁸⁸ Privacy and male control of the family were seen as necessary to keeping the lid on immorality and social stability while also maintaining the private sphere by keeping the state out of the family. Opponents of the bill had a difficult time deciding which was worse, taking rights away from fathers and giving them to mothers, thereby upsetting the natural power dynamic in families, or giving judges the right to step in and examine family affairs at the behest of wives. Handley asserted that:

We had intended to have shown fully and completely...the unconstitutionality of the Bill; how it tends to destroy the fundamental law of society,...[how] regulating the domestic happiness of twenty-six millions of moral beings, is now to be destroyed upon a plea of *six* cases and only *one* petition!...how the Bill places the regulation of the domestic life of every family in the country, directly or contingently, in the will, not only of eighteen men, but of any one of these eighteen;...how it tends to increase...the worst, most dangerous and unconstitutional part of the practice of the law,—the practice before a single Judge in his private chambers; how it leaves the Judges to decide upon the

¹⁸⁶ In the years following passage of the act, a number of judges remarked that it would allow women who were precluded by tyrannical husbands from performing their marital duties to continue performing their maternal ones. But throughout this period, at least until 1857, access and custody remained dependent on marital status and paternal forfeiture.

¹⁸⁷ Probably the most oft-quoted phrase in the debates was that this bill would facilitate separations and thereby destabilize society. "Upon the whole it was safer and better for society and the marriage state, for the comforts of the parties, and, above all, for their issue, that the father should have uncontrolled care of that issue, than that control should be shared as a matter of right with the mother." Lord Brougham, 44 Hansards 782 (daily ed. July 30, 1838). However, as others argued, the then current state of the law encouraged more vice and immorality than the reform might. Caroline Norton believed that removal of a woman's children would render her restless, unnatural, and alone, and that she might seek "consolation in hollow gaiety, or unlawful affection." Norton, *Separation*, *supra* note 107, at 19. It would also tempt men to immorality, "for men are apt to be careless of such crimes as bring neither disgrace by their detection, nor penalty by their commission." *Id.*

¹⁸⁸ "The duty which was cast by law upon the husband of taking care of the children and attending to their education he never could perform if the present bill were allowed to pass into a law, ruining half the families in the kingdom, and corrupting the morals of the young generation." Wynford, 44 Hansards 790 (daily ed. July 30, 1838).

greatest possible right with the least possible responsibility; how it thus tends to introduce, under the formality of law, a domestic inquisition armed with tyrannical powers of oppression, such as no one has ever dared to propose in this country since the abolition of the abhorred Star Chamber."¹⁸⁹

The intervention of the state into the privacy of a man's family life was an overarching objection to adjustments in the legal rights of husbands and wives. Edward Sugden objected to the Bill because "it gave a right to the judge...to investigate the whole domestic life of the parties from the time of the marriage to the very day of the application."¹⁹⁰ The role of law in maintaining the veil between the public and private spheres, whether it keeps the private out of the public or the public out of the private, was of principle concern in the debates over this bill. What was seen as the primary threat is the potential mingling of the two realms, envisioned in the escape of the woman into the public world of the courts, or the invasion of the state into the private life of the bedroom. Man was seen, therefore, as gatekeeper trying to protect his own liberty by keeping women in the home and the state out of the home. And the best of man's weapons against both threats was the law of coverture, a law that denied married women access to courts and consequently to their children.

What is striking is that only Handley and Sugden recognized that the right women were gaining in their children was a power that would ultimately undermine coverture. Although many saw the law as a breakdown of patriarchal authority in the family, it was never referred to directly in terms of coverture or in terms of a legal capacity to challenge one's husband. Because women's civil rights died upon marriage, their ability to petition a court of equity for custody against their husbands represented one of the first challenges to the fiction of civil death. It was not so much that she could now acquire custody of her children, for she had *de facto* custody in many situations (death, desertion, forfeiture by the father, and illegitimacy), but now she was given the *de jure* right to bring suit against her husband, to challenge his authority in family decision-making. Although the rights that women eventually achieved in the 1839 Bill were limited—husbands' rights to custody remained unchanged—her right to invoke the authority of the state on her behalf against her lord was a necessary first step to the dismantling of coverture.

Maternal rights had the potential to disrupt the prevailing separate spheres ideology and the long-standing doctrine of coverture by allowing women to make the private public. A necessary part of that disruption was a recognition of the role played by the law of child custody in perpetuating the subordination of women. What we have seen, with the benefit of

¹⁸⁹ Handley, *supra* note 146, at 358-59.

¹⁹⁰ 42 Hansards 1050 (daily ed. May 9, 1838).

hindsight, is that women did not break out of the privacy of the domestic sphere as was feared; rather the state invaded the male privilege of family control. In other words, the husband was replaced by the judge, but women still rode behind on the family horse.

VII. JUDICIAL APPLICATION OF THE CUSTODY OF INFANTS ACT: 1839-1857

In the eighteen years between passage of the Custody of Infants Act and the establishment in 1857 of the Divorce and Matrimonial Causes Court, the Chancery judges had numerous opportunities to examine, interpret, and apply the new law. Within two months of passage of the Act, at least two petitions were presented by separated mothers seeking custody of or access to their children.¹⁹¹ Both petitions were dismissed with reference to the pre-Act rights of the father.¹⁹² In these eighteen years, the judges sometimes pondered their powers under the Act and their ability to interfere with fathers' rights on behalf of mothers. In the first ten years only one mother received custody of her children,¹⁹³ and mothers later would receive custody if their husbands were homosexual, religious fanatics, or had committed incest.¹⁹⁴ Yet in every instance of mothers gaining custody, the fathers met the pre-Act forfeiture standard. There were also a handful of cases in which the mother was granted access rights to her

¹⁹¹ Taylor v. Taylor, 4 Jur. 959 (1840); An untitled case mentioned in Taylor is also relevant. *Id.* at 961.

¹⁹² As the court explained in the second, unnamed case:

The principles therefore which have determined the discretion of the court in cases where the custody of its wards are concerned, are the principles by which the court will administer this act; and all the cases from which those principles are to be collected, are on point to the present application. In all those cases, the court has grounded its interference on the interest of the infants only, and has refused to act against the legal rights of the father, unless a very clear case has been made out of danger to the moral or religious principles of the children. Some of these cases may have been ill decided. If Ball v. Ball had been carried before Lord Eldon, he might possibly have overruled the vice-chancellor's decision; but the principle on which those cases proceeded is, to this day, the principles [sic] of the court. . . . There is no ground for contending that the mother has by this act acquired a right.

Id. at 961.

¹⁹³ Warde v. Warde, 41 Eng. Rep. 1147 (1849). Mothers also received custody of one child in two other cases in which courts split the children among both parents, the mother receiving only the youngest, and the father receiving all the others. In re Fynn, 2 DeG & Sm. 457 (1848); Ex parte Bartlett, 63 Eng. Rep. 906 (1846).

¹⁹⁴ Anon., 2 Sim (n.s.) 54 (1851); Thomas v. Roberts, 64 Eng. Rep. 693 (1850); Swift v. Swift, 34 Beav. 264 (1865).

children, except when she had been guilty of adultery. But in the majority of cases, the petitions were dismissed or withdrawn because of enforcement difficulties, jurisdictional questions, or reconciliation by the parties after judicially enforced delays.

Despite the paucity of cases, some striking patterns emerge. No mother won on the merits of her own claim; she would only win on the demerits of her husband's claim. The courts spent a significant amount of time listening and responding to arguments disputing the scope and application of the new law, but even in 1857 those arguments were still occurring. The fears of opening the floodgates of immorality and judicial attitudes about women's private and passive character were more openly discussed between advocates and judges than in the cases prior to the Act. Ultimately, however, fears of opening the domestic can of worms, or contributing to the breakdown of the patriarchal family, motivated the judges in every case to limit, narrow, and constrain the Act until it became nothing more than an expansion of the court's common-law powers over the non-propertied as well as the propertied child.

If they could not dispense with a case on procedural or jurisdictional grounds, the courts' initial starting point was the paternal rights standard enunciated in Greenhill:

It does not follow because a husband's conduct is such as to make his wife very unhappy, that he is therefore to be deprived of the custody of his children. To justify such an interference with the father's rights, his misconduct must appear to be of such a nature as to be likely to contaminate and corrupt the morals of his children.¹⁹⁵

Most significantly, the only time fathers were denied custody was when they met the pre-1839 life and limb forfeiture rule.

In the first custody dispute decided after passage of the Act, Talbot v. Earl of Shrewsbury, Chancellor Cottenham explicitly denied the mother any custody rights as against a testamentary guardian (a substitute father).¹⁹⁶ This decision reversed the trend of the eighteenth century guardianship cases which had recognized limited maternal rights and looked instead to the nineteenth-century inter-spousal custody cases for language denying mothers any rights in their children whatsoever. He explained:

¹⁹⁵ In re Spence, 41 Eng. Rep. 937, 939 (Ch. 1847).

¹⁹⁶ Under the 1846 Abolition of Tenures Act, reaffirmed 12 Chan. C. 24 (1660), testamentary guardians were deemed to step permanently into the shoes of fathers and to have all their rights, subject only to oversight by the Chancellor. It apparently was not suggested, or at least not determined, whether limitations on paternal rights by the Custody of Infants Act would carry over to testamentary guardians.

When the case was before me in the autumn, I had considerable reason to believe that there was much misapprehension in the mind of the mother as to her rights as mother; and I thought it necessary to explain that, in point of law, she had no right to control the power of the testamentary guardian. It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians.¹⁹⁷

Cottenham held that, “[p]rimâ facie, [the guardian] has a right to the possession of both children.”¹⁹⁸ Though he did allow the mother to retain possession of the nine-year-old daughter who had a weak constitution, he affirmed that the guardian retained responsibility for the care and education of the child and should therefore have “free access to the child, and must be considered as having the custody of the child.”¹⁹⁹ Because the Act only addressed mothers in disputes with their husbands, it provided no relief for a mother against a testamentary guardian who, by the 1646 Abolition of Tenures Act, could be appointed by a father to the complete exclusion of the mother. That power was not changed until 1886.²⁰⁰

A few months later a custody decision came out of the Chancery that fell within the 1839 Act. In that case, Taylor v. Taylor,²⁰¹ the husband and wife had separated informally and Mr. Taylor had taken up residence in France with all five children of the marriage. Mrs. Taylor had remained in England and petitioned the court that the three children under age seven be allowed to reside with her and that she be allowed access rights to any not in her custody. During the course of this custody dispute, Mr. Taylor opposed Mrs. Taylor’s suit in the ecclesiastical courts for restitution of conjugal rights, thus again bringing to the forefront the coverture issue, though arguably the Act was to have given the wife the power to petition without having to obtain a legal separation first.

The advocates for both sides argued at length about the meaning and scope of the Custody of Infants Act. Knight Bruce, arguing for Mrs. Taylor, claimed that:

[T]he act of Parliament created a positive right of access in the mother, which the court could not take away without repealing

¹⁹⁷ Talbot v. Earl of Shrewsbury, 41 Eng. Rep. 259, 263 (Ch. 1840). The case was filed before the Act was passed, but was not decided until a few months after it went into effect.

¹⁹⁸ *Id.* at 264.

¹⁹⁹ *Id.* at 263. This distinction was because of the importance of control over large estates. Because girls were unlikely to be heirs after the rise of the strict settlement, judges routinely distinguished between boys and girls when making custodial determinations. See Spring, *supra* note 26, at 32-35.

²⁰⁰ See Abramowicz, *supra* note 21.

²⁰¹ See Taylor v. Taylor, 4. Jur. 959 (1840).

the act....A discretion was given to the court; but that discretion was to determine the manner in which the right was to be enjoyed, not to take it away.²⁰²

Bruce argued that whatever impediment might exist in the court's future ability to execute its order against a non-resident father did not detract from Mrs. Taylor's existing right to an order of access or custody. The order, if it were given, would take effect immediately upon Mr. Taylor's coming into the jurisdiction, and "in the meantime would operate as a declaration of the petitioner's right, and of her innocence of all misconduct."²⁰³

Advocates for Mr. Taylor, however, argued that the preexisting near-absolute rights of the father were unchanged by the Act; that the only change was the expansion of the court's jurisdiction over all children, not just those children made wards of the court by the settlement of property.

As to wards of court, [the Chancellor's] jurisdiction is neither enlarged nor limited by this act, but [now] he is enabled under certain restrictions to make the same order with respect to children not being wards of court, which he could previously have made in the case of children who were....The provisions that such an order must be made, if at all, on the petition of the mother, and must direct custody or access to be given to her, and not to another person, are merely restrictive of the jurisdiction; they confer no right whatever upon the mother, except that of benefiting by the discretion of the court, if it shall be exercised according to her desire.²⁰⁴

The husband's advocates even argued that the same principles that "determined the discretion of the court in cases where the custody of its wards are concerned, are the principles by which the court will administer this act."²⁰⁵ In reply, Knight Bruce quite persuasively urged, that:

[Mr. Taylor's] construction of this act, which denies that any new rights [sic] is given to the mother,...is ingenious but purely arbitrary. It is utterly inconsistent with the known intention with which this act was introduced; and if adopted by the court, would

²⁰² *Id.* at 960.

²⁰³ *Id.*

²⁰⁴ *Id.* at 961. Under prior Chancery jurisdiction, the *parens patriae* power could be enlisted only on behalf of children made wards of the court, and that traditionally required property. See generally H.E. Bell, An Introduction to the History and Records of the Court of Wards and Liveries (1953); Charles Carlton, The Court of Orphans (1974); Joel Hurstfield, The Queen's Wards (1958); Wright, *supra* note 21, at 267-70. These sources discuss jurisdiction of the sixteenth century Court of Wards and Liveries and its abolition and transfer to Chancery under *parens patriae* powers.

²⁰⁵ Taylor v. Taylor, 4. Jur. at 961.

have the effect of repealing the act. The intention was manifestly to create a right in the mother...[Furthermore,] if the court should hold that the mere circumstance of a residence abroad is sufficient to exclude its jurisdiction over domiciled British subjects, nothing more will be necessary for a father who is desirous of evading the operation of this act than to take his children abroad.²⁰⁶

Without resolving the critical dispute about whether the Act gave mothers a protected custody right or merely broadened the Chancellor's power over a wider class of children, Vice Chancellor Shadwell agreed with the father that the inability to execute its order was fatal to the Chancellor's jurisdiction.²⁰⁷ He concluded that "at present there should be no jurisdiction exercised under this act pending the question in the ecclesiastical court, combined with the difficulty of making any order which would be effectual, [which] seems to be a reason for not interfering under the act."²⁰⁸ Thus, in the first dispute brought under the new law, the court refused to act on the petition, and it was postponed indefinitely until the ecclesiastical court proceedings resolved the issue of coverture.

The dispute presented in the Taylor case is important because these same issues crop up again and again in later petitions under this law. Advocates for mothers asserted that the Act gave married women a legal right to access and custody of their children, similar to what the law recognized for unmarried mothers. The right might be subordinate to the father's right, but it was to be seen as a recognition that the mother had a legal claim independent of her status as wife. Advocates for fathers, however, insisted that the Act could not grant mothers any rights without weakening fathers' rights. Thus, as their rights had not been expressly restricted by the Act, the common law forfeiture standard was held to be unaffected by the Act, which instead merely expanded the Chancellor's jurisdiction to apply the old common law standard over a larger number of

²⁰⁶ *Id.* at 963.

²⁰⁷ Shadwell notes:

It has been stated that the order, though for the present ineffectual, would operate as a declaration of right on behalf of the petitioner, and that she is entitled to such a declaration. Such a notion is altogether foreign to this jurisdiction and to the intention of the act by which it is created...[T]he order is to determine not who ought to have, but who shall have the custody; and, concerning access, not merely that the mother is entitled to it, but in what manner she shall enjoy it. If the order stops short of this, it is not an order under this act.

Id. at 961-62.

²⁰⁸ *Id.* at 964.

children; i.e., those children brought within the court's jurisdiction by the wife's petition.

As before the Act, procedural problems continued to plague these cases. Where the mother already had physical custody and was being challenged by the father, the Act did not apply. Thus, in Corsellis v. Corsellis,²⁰⁹ the Lord Chancellor of Ireland declined to act because he was fairly certain that the Act was not designed to be used as a legal defense against a petition of the husband, for he himself had "paid great attention to that Act, in its progress through the House of Commons." He did, however, recognize the underlying issue of who had the right to custody—mothers or fathers. In the end, he decided that he would not decide the case at present, but would confer with the Lord Chancellor of England on the point at his next opportunity.²¹⁰

Initially it seemed that a wife who brought a petition under the Act would not need to have obtained a prior ecclesiastical separation. When Mrs. Taylor's advocate, Knight Bruce, became vice chancellor, he rejected an argument that the wife must first obtain a legal separation, in a case involving a wife who had separated from her husband due to his physical violence. In Ex parte Bartlett, Bruce noted that:

[The] statute in question does not, as a condition of the interference of the Court, require that the wife should have obtained, or should be entitled to obtain, a divorce *à mensâ et thoro*; and the existence of cases in which it may be right for the Court to interfere without a divorce must, I apprehend, be considered possible.²¹¹

Bruce's assurance that equity jurisdiction allowed for a custody determination even before closure of the ecclesiastical suit was rejected, however, three years later in In re Tomlinson, where a different vice chancellor deferred acting on the petition for custody until the parties could reconcile or seek other avenues of redress.²¹² He pondered that it "is probably true that the statute of 1839 has enabled or rendered justifiable the interposition of the Court of Chancery in some circumstances in which the court could not or would not have acted independently of the statute, and with reference to some considerations, to which, but for the statute, it could

²⁰⁹ 1 Dr. & War. 235 (Ch. 1841).

²¹⁰ *Id.* at 235.

²¹¹ Ex parte Bartlett, 63 Eng. Rep. 906, 907 (1846).

²¹² 64 Eng. Rep. 520 (V.C. 1849) (the mother brought a petition to allow her to retain custody, and for a writ of prohibition to prevent the father's suit for habeas corpus to have the child delivered).

not or would not have looked,"²¹³ but those circumstances did not exist in the case at bar.

The judicial reluctance to embrace the notion of a mother's statutory rights to custody prompted even the most sympathetic judges to limit the remedy they might order. Though Knight Bruce held that Mrs. Bartlett was entitled to custody of their two-year-old daughter until she reached age seven and access to the other five children before the ecclesiastical proceedings were over, the vice chancellor would not order delivery to the mother of the youngest boy, also under age seven.²¹⁴ Her victory was mitigated by the fact that she lost custody of her other four children, would lose custody of the fifth upon the child reaching age seven, and that her access to the other four was ultimately subject to "proper regulation" while the abusive husband's access to the infant girl would be "at convenient seasons."²¹⁵ Her access would be regulated and limited as though she had been the guilty or negligent parent.

Eight years after passage of the Act, wives were still so unsure of their legal rights that they would flee rather than risk an adverse decision on custody. Lord Cottenham refused to interfere in a custody dispute between a father, residing in England, and his estranged wife who was living incognito abroad in *In re Spence*.²¹⁶ The court refused to intervene because it only had jurisdiction over the wife's brother, who did not have actual physical custody of the children. In refusing to resolve the dispute, however, the court in effect forced the wife to live as a fugitive until the

²¹³ *Id.* at 521.

²¹⁴ He made this cryptic comment:

I think it right to add that, to whatever observations Mr. Bartlett's conduct may be open in case he shall refuse to deliver the youngest boy into Mrs. Bartlett's custody, the Court having the power of removing the youngest boy into her custody does not think fit to exercise that power.

Bartlett, 63 Eng. Rep. at 907. The reporter then noted that "Mr. Bartlett declined to give up the youngest boy." *Id.* The court thus granted custody of the infant girl to its mother but not the infant boy, yet insinuated that the father's refusal to relinquish custody of the boy would reflect badly on his character. But being of bad character was not against the law. There was no discussion of the mother's rights under the act, or of the children's best interests, or any reason for distinguishing between the girl and the boy who were both under seven years of age. *Id.*

²¹⁵ *Id.*

²¹⁶ 41 Eng. Rep. 937 (Ch. 1847). It is interesting to wonder if this case in any way influenced Anne Brontë's novel, The Tenant of Wildfell Hall, where a young wife ran away with her child to escape the immoral influences of her husband. She prevailed on her brother to find her a place of refuge and act as her go-between to provide her with basic supplies and keep her hiding place secret. In this case, Lord Cottenham refused to force the brother to stop transmitting income to her on the grounds that it would not force him to do indirectly what it could not make him do directly.

children came of age, continuing the pressure on wives to flee rather than subject themselves to the courts.²¹⁷

Even a decade after passage of the Act, the courts were still following the pre-Act life and limb rule if the mother had custody. *In re Fynn*²¹⁸ found the vice chancellor echoing Vice Chancellor Hart in *Ball*, that as much as he regretted it, he felt compelled to turn the children over to their father despite his clear unfitness. In that case Mr. Fynn fled from the maternal grandmother's house in Brussels with the two eldest children, boys aged four and three, pawning their plate, and eventually his gold pin and the boys' spoons to get bread. After Mr. Fynn was arrested and confined in debtor's prison with his two sons, Mrs. Fynn obtained the children who were half clad, filthy, and near starved, leaving her husband to fend for himself. When the prison was broken open in the Revolution of February 1848, Mr. Fynn escaped, returned to London, filed suit for restitution of conjugal rights, and obtained a writ of habeas corpus for production of his children. The judge ordered that he be given access to them.²¹⁹ The children's maternal grandmother then filed a petition in Chancery on their behalf praying for the appointment of a guardian and that their father might be restrained from all intercourse with them, and from proceeding upon the writs of habeas corpus to obtain possession of them.²²⁰

After discoursing at great length about the "acknowledged rights of a father with respect to the custody and guardianship of his infant children [that are] conferred by law" and that:

[B]efore this jurisdiction can be called into action...it must be satisfied...that the father has so conducted himself, or has shewn himself to be a person of such a description...as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended.²²¹

the vice chancellor ordered that the infant daughter remain in the custody of the mother, but that the two boys be turned over to the father, that the petition be dismissed, and that the mother have access to the boys for six hours daily at her residence. In speaking of the mother's claim, the vice chancellor remarked that "[w]hat I have said may...where there is a mother,...be subject to qualification with reference to her rights (if I may use the expression), created by the statute called Mr. Sarjeant Talfourd's

²¹⁷ Mrs. Greenhill had to flee, as did the heroine in Anne Brontë's *Tenant of Wildfell Hall*. See discussion *infra* Part VIII.

²¹⁸ 64 Eng. Rep. 205 (1848).

²¹⁹ *Id.* at 209.

²²⁰ *Id.* at 205.

²²¹ *Id.* at 212.

Act.”²²² His reluctance to use the term “rights” to refer to the mother’s interests under the Act is telling. Without recognizing any rights in Mrs. Fynn, the court would preclude her from challenging the award under the statute because she was granted access; any further challenge therefore would have to meet the common law strict paternal forfeiture standard. If nearly starving his children while living in debtor’s prison was not sufficient to remove the father from his custodial rights, it would be hard to imagine what he would have to do to endanger their lives further.

During this time only one mother was granted outright custody of her children, but the court denied the mother any substantive rights, finding that the father in that case met the life and limb forfeiture standard anyway. In *Warde v. Warde*,²²³ a wife who had obtained a separation due to her husband’s profligacy and adultery, appealed for custody to the Chancellor, Lord Cottenham, who first held the petition over for eight or nine months, leaving the children with the father, in the hopes that the parties would reconcile their differences, namely, that Mrs. Warde would return home where she quite obviously belonged.²²⁴ When it became apparent that the parents would not listen to reason, the petition was redocketed and Cottenham granted custody of the oldest child, a girl of eleven, to the mother. Then, because he would not “accompany that measure with the great evil and danger to the children of separating one portion of the family from the other,”²²⁵ he granted custody of all four children to the mother.

It took ten years from the passage of the Custody of Infants Act before a mother brought a petition for access and/or custody of her children who were then in the possession of the father. All parties being within the jurisdiction of the court, the court explained the scope and parameters of the statute, and then gave custody to the mother. The victory was tarnished, however, because the father’s behavior was just as culpable as that of the pre-Act *Wellesley* case. Thus, despite the disquisition on the absolute power of the court to interfere, this case did not raise an issue that required the application of the statute, for Mr. Warde’s conduct was deemed to be

²²² *Id.*

²²³ 41 Eng. Rep. 1147 (1849).

²²⁴ Cottenham opined:

The object of the Act...was to protect mothers from the tyranny of those husbands who ill-used them....Parliament thought that the mother...should be at liberty to assert her rights as a wife, without the risk of injury being done to her feelings as a mother. . . . I have now an *absolute authority* over the children under seven years of age, and a larger power than the Court then had with regard to children above that age.

Id. at 1148 (emphasis added).

²²⁵ *Id.* at 1149.

sufficiently detrimental to meet the pre-Act life and limb forfeiture standard. The case did not raise the more difficult issue of how to resolve custody disputes between two “fit” parents, the unique problem presented in De Manneville, and the situation which had yet to be resolved in any case in favor of the mother. Moreover, Cottenham’s decision was the first to rely on that indelible link Handley and Sugden propounded between marital fault and maternal rights. Because Mrs. Warde was not at fault for the marital breakup, the court believed she should not lose her children.

The common law life and limb and moral degradation standard continued to remain the principal yardstick for adjudicating these parental disputes throughout the 1850s, though the courts’ focus was on the welfare of the child, never correlative rights of the mother. A homosexual father lost custody,²²⁶ as did a religious fanatic,²²⁷ as did a father who was sexually abusing his daughter.²²⁸ The moral degradation that would justify removing a father from custody was far greater than mere adultery, adultery mixed with cruelty, or even the exaggerated adultery of the Wellesley case. Blind, absolute, and visceral condemnation of parental behavior occurred only in cases where the mother was guilty of adultery or the father of incest or homosexuality. Physical violence to wives and children, neglect leading to illness or near starvation, irreligion, much less alcoholism, gambling, adultery, and swearing did not bring down on an errant father the state’s moral censure necessary to deprive him of contact with his children.

²²⁶ He was committed until trial, but when none of the witnesses appeared for the trial, the judge ordered the jury to return a verdict of not guilty. Upon his immediate release he left for the continent, where he resided on and off for five years, including a lengthy stay in an asylum for treatment of his “condition.” He then returned in 1851 and petitioned for custody of his children. Vice Chancellor Lord Cranworth noted:

When the Court refuses to give possession of his children to the father, it is the paramount duty of the Court to do so for the protection of the children themselves, and the Court will perform that duty if the father has so conducted himself as that it will not be for the benefit of the infants that they should be delivered to him—or if their being with him will affect their happiness—or if they cannot associate with him without moral contamination—or if, because they associate with him, other persons will shun their society.

Anon., 61 Eng. Rep. 260, 266 (1851). Cranworth had no difficulty denying the father custody or access on the grounds that the children would be shunned by all decent society if people thought they had any contact with their father.

²²⁷ In another case, the mother was granted custody because the father was clearly a religious extremist who had insinuated himself into her family and was a gold-digger. Vice Chancellor Knight Bruce spent nearly eight pages expostulating at length about the father’s religious fanaticism and hypocrisy and devoted not even one sentence to the precedents or rules governing custody decisions. Thomas v. Roberts, 64 Eng. Rep. 693 (1850).

²²⁸ Swift v. Swift, 55 Eng. Rep. 637 (Rolls. 1865). Though after the period discussed here, this case was decided with reference to pre-1857 forfeiture cases.

Ironically, imprisonment of the father was not grounds for removing custody of his children from him. In *In re Halliday's Estate*,²²⁹ Vice Chancellor Turner would not turn an infant back over to the mother, a charwoman, even though the father had snatched the child shortly after being released from prison where he was held for deserting his wife. Turner, in examining the Custody of Infants Act, spelled out a three part test for custody that failed to recognize any interests of mothers. He explained that:

The act proceeds upon three grounds. First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child.²³⁰

He explicitly denied that the Act has any regard for the mother's interests, for if it did he could not "account for the distinction taken between the cases of children above and under seven years of age, it being perfectly obvious that the comfort of the mother was as much affected whether the child were over or under seven years of age."²³¹ Because these three factors made no reference to the mother's interests, Turner focused exclusively on the father's conduct. Then he declined to grant the mother's petition, stating:

[A]ssuming all the circumstances alleged against the husband to be true, they relate wholly to the past, and only prove that antecedently to May, 1852, he was living a life of idleness, profligacy, and drunkenness; but they fail to prove that since May there has been any such idleness, profligacy, or drunkenness as to warrant the interference of the Court. It is not because a man has at one time been guilty of these habits that the Court will at any future time interfere to deprive him of the custody of his children.²³²

This case was decided only six months later, in November 1852. He did, however, order access for the mother on the grounds that denying maternal access was in "contravention of the [father's] marital duty."²³³

Furthermore, in bitter disputes involving multiple lawsuits, as in *Westmeath* and *Greenhill*, the doctrine of coverture continued to act as a bar to a wife's claim. In a lengthy series of disputes between Adrian John

²²⁹ 17 Jur. 56 (1852).

²³⁰ *Id.* at 56.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 57.

Hope, an Englishman, and Mathilde Emilie Hope, the daughter of a French officer, who retained custody of their children in France under an interim order of the French court, Lord Chancellor Cranworth ordered Mrs. Hope to relinquish custody and that both “Mr. and Mrs. Hope should take all such steps as might be necessary and proper according to the laws of France to cause the children to be delivered up to their father.”²³⁴ She then entered into an agreement with her husband to turn over custody of one of the boys she retained in exchange for Mr. Hope’s execution of a private separation agreement. Mrs. Hope agreed to drop her appeals, both in England and France, deliver up custody of the elder boy, retain custody of the youngest, abandon her suit for divorce, and facilitate Mr. Hope’s suit for a divorce. In exchange, Mr. Hope was to pay his wife 75,000 francs annually as well as her debts and expenses up to the amount of 60,000 francs. In satisfaction of this agreement, Mrs. Hope relinquished custody of the one son and dismissed her suits, performing entirely her side of the agreement. Mr. Hope, however, refused to grant her any access to the three oldest children he originally retained or the son she had relinquished and paid no part of her annuity or her debts and expenses. Mrs. Hope then brought suit for specific performance of the agreement. Lord Justice Turner, of the Court of Appeals in Chancery, held the provisions giving custody of the youngest child to the mother to be against public policy and therefore void.²³⁵ Citing Westmeath, Turner explained that the “law of this country gives to the father the custody of the children, and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties and with reference to the public welfare.”²³⁶ The custody provision was thus held to be “repugnant to both the law and policy of this country”²³⁷ and therefore unenforceable.

These cases span the eighteen years between passage of the Custody of Infants Act in 1839 and the creation of the Divorce and Matrimonial Causes Court in 1857 and show little change in the substantive law of custody and parental forfeiture during this time. Although Lawrence Stone may be correct that the 1839 Custody of Infants Act “stripped traditional unlimited patriarchal authority from the father,”²³⁸ the judiciary apparently did not agree. Whether the Act was intended to grant mothers a new right to access or custody, or whether it was merely to alter the Chancellor’s *parens patriae* jurisdiction, the Chancery judges did not take an expansive approach to the law. Some mothers were granted access rights, but this was generally done on grounds of either the best interests of

²³⁴ Hope v. Hope, 44 Eng. Rep. 572 (1857).

²³⁵ *Id.* at 577.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Stone, Road to Divorce, *supra* note 3, at 178.

the children or because depriving a mother of contact with her children was seen as a violation of a father's marital and/or parental duty. Mothers who won custody did so under the pre-1839 life and limb forfeiture standard.

The usual story told by historians about this period is that the Custody of Infants Act began the breakdown of coverture, allowed women greater control within the family, removed the fear of patriarchal tyranny, and enabled them to perform their maternal duties without reference to marital obligations.²³⁹ Mothers were no longer barred from bringing suit because they had not obtained an ecclesiastical divorce. Mothers, if they were not given rights under the Act, were identified as one of the principal beneficiaries for whom custody and access orders were to be made. The language of the best interests standard became more widespread during this period and mothers were often granted access because maternal contact was deemed beneficial to children. Whether it was done in the name of children or in the name of mothers, more women got custody and access. Thus, it has been argued, they benefited.²⁴⁰ But the cases do not bear out this interpretation.

The 1839 Act most certainly gave women a strong, if unfounded, belief that their maternal roles would be protected by law. Although it took three years, George Norton eventually withdrew his opposition to Caroline's petition for access and she was finally allowed unrestricted contact with her children. It is surprising, though, that after De Manneville, Ball, and Skinner any woman went to court for her children. Even after 1839, mothers continued to lose so regularly that the idea of legal reform bringing about meaningful change seemed completely fanciful. Moreover, the problems and barriers the women litigants faced were quite different from the problems and barriers the judges feared. In particular, the tripartite sharing of jurisdiction between the Ecclesiastical, law, and equity courts in family issues, coupled with women's incapacities under coverture, made these custody cases incredibly complicated for judges, while they seemed astonishingly simple to women. Innocent mothers should have protectable rights to contact with their children regardless of marital fault, marital status, or even the procedural niceties of which spouse had custody at the time the petition was filed.²⁴¹

²³⁹ *Id.*; see also Maidment, *supra* note 16, at 107-26. Maidment argues that "1839 represents a turning point in English family law." *Id.* at 115. Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States (1994) (referring to English law in contrast).

²⁴⁰ Maidment, *supra* note 16.

²⁴¹ We should not forget that this is occurring in the first half of the nineteenth century when the Chancery was particularly plagued with ossified rules and procedural complexities. As J.H. Baker explained: "For two centuries before Dickens wrote Bleak House, the word 'Chancery' had become synonymous with expense, delay and despair." An Introduction to English Legal History 128 (1990). It was not until 1885 that some of the administrative burdens were lifted.

What these cases show, however, was a formalistic attention to jurisdictional details and precedents that undermined any hope of mothers' legal rights. There was a clear reluctance to interfere with paternal rights to custody unless forfeiture was shown, though there was a growing willingness to order access for the mother, not by virtue of any right in her, but in the interests of the children. While the courts were willing to exercise their jurisdiction to order return of the children to the father, even when the children were residing abroad with the mother, they would not exercise jurisdiction on behalf of a resident mother seeking custody of children that were living abroad with their father. Moreover, a pattern emerges in these cases whereby custody disputes would be resolved on the basis of a three factor analysis: the father's performance of his parental duties, the husband's performance of his marital duties, and the best interests of the child. At no time was an independent right in the mother recognized, nor were her interests or behavior considered to be relevant except to deny her any contact with her children when she was guilty of adultery.

Throughout the period, however, the women litigants argued that they should have a right to custody of or access to their children that was independent of their marital relationship. For just as a mother of an illegitimate child had custodial rights over her child independent of any marital bond or system of coverture, the mother of the legitimate child asked the law to recognize custodial rights in her children that were based on the biological tie, not the conjugal noose. Recognizing such substantive rights would have raised their status both in law and in relation to their husbands at the expense of the legal entrenchment of coverture. By falling back on the very narrow jurisdictional interpretation of the Act, however, the chancellors took what they perceived was the less drastic alternative: i.e., they left the paternal presumption and forfeiture standards intact, but took for themselves the ultimate authority to make custody and access decisions by virtue of their *parens patriae* jurisdiction. This extension of jurisdiction over all children, exercise of which could be called forth by a petition of the mother, enabled the judges to impose their own normative beliefs about proper marital and parental behavior onto a greater number of disrupted families, and confirmed one fear of the legislators who opposed the Act—the intervention of judges in the privacy of the family. At the same time, wives were flatly denied any substantive rights in the custody of their children. Wives were given the power to open the door to state intervention in the private spheres, but they were denied any legally protectable rights if they stepped outside that door.

VIII. DIVORCE REFORM: AN AGGREGATION OF MATERNAL RIGHTS AND MARITAL PERFORMANCE, 1856-1857

From the custody cases discussed above, we can identify the series of institutional constraints that drove much of the legislative debate over divorce reform. These problems posed the questions that were to be solved by the new law. At the same time, women like Caroline Norton, Barbara Smith Bodichon, and Emily Westmeath were writing pamphlets criticizing the law's treatment of women and asking for a different kind of reform.²⁴² These pamphlets echoed broad social attitudes about women's special relationships to their children and a growing rhetoric of domesticity that rejected legal rules and institutions. The same kind of arguments about women's relationships to their children that occurred in the legislative debates also occurred in the novels and pamphlets of the period, but with a notably different twist. While judges and legislators were concerned with the barriers of multiple jurisdictions, procedural variability, and preservation of fathers' legal rights, the women novelists and pamphleteers were concerned with recognizing maternal rights distinct from marital rights. The lawmakers wanted to find a single process for resolving these messy disputes, while the women novelists wanted legally protectable rights to discourage the tyrannical behavior of husbands that led to family breakdown. It was a matter of process or rights; for lawmakers, a better process would facilitate resolution of the cases by making state intervention in the family easier. For women, rights would solve the problem by rendering these cases unnecessary. Not surprisingly, the lawmakers won and the women lost.

By the mid-1850s, it had become obvious to mothers that the 1839 Custody of Infants Act was insufficient to remedy their legal incapacities. They still operated under strict legal disabilities as a result of coverture. For all intents and purposes the pre-1839 forfeiture standard continued to determine the foremost issue, paternal unfitness. Only upon the court's determination to remove a father would a mother's interests be considered. Moreover, the Chancery's interpretation of the Act to increase its jurisdiction over children not made wards of the court imposed greater state surveillance in a greater number of family breakups, thus decreasing the use and effectiveness of informal resolutions. In the push for divorce reform in mid-century, which was partially motivated by the failure of the 1839 Act to relieve the situations of abused mothers, reformers saw the need to completely restructure the tripartite system of ecclesiastical, law, and equity jurisdiction over matrimonial matters. Throughout the reform debate, we can see a deep divide between those judges, lawmakers, and reformers who wanted to aggregate the issues of marital performance, custody, and

²⁴² Caroline Norton, A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill (1839); Bodichon, *supra* note 126; Westmeath, *supra* note 94.

property and those, primarily women, litigants and writers who wanted to disaggregate custody from marital status and performance in order to enable the law to recognize distinct maternal rights for married mothers as it did for unmarried mothers.

In the debates that led up to enactment of the 1856 divorce and matrimonial causes bill, it was immediately clear to all the members of Parliament, including the clerical members of the House of Lords, that it was too great a burden to expect a wronged spouse to sue out three separate lawsuits in three separate courts.²⁴³ With regard to ecclesiastical control over marital validity and performance, nearly everyone agreed that marriage was fundamentally a religious institution that should be governed by the laws of the church. After citing Sts. Augustine and Paul, the members of Parliament adopted a new bill explicitly retaining the substantive canon law rules with regard to marital validity, including rules of evidence and procedure. The lawmakers had no desire to change the way marital validity was determined. The grounds for a legal separation, without the right to remarry, remained those of the canon law with regard to divorce *à mensâ et thoro*, i.e. cruelty and adultery.

Whether divorce should include the right to remarry, and for what reasons, was hotly contested. The lawmakers were inclined to allow it only in the case of adultery by the wife as that had been the only grounds for a Parliamentary divorce. Some contended for the view of the Roman Church, to completely disallow divorce,²⁴⁴ arguing that greater opportunities of divorce would lead to social breakdown. Others, however, would have equalized the grounds and claimed that society seemed perfectly stable in France and Scotland where divorce was available for both men and women on the grounds of simple adultery.²⁴⁵ The most progressive proponents of the bill argued that women should have an easier time getting a divorce than men because male adultery is so infamous and defiling that no woman should have to tolerate such impurity in her own household.²⁴⁶ In the end,

²⁴³ See *supra* note 2 (Justice Campell's narrative during the legislative debate).

²⁴⁴ This acceptance, however, must be juxtaposed to the prior 100 years of growing civil control over marriage, beginning with Lord Hardwicke's Marriage Act of 1753 and culminating in the complete usurpation of ecclesiastical control over marital standards in this 1857 reform. 26 Geo 2, c. 33. Hardwicke's Act resulted in a gradual shift to civil mechanisms for entering into marriage and a removal of the disabilities against dissenters. The Act punished clergy who performed marriages contrary to the civil rules regarding age of consent, publication of banns, and acquisition of a civil marriage license. *Id.* Removing the ecclesiastical courts from their jurisdiction over marital rupture, therefore, was consistent with a growing heterogeneity in matrimonial beliefs and practices. This was followed by marriage acts in 1823, 4 Geo 4, c. 76; 1836, 6 & 7 Wm. 4, c. 86; and 1898, 61 & 62 Vict., c. 58, that allowed for civil marriages and removed the barriers on dissenters. See Stephen Parker, *Informal Marriage, Cohabitation, and the Law, 1750-1989*, at 48, 71-74 (1990).

²⁴⁵ 142 Hansards 417-18, 424-25 (daily ed. May 20, 1856); 144 Hansards 1695 (daily ed. Mar. 3, 1857).

²⁴⁶ *Id.* at 425; 145 Hansards 502-04 (daily ed. May 19, 1857).

the legislators retained the prior substantive rules that absolute divorce would be granted to husbands for their wives' adultery, but wives would be entitled to a divorce only for aggravated adultery.

As an institutional matter it also made sense to remove the ecclesiastical courts from jurisdiction in these matters because they had no enforcement mechanisms. Hence, a wife who was granted an order of support in her divorce *à mensâ et thoro* action had to pursue a remedy in Common Pleas or Queen's Bench if her former husband refused to pay.²⁴⁷ This jurisdictional split was a holdover from the Reformation, which balanced approval of church authority over marriage and divorce with unease at church control over the division of property that resulted from marital breakdowns. While virtually all legislators saw some authority in church doctrines as models for the laws governing marital validity, most preferred civil over ecclesiastical authority in judicial decision-making that would affect property rights. Thus, while the legislators could accept St. Augustine and divine law for the premise that divorce should be available only for very limited breaches of marital performance, they also assumed that the civil courts were better equipped than the ecclesiastical courts to handle these disputes and to settle the concurrent property and custody issues that were not permitted to the church courts.

From a social perspective the divorce reform period continued to see a growing discourse of women's rights and maternal privileges. The idea that a working woman was not entitled to collect her own wages, or that she should be subject to losing a familial inheritance because of a drunken or spendthrift husband clearly suggested the need for reform in the property laws. Ironically, it was the ability to continue in one's maternal role while separated from an unreasonable husband that drove much of the female debate outside Westminster. Caroline Norton's pamphlets were replete with arguments that the law should protect an innocent mother's access to her children when a tyrannical husband had driven her from under his roof.²⁴⁸ In referencing the laws of illegitimate children, Norton saw a woman's maternal role as more fundamental to her existence than her conjugal role.²⁴⁹ That image was staunchly reinforced by women novelists of the period.²⁵⁰

To the members of Parliament, the biggest issue in this debate concerned the substantive legal question of whether or not women should

²⁴⁷ Consider the plight of Emily Westmeath who received an alimony award in the ecclesiastical court and it eventually took an act of Parliament to force her husband to comply because, as a peer, he was not subject to the jurisdiction of the regular courts. Westmeath, *supra* note 94, at 109-14; Stone, *Broken Lives*, *supra* note 94, at 331.

²⁴⁸ Norton, *Observations*, *supra* note 138, at 74-8; Norton, *Separation*, *supra* note 107, at 24-7.

²⁴⁹ Norton, *Observations*, *supra* note 138, at 49-59.

²⁵⁰ See discussion *infra* pp. 108-09.

be given the right to petition for a divorce on the same grounds as men (i.e. simple adultery); should have no right to petition for absolute divorce (i.e. the law as it supposedly stood)²⁵¹; or should be entitled to some different, more stringent, standard (i.e. aggravated adultery). While the third outcome was the one ultimately chosen, the first was the rule most favored by women reformers. As in the 1838 debates, there was a strong contrast between those who viewed women as inherently more moral and therefore less tolerant of male promiscuity, and those who viewed women as wild beasts whose lustful fantasies are barely contained by the bars of custody and divorce laws. What Brougham and Sugden viewed as the floodgates of immorality—custody and divorce restrictions on women—were actually distinct issues for women writers exploring the complex dynamic of the new domesticity and separate spheres. In analyzing the female reformers' arguments through the novels of this period that articulated a female vision of the role of law in domestic matters, we see a decidedly different image of custody and divorce than emerges from the pages of Hansards.

By 1857, political pamphleteers, judges, and legislators were not the only writers addressing the disabilities of mothers in disputes over child custody. An entire social discourse was fully developed around issues of motherhood, husband/wife relations, and the parent/child relation in the pages of novels, periodicals, and annuals. An interesting and insightful group of commentators were women novelists who generally were prevented from writing in other formats. What those sources reveal is that women who questioned the relation of law to male/female relations universally rejected legal courtroom disputes in favor of a modern, communitarian approach that aimed at compromise and a recognition of the important interests of family stability and children.²⁵² The sympathetic portrayals of mothers deprived of, or threatened with deprivation of their children reveal a great deal about the way these women writers viewed the contradictions between the legal rights of the father and the claims of the mother.

One of the first novels to explicitly take up the issue of contested custody was Mary Wollstonecraft's unfinished novel Maria: or the Wrongs of Woman, where we learn of the wrongs done to the gentlewoman Maria and the servant Jemima.²⁵³ The novel remarkably parallels the life of

²⁵¹ The Lords always claimed divorce for adultery was not available for wives, but in fact they did grant two divorces on the grounds of aggravated adultery. Stone, Road to Divorce, *supra* note 3, at 321, 432.

²⁵² The rise in the best interests of the child standard is indicative of a growing awareness of the child's needs for maternal as well as paternal care. This was echoed in the case of In re Halliday's Estate, 17 Jur. 56 (1852).

²⁵³ Wollstonecraft, Maria: Or the Wrongs of Woman, *supra* note 179; Wollstonecraft had already published her powerful Vindication of the Rights of Woman in which she attacked the current modes of education and upbringing for girls.

Caroline Norton, for when the couple falls on hard times because of his profligate ways,²⁵⁴ Maria's husband kidnaps their child to blackmail Maria into turning over separate property carefully settled on her by a favorite uncle.²⁵⁵ When she resists this, Maria's husband has her committed to an insane asylum while he secrets the child with strangers. Maria eschews legal forms of redress, trusting instead male relatives and a gallant gentleman she meets in the asylum who, as soon as he accomplishes their release, makes her his mistress and then abandons her. The novel is an allegory of all the ways men can wrong women because their legal disabilities prevent them from protecting themselves. Most notable is that while the lawmakers were worried about wives leaving their husbands, Wollstonecraft was critiquing the ease with which men could withhold access to the children to force their wives to acquiesce to their demands. This pattern played out with many other novelists as well. Thus, while the legislators were concerned with social stability, the novelists were concerned with power within the family.

The use of children and imprisonment to force wives to agree to unreasonable demands by husbands was a theme in a number of novels of the Victorian period. Margaret Oliphant's novel, *Sir Robert's Fortune*,²⁵⁶ involved a husband who snuck their child away the night his wife gave birth to prevent his wife's guardian from learning of their clandestine marriage. As the wife pines for her child and learns of her husband's true greedy character, he tells her the child has died.²⁵⁷ This final straw permanently

²⁵⁴ One reason Maria was unable to counter her husband's demands was that she had been raised in the fashion typical of a doctrine of separate spheres, in which girls were to be ornate and remain at home, while boys were to be responsible for supporting the home but also for controlling the way in which the family interacts with the public sphere.

My home everyday became more and more disagreeable to me; my liberty was unnecessarily abridged, and my books, on the pretext that they made me idle, taken from me. My father's mistress was with child, and he, doating [sic] on her, allowed or overlooked her vulgar manner of tyrannizing over us. I was indignant, especially when I saw her endeavouring to attract, shall I say seduce? my younger brother. By allowing women but one way of rising in the world, the fostering the libertinism of men, society makes monsters of them, and then their ignoble vices are brought forward as a proof of inferiority of intellect.

Wollstonecraft, *Maria: Or the Wrongs of Woman*, *supra* note 179, at 137.

²⁵⁵ Though it became common practice among the upper classes to settle property on married women separately through private trusts, husbands of all classes had the power to commit their wives, on their own signatures, in asylums. See Louisa Lowe, *The Bastilles of England, or, The Lunacy Laws at Work* (1883); Elizabeth Ware Packard, *Caveat Disclosure of Spiritual Wickedness in High Places* (Arno Press 1974) (1864).

²⁵⁶ Margaret Oliphant, *Sir Robert's Fortune*, (1894).

²⁵⁷ After her uncle's death, Lily, determined to seek her child out, does not understand the law of coverture that makes her her husband's property. Oliphant writes:

destroys the last bit of love Lily had for Ronald and she secretly vows to get the child back, if the child indeed still lived. When the uncle dies and their inheritance is secure, Ronald agrees to return the child to Lily. But she will not forgive him and vows never to live with him again. Fortuitously, Ronald falls to his death on the stairs before Lily is faced with choosing between the innocent child and the man she no longer loves.

Another important theme that characterized these novels was a tension between an older, more patriarchal vision of familial relationships, and a newer, more sentimental vision that valued women's childrearing skills and their unconditional love of their children. For while wives routinely fell out of love with their husbands, their commitments to their children created a contradiction in their lives that they could not easily resolve. Anne Brontë's *The Tenant of Wildfell Hall*²⁵⁸ is perhaps the most famous novel of a young wife who ran away with their child to avoid its exposure to her husband's intemperate ways.²⁵⁹ But the wife who stands up to her husband's authority, even over something so clearly within the domain allowed to her by the entrenchment of separate spheres, posed a tremendous challenge to Victorian notions of family harmony and patriarchal power. And when Helen, Brontë's heroine, realizes that she must leave her husband to save her child, she places her maternal duties

She was free—no one had any right to stop her; she was necessary to nobody—bound to nobody. So she thought, rejecting vehemently in her mind the ideal of her husband, who had robbed her, who had lied to her, but who should not restrain her now, let the law say what it would. Lily did not even know how much the property of her husband she was. Even in the old bad times it was only when evil days came that the women learnt this. The majority of them, let us hope, went to their graves without ever knowing it.

2 *Id.* at 228.

²⁵⁸ Brontë, *supra* note 179.

²⁵⁹ The heroine of the novel agonized in her journal for many months over the difficult state of a wife whose authority over her children was constantly undermined by a lazy, intemperate husband.

It is hard that my little darling should love him [his father] more than me; and that, when the well-being and culture of my son is all I have to live for, I should see my influence destroyed by one whose selfish affection is more injurious than the coldest indifference or the harshest tyranny could be. . . . Thus, not only have I the father's spirit in the son to contend against, the germs of his evil tendencies to search out and eradicate...but already he counteracts my arduous labour for the child's advantage, destroys my influence over his tender mind, and robs me of his very love.

Id. at 266-67.

above her marital duties. "The world's opinion and the feelings of my friends must be alike unheeded here, at least alike unable to deter me from my duty."²⁶⁰

After Helen's escape, her husband Arthur pleads with her friends to send her home, but to no avail. She sees through his plots. "[H]e does not *want* me back; he wants my child. ...But, Heaven help me! I am not going to sell my child for gold, though it were to save both him and me from starving."²⁶¹ Arthur's concern with what the world would think gives us a likely insight into why men like George Norton were willing to use their children as weapons to force their wives to remain in their homes. If the law supported women, then their husbands' cruelty and avarice would be revealed for the world to see.²⁶² For many women it was not a slamming shut, but an opening of the bedroom door that they desired through changes in the law.²⁶³

Helen has entirely bought into the "cult of womanhood" ideal; she believes she can reform her errant husband through her temperate and virtuous piety. Yet so long as men teach boys to drink, swear, and dominate women, she is caught in an eternal paradox. With no power to demand compliance from her lord and master, she is bound to fail. She must either abduct her son and thus wrong her husband, or remain loyal to her husband and sacrifice her son.²⁶⁴ Despite Helen's good motives and

²⁶⁰ *Id.* Note her use of the term "duty," something very different from the general total submissiveness to the father articulated in the more traditional sources.

²⁶¹ *Id.* at 325.

²⁶² This concern with social standing is by no means unique to the sensitive British. In New Hampshire, Asa Bailey tried innumerable times to prevent his wife from publishing his adultery, incest, and physical abuse in order to maintain his reputation among his neighbors. But when he finally went too far his wife swore the peace against him and he was taken into custody. As Hendrik Hartog suggests:

We can imagine that for Asa an informal separation represented a way of blurring the line between a parting caused by his immoral conduct and the sorts of separations that occurred regularly—and more or less innocently—between couples, when jobs or military service or lack of love drove them apart.

Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in *Law in Everyday Life* 63, 98 (Austin Sarat & Thomas R. Kearns eds., 1997).

²⁶³ For an informative discussion regarding nineteenth-century family law, see Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983).

²⁶⁴ At one point in the novel Helen laments:

How many women have suffered because they loved so much? Fool that I was to dream that I had strength and purity enough to save myself and him! Such vain presumption would be rightly served, if I should perish with him in the gulf from which I sought to save him!...and though I

Brontë's heavy-handed portrayal of Christian motherly duty, contemporary reviews of The Tenant shrieked in outrage and shocked indignation at the impropriety of violating sacred paternal rights by stealing a father's child and heir. It was declared that no children would be safe from abduction by their mothers in all England if this book were allowed to be read.²⁶⁵ For Helen's opening of her bedroom door, there was no end of comment in the reviews.²⁶⁶

What sets The Tenant apart and makes this book a powerful force in the social discourse of marriage and parenthood is the brutal honesty with which Brontë depicts scenes of domestic disharmony. Arthur's drunken revels, his adultery, and his corruption of their child lead Helen to violate her marriage vows and sacrifice her husband for her child. If it was brutal and coarse, the morality was all too clear. Motherhood transcends the marriage vow. Why? Because while the adults of this generation are beyond redemption, the future can be saved. She sees that Arthur's vices are the result of a harsh father and an indulgent mother and she declares that if she is ever a mother she will not suffer that lack of discipline to condemn her child to a life of vanity.²⁶⁷

Additionally, Victorian novels created intergenerational conflicts around maternal rights and duties. Elizabeth Gaskell's unfinished novel,

write as if you were some abandoned wretch, past hope and past reprieve, it is only my anxious fears—my strong desires—that make me do so; one who loved you less would be less bitter—less dissatisfied.

Brontë, *supra* note 179, at 216.

²⁶⁵ *Spectator*, July 8, 1848, at 660; *N. Am. Rev.*, Oct. 1848, *quoted in the First American Reviews of the Works of Charlotte, Emily, and Anne Brontë, in Brontë Society Transactions* 39 (1949) [hereinafter *First American Reviews*]; *Grahams Lady's Magazine*, Oct. 1848, *quoted in First American Reviews*, at 41. For some interesting responses to Emily's *Wuthering Heights*, see *N. Am. Rev.*, Oct. 1857 ("It calls for no harsh judgment as a moral utterance; for its monstrosity removes it from the range of moralities altogether, and can no more be reduced to any practical application than the fancies which perplex a brain in a paroxysm of a nightmare."); *Grahams Lady's Magazine*, Oct. 1848 ("How a human being could have attempted such a book as the present without committing suicide before he finished a dozen chapters is a mystery. It is a compound of vulgar depravity and unnatural horrors.").

²⁶⁶ But despite the book's negative reviews, The Tenant was appreciated by some critics for exactly those qualities which condemned it for others. Its unconventionality, its brutal honesty, its "exuberant vigor of style," were attributed to a mind "of great strength and fervor." *Sartain's Mag.*, Sept. 1848, at 144; *Literary World*, Aug. 12, 1848, at 544.

²⁶⁷ Brontë, *supra* note 179, at 187. In the end Helen is relieved of having to resort to law, which she would have regretted had she tried. Arthur's vices did not rise to the level of aggravated adultery necessary to merit an absolute divorce, and under the forfeiture rule Helen would most likely have lost custody of her son if it had been litigated. However, the novelist can indeed play God and Helen was given a second chance. Arthur's dissolute life led to an early grave and Helen found herself fortuitously free of the conjugal noose. A much wiser and sadder woman, she is cautious in reentering the marriage state.

Wives and Daughters,²⁶⁸ pits a young, powerless widow against her domineering, aristocratic father-in-law. Upon the death of his son, the Squire quickly plans to send the wife back to “her own country” and raise the young heir himself. Raised in a strictly patriarchal society, the Squire sees no obstacles to his exercise of control over the patrimony, but Gaskell complicates the matter by engaging the sympathy of his other son and his fiancé, a younger generation, with the young mother. As in Tenant, the old patriarch indulges his grandson with cigars and sweets, allowing him to tyrannize the servants, much to the horror of the powerless mother. Under a threat of the child’s death, however, the Squire learns the true nature and importance of the mother’s love and the necessity of her presence in nursing the child back to health. After witnessing her sacrifice, the Squire and his daughter-in-law are united in their concern for the child.²⁶⁹ Gaskell’s novel suggests that only a mother has that special combination of true devotion and sincere concern for her children necessary to raise a disciplined, restrained, and moral child.²⁷⁰ Notably, the child’s interest in this case calls for a repudiation of the legal model of patriarchal property in the name of informal communal and domestic interests.

It is not surprising that only a few novels center directly around inter-spousal custody disputes. One reason may be that there was no legal ground for maternal claims and thus, it could be argued, little social awareness of anything incongruous in the patriarchal model to inspire challenges to the law. Additionally, custodial disputes in real life are often consequent to marital breakdowns, a subject not generally believed at the time to be the proper basis of a novel.²⁷¹ But these novels were not unique in presenting the conflict faced by mothers who had a duty to their children that outweighed their duties to their husbands. The disjuncture between marital and maternal duties was a constant theme in novels that depicted family disharmony. What we see in the emergence of novels like those discussed here is the repudiation of law and a demand by women for the power of self determination. If women are to be limited in their life choices, at least they ought to have the power to control the performance of those few roles open to them. Not coincidentally, this is exactly the

²⁶⁸ Gaskell, *supra* note 179.

²⁶⁹ *Id.*

²⁷⁰ These novels came at a time when English society was changing from the relatively indulgent Georgian period to the restrained and disciplined Victorian period. The arguments were well known: “spare the rod and spoil the child” was one of the most clichéd truisms of the period. Indulging children, especially male children, was believed to deeply harm the child who is further from the grace and serenity of a pure, devout, and altruistic heart.

²⁷¹ Consider how pathbreaking the movie Kramer vs. Kramer was when it came out in 1979. The Tenant of Wildfell Hall was written over 120 years earlier.

argument made by the women reformers like Caroline Norton as they petitioned for change in the laws.

These novels also helped create a social consciousness around the competing duties of wife and mother. Caroline Norton, in a poem published in 1863, explains the important difference. Helen's Tower: Erected by Lord Dufferin, in Honour of his Mother juxtaposes the conjugal love of the "Moorish maiden" for her "Sultan" with the "holy, calm, and pure" love of a mother for her child.²⁷² In the first, the young maiden seeks her own being in that of her lord.

*A Moorish maiden? darkly bright;
Who folds her stirless hands,
And, lifting her appealing sight
To know her lord's commands,
In his hot eyes' enamoured light
With deepening blushes stands;
Who, when her Sultan turns to go,
Is straightway pale again,
And faithful to the vanished glow,
No glory doth retain,
But in the shadow of her woe
Doth patiently remain?*

Against this transient and "enamoured" love is the "true...love" which "no sensual dreams allure." Referring to the mother's love as like the guiding power of the lighthouse, Norton writes that:

*The love that dawns with dawning life,
And lives till Life is done;
A watchtower in the weary strife,
Where Fate's rough billows run;
The changeless love, where change is rife-
A Mother's for her Son!²⁷³*

The mother's love will, like the lighthouse, save the wandering soul from the fatal shoals and the wave-tossed uncertain sea. "Emblem of what a steadfast guide/A mother's love may be!" And the devoted child who realizes the truth and depth of maternal love will see how that love has guided and made possible his own life's quest.²⁷⁴

²⁷² Caroline Norton, Helen's Tower, in 8 Macmillans 150-52 (1863).

²⁷³ *Id.*

²⁷⁴ *Id.*

But what does this trope have to do with law? On the one hand, the only true love in all these novels is the maternal—but it is the one love that is unprotected by law. On the other hand, the apparent rejection of legal redress by these writers does not call for the rejection of law altogether. Lawyers are common characters and references are often made to the unjust laws that would not protect maternal duties. So while law is not absent in the novels, its legitimacy is questioned and its processes rejected. This brings us back to the reform value of narratives of wronged motherhood. These stories, like the stories of Mrs. De Manneville and Mrs. Greenhill, proclaim that experiences of injustice are relevant to the reform process. Perhaps they are not relevant to lawmakers, but they are certainly relevant for creating a social consciousness about the motives, needs, and processes of legal reform. Although changes in laws might prevent immediate injustices, the adherence by the novel's heroines and allies to a kinder, gentler morality, may be more important than laws and strict legal rights for improving women's lives.

In seeking a separation of their maternal and conjugal duties, I believe these women sought a separate standard in divorce and custody disputes. Divorce was to be premised on breach of marital duties, such as adultery, desertion, or cruelty: duties centering around sexuality and property. Custody, on the other hand, was to be premised on the civic virtues of providing a good moral upbringing for the next generation: proper care, nurturance, and unconditional love. Making it possible for women to perform one when prevented from performing the other was at the heart of their demands, yet such a separation is precisely what did not develop in subsequent interpretations of the 1857 Act.

IX. CUSTODY AND MARITAL PERFORMANCE IN THE NEW COURT: 1857-1886

With the creation of the new court, Judge Ordinaries faced a steady stream of litigants seeking divorces, separations, property protective orders, and custody arrangements.²⁷⁵ Unlike the Chancellors after the 1839 Act, however, the Judge Ordinaries embraced the broadly defined discretionary powers granted them under the new act.²⁷⁶ From the very beginning, the

²⁷⁵ For a brief discussion of the child custody cases of this period, and their further effects, see Maidment, *supra* note 16, at 107-48.

²⁷⁶ An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 1857, 20 & 21 Vict., c. 85.

I am in doubt whether it was intended whether the Court should act as nearly as possible on the rules and principles by which the Lord Chancellor has been guided in questions relating to the custody of

judges granted temporary and permanent custody to mothers of children ages seven or younger when the mother was innocent, and granted liberal access to mothers of children ages seven or older. But the court's liberal interpretation of its jurisdiction was severely curtailed as their decisions were overturned on appeal to the Chancery. As the divorce and the appeals courts resolved their differences and established some settled doctrines, however, the rules that emerged did not permit the separation of maternal from marital rights that the women activists and novelists had wanted.

The first few years of the court's existence found the Judge routinely granting custody to mothers as part of its resolution of the marital difficulties. In Curtis v. Curtis,²⁷⁷ the mother received custody because the father was "indifferent" toward the children during the period of marital trouble. In Marsh v. Marsh,²⁷⁸ the mother received custody of all four of the children because the father's cruelty was sufficient to justify a judicial separation. In Hyde v. Hyde,²⁷⁹ an adulterous father lost custody of his twelve-year-old son to the mother because "it would be unjust if a husband, having deserted an unoffending woman, were allowed to deprive her of the custody of her child."²⁸⁰ And in Duggan v. Duggan,²⁸¹ on facts reminiscent of Eldon's decision in Wellesley, the court granted a mother custody on the grounds of the father's adultery, noting in particular the impropriety of having the children remain with the father so long as he cohabited with his mistress. In the initial few years the new court developed a general rule that marital fault was *prima facie* grounds for losing custody.²⁸² By 1869 the

children, or whether it was intended to invest the Court with an absolute discretion, to be moulded [sic] by degrees into something like a system.

Curtis v. Curtis, 27 L.R.-Ch. 73, 86 (1858);

I apprehend...the words 'just and proper' are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and common law have been governed in questions respecting the custody of infants; in short, that it was the intention of the legislature to give a discretionary power to the Court, exceeding that which had been previously exercised by Courts of law and equity.

Marsh v. Marsh, 164 Eng. Rep. 744 (1858).

²⁷⁷ 27 L.R.-Ch. 73 (1858).

²⁷⁸ 164 Eng. Rep. 744.

²⁷⁹ 38 L.R.-Ch. 150 (1859).

²⁸⁰ *Id.*

²⁸¹ 38 L.R.-Ch. 159 (1860).

²⁸² Mothers would also retain custody pending final determinations on separation or custody, as in Anthony v. Anthony, 164 Eng. Rep. 875 (1860).

court would hold that it “always looks to see whose fault it was that led to the breaking up of the common home.”²⁸³

The Judge Ordinaries and the attorneys in these cases referred to American precedents for this new marital fault rule and relied on an assumption that mothers are likely to be more virtuous and devoted caregivers. In Suggate v. Suggate,²⁸⁴ another custody case instigated by the husband’s adultery, the court granted custody to the wife because it was felt that her innocence entitled her to a separation, “and that she ought not to obtain it at the expense of losing the society of her children.”²⁸⁵ In particular the court expostulated at length on the immorality and blasphemy engaged in by the father which justified giving custody to the mother who, it was believed, would bring up the children more “carefully and morally.” The concern with the moral welfare of the children stemmed from the American precedents and the generic principles of equity jurisdiction rather than with the prior common-law rules that focused principally on parental rights.

The court also began to deviate slightly from the 1839 prohibition on access or custody for adulterous mothers. In Spratt v. Spratt,²⁸⁶ the father received custody of the oldest child but, despite her own adultery, the mother retained access to the oldest and “custody” of the youngest, even though she was to leave the child in the physical custody of family friends. The court believed that the youngest was “of so tender an age, that there is no fear of its being contaminated by the alleged conduct of the mother.”²⁸⁷ This case may have been decided with leniency toward the mother because the judge did not believe the mother’s misconduct was sufficiently proven or perhaps that it was justifiable under the circumstances.²⁸⁸ Yet, mothers began to receive access in nearly all cases, even if they were partially to blame, and custody in most cases in which they were in no way to blame.

The marital fault rule was explicitly stated in 1860 in Martin v. Martin,²⁸⁹ in which a husband guilty of violence lost custody of the two

²⁸³ Milford v. Milford, 38 L.R.-Ch. 63 (1869).

²⁸⁴ Suggate v. Suggate, 164 Eng. Rep. 828, 830 (1859).

²⁸⁵ *Id.* at 830.

²⁸⁶ Spratt v. Spratt, 164 Eng. Rep. 699 (1858).

²⁸⁷ *Id.*

²⁸⁸ Mothers would lose custody if they alone had been guilty of adultery. See Bent v. Bent & Footman, 164 Eng. Rep. 1047, 1048 (1861); Clout v. Clout & Hollebhone, 164 Eng. Rep. 1047 (1861); Codrington v. Codrington, 164 Eng. Rep. 1367, 1370 (1864) (allegation of wife’s adultery was not proven but she lost custody anyway because she waited to bring a petition for custody until after the father had removed the children from the jurisdiction, well along in the proceedings); Boyd v. Boyd & Collins, 164 Eng. Rep. 860 (1859).

²⁸⁹ 29 L.R.-Ch. 106 (1860).

infant daughters, but was granted custody of a four-year-old boy. This case reveals a continuing double standard between the grounds of removal or forfeiture applied to the male heir and to younger children and daughters. There was a clear judicial reluctance to remove a male heir from custody of the father unless the child was in danger of harm to life and limb—i.e., the father met the forfeiture standard. But younger children and daughters were surrendered to the mother's care without such a strict showing. The court explained the difference thus:

I think that when a husband, for his own fault, is separated from his wife, she has a *prima facie* right to the society of their children. The circumstances of this case differ, however, from those of any previous one with which I have had to deal. The husband was at all times impetuous and hasty, and there were in evidence some instances of misconduct before the more serious consequences which occurred, and which, it might be feared, would recur, from the irritable and hasty condition into which he was thrown by the anxiety of business. There was no instance, however, of anything but kindness on his part towards the children. I think the two youngest ought to remain with the mother, and she must give up the boy, who is four years old, to the father, with the usual arrangements for mutual access.²⁹⁰

Because there was no evidence of cruelty aimed directly at the children, the father's fault was not so extensive as to justify forfeiture of his most significant parental right, the right to control the heir. Thus, the medieval distinction between the heir and the other children remained alive. It is also a disturbing reminder that property issues sometimes led to further breakup of the family by separating young children from their siblings.

The new court also might grant custody to an errant mother if the father's conduct had been even worse than hers. In Boynton v. Boynton,²⁹¹ the court explained that it gave custody to the mother over the adulterous father, not because of her innocence but because of his fault. It was important to the court that the wife "has not shewn that she deserves to have the custody of the child. It appears from the affidavits that she has manifested utter indifference to the child."²⁹² In contrast, in Barnes v. Barnes,²⁹³ the mother was granted custody because her health "ha[d] suffered from being deprived of their society," even though she had been charged with adultery. Mothers who showed the proper amount of emotional upset at loss of their children might receive custody even if they

²⁹⁰ *Id.* at 107-08.

²⁹¹ 164 Eng. Rep. 1001 (1861).

²⁹² *Id.*

²⁹³ 1 L.R.-P. & D. 463 (1867).

were the parties at fault. But a double standard remained. In Chetwynd v. Chetwynd,²⁹⁴ both parents lost custody of their children, he for committing adultery and she for thinking about it. It appears that the mother had revealed in her journal that she had “for long surrendered her mind and affections to a guilty passion for [a gentleman friend, which the court felt was] the gravest but one of connubial offences.”²⁹⁵

The court was not always on the side of the mother, however, for in a striking example of legal idiosyncrasy, an innocent mother, who had obtained a judicial separation on the grounds of her husband’s cruelty, was denied custody of a mentally handicapped boy of twelve because she based her petition on the welfare of the child, not on her own suffering or maternal rights. In Cooke v. Cooke,²⁹⁶ the judge explained:

[W]here the wife is the innocent party, I consider that she is entitled to the solace of having the custody of her children. But in deciding such questions, I have been in the habit of considering only what are the rights of the parents. Here Mrs. Cooke asks for the custody of the child, not as a solace to herself, but for the welfare of the child. That is a ground which would, I think, involve the Court in considerations foreign to it.²⁹⁷

In 1863 the divorce court explicitly found that a welfare consideration was simply not within the scope of its authority. Thus, despite borrowing from American cases and ideologies of the importance and character of the mother in the special period of childhood, even this new equity-based court continued to frame the issue as one of lost or forfeited parental rights, with some recognition of the maternal role, but without reference to a best interests or welfare standard.²⁹⁸

The fault rule articulated by the divorce court in the late 1850s and early 1860s was not ardently supported or followed by the other courts that faced custody decisions. Ironically, as the divorce courts were applying their discretionary powers quite liberally to find custody for mothers, the Chancery and appellate courts continued to operate under the rules developed in the pre-1839 forfeiture line of cases. For instance, in the 1858 case of Vansittart v. Vansittart,²⁹⁹ the parties had entered into a separation

²⁹⁴ 35 L.R.-Ch. 21 (1865).

²⁹⁵ *Id.* at 23.

²⁹⁶ 164 Eng. Rep. 1269 (1863).

²⁹⁷ *Id.*

²⁹⁸ This case shows the inconsistency exhibited by the courts. One strand of cases stemming from Mansfield’s eighteenth century reforms hinted strongly at a welfare standard, while others, with no rhyme or reason, would eschew a welfare standard in favor of a parental rights test.

²⁹⁹ 70 Eng. Rep. 26 (1858).

agreement stipulating that Mrs. Vansittart would retain custody of two children while the father would have custody of the other two. The agreement was in consideration for Mrs. Vansittart abandoning her divorce suit on the grounds of adultery and cruelty. When the father refused to comply, Mrs. Vansittart brought suit for specific performance. The vice chancellor, while noting that abandoning a divorce suit was sufficient consideration for the agreement, and that the contract terms would otherwise prevail to the extent they affected property issues, dismissed the suit on the grounds that the custody provisions infected the entire document. In particular, because the agreement gave the wife "rights and privileges to which she would never be entitled as the natural result of her suit for divorce,"³⁰⁰ the agreement was held unenforceable. The flexibility of the private separation deed that had been so attractive to separating couples in the eighteenth century had, by this time, become so inflexible as to allow for only the same rights and responsibilities as could be achieved through strict legal formalities.³⁰¹

The different rules can most clearly be seen when the 1858 case of Curtis v. Curtis,³⁰² mentioned earlier, was appealed in 1859 to the Chancery. The divorce court had granted Mrs. Curtis' separation on the grounds of her husband's cruelty, and granted her temporary custody for three months with leave to petition Chancery for a permanent order. Mr. Curtis appealed the divorce court's decision, but it was affirmed.³⁰³ Mrs. Curtis then petitioned the Chancery for a permanent order of custody, which was denied under the same forfeiture standard that prevailed after De Manneville. Vice Chancellor Kindersley stated that:

[W]hen we recollect how very serious a matter it is to interfere with the right of a father, in respect of his own children, it appears to me that the Court ought never so to interfere unless...in some very material and important respect it is essential to the welfare and well-being of the children, either physically, intellectually or morally, that it should do so.³⁰⁴

Moreover, the court explained away the violence as predominantly Mrs. Curtis' fault, for "[h]owever harsh, however cruel, the husband may be, it does not justify the wife's want of that due submission to the husband which is her duty both by the law of God and by the law of man."³⁰⁵ Her

³⁰⁰ *Id.* at 32.

³⁰¹ See Staves, *supra* note 97.

³⁰² 27 L.R.-Ch. 73 (1858).

³⁰³ 28 L.R.-Ch. 55 (1858).

³⁰⁴ 28 L.J.R. (n.s.) 458, 460 (Ch. 1859).

³⁰⁵ *Id.* at 464.

suit was dismissed and the children were returned to the father, despite the mother's earlier victory in the divorce court and on appeal.

The Curtis case highlights the tension between the divorce court's standards for determining custody and the Chancery's. In the divorce court, marital fault, be it adultery or violence, was accepted as *prima facie* grounds for losing custody. Also, the divorce courts often granted access rights even to adulterous mothers. Where the parties brought a petition in Chancery, however, it was not unusual for the chancellors to ignore the more lenient divorce court rules and go back to the old common law forfeiture standard. In one complicated case, In re Winscom,³⁰⁶ Mrs. Winscom had apparently committed adultery early in the marriage, before the birth of their only child. Soon thereafter, the couple moved to India where Colonel Winscom, suspecting another illicit liaison, asked his wife to return to England with their five-year-old daughter in 1861. The Colonel filed a petition for divorce on the grounds of his wife's adultery, but judgment was given in favor of Mrs. Winscom and the Colonel did not appeal. On the day after the appeal period had run, Colonel Winscom removed the child from England to a school on the continent. Mrs. Winscom then petitioned the vice chancellor for an access order, which was granted. On appeal the access order was rescinded and the petition ordered to be reheard with an opportunity for entry of new evidence. On rehearing, Vice Chancellor Wood refused to allow the mother any right of access to her child even though there had been no judgment against her in the divorce court. Thus, although the divorce court determined that adultery was not sufficiently proven to justify a divorce and therefore granted access to the mother, the Chancery rescinded the access on the grounds that any contact would be detrimental to both mother and child.

The Chancery continued to redefine the conditions under which it would enforce custody provisions of separation deeds. Where a father agreed to surrender custody to the mother but then changed his mind, as in Vansittart, the court would not enforce the provision against him. In contrast, where the father agreed to surrender custody and his behavior also met the forfeiture standard, the provision would stand. For example, in Swift v. Swift,³⁰⁷ Mr. Swift had entered into an agreement to surrender custody of their children to the mother on the grounds of his criminal incest with their seven-year-old daughter. The court was willing to go against the well-established policy that contractual provisions regarding custody of children were void, because the father would clearly have lost custody under the forfeiture standard anyway.

It was not until the 1870s that we see the chancellors beginning to adopt the fault test, in limited circumstances, and only to replace the even

³⁰⁶ 71 Eng. Rep. 573 (1875).

³⁰⁷ 34 Beav. 264 (1865).

stricter forfeiture rule. In the 1871 case of Hamilton v. Hector,³⁰⁸ the parties had entered into a separation deed and the father had surrendered custody to the mother to avoid her divorce petition on the grounds of cruelty and adultery. Although the father changed his mind and sought to regain custody, the Master of the Rolls denied it on the grounds that custody for the father would be detrimental to the children. This was followed in 1876 by In re Goldsworthy,³⁰⁹ in which Lord Coleridge denied a father custody of his child, stating:

A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be for their sakes and his own removed; he may be all this without rendering himself liable to judicial interference:...but...the father [must have] shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with.³¹⁰

In this case the father met the pre-1839 forfeiture standard of “gross and habitual intemperance, associated with the constant and habitual use of such improper and outrageous language,...as cannot but be seriously prejudicial to the moral safety and welfare of the child.”³¹¹ Lord Coleridge asserted that he was following the rules developed in the equity courts with regard to the custody of children.³¹²

If the courts were easing up in their application of the strict paternal forfeiture rule out of sympathy for innocent mothers, they were quickly called to task in a couple of prominent cases in the late 1870s and 1880s. In the first, In re Besant,³¹³ the well-known feminist, atheist, and birth control proponent Annie Besant lost custody of her daughter because she refused to bring the girl up in any particular religion. Annie and her husband, the Rev. Frank Besant, had entered into a private separation agreement that granted Frank custody of the boy and Annie custody of the girl of the marriage.

³⁰⁸ 13 L.R.-Eq. 511 (1871).

³⁰⁹ 2 L.R.-Q.B. 75 (1876).

³¹⁰ *Id.* at 82-83.

³¹¹ *Id.* at 84.

³¹² Pursuant to the Judicature Act, 1873, 36 & 37 Vict., c. 66, the courts of common law were granted jurisdiction to determine custody decisions but to do so according to the rules of equity.

³¹³ 11 Ch. D. 508 (1878).

However, five years after adhering to the terms of the separation, Frank petitioned for a return of custody of the daughter on the grounds that his wife was leading a depraved and immoral life. The Master of the Rolls believed that Annie's conviction for publishing an immoral book³¹⁴ supported his decision, even though the conviction was overturned on a flaw in the indictment.

On appeal Annie claimed that under the separation agreement, and an 1873 statute allowing fathers to make binding agreements to relinquish custody to mothers,³¹⁵ she had stepped into the shoes of the father and that the court could remove the daughter from her custody only on the same grounds it could previously remove a child from its father. The court rejected this argument, holding that the father indeed relinquished the custody of the child, but not to the mother. The child became, as it were, a fatherless child, whose care and control rested in the hands of the court. The court then declined to allow custody to remain with the mother, who refused to raise her child in the Christian religion. Hence, although a father could relinquish his paternal rights under the statute, as this father had done, the court held that those rights could not be transferred by law to the mother. Instead, the rights transferred to the court, which could either return them to the father or give limited rights to a mother. The court then applied the unchanged rule that "a fatherless ward is [to be] brought up in the religion of the father."³¹⁶ The court treated the child as it would any ward under the control of a testamentary guardian, and not a biological parent.

The second and even more disturbing case shocked the moral conscience of the judiciary and sent the struggling idea of maternal rights into a tailspin. In *In re Agar-Ellis*,³¹⁷ Mrs. Agar-Ellis agreed to marry her husband only on the condition that any children born of the marriage would be raised Roman Catholics. Mr. Agar-Ellis agreed, but almost immediately after the birth of their first child, the parties began quarreling as to whether they would be raised Catholics or Protestants. To keep the disruptions to a minimum, Mrs. Agar-Ellis simply raised the children as Catholics behind her husband's back. When they were young teenagers they rebelled from their sham attendance at Protestant services with their father and the deception was revealed. Mr. Agar-Ellis then brought suit in Chancery to make the children wards of the court and for an order that they be raised Protestants. The court was quite horrified at the deceptions practiced by Mrs. Agar-Ellis and granted the father's petition to have the children

³¹⁴ This book was a scientific study of birth control and population.

³¹⁵ Married Women's Property Act, 36 Vict., c. 12. (1873) (amending Married Women's Property Act, 1870, 33 & 34 Vict., c. 93).

³¹⁶ *In re Besant*, 11 Ch. D. at 519.

³¹⁷ 39 L.T.R. (n.s.) 380 (1878)

removed to the home of Protestant friends. Shortly thereafter, Mrs. Agar-Ellis brought an action in the divorce court for access to her eldest daughter, which was granted, and she subsequently dropped the divorce suit. By this time the parties were apparently living separate and apart. Mr. Agar-Ellis allowed only very limited access, once a month under supervision, and required all correspondence between the mother and her children to pass through his hands. Upon the eldest child's reaching sixteen, however, Mrs. Agar-Ellis again petitioned for greater access to her daughter and a removal of the supervision of their correspondence. The petition was denied, and Mrs. Agar-Ellis appealed.

The report of the appeal consists of a lengthy discussion between Brett, Master of the Rolls, and Lords Cotton and Bowen, junior justices, on the grounds for interference with paternal discretion. The court concluded that interferences with paternal rights could only occur upon strict necessity, and focused the discussion on whether the father's power to dictate education, religion, and custody continued until age twenty-one. Brett, however, insisted that the rights of the father were "sacred," that "this court, whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children."³¹⁸ The court resolutely stuck by the rule that only danger to life or limb would justify interference with a father's rights. Only Lord Bowen felt any compunction about the harsh outcome in the case when he said:

if we were not in a court of law, but in a court of critics capable of being moved by feelings of favour or disfavour, we might be tempted to comment with more or less severity upon the way in which—so far as we have heard the story—the father has exercised his parental right; but it seems to me that the court must not allow itself to drift out of its proper course. The court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father.... Now, the court must never forget, and will never forget, first of all the rights of family life, which are sacred.³¹⁹

The Besant and Agar-Ellis cases were particularly important in halting the liberalizing trend from strict paternal rights that had occurred since 1857. They were both highly public cases and proved, to the conservative judiciary, that rights for mothers was a bad idea. If fathers were going to lose their paternal rights in favor of mothers, the courts were going to ensure that only those "deserving" mothers, those who suffered at the loss of contact with their children, those who fully adopted traditional norms and values, would be allowed to keep custody. Otherwise, the courts would intervene. As Lord Justice James explained in Besant:

³¹⁸ *In re Agar-Ellis*, 50 L.T.R. (n.s.) 161, 165 (1884).

³¹⁹ *Id.* at 167-168.

[T]he Court cannot allow its ward to run the risk of being brought up, or growing up, in opposition to the views of mankind generally as to what is moral, what is decent, what is womanly or proper, merely because her mother differs from those views and hopes that by the efforts of herself and her fellow-propagandists the world will be some day converted.³²⁰

The result of this tension between the more lenient divorce court's fault rules and the Chancery rules of forfeiture was a continuing pressure to recognize something like maternal rights for truly innocent mothers, but a strong antipathy to interfere with the rights of fathers unless they had acted quite egregiously. The pressure was still on women to conform to traditional models of patriarchal authority. This led to a bifurcated rule. Innocent and traditional mothers would win access at the least, and frequently custody. However, nontraditional or slightly errant mothers would still have to meet the pre-1839 forfeiture standard that required proof of danger to life and limb in order to interfere with a father's rights. In 1886 Justice North of the Chancery Division of the High Court reiterated the oft-cited rule that the father is *prima facie* entitled to the custody of his child. Justice North returned custody of a three-year-old child to the father in the hopes that the wife, who took the child and left her husband's home because of his drunkenness and cruelty, would have sense enough to return home where she belonged. He believed the wife's absence from the home was "without justification," and therefore ordered:

[T]he interest of the child is in accordance with the husband's rights. He is entitled to have the child restored to his custody, and I am very glad to be able to do that without depriving the wife of the custody of the child, and of using her motherly influence to it, and I hope she will continue that devotion and duty, both to her husband and child, which have unfortunately been interrupted.³²¹

What these cases show is that even as late as 1890, the Chancellors and the courts of appeal would continue to adhere to the strict paternal rights begun in De Manneville even while the divorce courts were adopting a marital fault rule. Adultery by the father in Martin was *prima facie* grounds for losing custody. But violence, cruelty, and adultery were not sufficient grounds for losing custody in cases before the chancellors and, as in Vansittart, Winscom, and Agar-Ellis, divorce court decisions were routinely reversed to limit or narrow maternal access to children whenever the father pressed his case. It is still a common situation that when fathers prove a willingness to fight for their children they often get them, even

³²⁰ In re Besant, 11 Ch. Div. 508, 521 (1878).

³²¹ Constable v. Constable, 34 W.L.R. 649, 650 (1886).

when they have been at fault and so long as there is no danger to life and limb.³²²

Additionally, these cases reveal an interesting reaction to the crisis created by the inter-spousal custody disputes. One problem was solved; litigants did not need to pursue judicial remedies in three separate courts and legal remedies were now available to a larger range of people. The new divorce court would not dismiss a mother's custody claim on coverture grounds because she lacked a legal separation from the ecclesiastical courts. But the unification of jurisdiction under a single court led to the inevitable commingling of legal issues and eventual modification of the substantive law. Prior to 1857 the marriage issue was confined to answering questions of status. If married, the children were legitimate and mothers' and fathers' rights were determined accordingly. After 1857, the marriage issue, with the rising importance of divorce, became a question of fault in the performance of the marriage contract, not simply status. That shift was crucial to enforcing traditional gender roles within marriage. Now custody would be directly dependent on marital performance, and due to increased jurisdiction of the courts over the nonpropertied child as well as the propertied child, greater moral and ethical considerations would be brought into the custody analysis. By keeping children in the custody of the non-guilty spouse, the courts maintained an ethic of traditional spousal performance in which custody became a reward for not violating the marriage contract.

The jurisdictional unification made it possible to bring a greater number of dysfunctional families within the control of the royal courts. By criticizing the elitism of the prior system, lawmakers were able to create a court system that would draw under its aegis a greater and greater percentage of family disputes. Besides limiting patriarchal power within individual families, it also made it more difficult for individual couples to resolve disputes without interference of the law. As Sarah Abramowicz argues with relation to the 1646 Abolition of Tenures Act, the shift was from the patriarchal power of fathers to the patriarchal power of judges, and women lost out in the process.³²³ This is not to say that the new court made all women worse off, but it certainly made some worse off. And as the informal and nonlegal mechanisms for resolving family disputes in the

³²² Although the custody problem is not so significant today, the income problem is. According to Susan Maidment, women in the 1970s received custody in roughly ninety percent of divorces and separations, although fathers had a higher likelihood of obtaining custody in contested cases. Maidment, *supra* note 16, at 61-66. On the other hand, women's post-divorce standard continues to be significantly lower than that of their ex-husbands. Eekelaar, *supra* note 15, at 89-95. See *A Century of Family Law*, *supra* note 12; Maidment, *supra* note 16, at 61-66; Olive Stone, *Parental Custody of Infants in English Law*, in *Parental Custody and Matrimonial Maintenance: A Symposium* (1966).

³²³ See Abramowicz, *supra* note 21.

eighteenth century became less practical, now more and more families would come before the scrutiny of the law.

The institutional problem of custody was solved by allowing a single court to resolve a whole host of interrelated questions, but the legal paradox remained. The court still had to grapple with the enduring tension between a legal regime of parental rights and the growing need for a robust child welfare standard. As long as courts continued to think of custody as a matter of parental rights, they would find themselves torn between the competing rights of mothers and fathers, and the quasi-fiduciary question of the child's best interests. As we saw in the post-1857 cases, fathers' rights still had to be deemed forfeited before mothers could obtain custody. Although the grounds for finding forfeiture by fathers expanded to include marital fault, the courts did not generally find maternal rights to exist separate from paternal wrongdoing. A mother still had to prove her own fitness as well as her husband's unfitness, and her fitness also came down to a matter of marital performance. The judge who, in 1863, held that a welfare analysis was simply not within the scope of the court's powers was reaffirming a rights-based model of custody, a model that continues to make custody disputes nearly impossible to resolve.³²⁴ For despite the rhetoric otherwise, and the eventual codification of the best interests test for custodial decision-making, a rights-based model continues to operate in part in both England and the United States.³²⁵ Thus, although the lawmakers wanted to remedy the situation of wrongly used wives, they were and still are unwilling to do so at the expense of upsetting the medieval rights of fathers.

Perhaps the most significant aspect of this unified court structure and the interdependent family law that developed is the social consequence to women of tying custody to marital fault. The inherent contradiction of a unified family law is that these women were more constrained by coverture because custody was tied to their legal inability to function in the public sphere. When they began to challenge their husbands, they demanded a

³²⁴ Cooke v. Cooke, 164 Eng. Rep.; see also Michael Grossberg, Governing the Hearth (1985).

³²⁵ In 1962 Harmon, L.J. commented that:

It is not the law, and it never has been, that no consideration shall be given to the spouse who has been deserted, whose home as been blasted, whose matrimonial felicity has been ended through no fault of his. If a wife chooses to leave her husband, for no ground which she chooses to put forward, but because she has a fancy or passion for another man, as this woman has, she must be prepared to take the consequences. She is a curious woman in that she seems to have no consciousness that she has duties as well as rights.

Re L, 1 W.L.R. 886, 890-891 (1962).

separation between marital duties and parental duties because despotic husbands had precluded their ability to perform both. As they pressed the courts and pushed the law to recognize maternal rights independent of conjugal performance or status, they ultimately wanted protection in their parental performance. With the unification of family law, rather than recognizing independent maternal rights, the courts premised protection of parental rights on acceptance of separate spheres and domestic ideology, everything that coverture was. As long as women remained at home, controlled by a patriarchal legal system, they would be allowed to retain custody of their children. In contrast, any woman who threatened the domestic order, and thus threatened to perpetuate through the generations a disregard of the domestic ideal, would lose access to her children.³²⁶ Women would get custody most of the time, yet custody became a reward for buying into patriarchy and the domestic ideal. Custody law thus became the way to maintain the unity and cohesion of family life through a “family law.” It became the threat and the reward.

If we look back to the origins and the discourse of maternal rights that sought to disaggregate custody from marital performance, we see how the threat to domesticity posed by these women litigants was diffused by shifting authority to a highly centralized and unified court and set of legal doctrines. It gave them what they wanted—their children—but it took away the power and freedom that had previously accompanied custody. Ironically, women needed to break down the restraints of coverture before they could sue for custody, but the maintenance of the forfeiture standard and the presumption of paternal rights was a substantive reaffirmation of women’s second class legal status and an underhanded way to continue the basic disabilities of coverture without actually calling it that.

X. THE MAINTENANCE OF PATRIARCHY AND REGULATION OF THE PRIVATE SPHERE THROUGH FAMILY LAW: THE LEGACY OF THE CUSTODY DILEMMA

One of the quintessential elements of family law is a parent’s right to determine how to raise his or her children. Before the royal courts had taken over ecclesiastical jurisdiction on marital and divorce issues and abolished the criminal conversation and restitution of conjugal rights actions, they were setting the stage for a new, unified family law when they recognized the concept of physical custody as separate from control over a child’s estate. With this new notion of custody they were forced to come to grips with the normative concept of a good, moral upbringing that is implicit in the modern day welfare standard. But the substance of that good, moral upbringing carries within it innumerable opportunities to impose a particular set of expectations and values on a vulnerable group of

³²⁶ *In re Besant*, 11 Ch. D. 508, 508 (1878).

people.³²⁷ Many women believed that if the courts would just realize that women were much better caretakers than men, the law would change to protect their interests in their children.³²⁸ They believed that the best interests test would clearly favor maternal custody. What they did not expect was that the judicial response to their demands would be articulated in terms of a balance between father's rights and the child's welfare. By converting the issue into a question of rights, only mothers who were absolutely "innocent," who fully complied with traditional gender roles and had not breached their marital contract, would receive custody, and still only in cases where the father had forfeited his rights through negligence or malfeasance. Although the courts often reiterated the best interests rhetoric, they still deferred to paternal rights and valued the educational influence fathers would likely provide more highly than the nurturing or religious influence mothers were expected to provide. Women seemed to lose out under both a rights-based scheme and under a best interests scheme so long as they were relegated to the domestic sphere and that sphere was devalued and subordinated both in terms of legal protections and social status.³²⁹

Family law, as it evolved to premise custody rights on marital performance, perpetuated patriarchy in a number of different ways. Despite the gendering of the domestic sphere, the family has been for centuries the *sine qua non* of patriarchal authority; it is the place where the law of the father has its purest operation. The Roman notion of the *patria potestas* represents the most extreme form of patriarchy embodied in law, and English judges accepted a modified form fairly early in English history.³³⁰ Even with changes in substantive law, the patriarchy remained. At the most explicit level, judicial deference to paternal rights and authority weakened women's ability to control the resources of the marriage and dictate the manner in which children would be raised. Nearly eighty years and four acts of Parliament elapsed between the De Manneville case in 1804 and Justice Bowen's words that:

[I]t is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law

³²⁷ Rayna Rapp explains that a "use of the concept of family to blame people in intimate terms for 'failures' that are socially constructed is an instance of ideological domination along the simultaneous lines of race, class, and sex." Examining Family History, 5 Feminist Stud. 180 (1979).

³²⁸ Norton's Separation pamphlet makes this point throughout. See *supra* note 107.

³²⁹ P.M. Bromley has claimed that the 1925 statute making the best interests test the principal standard in custody disputes was codifying the common law rules of the period. This appears to be mistaken. At the appellate level, at least through the turn of the century, the courts would not deprive fathers of custody even if it was in the child's best interests unless the father had forfeited his rights. Bromley, *supra* note 14, at 301, 307.

³³⁰ Forsyth, *supra* note 31, at 2-6.

which points out that the father knows far better as a rule what is good for his children than a court of justice can.³³¹

A mother's input was deemed irrelevant in the court's legal analysis. Until well into this century, women's power to control custody or make educational decisions for their children was legally curtailed,³³² which meant that they were hampered in their ability to resist demands of their husbands to get at property settled solely in their own hands.³³³ Separated fathers could remove children from England, and hence from contact with mothers, who could only hope the children might return safely. Separated mothers had no power to choose their children's religion, school, or country of residence if the father, or the father's will, contradicted such wishes.

On a more subtle level, however, patriarchy is maintained through the enforcement of traditional gender roles when nontraditional parents lose custody. Fictionalized tropes of the ideal mother, father, child, husband, and wife were encouraged and perpetuated through laws that enforced the separation of spheres and the stark parameters of the domestic. For instance, a custody law that incorporated the "tender years" doctrine presumed that only mothers could give appropriate care in the early years of a child's life. Similarly, the law of coverture conflated the wife's legal existence into that of her husband who, as the family's spokesperson, was to represent her interests in the public sphere. Women were relegated to the private sphere both in social discourse and in laws that punished those women who strayed beyond its confines. Married women who labored in the open market did not have the right to collect their own wages; their husbands could demand that their employer pay them directly.³³⁴ Women

³³¹ *In re Agar-Ellis*, 24 Ch. D. 317 (1883).

³³² See Guardianship Act, 1973, c. 29, §1.

³³³ This is the familiar "kissed or kicked" syndrome in which husbands can either beg or bully their wives to turn over property that was separately settled out of their hands.

In these struggles to force a wife to surrender to her husband control over property vested in trustees on her behalf, the three weapons that a husband had at his disposal were consistent wheedling or bullying—being 'kissed or kicked' as it was later described; the removal of the children from the house and a refusal to allow their mother any access to them; and kidnapping followed by indefinite incarceration at home or in a madhouse, sometimes, ...accompanied by physical torture. Only the last was subject to legal intervention, and then only if the wife's friends could find out where she was confined, and also obtain a writ of habeas corpus for her release.

Stone, *Broken Lives*, *supra* note 94, at 81. See also 44 *Hansards* 777 (daily ed. July 30, 1838).

³³⁴ This was not changed until the Married Women's Property Act of 1870, 33 & 34 Vict., c. 93. The Act was amended in 1882. 45 & 46 Vict., c. 75.

who sought political, economic, or legal rights in the public sphere were explicitly and sometimes forcefully excluded. Mrs. De Manneville's quest for legal protection of her status as mother was quashed precisely because she had stepped outside the domestic sphere in a way that threatened family harmony. Lord Eldon seemed unconcerned with the fact that her family had already been disrupted and that her resort to law was a final attempt to bring stability back into her life, not the other way around.

The law governing the family also maintained patriarchy when it protected the private sphere in order for male authority to continue to keep female disorder from seeping into the public sphere. Men often justified their extensive legal rights to control their wives through physical correction by reasoning that their legal responsibility for their wives' actions necessitated the power to punish their wives for disobeying their authority.³³⁵ Likewise, the power to remove a mother from all access to her children was deemed necessary for exercise of the father's rights to determine and control his children's education, for he could not perform his legal duties if he did not have the power to deny access to an adulterous mother or prevent a bitter mother from alienating the children's affections.³³⁶ While men were given unilateral power to control their children's access to their mother, so as to ensure they would not be exposed to immoral or corrupting influences, women could control their children's access to the father only in cases where the father posed serious physical risk to the children's lives. Incest, violence, and abandonment were necessary to remove fathers from control over their children; mothers could be removed for no reason at all. Thus, so long as laws made men responsible in the public sphere for performance of all familial duties, such responsibility served as a justification for them to claim the requisite power in the private sphere to control their wives and children.³³⁷

³³⁵ 1 Blackstone, *supra* note 10, at 446-59.

³³⁶ This was taken to an extreme in the *In re Agar-Ellis* case in which the justices proposed compromise terms for access on their admission of feeling sorry for the exiled mother. Yet such feelings were not sufficient to overpower their legal duty to grant the father the right to forbid access altogether, regardless of the mother's fault, so long as he had not placed the children in danger of life or limb. 24 Ch. D. 317. Consider also the case of Emily Westmeath who never again had a close relationship with her daughter after the child was sequestered away in the North Country and no fault was ever attributed to her actions. In fact, she won every suit against her husband except the suit for custody to enforce the separation deed he had signed granting her sole custody. *Westmeath*, *supra* note 94.

³³⁷ See O'Donovan, *supra* note 25; see also Dingwall & Eekelaar, *Families and the State: An Historical Perspective on the Public Regulation of Private Conduct*, Law & Pol'y, Oct. 1988, at 356-57.

With the residual notion of the state in liberal social thought, the first preference is for regulation by individual initiative....The generational order within the family becomes, then, a point of particular tension in the reproduction of the society....[P]olicy concerns over children have been

Historians of family law have not given enough attention to the way custody law has historically relied on and supported patriarchy and the ideology of separate spheres in numerous interconnected ways. Many novels and memoirs show women rejecting law and legal mechanisms in disputes over children because, although they disliked many of the laws of nineteenth-century England, they generally adopted the idea of separate spheres and the naturalness of male superiority. They accepted patriarchy in many aspects of their lives, including most of their legal rights. But they did not accept the superiority of male rights when it came to custody of children. Women's labor in bearing and raising children, their naturalized capacities for care and nurturance, and their socialized role as primary caretakers all repudiated patriarchy in custody law. Yet by linking custody to other issues of family law, women's demands for independent rights were subsumed in favor of continuing patriarchal power to enforce women's compliance in other areas of the private sphere. The authority of the state to regulate the private sphere came as a necessary consequence of trying to give women greater control over their children without giving them the power to exercise that control in a way that threatened state interests in social stability, family harmony, property, or male autonomy in the family.³³⁸ Women had to be pacified, but men had to remain in control. The method of ensuring this was a unified family law that protected male prerogatives while ensuring female labor over children.

If we see how the post-1839 cases posed a profound problem for the diverse structure of pre-1857 family law, the process of reform begins to take on a decidedly different hue. Historians and scholars have all viewed the creation of the Divorce and Matrimonial Causes Court with approval because, it was suggested, the court finally recognized the importance of a law for the domestic sphere.³³⁹ After 1857 women would begin to get custody, poor couples as well as wealthy ones could get divorces, women could initiate divorce actions, and their status within the family accordingly improved. Although the changes were piecemeal, the consensus has been that the emerging family law, in conjunction with married women's property laws and eventually the vote, has slowly broken down coverture and equalized women's status. However, while coverture has declined in relation to property, a more subtle form of patriarchy has arisen to

dominated by the problems of conserving an established public order in the face of perceivedly inadequate private moral socialization.

Id.

³³⁸ Rapp, *supra* note 327, at 179 ("I think it is fair to say that all states promulgate, enforce, and depend on a 'family policy.' The juridical realm has both defined legitimate family forms and relied on the notion of family to reproduce state authority.").

³³⁹ Stone, *Road to Divorce*, *supra* note 3; see also Dorothy M. Stetson, *A Woman's Issue: The Politics of Family Law Reform in England* (1982).

disempower women from challenging male authority. By unifying family law and making custody and property determinations rest on marital performance, women gained control and lost power. Their demands in the custody context, for an independent law of parental rights and duties, clearly rejected the interdependence that became institutionally sanctified with the creation of the new court. Women sought reform in the laws of domestic and family relationships, but what they got was a prison.³⁴⁰

With the creation of a unified family law, civil control over the private moral atmosphere of the home became a matter of law. At the heart of most reformers' demands was a desire that status and family relationships be governed by laws that were not premised on the protection of property. They should be premised upon a belief that people should be required to fulfill the duties they undertake to children and spouses, to provide support, nurturance, and a safe and healthy home. Suits for restitution of conjugal rights, while often motivated by financial concerns, were coded by lawyers and judges as suits for the enforcement of marital duties that would maintain stability and order within the family unit. The moral environment of the home, for the first time, was opened up to public legal scrutiny with these custody cases.³⁴¹

However, the law did more than provide a regulatory mechanism for policing deviant family breakdowns; it also provided the mortar for walling in certain groups and practices behind the wall of domesticity and the private sphere. It helped structure the family behind the wall by granting power to fathers and then refusing to come to the aid of mothers when fathers exercised that power. This represents, as Dingwall and Eekelaar cogently described it, a balance between totalitarianism (the moral socialization and reproduction of society through highly intrusive state mechanisms) and individualism (that requires privacy and independence from state intervention).³⁴² The family thus becomes the buffer, the device for further socialization of new members, to keep the public order and yet to maintain sufficient privacy to enable the growth of the liberal individual. At the same time, when the family breaks down, the state may readily step in to remove children and otherwise regulate the private behavior of all members.

It is ironic that we bewail the way that contemporary custody disputes often deteriorate into bitter battles over custody of children, yet

³⁴⁰ See Dingwall & Eekelaar, *supra* note 337, at 353 (“[W]omen were expected to comply with externally-created standards of private behaviour. The barrier around the family was breached by the woman’s invitation to enter.”); see also Jacques Donzelot, *The Policing of Families* (Robert Hurley trans., 1979).

³⁴¹ This was followed by major changes in a number of areas of social control over working class or deviant family households. See Dingwall & Eekelaar, *supra* note 337, at 353.

³⁴² *Id.* at 357.

historians have not seriously examined the socio-legal causes of those battles. It is strange to think that Victorian parents did not often fight over their children when they sought a divorce or separation, or that when they did the legal issues were particularly novel and difficult for the courts. For many legal historians, custody debates have been viewed as simply another battle over division of the marital property; children were just one more thing to fight over. Family law historians have generally viewed the marital determination to be of principal importance, while custody and property divisions were ancillary and subsequent issues to resolve once the primary decision of marital fault was determined.

That hierarchy is a result of viewing family law backwards with a contemporary lens. Looking at the origins of the court from the eighteenth century, and the custody law that preceded the unified family law gives us new insight into why custody was not generally an issue; there were few disputes because the law was clear that mothers would always lose. The reason custody became an issue for the women's movement was not simply because women wanted control over their children, but because husbands' power to prohibit access to children upset the power balance in the family to such an extent that women could not resist their husbands' tyrannical demands in any other area of family decision-making. Custody was the blackmail card. In the demands of these women writers to disaggregate marital from maternal performance the biggest complaint was the ability of husbands to use the children against their wives. That dynamic continues today in part because the unified family law that evolved did not disaggregate maternal from marital rights.

XI. CONCLUSION

Katherine O'Donovan has argued that current marriage, divorce, and child custody laws (legislation and judicial opinions) reinforce patriarchal power relations within the family and rely on and perpetuate gender stereotypes of the traditional homemaker mother and breadwinner father.³⁴³ Within the scope of her analysis—the late twentieth century—the evidence supports her argument. The laws of marriage and divorce clearly envision the idealized nuclear family of the 1940s and 1950s. But the family law she discusses originated within a liberal ideology of separate spheres and masculine individualism in the nineteenth century, and those values remain paramount within the academic discourse of family law to this day. Until the law of the family disaggregates the issues of marital performance, child custody, and property, women will continue to feel pressured into adopting traditional gender roles within the family, and as a result will reproduce the economic disparities that make equal status within the family an illusion.

³⁴³ O'Donovan, *supra* note 25.

Determining custody of children is probably one of the most difficult tasks we set before the judiciary. We expect them to put aside their own values and biases in order to engage in a true best interests test. We want them to be able to distinguish between the nontraditional parent who wants to put his child into prostitution and the nontraditional parent who believes that raising her child as an atheist will provide her with a better grasp of science and the world around her. We know that children who encounter violence and abuse in the home are more likely to perpetuate that cycle as adults.³⁴⁴ Likewise, children who grow up in loving and nurturing homes tend to be better parents themselves. What a child learns within the domestic sphere will be carried forward into the public sphere and into the child's own adulthood. For that reason, custody of children is a legitimate concern of the state, and is therefore a fit subject of legal control. However, recognizing the cycle simply makes it more important that we understand the relationship between the law and patriarchy, between custody and marital fault, and between family law and individual rights and aspirations. Only if we see the relationships can we move forward to change or strengthen them.

This article attempts to show that the inter-spousal custody cases of the nineteenth century created such a crisis in equity that they eventually demanded a new court structure and a new set of legal doctrines. The period began with a diligent effort by the judges to discourage these suits through dismissals and the establishment of an absolute rule of paternal rights. The 1839 Custody of Infants Act promised to relieve the hardships of the particularly egregious cases, but the judiciary quickly realized that the Act carried profound implications for coverture and the domestic law of husband and wife. To avoid recognizing mothers' rights, a move that would severely undermine coverture and institutionalized patriarchy, they shifted greater authority to the state to intervene in more disrupted families while keeping the substantive law of paternal rights intact. When that proved even more difficult to maintain and justify, lawmakers created a new court and a new set of family laws rather than recognize an independent right in mothers to custody of or access to their children, a right that would derogate from the long established rights of fathers.

With the new court came promises of a kinder, gentler morality in custodial decisions. But as wives quickly learned, what limited rights they would acquire in their children came at the expense of a further embedding of the domestic sphere and an acceptance of traditional family roles, norms, and marital performance. The eventual codification of the best interests

³⁴⁴ James Garbarino & John Eckenrode, Understanding Abusive Families: An Ecological Approach to Theory and Practice 86 (1997); Angela Browne & David Finkelhor, Impact of Child Sexual Abuse, in Classic Papers in Child Abuse 217 (Donnelly & Oates eds., 2000) [hereinafter Classic Papers]; Cathy Spatz Widom, Does Violence Beget Violence? A Critical Examination of the Literature, in Classic Papers, supra, at 309.

standard would continue to elevate paternal rights by privileging the functions fathers played in determining religion, education, and socialization of children over the limited domestic roles of mothers in infantile childcare and physical nurturance. Hence, so long as the custodial decision rested on marital performance, mothers would be relegated to fairly strict traditional roles in order to maintain the moral high road necessary to defeat the legal privileging of fathers' rights and responsibilities under a forfeiture standard.

The institutional situation of tripartite marriage jurisdiction created an untenable paradox for the equity court when mothers began to claim rights to their children. Under coverture the royal courts could not hear a case between a married woman and her husband. Although the 1839 Act gave women the access to the courts necessary to challenge their husbands, the courts interpreted the Act to merely expand their jurisdiction over a greater number of children rather than to provide married women with any new rights. Because coverture had not technically been abolished, the courts continued to have a difficult time resolving these troublesome cases.

With the creation of the Divorce and Matrimonial Causes Court in 1857, however, the coverture problem disappeared, as did the jurisdictional difficulties of the tripartite court system. But the problem of maternal rights did not go away. Women continued to petition for access to and custody of their children. There were certainly situations when mothers deserved custody, but the court was in something of a bind. If it recognized maternal rights, it could do so only at the expense of paternal rights, a move that was staunchly resisted in the absence of express legislative authority. If, on the other hand, it adopted a welfare standard, it could finesse the issue of rights.

Rather than do either, the appellate court and Chancery enforced a rule that effectively continued the pre-1839 forfeiture standard. The effect of this rule was to leave the burden on mothers to prove the father's unfitness as well as their own fitness. To ease the difficulty of determining fitness, the courts turned to marital fault as the indicator of fitness. Hence, the guilty spouse was the least likely to obtain custody. The effect of that rule was to tie marital performance and custody in such a way that only women who adopted traditional domestic roles and did not violate their marriage vows would retain access to their children. Of course, fathers who violated their marriage vows retained the presumption of fitness because of the sexual double standard. So in the end, the separation of marital and maternal roles that the women reformers sought was denied, and instead women were held hostage by their children. Even today, custody of children remains a reward for women and never a right.

The custody cases posed such a profound threat to the stability and authority of the Chancery courts that within fifty years an entirely new court system was required. That court system combined the tripartite jurisdictions of the law, equity, and ecclesiastical courts in matrimonial matters. While many scholars and historians have applauded that moment,

I would suggest that the new court was merely a way to solve the legal and jurisdictional problems without improving the rights or status of women and children. We can see this by observing the arguments and wishes of the women reformers who wanted a complete separation of marital and maternal duties. Instead, by creating an interdependent court with interdependent rules, women were forced to adhere to traditional patriarchal patterns of behavior. Children became the reward, but at what cost? Women were expected to accept the sexual double standard, they still had to prove their husband's unfitness and their own fitness to defeat the paternal presumption, and they would lose custody if they deviated even slightly from the most subordinate and traditional behavior. By understanding the role played by child custody disputes in the creation of the unified family law courts, we can begin to unpack the way in which contemporary family law contributes to the subordination of women in our own day and age.