"Well-Behaved Women Don't Make History": Rethinking English Family, Law, and History

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"WELL-BEHAVED WOMEN DON'T MAKE HISTORY":* 
RETHINKING ENGLISH FAMILY, LAW, AND HISTORY

Danaya C. Wright**

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* A common bumper sticker and slogan of the feminist movement. While the 
slogan clearly encourages women to make history by misbehaving, it reminds us of the 
vast numbers of women who, because they did behave, or misbehaved within 
acceptable social norms, have been hidden from history. I hope to reclaim some of 
that history for the relatively well-behaved women of the nineteenth century.

** Professor of Law, University of Florida, Levin College of Law. This article is a 
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I. Introduction

In 1793, Edward Addison and Jessy Campbell were traveling together through Scotland, quite happily in love. The only bar to their future happiness, however, was that they were already married—to others. In fact, Jessy was Edward’s sister-in-law. Edward was married to Jane Addison, Jessy’s sister, and Jessy was married to James Campbell.1 When James Campbell sought a divorce by private Act of Parliament for Jessy’s adultery with Edward, it excited no controversy and was readily granted.2 But when Edward’s wife, Jane, sought a divorce, there was no end of debate and delay. Eventually, Jane received her divorce—the first granted to an English wife—but at great cost to the social and legal norms surrounding the accepted sexual double standard.3 It was a well-understood legal fact in nineteenth-century England that wives who committed adultery could be divorced with little effort, though some cost; husbands who committed adultery could do so with impunity.4

Divorce in England has a complicated history. Despite the common belief that Henry VIII brought divorce to English soil, it was not until a century after Henry’s reign that the first English divorce was granted, by private Act of Parliament, in 1670.5 Between 1670 and 1857, 379 Parliamentary divorces were requested and 324 were granted.6 Of those 379 requests, eight were by wives, and only four of

1. Jane and Jessy were the daughters of (a different) James Campbell, a strong supporter of William Pitt, and a hereditary usher of the white rod for Scotland. See ALLEN HORSTMANN, VICTORIAN DIVORCE 20-22 (1985).
3. Id. (citing 41 Geo. 3, c. 102 (Eng. 1801)).
4. HORSFMAN, supra note 1, at 20-22.
5. Id. at 1. Until 1857, divorce with the right to remarry could only be granted by a private Act of Parliament. Horsman identifies the Roos divorce in 1672 as the first divorce act. A Parliamentary return from 1857 placed the Roos divorce in 1670 and identified two earlier divorces, one in 1540 and one in 1551, the latter one having been repealed. See RETURN OF ALL MARRIAGES WHICH HAVE TAKEN PLACE IN ENGLAND AND WALES FROM THE COMMENCEMENT OF THE ACT 6 & 7 WILL. 4, C. 85, TO 31 DECEMBER 1855, reprinted in 3 BRITISH PARLIAMENTARY PAPERS: MARRIAGE AND DIVORCE 117 (Irish Univ. Press 1969) [hereinafter RETURN OF ALL MARRIAGES]. Additionally, annulments through papal dispensations had been available in the late sixteenth century. See MARY POOL, UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND 55 (1988).
6. LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND, 1530-1987, 432 tbl.10.1 (1990) [hereinafter STONE, ROAD TO DIVORCE]. It is easy to see how lawmakers assumed there was a divorce epidemic. Nearly four times as many divorces occurred in the last fifty years of the period (1800-1850), than in the first fifty years (1670-1720). Id; Wolfram, supra note 2, at 181. Sybil Wolfram has also looked at these records and found some differences in the numbers and costs that have been reported by other historians, though the basic conclusions are similar. See Wolfram, supra note 2.
those were granted.\textsuperscript{7} It was firmly understood that a wife who committed adultery, possibly interposed spurious children into the bloodline, and degraded her husband’s honor, had committed the worst marital sin next to treason.\textsuperscript{8} Once accepted as a legal remedy, divorce was deemed appropriate only for a wife’s adultery. A wife whose husband had committed adultery, however, was expected to submit to his infidelities which did not threaten her or her children’s legal status, and if the behavior became too outrageous to tolerate she could receive a divorce \textit{a mensa et thoro}\textsuperscript{9} from the ecclesiastical courts that would allow her to live separate and apart, with his support, though she could not remarry.\textsuperscript{10}

The Addison/Campbell adultery, however, threw a wedge into the well-established law of marriage and divorce, as the English legal tradition recognized that parties similarly situated should be treated similarly by the law.\textsuperscript{11} Yet the reluctance to grant Jane’s divorce from

\textsuperscript{7} Stone, Road to Divorce, \textit{supra} note 6, at 432 tbl.10.1. Wives succeeded in their Parliamentary divorce acts at a rate of 50% while husbands succeeded in theirs at a rate of 86%. \textit{Id.}

\textsuperscript{8} A wife who killed her husband was not guilty of simple murder, but rather of petty treason, the killing of her lord and master. \textit{See} John H. Baker, \textit{An Introduction to English Legal History} 484 (4th ed., Butterworths LexisNexis 2002) (1971).

\textsuperscript{9} Divorce \textit{a mensa et thoro} was the only separation available in the ecclesiastical courts, other than an annulment. The former was based on a marital fault which allowed the parties to live separate and apart, though they could not remarry. The latter treated the marriage as never having been completed; thus, parties to annulled marriages could marry again. \textit{See} J.E.G. De Montmorency, \textit{The Changing Status of a Married Woman}, 13 Law Q. Rev. 187, 190-91 (1897); Black’s Law Dictionary 515 (8th ed. 2004).

\textsuperscript{10} \textit{See}, e.g., 144 Parl. Deb. (3d ser.) (1857) 1702; 142 Parl. Deb. (3d ser.) (1856) 1982. There was great consternation among lawmakers and commentators about the appropriateness of putting aside one spouse and being permitted to take another. The members of Parliament discussed at great length the propriety of allowing remarriage for the innocent and/or the guilty spouse. \textit{See}, e.g., 144 Parl. Deb. (3d ser.) (1857) 1702; 142 Parl. Deb. (3d ser.) (1856) 1982. Margaret Oliphant, in her early conservative years, believed innocent spouses should not remarry, but should resolve themselves to a future life of loneliness and celibacy. \textit{See} Margaret Oliphant, \textit{The Laws Concerning Women}, 79 Blackwood’s Edinburgh Mag. 379, 386 (1856). \textit{See also} Richard Helmholz, \textit{Marriage Litigation in Medieval England} 100-07 (1974) (on the ecclesiastical court’s jurisdiction over divorce \textit{a mensa et thoro}).

\textsuperscript{11} English legal and political philosophers were quite generally agreed that laws should apply equally to parties similarly situated. While they might not agree that certain individuals were equally situated, they advocated equality under the law. And they did not believe that husbands and wives were similarly situated, but the Jane Addison divorce clearly challenged the accepted view that husbands and wives were so differently situated that wives would never require the benefits or protection of a divorce. The Utilitarians, the Chartists, and the Owenites all advocated equality and they often touched upon the relations of the sexes. All viewed legal reform as important in bringing England to the apex of legal rationality, though there were obvious differences in the types of reform they advocated. \textit{See} Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation} (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789); John Stuart Mill, \textit{On Liberty} (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); Robert Owen, \textit{A New View of Society}.
Edward, which was presented on virtually the same grounds as James’ divorce against Jessy, revealed the depth of the judicial and legislative acceptance of the double standard for adultery. This action also reinforced the view that husbands and wives were not similarly situated in issues of marital fault. In the end, Parliament could not sanction the blatant injustice that would exist in granting relief to James and not to Jane. Jane received her divorce in 1801. However, to stem the rising tide in what it saw as a “divorce epidemic,” Parliament limited a wife’s grounds for a divorce to incestuous adultery. The narrow incest exception was not expanded until 1838 when Ann Battersby received a divorce from her husband, Arther, on the grounds of bigamy. Before the mid-nineteenth century, wives had limited grounds under which to obtain a full divorce: adultery aggravated by incest or bigamy.

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in Selected Works of Robert Owen, Vol. 1: Early Writings 23 (Gregory Claeys ed., Pickering & Chatto 1991) (1813). Lord Brougham, in the 1840s and 1850s, was an influential advocate of legal reform who founded the Law Amendment Society in 1844 to follow through on many of Jeremy Bentham’s reformist ideas. Additionally, William Gladstone spoke before the House of Commons about the equality of men and women and the importance of equal rights before the law. 147 Parl. Deb. (3d ser.) (1857) 393.


13. 43 H.L. Jour. 101-04, 190, 290 (1801).

14. Wolfram, supra note 2, at 174 (41 Geo. 3, c. 102 (Eng. 1801)).

15. Ironically, had Edward and Jessy not been in-laws already, Parliament would have granted James’ divorce of Jessy and not Jane’s divorce of Edward. Incest under these rules was defined by the ecclesiastical court’s position on the prohibited degrees of relationship for marriage, which treated blood relations the same as affinal relations. See James Brundage, Law, Sex, and Christian Society in Medieval Europe 140-41 (1987); Helmholtz, supra note 10, at 77-87.

16. Horstman, supra note 1, at 23-24. After their marriage, he had cohabited with Ann for only three weeks, during which time he had frequented numerous brothels and given her a venereal disease. Id. Arther deserted her six months after the marriage and resurfaced more than ten years later in Newgate prison, remarried. Id. After the conviction for bigamy, he was transported to Australia for seven years and Ann received a full divorce. Id.

In 1857 Parliament finally succumbed to public and political pressure and passed a bill creating a domestic relations court: the Court for Divorce and Matrimonial Causes.\footnote{Id.} This new court, for the first time in common-law history, combined the following jurisdictions: the ecclesiastical court's jurisdiction over marital validity and separation; the Chancery court's jurisdiction over child custody and equitable estates; the common-law court's jurisdiction over property; and Parliament's jurisdiction over divorce and marital settlements.\footnote{Id.}

This made the process far less expensive and therefore open to the middle as well as the upper classes. Stone, Road to Divorce, \textit{supra} note 6, at 5, 357. In 1573, Scotland passed a law which allowed women the right to petition for a divorce on the same grounds as men: simple adultery. Scot. Parl. Acts 1573, c. 55. Despite the greater availability and lower cost, Scottish divorces were not rampant. Between 1847 and 1857, 174 divorce decrees were granted in Scotland, ninety-nine at the suit of the husband, and seventy-five at the suit of the wife. \textit{Return of All Marriages}, \textit{supra} note 5, at 117. During these same years, thirty-six Parliamentary divorces were granted in England. \textit{Id.} As the nineteenth century progressed, there was quite a lot of pressure to make the English law conform to that of Scotland and France, both in terms of the equality of grounds and the access to civil courts. Yet, England had resisted civil divorce for 300 years longer than Scotland, a tribute more likely to religious and social differences than to gender or class differences, even though the latter formed the basis of most of the mid-nineteenth-century criticism. Although English critics often referred to the law in France and Scotland for a model that was egalitarian in gender and class terms, it is not surprising that Parliament accepted the class-based critique and thus instituted civil procedures for divorce, but not the gender-based critiques that would equalize the grounds for men and women. When discussing the class issues, the law's critics often referred to Scotland as the model, but when discussing the gender issues, they often referred to France or other countries on the continent. \textit{See} 145 Parl. Deb. (3d ser.) (1857) 530 (Bishop of Oxford referring to the crisis in Prussia from a weakening of their divorce laws). Not surprisingly, the perceived laxities in continental morality thus justified retaining the sexual double standard for women, while the perceived Anglo-Saxon restraint of the lower classes in Scotland justified moving toward civil divorce. \textit{See} 147 Parl. Deb. (3d ser.) (1857) 1643.

18. Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85. (Eng.) (hereinafter referred to as the 1857 Act). The term "domestic relations" court is a modern term that I use here. Family law and domestic relations were terms not used in the nineteenth century to refer to the kind of interdependent set of legal doctrines concerning marriage, children, and families that evolved from the 1858 court. The law at the time used the term \textit{baron and feme} to refer to marriage and custody of children, while property matters associated with the family were subsumed under traditional property law. The civil court in Scotland that granted divorces was not a specialized divorce court, but was the Court of Session. \textit{See} 13 & 14 Vict., c. 36, § 16 (1855) (Eng.); Hugh Barclay, A Digest of the Law of Scotland 286 (2d ed., Edinburgh, T. & T. Clark 1855). Despite the modernity of the term, critics today often refer to the divorce and matrimonial causes court as an answer to "family law reform." \textit{See, e.g.}, Poovey, \textit{supra} note 5, at 54. I use the term "domestic relations court" and "divorce court" interchangeably to refer to the 1858 Divorce and Matrimonial Causes Court and where necessary refer to modern family law courts as such.

19. For a history of the debates leading to the creation of the divorce court, \textit{see} Horstman, \textit{supra} note 1, at 85-110; Poovey, \textit{supra} note 5, at 51-88; Mary Lyndon Shanley, Feminism, Marriage, and the Law in Victorian England 22-48 (1989); Dorothy M. Stetson, A Woman's Issue: The Politics of Family Law Reform in England (1982); Stone, Road to Divorce, \textit{supra} note 6, at 368-90; S.M. Waddams, En-
Wives were given the legal right to seek a divorce or judicial separation in a court of law, receive custody of the children of the marriage, and were allowed an order granting them independent property rights.²⁰ Divorce could now be granted in a single civil court and the costs would be substantially less than a Parliamentary divorce.²¹ Such action gave wives almost the same rights as husbands before the new judge.

Until now, no one has studied the records of this court to see how it responded to different types of petitioners or to uncover details about the lives of the people seeking resolution before its bar. Historians of divorce have examined the rules that evolved from the court and criticized the inequalities that the 1857 Act embedded in the court’s policies and procedures.²² And family-law scholars often begin their studies of family law with 1857, recognizing the importance of civil divorce to modern family law.²³ But what is notably absent from the scholarship is a critical analysis of the role the court played, both in terms of the rules it created and the outcomes of its cases, on the intellectual project of writing the history of family law.

During my extensive research into the Victorian family I have become intrigued by an historical problematic, a tension between four things: 1) evidence that women reformers in general wanted extensive reforms in the laws of coverture²⁴ and most particularly the disaggregation of legal rights to property, custody, and divorce with themselves gaining the right to use law and courts for their own personal benefit; 2) the creation of a court that instead aggregated these rights and imprisoned women in very traditional subordinate roles within a narrowly constrained domestic sphere; 3) a dominant historical narrative that applauds the court as empowering women and yet also cites an emphasis on legal rights and selfish individualism as fundamental flaws with the family law of the late nineteenth and most of the twentieth century;²⁵ and 4) the fact that despite radical changes in family law and the nearly complete dismantling of coverture, gender inequal-

²⁰ 20 & 21 Vict., c. 85 (1857) (Eng.).
²¹ Id. See also Horstman, supra note 1, at 85.
²² See articles cited infra note 34 and accompanying text.
²³ See articles cited infra notes 33 & 35 and accompanying text.
²⁴ Coverture is a medieval doctrine that treats husband and wife as a single legal entity. See discussion of coverture infra notes 79-89 and accompanying text.
²⁵ By this I refer to the common complaint of conservative critics that women's rights conflict with the interests of families and children, that when women leave the home to work or compete with men for high-paying jobs, families suffer. See, e.g., Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe 147 (1989) (arguing that the increase in individual rights has led to "alienation, powerlessness, and dependency"). See also Milton C. Regan, Jr., Alone Together: Law and the Meanings of Marriage (1999); Sanford N. Katz, Individual Rights and Family Relationships, in Cross Currents:
ity still remains very much alive for vast numbers of Anglo-American women.\textsuperscript{26}

The centerpiece of this article is a critical analysis of what I have termed the "liberalization narrative."\textsuperscript{27} Historians and family-law scholars have generally viewed the rise in family law as beneficial to women because it recognizes their special interests in the family and it rejects the hierarchical, male-dominated values of commercial and public law that dominate the capitalist marketplace.\textsuperscript{28} Family law often rejects the rhetoric of legal rights in favor of very malleable terms like interests or duties. And that is good, according to the liberalization narrative, because women are believed to be uncomfortable asserting legal rights in the context of complex interrelationships that are seen to be ultimately more meaningful to them than the property or the agency that would accompany recognition and protection of rights. The liberalization narrative asserts that because women are gentle, build relationships, and have interests focused in the home, a special law of the family is good for them; it reflects their way of interacting with people and it protects the things they value. But in the nearly 150 years since this first family-law court was created, no one has looked at whether the women in the 1850s who were advocating for legal reform wanted the particular legal rules that were enacted, whether women as a class fared well under this new family law, or the extent to which the family law that evolved from the 1858 court simply replaced one patriarchal scheme with another. More importantly, no one has analyzed how the new court, its subsequent history, and the evolving family law that arose have constructed a narrative in which legal rights for women within the family are viewed as unnatural, antagonistic to the interests and needs of husbands and children, and ultimately destructive of the social order. By examining the law that preceded the new court, the reform debates, empirical data from the court's first decade, and the historical narrative we have constructed about the rise of family law, I argue that family law's role in perpetuating gender equality is occluded by the historical and intellectual hegemony of the liberalization narrative.

\textsuperscript{26} Tying the modern family and its production through family law to fundamental gender inequalities today must remain for another project, though I suggest certain links in infra Part VII.

\textsuperscript{27} The "liberalization narrative" is a term I have coined to represent what I see as a generally accepted view that the development of family law has had a liberalizing effect on women's lives. It contrasts the limits of coverture from the eighteenth and nineteenth centuries with the legal rights family law gives women in the late twentieth and early twenty-first centuries and asserts that women are better off now than before. Of course, this is the heart of my argument, the uncritical acceptance of the liberalization narrative, and I critique it in infra Part VII.

\textsuperscript{28} See articles cited infra note 35.
Because this article combines empirical data from the first decade of the 1858 divorce court with a theoretical critique of the reform of family law all in the context of the historical reform movement, its structure is somewhat complicated. In Part II, I explain the theoretical conundrum underlying this project as well as its historical genesis. In Part III, I set out the basics of the pre-reform law of divorce and its relation to women's disempowerment under coverture. In Part IV, I examine the reigning ideology of separate spheres that justified and was perpetuated by the law of coverture. In Part V, I explore the different kinds of arguments for reform of the law of divorce, child custody, and married women's property. These nineteenth-century critiques framed the reform debate of the 1850s and established the parameters within which civil divorce would occur. In Part VI, I turn to empirical data from the records of the court's first nine years to explore the extent to which the legal reform answered these stated needs of progressive reformers or frustrated the desires of female petitioners. The data reveal some limited improvement as well as great continuity in women's subordination within the family. In Part VII, with the evidence of the court's performance, I then challenge the historical claims that the shift from coverture to family law benefited women. In discussing the liberalization narrative that posits family law as good for women, I examine the reform debate and the reform itself as establishing a narrative of law's innocence in the subordination of women. I conclude by suggesting possible implications of the narrative of law's innocence in contemporary family law and the lives of men and women today.

II. PRELUDES, QUALIFICATIONS, AND FOUNDATIONS: THE HISTORICAL CONUNDRUM OF REFORM AND FAMILY LAW

This article has been over ten years in the making and is a first stab at a very theoretically complex argument. It uses empirical data and narrative analysis to get behind the cultural and legal environment of the movement for divorce reform in the 1850s. It argues that by looking at the historical precedents of the 1858 divorce court and the family law that evolved from it, we can more clearly see how contemporary family law continues to carry within it the values and presumptions of gender subordination that prevailed at its creation. But even as I talk about family law and the general role of law in gender inequality, I am aware of the profound indeterminacy of law as an institution separate from the people who write and enforce it. Law has no independent existence separate from the people of the time who interact with it as subjects and objects. Similarly, history cannot be separated from the historians who write it. Thus, even as I attempt

29. I am indebted to Walter Weyrauch for his work on the indeterminacy of law and his helpful comments on a draft of this manuscript.
to write a history of the origins of English family law, I am conscious of the contradictions inherent in the very project.

If law has little meaning outside the lives of those affected by it, then it is critical that I examine the lives of those people who brought their disputes to the new court. At the same time, however, the court records are not reliable narratives of the true events that occurred because they are the products of the people who lived those events. They are also necessarily incomplete. Yet they are the only records we have and to ignore them would be to ignore a valuable piece of the puzzle. The court data, along with periodical articles, novels, reform debates, and legal and institutional contexts of the period must all be fitted together, like a multi-layered puzzle, to produce a narrative that resonates with the reader of today. My own discomfort with the difficulties of writing history in a post-modern world is exacerbated by the awareness that I am doing precisely what I criticize other historians for doing. In the end, however, I hope that the reader will view history, law, the family, divorce, gender, rights, and equality more critically. In particular, I hope the reader will view legal change and reform with a new eye—an eye that constantly picks at, turns over, and questions the appearance of legal and historical claims.

To understand how I am challenging the traditional versions of family-law history, I must first explain how historians and legal scholars have constructed the narrative linking family law and women’s equality. Notably, they argue the divorce laws emanating from the 1858 court fundamentally changed the law of domestic relations by forging a path toward equality of rights. These scholars cite the creation of the divorce court and the liberalization in a wife’s ability to seek a divorce, custody of her own children, and protection for her separate property as critical to improving the legal status of women. Women’s improved legal status is then believed to equalize the balance of power between husbands and wives within the domestic realm. The court, one of the first true family law courts in the modern world, is credited with improving women’s lives, softening the harsh results of patriarchal legal rules, and recognizing the importance and separateness of the domestic realm.

30. See discussion of the liberalization narrative, infra Part VII.

31. Historians have argued that by giving women a right to a divorce they would have more power to disagree with their husbands and hence determine their own futures, thus improving their own lives. Elaine Showalter, Family Secrets and Domestic Subversion: Rebellion in the Novels of the 1860s, in The Victorian Family 107 (Anthony Wohl ed., 1978) (stating that the Divorce Act “caused a minor social revolution in England” (citing Margaret Maison)); STETSON, supra note 19; STONE, Road to Divorce, supra note 6, at 388-90.

32. Showalter, supra note 31; STETSON, supra note 19; STONE, Road to Divorce, supra note 6, at 388-90.

33. STONE, Road to Divorce, supra note 6. See also GEORGE BEHLMER, Friends of the Family: The English Home and Its Guardians, 1850-1940, at 190 (1998) (calling it “a watershed in English social legislation”); R. H. Graveson & F.R. Crane, A Cen-
Of course, no single piece of legislation ever truly revolutionizes complex human relationships. Scholars have been quick to note that the promises of the 1857 law were perhaps overstated. It is not surprising that this new court perpetuated the sexual double standard and women's inequality, given the extreme gender differences inherent in Victorian society and the corresponding legal sanctioning of differential treatment. Even though the legislation sought to ameliorate the harsh effects of wives' legal non-existence, I argue that this new law made matters worse, not better, for women.

But most people, including historians, lawyers, and feminist scholars, endorse the fundamental importance of the new court as the first major step toward giving wives the right to civil divorce and legal agency. And there is a naturalness in recognizing the special realm of the family as a domain of particular interest to women, deserving of its own unique legal rules and procedures. The project of family law, if not the particular manifestation of it, is widely accepted by historians, scholars, lawyers, and laypeople, as an important legal reform as well as a critical component in women's struggle for legal rights.

However, I am skeptical of the overall acceptance of family law, for I am unclear how, if at all, it has improved women's lives. This does not mean that the pre-1858 law virtually prohibiting divorce for women was better than what was available after 1858, especially for

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34. See W.R. Cornish & G. de N. Clark, Law and Society in England: 1750-1950, at 386-90 (1989); Stone, Road to Divorce, supra note 6, at 388-90; Holmes, supra note 12; Probert, supra note 12; Shanley, supra note 12; Woodhouse, supra note 12.

35. This is not to say that modern scholars think any current instantiation of family law is perfect, or that they do not critique the patriarchal family from a feminist, a Marxist, a radical, or a post-modern perspective. Rather, they take family law as a given, as a logical and generally sensible subset of law centered around a coherent and pre-existing social unit. And then they critique the failures of certain rules within family law to relieve the subordination of women. But at heart, most family-law scholars believe the enterprise is logical and sensible. See, e.g., Glendon, supra note 25, at 85-94; Michael Grossberg, How to Give the Present a Past? Family Law in the United States: 1950-2000, in Cross Currents, supra note 25, at 4-12. See generally John Eekelaar, Family Law and Social Policy (Robert Stevens et al. eds., 2d ed. 1984); Katherine O'Donovan, Family Law Matters (1993) [hereinafter O'Donovan, Family Law Matters]; Rethinking the Family: Some Feminist Questions (Barrie Thorne & Marilyn Yalom eds., Northeastern Univ. Press 1992) (1982); The State, the Law, and the Family: Critical Perspectives (Michael D.A. Freeman ed., 1984). What they do not question is the role of family law itself in constructing the subordination of women.

women who wanted out of abusive and intolerable marriages. Laws purporting to aid some women can harm the collective goals of women as a class. Additionally, laws written by men with the stated aim of helping a disenfranchised class like women should make us look closer at whether they were designed to improve women's lives or rather help those in power remain in power. I caution against uncritical praise of change which looks progressive in light of the previous legal rules, but which may be less progressive when viewed within a broader perspective of the more expansive changes being requested and the long-term constraints of the limited change that did occur.\textsuperscript{37} It is not entirely clear that the direction of the reform—toward family law—has brought us or will get us any closer to gender equality than other avenues that were conceived of and advocated for at the time.

I approach the subject of this article, therefore, with less focus on the obvious need for reform, and more on the uncritical acceptance of family law as the answer to infidelity, violence, and desertion within marriage. Though some scholars have criticized the particular contours of family law, as noted above, it is the widespread belief that reform of divorce law and the creation of a unified family law would solve the perceived social problems that I wish to unpack. To do so, we must understand what the reformers wanted, what they obtained, and how, if at all, the reform brought about significant change. And it certainly did bring about significant change in the procedures of obtaining a divorce. In a sense, it also opened the door to more significant reforms in the twentieth century. But was the change meaningful for those most immediately affected—the men and women of the late 1850s and 1860s? Did the new family law help women achieve some level of equality within their private lives? I think not. The family law of the late nineteenth century differed very little from the pre-1858 law of coverture that erased women's legal existence. Family law has rearranged the power dynamic within families, but it has done very little, I suggest, to empower women in the full range of their lives. I do not believe family law is such a radical change from

\textsuperscript{37} New social histories have shown that women were not so completely disabled under coverture as one might think. Similarly, they have shown that the reforms were not so extensive and revolutionary as to dramatically change women's lives. Not surprisingly, studies of individual families have shown that women did participate in the public sphere, did exercise some power within their families, and did act as somewhat autonomous actors both before and after the mid-century legal reforms, thus indicating that the effect of legal change in people's lives is piecemeal and not dramatic. See, \textit{e.g.}, Norma Basch, \textit{Framing American Divorce: From the Revolutionary Generation to the Victorians} (1999); John Gillis, \textit{For Better, For Worse: British Marriages, 1600 to the Present} (1985); Hendrik Hartog, \textit{Man and Wife in America: A History} (2000); Louise Tilly \& Joan Scott, \textit{Women, Work, and Family} (1978). My critique of the historical narrative of family law challenges not only the claims of revolutionary change in women's lives, but also the acceptance of the general direction of reform which I see being applauded simply because of its divergence from coverture rather than because it is heading in a direction that will yield gender equality.
early nineteenth-century coverture, nor do I believe it is necessarily
the right change. I do believe strongly, however, that change was
quite necessary.

Let me also clarify what I mean by "family law." Prior to the twen-
tieth century, the legal relationships we associate with marriage and
family were disaggregated and subsumed into more general categories
of laws. Thus, there was the law of baron and feme dealing with mar-
rriage, the law of wardship and custody of children that dealt with or-
phans, the law of trusts and settlements for marital property, the law
of master and apprentice that addressed parents who apprenticed and
educated their children, and the like. These relationships were lo-
cated in broader contexts of property, contract, and equity law. To
some extent, each relationship was governed by a separate court, us-
ing separate substantive and procedural rules. Marital validity and
separation were governed by the rules of the ecclesiastical courts.
Child custody and trust law were products of the Chancery courts.
Most property disputes would be settled in the courts of Common
Pleas or King's Bench. The idea that there was a core set of relation-
ships, centered in the family unit, was unknown until well after the
creation of the 1858 Divorce and Matrimonial Causes Court. The
term "family law" did not come into regular usage until the twentieth
century.

Today, however, the term "family law" refers to a coherent set of
legal doctrines that traditionally center on the marital unit and its sup-
port.38 Marriage/divorce, custody of children, and marital property
form the triad of most family-law casebooks. Additional issues like
adoption, guardianship of the property of minors, inheritance, mari-
tal rape, change of name upon marriage and divorce, and education
of children also typically come into play in family law. But these are
clearly subordinant to the traditional three that are at the center of
the ideology of the private Victorian family.

Despite some expansion beyond the traditional triad of divorce,
custody, and property, family law ignores many persons living as a
nontraditional family unit, such as children being raised by grandpar-
ents, adult children returning to their elderly parents' homes, and
same-sex coupling or parenting. It also ignores outside pressures and
conflicts like elder care for dying parents or extended family, hus-
hands and wives living in separate states, contradictory expectations
about how to use marital property, adoption and step-parenting, and
taxation of estates. Even homelessness and a living wage are all legiti-
mate aspects of family formation and function that are more or less
outside the umbrella of traditional family law and are governed to a
great extent by how much these non-traditional relationships resem-
ble the traditional parent-child or husband-wife relationships and ex-

38. See P.M. Bromley, FAMILY LAW 1-2 (5th ed. 1976); Stephen Cretnet AL.,
pectations. Despite these legitimate aspects of family life, family law has remained mired in the traditional triad that grew out of the 1857 law and it continues to conceive family life in truly nineteenth-century ways.

I use the term "family law," therefore, in this traditional sense of centering the rights and duties of the parties around the heterosexual marriage of a man and a woman. And the origins of the marriage-children-property triad is easily seen in the 1858 divorce court's enacting legislation. It is the bringing together of these three subjects within the traditional heterosexual marriage that arguably began the movement toward what later came to be called family law. Thus, for this article, I discuss the project of family law in terms of the traditional aggregation of marriage, marital property, and custody of children into a single legal category, and the simultaneous exclusion of other relationships and values. Moreover, I am especially interested in whether the aggregation of these relationships and values in a unified family law benefits women as a whole and adequately protects those things they most value.

Yet if we perhaps went in the wrong direction, how do we know it, how did it happen, and why do we not turn around? It is certainly impossible to go back to the early nineteenth century and begin again. And most men and women would not wish to do so. Despite the rather obvious evidence that women and men remain quite unequal today and that family law has been in existence for nearly 150 years, uncovering a course that might have worked better, if there even is one, is rather a waste of time precisely because we cannot go back and start over.

In a sense we are left with the typical historical enterprise of trying to uncover what happened in the past so we can

39. 20 & 21 Vict., c. 85 (1857) (Eng.).

40. I do not pretend to believe that all women's interests are the same, nor would I claim an essential female perspective. To the extent I talk about the interests of women, I do so with full awareness that not all women's interests are the same and that in many instances women's and men's interests may coalesce. As a general statement, however, I believe the court and the family law that evolved envisioned a traditional white, middle- or upper-class woman who came from and sought to participate in traditional nuclear family formations. I recognize the tension in talking about "women's interests" and "women's values" as though they are monolithic and identical for all women and also saying that women's interests and values differ. But just as I embrace the contradiction in the law, that it is transformative and impotent, I also embrace the contradiction in saying women's interests are multi-faceted and diverse and at some level the same.

avoid certain mistakes in the future. However, using history to guide us in the future is only one of its valuable purposes. Understanding how the history of family law has been written may encourage us to think more critically about the project of writing history in a period in which nearly every historical truth we have clung to has been questioned. It may also encourage us to think more critically about family law and the continuing disempowerment of women. This article is very much an exploration of an historical conundrum about women’s role in the family that has bothered me for many years.

Determining the attitudes of nineteenth-century British men and women toward family law, especially when there was no formal institution or legal category, is a task of untangling the nineteenth-century worldviews of the intersection of family life and the law. Like most other historians, I began by reading what others had said about the subject. Then I began to explore what evidence I could find about the lives and practices of the different men and women who sought assistance in the court, including why marriages failed and custody battles ensued, and I examined the court’s unpublished records and printed case reports. As I studied these unfortunate experiences of family conflict in the nineteenth century, I could not escape the effects of the legal and social history that interpreted and filtered the documents I examined. It then became necessary to go back to the prior histories to study how they seemed to produce a narrative of liberalization about the rise of family law that masked the underlying role of coercive legal mechanisms in producing and maintaining gender inequality. Although women in the twenty-first century can now receive a divorce, when before they could not, I am not comfortable

42. The preliminary results of the primary records are published in another article. Danaya C. Wright, Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866, 38 U. Rich. L. Rev. 903 (2004) [hereinafter Wright, Untying the Knot]. That article details the methodology used to analyze the data and offers far more detail about the court than could be included here. This article draws some conclusions from that data to analyze the role of the court in its historico-legal context.

43. Keith Jenkins argues that post-modern historians should be focusing on the sources of the past and should be constructing histories from different perspectives, but that they should also be conscious of the changes in history(ies) over time to understand how the project of doing history serves a particular dominant power structure. Keith Jenkins, Re-Thinking History (1991). In that vein, I have tried to analyze the different histories of nineteenth-century English family law to see how the changes in histories reveal different things about each historian’s generation. See, e.g., Cross Currents, supra note 25; Ruth Deech, Matrimonial Property and Divorce: A Century of Progress, in The State, the Law, and the Family: Critical Perspectives, supra note 35, at 245; Susan Maidment, Child Custody and Divorce (1984); O’Donovan, Family Law Matters, supra note 35; Katherine O’Donovan, Protection and Paternalism, in The State, the Law, and the Family: Critical Perspectives, supra note 35, at 79; Katherine O’Donovan, Sexual Divisions in Law 81-134 (1985) [hereinafter O’Donovan, Sexual Divisions in Law]; Carol Smart, Marriage, Divorce, and Women’s Economic Dependency: A Discussion of the Politics of Private Maintenance, in The State, the Law, and the Family: Critical Perspectives, supra note 35, at 9.
with the traditional narrative applauding the 1858 court for making the weaker sex, as Blackstone phrased it, a "favorite of English law."44

But I must qualify my characterization of the historical affirmation of the new court. While some historians viewed the 1858 court as revolutionary, others have written extensively about its limitations, especially concerning women's rights and interests.45 However, skepticism of the legal rules that created and governed the court is generally attributed to the substantive rules and procedures of the court and is accompanied by a relatively uncritical acceptance of the overall project of creating family law. Thus, while some historians have criticized the specific family laws that arose, they tend not to analyze the underlying assumptions behind the appropriateness of a separate family law court.46 The liberalization narrative I identify in this article is the larger acceptance of family law and domestic relations courts in general and not so much the specific manifestation expressed in the particular 1858 court.

Like the family law it studies, this article has an inherent tension between macro-level conclusions about law's role in constructing patriarchy and micro-level conclusions about individual differences among the litigants before the new court. First, it seeks to explore the way in which legal institutions reinforce gender inequality through the creation and regulation of a domestic sphere. Law is ultimately coercive, and when it regulates family relationships it profoundly affects women's daily lives, especially when women are prohibited from having lives outside the family. Second, this article explores a few of the social and behavioral differences identified in the 1858 court's records among different female petitioners to get a better sense of how the new court and the laws it created may have operated differently over different groups of women. Differences between young and old, women with and without children, and upper-class and middle-class women appear rather stark in the data, which suggests that the law did not operate uniformly nor were women equally well situated to take advantage of the benefits the law provided.47 In many

44. After discoursing at great length on the legal disabilities of married women, Blackstone then remarked that "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 445 (St. George Tucker ed., Birch & Small 1803). Although Blackstone wrote this nearly a century before the creation of the divorce court, his interpretation of the law's relation to women was reproduced by the legal reformers of the mid-nineteenth century who viewed the creation of civil divorce as helping those few English women who, because of particularly abusive husbands, found their otherwise comfortable legal existence inadequate to their needs.

45. See supra note 34 and accompanying text and infra notes 406-408 and accompanying text.

46. See, e.g., GRAVESON & CRANE, supra note 33, at 11; SHANLEY, supra note 19, at 47.

47. For a discussion of court data, see infra Part VI. For a more detailed discussion of my findings, see Wright, Untying the Knot, supra note 42.
respects, the change in the law may have had less impact on their lives than other social conditions like age, class, or domicile. Seeing legal change as embedded in a social context forces us to think more critically about the effect of the legal rules of coverture and marriage on women’s lives.\textsuperscript{48}

It may seem that I am saying on the one hand that law does not matter because other differences overshadow legal changes and legal rights, and on the other that law does matter because it reinforces gender inequality through the legalization of patriarchy. I am indeed saying both, and I embrace the contradiction. But the two views are not inconsistent when understood in their less absolute forms. I argue here that while legal changes resulted in different effects in differently situated women’s lives, the changes also worked, institutionally, to maintain a gender hierarchy that is both socially and legally constructed and within which the differences in individual choices show the inadequacy of law for resolving complex human problems.

III. The Law of Divorce and Coverture Before Mid-Century

There is little doubt that the pre-1858 law of domestic relations had a terrible impact on women. These laws erased married women’s legal existence, maintained patriarchy, treated wives and their property as the husband’s chattel, and legalized the sexual double standard. Prior to 1858, a husband seeking a divorce had to sue his wife’s lover for damages in a criminal conversation action,\textsuperscript{49} and then seek a...
legal separation (a divorce *a mensa et thoro*) in the ecclesiastical courts on the grounds of her adultery.\textsuperscript{50} Then the husband would petition both houses of Parliament by private bill for an absolute divorce that would allow him to remarry.\textsuperscript{51} The cost in the early to mid-nineteenth century was well over £1000, and could easily rise to £5000 if the case were contested.\textsuperscript{52} Due to his wife's adultery, a divorced husband would have absolute rights to custody of the children of the marriage and he would be relieved of paying his wife any alimony or support because of her breach of marital obligations.\textsuperscript{53} As an added boon, the husband would not be required to return any of the property his wife brought to the marriage. Although real property she brought would likely be readjusted to pass to their children upon his death, and Parliament often readjusted the property to protect family legacies, the courts showed little concern for the financial well-being of discarded wives.\textsuperscript{54}

In contrast, a wronged wife could only request a legal separation in the ecclesiastical courts on the grounds of her husband's cruelty, desertion, or adultery.\textsuperscript{55} If she won, she might be granted alimony by the court, but her right to financial support would be unenforceable as the ecclesiastical courts had no enforcement powers. The wife
would then need to petition the equity courts for enforcement of any alimony order. Moreover, the wife would have a further burden if her husband was a peer of the realm. His title guaranteed that the order would be unenforceable by any court; only a private Act of Parliament would be binding on her husband. The ecclesiastical courts had no power to order custody of the children be given to the mother; she would need to bring a separate suit in Chancery for custody, though she would most definitely lose unless the father was shown to pose a danger to a child's life and limb. Violence to the wife, even life-threatening violence, would not justify removal of children from their father if there was no evidence that he had visited such violence on the children. A legally separated wife had limited control over money she acquired after the separation, and no control over any property brought to the marriage, which had vested in her husband on the date of marriage. And the ecclesiastical courts had no power to modify or adjust the property rights of the parties upon separation.

A husband or wife who could not afford the fees and costs of these legal remedies, or eschewed the public nature of such proceedings, could opt instead for a private separation agreement to settle their conjugal disputes. In such an instance, the husband, and trustees on behalf of the wife, would enter into a contract which would


57. Peers were members of the House of Lords who, by virtue of their titles, were not subject to orders of the regular courts, much as foreign diplomats today are exempt from legal process in United States courts. Peers included dukes, marquis, earls, viscounts, and barons.

58. See Stone, Broken Lives, supra note 52, at 331 (describing how enforcement of the Westmeath alimony order led to the passage of the Ecclesiastical Court Powers Act).

59. See Wright, De Manneville, supra note 36 (describing the development of the law of inter-spousal custody and almost uniform denial of custody or access for wives unless the father had endangered the children's lives or morals).

60. In re Fynn, 64 Eng. Rep. 205 (1848); Ex parte Bartlett, 63 Eng. Rep. 906 (1846). It even took excessive cruelty directed toward the children to cause the court to intervene. See Blake v. Lord Wallscourt, 7 L.T.O.S. 545 (V.C. 1846).

61. See Holcombe, supra note 54; Susan Staves, Married Women's Separate Property in England, 1660-1833 (1990). The only control she had came from her husband's choice not to exercise his legal rights to control her earnings. See Poovey, supra note 5, at 65-67, 82. Caroline Norton's own stories are a classic example of a husband's control over his wife's earnings and the length of her efforts to restrain him. See Caroline Norton, A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill 9 (3d ed., London, Longman et al. 1855) [hereinafter Norton, A Letter to the Queen]; Caroline Norton, English Laws for Women in the Nineteenth Century (London, 1854) [hereinafter Norton, English Laws].

62. See Stone, Road to Divorce, supra note 6, at 149-82. Many also eschewed legal forms altogether and engaged in informal wife sales, committed bigamy, or deserted to the colonies. See generally Roderick Phillips, Putting Asunder: A History of Divorce in Western Society 279-313 (1988); E.P. Thompson, Customs in Common (1991).
usually provide that each party could live separate and apart from the other; that neither would bring a restitution of conjugal rights action or otherwise annoy the other; and that the husband would be free of liability for his wife's debts. 63 This last was usually in exchange for alimony amounting to one-third of his income, payable to the trustees and not directly to his wife. 64 Neither could remarry and courts would not enforce custody provisions that placed the children with the wife. 65 The husband could claim all earnings or property his wife acquired after the separation, and any lawsuit by a creditor would have to be filed against the husband or the wife's trustees, because the wife had no legal right to bind herself in debt. 66 A wife who had begun her own business generally could not sue to collect debts owed to her, nor could she sue on her own behalf for slander or libel. 67 For most of the early nineteenth century, any contractual provisions that derogated from a husband's common-law rights were unenforceable. For example, a promise by a husband that the children would be raised in a particular religion was unenforceable. 68 The courts generally enforced private separation agreements only to the extent they replicated the results that could be achieved by a legal separation. 69 Separations often left the parties worse off than either married or divorced couples. 70 The parties were still legally married and their rights and duties continued unchanged as though

63. In re Besant, 11 Ch. D. 508 (1878); Vansittart v. Vansittart, 70 Eng. Rep. 26 (Ch. App. 1858); Westmeath v. Westmeath, 37 Eng. Rep. 797 (1821). See also Stone, Road to Divorce, supra note 6, at 149-82.
64. See Stone, Road to Divorce, supra note 6, at 149-82.
66. Stone, Road to Divorce, supra note 6, at 160-61.
67. There was some limited right by custom of wives who owned their own businesses and resided in London to sue for business contracts. See Baker, supra note 8, at 484; Beard v. Webb, 126 Eng. Rep. 1175 (Ex. Ch. 1800). See also Richard Chused, Married Women's Property Law: 1800-1850, 71 GEO. L.J. 1359, 1388 & nn.129-31 (1983). Slander and libel were also important issues because many women were accused by their husbands of having committed adultery in criminal conversation actions against their purported seducers. If the suit failed, the wife would have no way to clear her besmirched reputation. Both Caroline Norton and Emily Westmeath protested the state of this law in their pamphlets. See Norton, A Letter to the Queen, supra note 61, at 77; Norton, English Laws, supra note 61, at 55; Emily Westmeath, A Narrative of the Case of the Marchioness of Westmeath 122-28 (London, Ridgway 1857).
70. Stone, Road to Divorce, supra note 6, at 181-82.
they were a fully functioning family, but by living apart they had two households to support. The wife often could not obtain credit to provide herself with necessaries, and acrimony prevented alimony or custody from operating smoothly. Wives also had to sign deeds to release their dower rights in land and husbands had to enter into contracts on their wives’ behalf, thus prolonging the contact and the legal relationship.\footnote{This type of post-separation contact was, and continues to be, cited by many husbands as a reason for refusing to pay child support; contact with the ex-wife often arouses feelings of anger and resentment that does not allow the parties to move toward more amicable relations. See Carol Smart, Marriage, Divorce, and Women’s Economic Dependency: A Discussion of the Politics of Private Maintenance, in The State, the Law, and the Family: Critical Perspectives, supra note 35, at 9-24. Caroline Norton spends the vast majority of all of her pamphlets complaining about the interpersonal animosity that is encouraged by the unjust laws. See infra note 187.}

To say that the law of divorce was inequitable and gender biased is an understatement. Throughout the first half of the nineteenth century, both women and men criticized the law, though for different reasons. Many evangelicals thought divorce was a sign of modern decadence—the failure to live up to the God-fearing, upright, and virtuous dictates of Christian morality.\footnote{They often believed that the wife was at fault for the husband’s lapse. See 139 Parl. Deb. (3d ser.) (1837) 1091 (regarding the Custody of Infants Act); 144 Parl. Deb. (3d ser.) (1857) 1715 (regarding the Divorce Act of 1857); Edwin Hill Handley, Custody of Infants’ Bill, 7 Brit. & Foreign Rev. 269, 296 (1838) (envisioning that wives who are deceitful and want to separate will act innocent and blame their marital troubles on husbands’ false tyranny).} They thought divorces should never be allowed because of the weaknesses they would impose in the social fabric.\footnote{Horstman, supra note 1, at 51.} Some evangelicals argued that the wife was nearly as great a sinner as an adulterous husband, and the clergy felt that neither should be rewarded by a divorce.\footnote{Equal rights were advocated by Harriet Taylor Mill & John Stuart Mill, Enfranchisement of Women & The Subjection of Women (Virago Press 1983) (1869), and progressive Lords Lyndhurst, 142 Parl. Deb. (3d ser.) (1856) 408-18, and Brougham, 142 Parl. Deb. (3d ser.) (1856) 419-23. Members of Parliament, especially Lord Chancellor Cranworth, believed that the court would sit idle much of its time for lack of business, and that the pre-Act rate of four to five cases per year would increase perhaps to as high as eighteen to twenty per year. 142 Parl. Deb. (3d ser.) (1856) 404. When the first year saw 340 petitions for divorce and judicial separations, people were stunned. See Horstman, supra note 1, at 85.} Clerics preached in the pulpit and articulated to the judiciary that both men and women were to restrain their sexual appetites.\footnote{Horstman, supra note 1, at 21.} On the other hand, progressives believed that the way to circumvent the sexual double standard was to provide wives equal rights to a divorce, even if that meant possibly allowing collusion and contributing to the “divorce epidemic.”\footnote{144 Parl. Deb. (3d ser.) (1857) 1704-07; 142 Parl. Deb. (3d ser.) (1856) 1981-82; 143 Parl. Deb. (3d ser.) (1856) 232.}
vorce at the very least, and equal divorce at best, would allow married women a modicum of legal agency in their lives.\textsuperscript{77}

Critics of the law addressed perceived injustices at many levels of daily existence. Women who were deserted wanted their property protected from deserting husbands who might return and raid their savings. Husbands wanted to be free of the debts of adulterous wives, and wanted to remarry, especially if there had been no children of the first marriage. Poor men wanted the same right to divorce and remarry as wealthy men. Creditors wanted to be able to attach the assets of working women to whom they had extended credit without the property being snatched from under them. Wives wanted to get free of husbands who were unfaithful, who infected them with venereal disease, who were violent, or who had deserted them. Mothers wanted the custody of their children to be protected, especially when their husbands were at fault for the marital breakdown. Wives wanted the property they brought to the marriage to be returned to them upon the breakdown of the marriage. Fathers wanted to protect property that would be inherited by their daughters from spendthrift sons-in-law without having to use the trust mechanisms established by the equity courts.\textsuperscript{78} In other words, the parties wanted a way to renegotiate the legal system of coverture, which merged the legal identities of husband and wife into a single person: the husband. Coverture gave husbands control over all the property their wives brought to the marriage, made them liable for all debts, gave them near-absolute rights to custody of the children, made them the representative of the couple in court, and allowed husbands to commit adultery with impunity.\textsuperscript{79}

Coverture, however, was a firmly entrenched doctrine in the nineteenth-century Anglo-American legal system. As Blackstone summarized it:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-

\textsuperscript{77} Norton, A Letter to the Queen, supra note 61, at 59; Shanley, supra note 19, at 43-44.

\textsuperscript{78} In the seventeenth and eighteenth centuries, Chancery developed a process of allowing property to be settled in trust, with unrelated male trustees, for the benefit of women soon to be married. This allowed women to remain economically independent and prevented estates from falling in the hands of spendthrift sons-in-law. See Graveson & Crane, supra note 33, at 14; Staves, supra note 61.

\textsuperscript{79} De Montmorency, supra note 9. Although the law of coverture did not expressly allow husbands the legal right to commit adultery, a wife's complete lack of power meant she had very little ability to demand that her husband alter his behavior in any way. Unless he was physically violent and she could charge him with breach of the peace, however domineering and tyrannical he was, he feared no legal repercussions.
covert, foemina viro co-operta; is said to be covert baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.\textsuperscript{80}

Under coverture, wives' legal identities were merged in that of their husbands. They could not own their own property, collect their own wages, sue or be sued, enter into contracts, write wills, have custody of their own children, or be prosecuted for certain crimes.\textsuperscript{81} At its heart, coverture was centered in the private family but it radiated into the public sphere by denying married women any public legal existence.\textsuperscript{82} Like minors, lunatics, and idiots, married women were incapable of making legally binding decisions, except of course the ultimate deci-

\textsuperscript{80} Blackstone, supra note 44, at ch. xv, at iii. A feme-covert was, literally, a woman who was "covered" by her husband under the law. She was to be distinguished from a feme-sole who, as an unmarried woman, had many of the legal rights and responsibilities of men. She could not vote, attend many educational institutions, or engage in numerous professions, but a feme-sole could own property, make a will, enter into contracts, have custody of her illegitimate children, and sue in her own name. Id. See also A Treatise of Feme Covert: Of the Lady's Law (reprint 1978) (1732). Many women who married and became covered found that being stripped of their property and legal existence was profoundly upsetting. The doctrine of coverture made a certain amount of sense in that it treated the marital couple as a single entity, a legal fiction the law continues to enforce with such doctrines as the tenancy by the entirety and spousal immunity against testifying against one's spouse. The criticisms of coverture, however, are legion. By assuming a model of a breadwinner husband and a domestic wife, coverture did not protect the earnings of working women, made it difficult for married women to own their own businesses, and did not allow couples who wanted the wife to have legal independence to structure their marriages accordingly. In many respects, our laws continue to reflect the ideal represented by coverture in a functional family, where the property is commingled marital property and the couple, as an entity, functions like a business partnership. But today's laws on family custody and property have attempted to remove the bias in favor of the husband and promote marketability of property, while leaving adequate protections for spouses through intestacy and elective share laws, as well as equitable distribution and best interests custody standards. For an excellent bibliography of scholarship on coverture, see Claudia Zaher, When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture, 94 Law Libr. J. 459 (2002).

\textsuperscript{81} Blackstone, supra note 44, at ch. xv.

\textsuperscript{82} It is important to realize the disjuncture between the law that gave married women no legal rights in the public sphere and the reality of most wives' lives, which was that they did operate, sometimes significantly, in public. By custom, in London married wives who owned certain types of businesses could enter into contracts and use the legal system to protect their business interests. See Beard v. Webb, 126 Eng. Rep 1175 (Ex. Ch. 1800); Baker, supra note 8, at 484. Other women, in England and the United States, were attorneys, ran businesses, owned property, made deals on behalf of their husbands, negotiated with their own publishers, and the like. But when business deals fell into dispute, these women needed a male figurehead to bring suit on their behalf. For a traditional study on married women working outside the home, see Tilly & Scott, supra note 37. And for the subtle ways in which married wives functioned quite well in the U.S. under coverture, see Hartog, supra note 37.
sion they made to strip themselves of all legal rights when they decided to marry.\textsuperscript{83}

The law of coverture may have made a certain amount of sense in a world that was primarily agricultural, in which the majority of property consisted of land and household furnishings, and in which marriage was primarily a commingling of family patrimonies.\textsuperscript{84} But by the beginning of the nineteenth century, England was no longer a predominantly rural economy, and many husbands and wives had accepted the romantic ideal of companionate marriage.\textsuperscript{85} This meant that for most couples, a partnership of property interests was not the foremost motive for their marriage. The legal system, however, was still dominated by the interests of landed property holders.\textsuperscript{86} The law of baron and feme had not changed significantly since the medieval period. Those changes that had occurred were principally grounded in the relationship between the individual family head (the husband) and the state.\textsuperscript{87} Thus, certain Interregnum laws designed to restrict

\textsuperscript{83} There was significant philosophical debate over whether or not a sixteen-year-old woman should be able to enter into a marriage contract that would be binding for the duration of her life, and would disempower her ability to make any future contracts. In other words, could she bind herself to a status that precluded any future legal contract rights? \textsc{Carole Pateman, The Sexual Contract} 154-88 (1988).

\textsuperscript{84} English seventeenth and early eighteenth-century life was primarily rural agricultural, with extended families living together under a single roof, and architectural styles that reflected rural over urban lifestyles. During the eighteenth century, manufacturing and industrial centers were growing, and by the end of the century, egalitarian revolutionary ideas were challenging the aristocratic basis of natural law. See Peter Laslett, \textit{Mean Household Size in England Since the Sixteenth Century, in Household and Family in Past Time} 125 (Peter Laslett ed., 1972); Shanley, supra note 19, at 6-7; Lawrence Stone, \textit{Family, Sex and Marriage in England, 1500-1800} (1977) [hereinafter Stone, \textit{Family, Sex and Marriage}]; Richard Wall, \textit{Mean Household Size in England from Printed Sources, in Household and Family in Past Time}, supra at 159.


\textsuperscript{86} However, eighteenth-century reforms in commercial law, especially those led by Justice Mansfield, had made law reform in some areas an acceptable enterprise. \textit{See generally} David Lieberman, \textit{The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain} (1989).

\textsuperscript{87} \textit{See discussions in} 2 Frederick Pollock & Frederic William Maitland, \textit{The History of English Law Before the Time of Edward I}, at 400-47 (2d ed. reprint 1952) (1899) and 6 William Holdsworth, \textit{History of English Law} 606-07 n.15 (2d ed. reprint 1966) (1914), regarding the relative continuity in the law of baron and feme over 700 years. \textit{See also} Wright, \textit{De Manneville}, supra note 36, at 271-73 (discussing the different ways the law treated inter-spousal child custody disputes and the importance of the Interregnum years (1646-1680) for restructuring the relationship between fathers and the state without concern for the rights of mothers). The Abolition of Tenures Act, 12 Car. II, c. 24, § VII (1646, reaff’d 1660), for instance, gave fathers the right to appoint testamentary guardians over their children, to the complete exclusion of mothers. This was a deviation from the medieval guardianship rules that gave orphaned children to their mothers if they inherited land in socage tenure or to their overlords if they inherited land in military tenure. \textit{See} Sara Abramowicz, \textit{English Child
the King’s power had expanded the power of the father in family affairs, further exacerbating the inequalities between husbands and wives created by coverture. 88 With industrialization, shifts of population to urban centers, the rise of the ideal of domesticity, the move to wage labor, and the growth of the middle class, marriage and children began to function for many English families in ways not compatible with the medieval law of baron and feme. 89 Change was inevitable, and the family the logical locus of that change.

IV. MID-CENTURY IDEOLOGY: FROM COVERTURE TO FAMILY LAW IN THE SHADOW OF SEPARATE SPHERES

Law reform does not occur in a vacuum. It is a result of changing attitudes toward the law itself, and changing views of the appropriate interplay of law and social norms, as well as new beliefs about human nature. The mid-century adoption of civil divorce occurred in a context of changing family structure due to urbanization and industrialization, conflicts over changes in women’s roles, a political backdrop of liberal individualism, and a middle-class ideology of separate spheres. 90 The role of law in creating the mid-Victorian culture of domesticity was a topic of some debate in the literature of the day. 91 And the interplay of law and culture is critical to understanding the goals and outcomes of the reform. Separate spheres ideology was the prevailing backdrop of the reform, and the law of coverture helped construct and maintain that divide.

However, in the end, law changed and separate spheres did not. Even though the 1857 judicial changes were mindful of separate spheres, the legal reform did not endanger the well-accepted ideology. The paradox is that the reform legacy was to ultimately reinforce separate spheres and women’s subordination despite the attempts of some progressive reformers and the hopes and fears of some lawmakers that the reform would challenge the ubiquity of coverture and separate spheres.

Separate spheres is a social construct that genders Anglo-American space into a male-dominated public sphere and a female-oriented

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88. See Abramowicz, supra note 87.

89. See Davidoff & Hall, supra note 52, at 521-56; Tosh, supra note 52, at 1-50.

90. Separate spheres was simply a prevailing belief, that has yet to disappear, that the proper sphere of women’s activities was the home, while the proper sphere of men’s activities was the public marketplace.

91. See generally Norton, ENGLISH LAWS, supra note 61; Norton, A LETTER TO THE QUEEN, supra note 61; BARBARA LEIGH SMITH BODICHON, A BRIEF SUMMARY IN PLAIN LANGUAGE, OF THE MOST IMPORTANT LAWS CONCERNING WOMEN, TOGETHER WITH A FEW OBSERVATIONS THEREON (London, J. Chapman 1854); Taylor Mill & Stuart Mill, supra note 76; Westmeath, supra note 67.
WELL-BEHAVED WOMEN DON'T MAKE HISTORY

private sphere.92 Under separate spheres, women are identified with their domestic abilities and their lives are constrained in a private sphere regulated and policed by men. The nineteenth-century Anglo-American social landscape has been viewed by many historians as the most perfect manifestation of separate spheres ideology: an ideal that logically indicated the rise of family law because a separate law of the family reflected the naturalness and importance of the separate domestic sphere—a domestic sphere comprised only of a husband, a wife, and their natural children.93

The dominant historical narrative about the rise of the modern family and its production in an insular, separate sphere centered around women and children, attributes domesticity to industrialization and the capitalist marketplace.94 In seventeenth-century, pre-industrial England, so the traditional history goes, men and women married for business reasons, men and women and children were deemed the property of their husbands and fathers, and childhood did not exist as a separate stage of innocent learning. The household was a unit of production, and the most likely composition of the household was an extended family, with a variety of interconnected consanguineal and affinal relationships.95

By the mid-nineteenth century this model had been changed by industrialization that moved the male breadwinner outside the home and turned the household into a unit of consumption. Childhood, especially among the growing middle class, was viewed as a special period of innocence in which education and nurturance fell more and more to the mother, both as a moral guide and spiritual teacher. Family life became more companionate and conjugal while the home became more private and nuclear. Women were more and more associated with the private, domestic sphere as sex role differentiation became greater. The law of coverture, which erased married women's legal existence, reinforced the separation of the private world of women from the public world of men.96


93. See, e.g., Davidoff & Hall, supra note 52.

94. See Debra Friedman, Towards a Structure of Indifference: The Social Origins of Maternal Custody (1995); O'Donovan, Family Law Matters, supra note 35; Pateman, supra note 83; Poovey, supra note 5; Shanley, supra note 19.


96. This dominant narrative is summarized in Friedman, supra note 94, at 37-51. For histories and studies that contributed to this narrative, see Aries, supra note 95; J.A. Banks & Olive Banks, Feminism and Family Planning in Victorian England
Separate spheres in its most absolute form is a myth describing an ideal Victorian society—women and children remaining at home and men pursuing the tedious task of earning a living and representing the family in all public affairs. Domesticity was an ideology of social order that arose out of a particular social milieu, but it was backed by legal force. Of course, as a myth it only partially described nineteenth-century English society, as many women stepped outside their allotted sphere to labor, speak, or engage in the political life of the day. Despite being a myth, separate spheres remains one of the most powerful tropes of modern society, and it continues to describe an ideal to which many Anglo-American couples ascribe. For women, it represents both a liberation from the cares of outside production, as well as a limitation on their political agency and a narrowing of their identities to their biological child-bearing and child-rearing function. Separate spheres denies women public rights and a public role by asserting the naturalness and limited scope of their domestic abilities; it goes beyond a mere ordering of social relationships to claim a biological appropriateness and necessity. The Victorian nuclear family was seen as the most natural form of intimate relations; women were biologically identified with the family, and separate spheres was the celebration of women's true natures as domestic caregivers.

Separate spheres was not just a social ordering reflecting middle-class values; it was a legal ordering as well. The law of coverture was critical in creating and maintaining separate spheres. The legal barriers married women faced in functioning in the public sphere leant credence to the ideology of separate spheres. Unmarried women who retained their legal status in the public world were seen as problematic to the social order and quickly labeled "redundant women." Histories too numerous to cite discuss women who were writers, who were politically active, and who were employed outside the household. See, e.g., Martha Vicinus, Independent Women: Work and Community for Single Women, 1850-1920 (Catharine R. Stimpson ed., 1985).

97. Histories too numerous to cite discuss women who were writers, who were politically active, and who were employed outside the household. See, e.g., Martha Vicinus, Independent Women: Work and Community for Single Women, 1850-1920 (Catharine R. Stimpson ed., 1985).

98. It is even alive and well in the feminist movement with the work of Carol Gilligan, In a Different Voice, and the countless works that build off her thesis of men and women's different moral development that correspond to women's domestic characters and men's political ones. See Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

99. Suffer and Be Still: Women in the Victorian Age (Martha Vicinus ed., 1972). There has been a tremendous amount of work done by women's historians about their role in the social and cultural events of the Victorian period. Some of the
Women were to marry as soon as possible and re-enter the purely private realm. Coverture reinforced a circular logic that asserted women belonged in the home because they had no legal power outside that realm, and women were given no legal power because no one believed they wanted or needed to leave their safe domestic havens. The laws of coverture were both a product of, and a contributor to, the erasure of women in the public sphere. Once a woman married she was to leave the protection and home of her father for that of her husband, with no tarrying in the outside, public world. Her lack of legal rights in the public sphere, supposedly corresponding to her natural infirmities, ensured that she remained firmly in her proper place—at home. Legal as well as social sanctions attached to those women who rejected separate spheres.¹⁰⁰

The logic of separate spheres implied that women did not need public power because they truly were passive, timid, powerless creatures who required the leadership of their head and lord. The law of coverture simply reflected the natural order. It did not create it. It was assumed that if women were truly masters of their own domestic domain, then coverture did not deny women any power they needed because coverture concerned the public world of men and law, and not the private world of women’s domesticity.

Yet even critics as early as the eighteenth century viewed the law of coverture as institutionalizing and reproducing the powerlessness and passivity it supposedly reflected to keep women in the home.¹⁰¹ Although the laws of coverture were directly aimed at women’s power in the public sphere, those legal disabilities inevitably translated into

more foundational works include Davidoff & Hall, supra note 52; Gillis, supra note 37; Deborah Gorham, The Victorian Girl and the Feminine Ideal (Indiana Univ. Press 1982); Holcombe, supra note 54; Margaret R. Hunt, The Middling Sort: Commerce, Gender, and the Family in England, 1680-1870 (1996); Karl Ittmann, Work, Gender, and Family in Victorian England (New York Univ. Press 1995); Alan MacFarlane, Marriage and Love in England: Modes of Reproduction 1300-1840 (1986); Poovey, supra note 5; Shanley, supra note 19; Stone, Broken Lives, supra note 52; Tosh, supra note 52; Margot Finn, Women, Consumption and Coverture in England, c. 1760-1860, 39 The Historical J. 703 (1996).

¹⁰⁰ For example, see Caroline Norton’s narrative in which she details all the ways her husband used legal means to frustrate her attempts at independence, Norton, English Laws, supra note 61, and the case studies detailed by Stone, Broken Lives, supra note 52. See also Re Agar-Ellis, 50 L.T.R. 161 (1884); In re Besant, 11 Ch. D. 508 (1878); Vansittart, 70 Eng. Rep. at 26.

¹⁰¹ See Anon., The HARDSHIPS OF THE ENGLISH LAWS IN RELATION TO WIVES WITH AN EXPLANATION OF THE ORIGINAL CURSE OF SUBJECTION PASSED UPON THE WOMAN (London, J. Roberts 1735). Similarly, Katherine O’Donovan has written that structures outside the family fundamentally affect what happens in private. One sphere is not, and cannot be, insulated from the other; “‘While the exclusion of women from the public sphere does not cause, but logically entails, their confinement in the domestic sphere, this confinement has consequences for the behaviour of males in the domestic sphere which, in turn, affects their behaviour in the public sphere.”

O’DONOVAN, SEXUAL DIVISIONS IN LAW, supra note 43, at 133.
similar disabilities in the private sphere. Despite the so-called naturalness of women's separate domestic aptitudes, a woman had no legal rights that could be asserted in her domestic world. She was like an infant, a lunatic, or an imbecile, who had no will or agency of her own. She owned no property, had no control over her wages, nor could she make religious, educational, or medical decisions for her children. She lost her name, control over her domicile, and even control over her own body. To the extent the wife "governed" her household, that power was firmly within the dictates set by her husband. She could expect no legal assistance if her husband failed to live up to his corresponding responsibilities: financial support and protection from the perils of a dangerous age. If he drank or gambled the family wages, deserted them, or led them toward ruin, there was very little a wife could do. Legal rights were the currency of the public sphere, and women's absence from that sphere implied, under

102. Of course, a lot of research has been done on the upper and lower classes to disprove the claim of women's absence from the public sphere. See, e.g., LEONORE DAVIDOFF, WORLDS BETWEEN: HISTORICAL PERSPECTIVES ON GENDER AND CLASS 151-79 (1995); KATHRYN GLEADLE, BRITISH WOMEN IN THE NINETEENTH CENTURY (2001). Women functioned at all levels in informal ways, both in the drawing rooms and the bedrooms of the powerful elite. GLEADLE, supra, at 71-78, 154-71. They also owned shops, ran boarding houses, owned taverns, performed wage labor, and contributed to their family's financial resources. Id. at 75-110. But except for a few laws, like the custom in London of allowing women who owned their own shops to enter into contracts, there were few legal protections to women's activities in the public sphere, and many barriers. See BAKER, supra note 8, at 479-99; sources cited supra note 37.

103. But even as critics have decried the powerlessness of women, the reality of most women's lives may not have been so bleak. Numerous studies show women engaging actively in the public market, making critical decisions for their family, and exercising control over their husbands and their property. See, e.g., DAVIDOFF, supra note 102; GLEADLE, supra note 102. Their lack of legal power did not necessarily strip women of all agency, at least when their husbands and male relations were reasonable men. That very fact went a long way toward providing fodder against the reform movement. Why, asked some lawmakers, should Parliament change the law to address the needs of a few women when so many had no need of legal rights? 144 PAREL. DEB. (3d ser.) (1857) 1705. In the battle against their lords and masters, all women were to be denied rights because most did not challenge their husband's authority.

104. One of the modern vestiges of coverture is that married women change their names to that of their husbands. But it has only been in the last thirty years that married women have been permitted to have a separate domicile from that of their husbands. Domicile and Matrimonial Proceedings Act 1973, c. 45, § 1(2) (Eng.). Husbands were able to lock their wives in the home until the advent of stricter commitment laws in the late nineteenth century. It has taken women reformers over a century and a half to remove the incapacities of coverture, and each step has taken tremendous work to persuade a predominantly male Parliament that coverture is indeed a medieval relic. See In re Cochrane, 8 Dowling's P.C. 630 (Q.B. 1840) (regarding a husband's right to lock his wife up on his own authority); SHANLEY, supra note 19, at 156-88 (regarding a husband's right to his wife's body).

105. Some commentators have concluded that changes in the law of married women's property were not motivated by a desire to give women more control, but to keep the families of drunken, profligate men off social welfare. Giving women control over some property was a form of social insurance because it was believed, not
the logic of separate spheres, that she did not need rights. But without them, she had no power in the private sphere either.

Unlike the image of the Victorian family presented in novels and domestic literature portraying men and women as equal masters of their own separate domains, women's disempowerment in the public sphere was not accompanied by power in the domestic sphere, but only, as Blackstone acknowledged, by her limited influence. A woman's place in the home was always subordinate to her husband's power to govern the family as lord and master.

Moreover, separate spheres was a middle-class ideal. The values of privacy of home, intellectual autonomy, individual rights and freedoms, and political responsibility were exclusively male and predominantly middle class. They were premised on male authority in the private sphere, accompanied by subservient acceptance of male power by women, all in the name of social order and natural law. Women were "angels of the house" who made the home a domestic "haven in a heartless world," a man's castle, a place where he could be lord and master.

unreasonably, that women would use their money for the support of their family and not drink or gamble it away. See Chused, supra note 67.

106. For example, in Jane Austen's Pride and Prejudice, Mrs. Bennet is quite clearly the authority in all matters domestic and Mr. Bennet simply withdraws into his library, refusing to participate in the women's world of love and ritual. In novels by Anthony Trollope and Charles Dickens it is usually the women who mastermind not only the romantic affairs of the books, but also keep the servants in line and run a functioning household. Consider David Copperfield, Bleak House, or Great Expectations by Dickens, or Lady Anna or any of the Palliser novels by Trollope. The women have firm control over the functions and concerns of the domestic sphere while men go into Parliament, run successful law firms, or live the lives of aristocrats. It is usually only in the working classes that one sees a blending of the public and private, as in Pip's sister's family in Great Expectations where the sister is the hardened disciplinarian, and Joe, her blacksmith husband, is the soft, gentle advisor. Elizabeth Gaskell's novel Wives and Daughters is an excellent example of women's control of the private sphere. In that novel the grandfather's attempts to oust his deceased son's new bride and keep the grandson as part of the patrimony are slowly overcome by the behind-the-scenes negotiating of the women of the neighborhood. The novel portrays a gradual acceptance of the interconnectivity and relationship building of the women's world, even in matters that have public import.

107. BLACKSTONE, supra note 44, at ch. 16, §2, 441 (referring to married women's power in the home as influence, not legal rights).

108. See POOVEY, supra note 5, at 79-80.

109. DAVIDOFF & HALL, supra note 52; O'DONOVAN, FAMILY LAW MATTERS, supra note 55; Kerber, supra note 92.

110. See PATEMAN, supra note 83, at 75-115.

111. Id. See also FRIEDRICH ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE (Alec West trans., Int'l Publishers 1972) (1884) (arguing that women's subordination is necessary to the rise of capitalism).

112. See LASCH, supra note 92; Laslett, supra note 92. The Angel in the House was a famous poem by Coventry Patmore that echoed the sentiments of separate spheres. COVENTRY PATMORE, THE ANGEL IN THE HOUSE TOGETHER WITH THE VICTORIES OF LOVE (George Routledge & Sons, Ltd. 1905).
Not surprisingly, numerous critics perceived a contradiction in the idea of the home as a man's castle, where he reigns supreme, and at the same time the sphere within which women's true natures and domestic talents held sway.113 If man was the lord, woman's agency within that sphere was, as Caroline Norton said, little more than head servant.114 It was certainly not her own co-equal domain in which she ruled her household as men ruled the state. The laws of coverture helped keep women's domestic interests subordinate to men's domestic interests.

A few progressive writers, like Mary Wollstonecraft, had begun criticizing the law of coverture as early as the late eighteenth century, claiming that the absence of legal rights turned women into the passive, insipid creatures the law claimed them to be.115 But there was little criticism of separate spheres until the twentieth century.116 Most importantly, nineteenth-century advocates of legal reform believed that coverture could be changed while leaving separate spheres intact.117 Changing coverture could address blatant injustices in individual marriages while still permitting the separate spheres and naturalized gender differences that were central to the idealized Victorian family to operate.118 It was believed by many that changing these laws—to protect women's rights to custody of their children, ownership of their own wages and personal property, and the right to divorce violent and adulterous husbands—would give them agency that would in turn help them protect their naturalized and sacred duties as child-rearers and domestic managers without challenging male dominance in the public sphere.119 Separate spheres would be

113. Probably the most famous critique was made by Harriet Taylor Mill and John Stuart Mill. TAYLOR MILL & STUART MILL, supra note 76. However, Caroline Norton, Barabara Leigh Smith Bodichon and Emily Westmeath also criticized the idea that women were domestic queens, yet had no real power in the home. NORTON, A LETTER TO THE QUEEN, supra note 61; SMITH BODICHON, supra note 91; WESTMEATH, supra note 67.

114. NORTON, A LETTER TO THE QUEEN, supra note 61, at 28 (referring to the fiction of man and wife being one “when they are about as much 'one' as those ingenuous twisted groups of animal death we sometimes see in sculpture; one creature wild to resist, and the other fierce to destroy”). See also J.S. Mill, The Subjection of Women, in ESSAYS ON SEX EQUALITY 217 (Alice S. Rossi ed., 1970) (writing in 1869 that “[t]here remain no legal slaves, except the mistress of every house”).


116. See, e.g., VIRGINIA WOOLF, A ROOM OF ONE'S OWN (Harcourt 1929).

117. POOVEY, supra note 5, at 79-80.

118. NORTON, ENGLISH LAWS, supra note 61; Anon., The “Non-Existence” of Women, 23 N. BRIT. REV. 536 (1855); T.H. Lister, The Rights and Condition of Women, 73 EDINBURGH REV. 99 (1841).

119. Giving women some limited power was not believed to undermine separate spheres and male power because of women's greater passivity and reluctance to exer-
strengthened by breaking down coverture because women would then have power within their own domain to make their world truly autonomous and equal to that of men. Ultimately, it was hoped by some lawmakers, conservatives, and even a few women reformers that power in the domestic realm would render unnecessary the yielding of power in the public realm.

Legal challenges to coverture began in 1839 with the passage of the Custody of Infants Act. That Act allowed married women to sue their husbands for custody of or access to their children, even though the law treated husbands and wives as a single legal entity. The Act was precipitated by a series of custody disputes between wives and husbands in which the courts dismissed the actions on the ground that wives under coverture could not sue their husbands; it would be like a husband suing himself. Even after wives learned to get an ecclesiastical separation before petitioning for custody, the Chancery was notoriously unsympathetic to interspousal custody disputes precisely because they pitted the husband against the wife, threatening the precarious balance of separate spheres and male domination over children. The 1839 Act simply allowed wives the right to enter the courthouse; it did not grant them any rights to their children. But, significantly, it was one of the first pieces of legislation to recognize that married women needed the legal right to challenge their husbands
bands in order to maintain the safety and welfare of themselves and their children within their allotted sphere.

When the 1839 Act proved of little assistance to wives who were in deteriorating marriages, especially marriages fraught with adultery or violence, the need for more extensive legal reforms became clear.\textsuperscript{127} From 1840 to 1850 there was a constant debate about the inability of wives to control abusive husbands or protect themselves or their families.\textsuperscript{128} Legal disabilities took center stage in the critiques by progressive feminists even though the appropriateness of women’s domestic limitations was fully accepted.\textsuperscript{129} Within separate spheres, women like Caroline Norton and Emily Westmeath advocated for narrow legal changes to a wife’s position in the family because the family was deemed to be her appropriate sphere.\textsuperscript{130}

The focus of upper- and middle-class reformers was logically the family because it represented the middle-class ideal of women’s social position.\textsuperscript{131} These early reformers were not yet interested in the wages of working-class women, work conditions, access to jobs, or adequate housing. In the early 1850s it was only the radical fringe of the women’s movement that advocated for public sphere reforms like control of wages or the vote.\textsuperscript{132} Most feminists advocated primarily for changes in coverture because coverture affected women’s natural place in the order of things.\textsuperscript{133} The reform focused on the family because that was the realm of the middle-class wife. As the century progressed we began to see far more critical discussions of the issues of working-class women, like temperance and wages, as well as non-
family-based issues like suffrage. But in the 1840s and 1850s, legal critiques were most often based in the family, and the acceptance of separate spheres made the creation of family law a logical answer to the disabilities and unfairness of coverture. But with the new family law, as wives were given a modicum of legal rights, those rights would be institutionally constrained within the legal equivalent of the private sphere—a domestic relations court.

V. Mid-Century Legal Reform: The Promise of Family Law

It came as no surprise to the public when Parliament, in 1850, ordered a law commission to investigate the legal aspects of divorce and make recommendations for change. Most everyone disapproved of the law in some way or other, though they did not generally agree about the solution. There were those who felt that divorce had become a remedy only for the aristocracy and that such class-based inequity was unfair. Others felt that England had become the laughing stock of European countries because it still retained the disreputable criminal conversation action. Progressive men and women disagreed with the gender-specific distinctions in the law, while some evangelicals disapproved of the availability of divorce altogether. The majority of the population apparently agreed with the law treating male and female adultery differently, but there was wide divergence as to how the law should best create disincentives to separation and adultery. The British generally decried the prohibitive cost of divorce and sought measures to make it unattractive.

When Parliament finally ordered an investigation into the state of the law in 1850, it was, as such institutions often are, behind the times. Editorials and commentaries blasted the divorce laws. There had already been a decade of harsh criticism in the periodical literature that had addressed questions of divorce, adultery, women's

134. Id.
135. See, e.g., Holcombe, supra note 54; Shanley, supra note 19; Stone, Road to Divorce, supra note 6.
137. See infra Part V(D) on class.
139. See infra Part V(A) on divorce and the sexual double standard.
140. Id.
141. See Wright, Untying the Knot, supra note 42, at 986-88.
142. See First Report of the Commissioners, supra note 136, at 1-2.
143. See Horstman, supra note 1, at 70-75; Shanley, supra note 19, at 29-35; Poovey, supra note 5, at 54.
And much of the progressive commentary directly tied issues of divorce to the law of coverture. A historical review of the timeline that created legal reform will be of aid in comparing the legal regulation of the family through coverture before 1858, with the ostensibly liberal changes that the courts mandated. Between the mid-1840s and the creation of the new court in 1858, a steady dialogue existed in political pamphlets and journals, Parliamentary debates, and even novels focused on four principal areas of law: divorce, custody of children, property rights of married women, and access to divorce for lower-middle-class and working-class couples. While the first three areas directly affected issues central to the legal doctrine of coverture, even the fourth area of class was linked to control over property and the need for married women to work outside the home. Even though coverture may not have been mentioned frequently by name in the literature, criticism focused on married women's legal disabilities more than on accepted social disabilities that resulted from women's relegation to the domestic sphere.

The majority of people believed women were inherently inferior to men, fundamentally different, and properly belonged in the domestic sphere. At the same time, the majority of critics believed women could acquire some limited legal rights to divorce and child custody without jeopardizing the social order of a coercive patriarchy. In analyzing the panoply of critiques around these four principal areas of law, we inevitably find ourselves embedded in a complex discourse about gender differences and the appropriate role of law in monitoring intimate behavior.

A. Divorce

Complaints about divorce reform focused on the inequities of coverture and the sexual double standard. Reform critics and legislators went back and forth on whether women should have the same rights to a divorce as men, primarily wondering whether adultery meant the same thing for husbands as for wives. The Church advocated a blanket denial of divorce to all people because it believed mar-

144. See Horstman, supra note 1, at 70-75; Poovey, supra note 5, at 54; Shanley, supra note 19, at 29-35.
145. See Horstman, supra note 1, at 70-75; Poovey, supra note 5, at 54; Shanley, supra note 19, at 29-35.
146. Poovey, supra note 5, at 69. Harriet Taylor Mill and John Stuart Mill's Enfranchisement of Women & The Subjection of Women, was a late entrant into the debate and took a stand of absolute equality that was quite novel for the time. Taylor Mill & Stuart Mill, supra note 76.
147. See infra Parts VI(A) and VI(B) and accompanying notes.
148. See, e.g., 145 Parl. Deb. (3d ser.) (1857) 502; 143 Parl. Deb. (3d ser.) (1856) 236. One commentator claimed that the notorious fact of the general incontinence of men before marriage, diminishes the horror with which subsequent infidelities are regarded, and therefore the amount of injury inflicted upon the wife. The desecration in
riage was a sacrament. If divorce were to exist, there were two positions reformers would take: equal rights to divorce or unequal rights to divorce. The minority view was that husbands and wives should have the same rights to divorce on the same grounds, including simple adultery by either spouse, as was the law in Scotland and France. This was strongly advocated by Lord Brougham who found "repugnant" the "practice of refusing . . . a remedy to one party and granting it to the other . . . ." But the majority believed that husbands should have an easier time getting a divorce for adultery because adultery by wives was deemed a more egregious crime than adultery by husbands. Those who advocated equal treatment of adultery, however, generally agreed that adultery by wives was a worse sin than adultery by husbands. But given wives’ disempowerment, many thought the legal rules should be equalized on grounds of equity and fairness as well as on the practical consideration that men’s “unaggravated” adultery could be so frequent as to become intolerable for middle-class wives.

A minority of reformers, including some evangelicals and dissenters, argued that adultery by husbands was just as egregious a marital

one case seems less than in the other. The offence of the wife changes purity into impurity; the offence of the husband makes impurity more impure. Anon., supra note 118, at 541. George Miller considered differential treatment for adultery perfectly reasonable if the only concern of the law was the transmission of property. George Miller, Considerations on the Law of Divorce, 26 BLACKWOODS EDINBURGH MAC. 756 (1829). Since the law was concerned with more than the transmission of property, he advocated adoption of the Scottish rule on equal rights to divorce. Id.

149. See, e.g., 146 PARL. DEB. (3d ser.) (1857) 204, 210; 143 PARL. DEB. (3d ser.) (1856) 237.
150. 142 PARL. DEB. (3d ser.) (1856) 418.
151. 142 PARL. DEB. (3d ser.) (1856) 419.
152. 145 PARL. DEB. (3d ser.) (1857) 813-14.
153. 145 PARL. DEB. (3d ser.) (1857) 490; SHANLEY, supra note 19, at 42.
154. 142 PARL. DEB. (3d ser.) (1856) 419-22. It seems odd to think of adultery as being aggravated. But infidelity accompanied by another offense, which could be discreet and relatively unoffending, like a one-time incestuous affair with a sister-in-law, would be deemed aggravated. In contrast, chronic adultery or scandalous infidelity over a long period would not constitute aggravated adultery and not give rise to the right to a divorce.
155. Numerous members of the Parliament believed the law should be equalized, though it was most strongly expressed by Lord Lyndhurst in the House of Lords and Mr. Gladstone and Mr. Drummond in the House of Commons. See 147 PARL. DEB. (3d ser.) (1857) 1268, 1272; 145 PARL. DEB. (3d ser.) (1857) 501; 142 PARL. DEB. (3d ser.) (1856) 411-12, 419. But see 147 PARL. DEB. (3d ser.) (1857) 1647, 1647-48, in which the Attorney General claimed that making the law equal would require a wife to seek out and serve process on her husband’s mistress, which would be too costly and difficult to do—especially, for instance, if the mistress was also married, in which case service would presumably have to be on her husband. There was an interesting toleration of adultery, especially among the upper classes, where a different legal rule might create an incentive to disclose the secrets that kept the upper-class home away from state oversight.
fault as adultery by wives because it brought the possibility of venereal disease and moral pollution into the sanctity of the home.\textsuperscript{156} Progressive feminists agreed, and found themselves in a curious coalition with conservative fundamentalists who strongly advocated the preservation of coverture while encouraging sexual purity and intolerance of any infidelity.\textsuperscript{157} However, in the mid-1850s, this coalition had not yet evolved into the powerful temperance societies that would dominate feminist reform in the 1880s.\textsuperscript{158} Hence, most reformers of the period, both male and female, and even those advocating equal grounds for divorce, accepted the sexual double standard in some form or another.\textsuperscript{159} They believed that adultery was inherently different for men than for women, even if they believed that legal rights arising from that act should be equal.

Besides disputing the morality of divorce, virtually every lawmaker was concerned with fears of collusion, or illegitimate use by litigants of what lawmakers viewed to be a socially destructive course of action.\textsuperscript{160} It was vital to discourage divorce and the seduction and predations on the sanctity of the family that underlay the embarrassing criminal conversation actions—actions which were viewed by many to be a blot on Victorian manhood.\textsuperscript{161} The ideal and imagery conjured a fractured and flawed logic. Husbands were seen as valiantly struggling to keep home and hearth together and also as spendthrift, lustful, intemperate beasts who preyed on other men’s wives.\textsuperscript{162} Similarly, wives were viewed as wanton harlots whose base lusts were only contained by strict divorce laws and simultaneously as long-suffering innocents to marital infidelity and abuse.\textsuperscript{163}

At the end of the day, Parliament was unwilling to equalize the grounds for divorce for men and women, ultimately reaffirming the

\textsuperscript{156} The amount of venereal disease was quite high and it came to be considered a separate ground of cruelty. \textit{See, e.g.,} 145 Parl. Deb. (3d ser.) (1857) 502; 142 Parl. Deb. (3d ser.) (1856) 415; Shanley, supra note 19, at 40.

\textsuperscript{157} See, \textit{e.g.,} Edward Bristow, Vice and Vigilance: Purity Movements in Britain Since 1700 (Rowman & Littlefield 1977); Phillips, supra note 62, at 495-507; Judith Walkowitz, Prostitution and Victorian Society: Women, Class, and the State (1980).

\textsuperscript{158} See, \textit{e.g.,} Bristow, supra note 157; Phillips, supra note 62, at 495-507.

\textsuperscript{159} Caroline Norton talked about the notion of equality as ridiculous. \textit{See Norton, A Letter to the Queen,} supra note 61, at 98 (“I never pretended to the wild and ridiculous doctrine of equality”). \textit{See Poovey, supra note 5, at 69.}

\textsuperscript{160} 143 Parl. Deb. (3d ser.) (1856) 248; 142 Parl. Deb. (3d ser.) (1856) 1980.


\textsuperscript{162} \textit{E.g., compare} 142 Parl. Deb. (3d ser.) (1856) 1981-82 (the Bishop of Oxford depicting greater ease of divorce as “the opening of the floodgates of licence upon the hitherto blessed purity of English life”), \textit{with} 142 Parl. Deb. (3d ser.) (1856) 425 (the Earl of Aberdeen arguing that women were “infinitely more virtuous than men” and far more likely to be taken advantage of by unscrupulous men than they were to be the perpetrators of vice).

substantive rules of the pre-existing Parliamentary divorce. Men could obtain a divorce on the grounds of simple adultery; a wife had to prove adultery aggravated by incest, bigamy, desertion, or cruelty. Indeed, the latter two grounds were the only substantive change the new law provided for women. And it was 1923 before the differential grounds were finally removed and wives received an equal right to a divorce on the grounds of simple adultery.

The commitment to social stability and order was the cornerstone of the divorce debates. Divorce was deemed destructive of social order and the law was considered a legitimate tool in protecting family stability by making divorce difficult to obtain. The relatively radical views of John Milton in the seventeenth century and John Stuart Mill in the nineteenth—that divorce should be as easy to obtain as marriage—were clearly rejected by the vast majority of even the most progressive reformers. While marriage was viewed as a natural state of man, divorce was deemed unnatural. Consequently, even though marriage was a legal act to be encouraged, divorce was a legal act to be discouraged. Divorce was not viewed as a private matter between a man and a woman, but rather a state of affairs that had implications for parents and children (immediate and extended families) and for the state. Thus, even as lawmakers viewed divorce as a legal event, they located it within a complex and holistic ordering of social relations that extended far beyond the immediate parties involved.

Divorce occupied a fascinating place in the public/private paradigm of social ordering. Lawmakers readily admitted that the family was a place of privacy, marital vows were intensely personal, and that the family home was sacred. Yet, they also understood marriage and family ordering as a public good that could be legitimately regulated by the state. While lawmakers claimed not to be interested in the sex lives of private citizens, the consequences of sexual activity in terms of disrupted families, illegitimate children, and venereal disease

164. This has led numerous commentators to claim that the law, substantively, did little, while at the same time they view the new court as an important liberalizing force in the struggle for women's rights. See, e.g., Graveson & Crane, supra note 33, at 11; Horstman, supra note 1, at 169; Stone, Road to Divorce, supra note 6, at 388-90.

165. Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, xxvii (1857) (Eng.).

166. Id.

167. Matrimonial Causes Act, 1923, 13 & 14 Geo. 5, c. 19 (Eng.).

168. John Milton and John Stuart Mill are notable exceptions. Each advocated for relatively easy civil divorce, though each was motivated by different concerns. See generally John Milton, The Doctrine and Discipline of Divorce (London, T.P. & M.S. 1643); Taylor Mill & Stuart Mill, supra note 76, at 33.

169. For example, see Lord Lyndhurst's remarks early in the debates deploiring the state of the law and the appropriateness of legal reform. 142 Parl. Deb. (3d ser.) (1856) 408-18.
were profoundly public in their minds and therefore properly the sub-
ject of legislation.\textsuperscript{170}

It is curious that of all the social relationships, the sexual one of
men and women should form the core of family law and not, for ex-
ample, domicile, parental status, or household makeup. This focus on
the sexual relationship means that family law traditionally ignores
such issues as elder care, homelessness, and employment that are cru-
cial to the formation and survival of family units.\textsuperscript{171} Michel Foucault
would attribute the rise of a family law centered on the sexual rela-
tionship of husband and wife as further evidence of the nineteenth
century's obsession with the control and construction of sexuality.\textsuperscript{172}
Adhering to the widespread acceptance of natural, biological differ-
ences and separate spheres, the new family law was premised on sex-
ual differences and gender subordination rather than on stable
voluntary units of production in which the key relationship is the eco-
nomic partnership rather than the sexual one.

Initially, the majority of women reformers focused on divorce re-
form in terms of individual relief for the handful of women who were
in intolerable domestic circumstances.\textsuperscript{173} These reformers viewed di-
vorce as an intensely personal decision that women should be able to
make without disrupting their other personal relations and responsi-
bilities.\textsuperscript{174} And they did not accept the dire warnings that the social
order would disintegrate if women were granted a right to divorce
their husbands. Many desperate women would avoid the stigma of a
divorce because the social and familial pressures to avoid the publicity
were deeply ingrained in the cultural fabric. These reformers argued
that no additional legal barriers were needed to keep most couples
together.\textsuperscript{175}

Male reformers, and notably members of Parliament, viewed di-
vorce in a holistic way. Because women, and especially lower-class wo-
men, were seen as intemperate, and divorce was socially destructive,
the safety, happiness, and well-being of a few women were to be sacri-
ficed to the good of social order and naturalized patriarchy.\textsuperscript{176} In its
public manifestation, marriage was the symbol of the natural order of
things. Protecting society was deemed more important than women's
legal rights or autonomy. Of course, to the extent separate spheres

\textsuperscript{170} Id.
\textsuperscript{171} See The State, the Law, and the Family: Critical Perspectives, supra note 35, at 1-5.
\textsuperscript{172} See Michel Foucault, The History of Sexuality (Robert Hurley trans.,
\textsuperscript{173} See Norton, A Letter to the Queen, supra note 61; Westmeath, supra note 67.
\textsuperscript{174} See Norton, A Letter to the Queen, supra note 61; Westmeath, supra note 67.
\textsuperscript{175} See Norton, A Letter to the Queen, supra note 61; Westmeath, supra note 67.
\textsuperscript{176} 143 Parl. Deb. (3d ser.) (1856) 234.
continued to operate to protect the privacy of the family for the sake of male autonomy, discouraging a woman’s ability to divorce protected both the social fabric and the private domain of a man’s home. Therefore, the sexual double standard and the holistic view of divorce subordinated female autonomy and privacy in the name of social order and male power.

Not surprisingly, the sexual double standard for divorce has received significant criticism from modern historians who, at the same time, applaud the court for making civil divorce available to far more women than the Parliamentary divorce.177 The traditional history tells us that women got halfway there in 1857 and all the way there in 1923.178 What is surprising is the relatively uncritical acceptance by legal and historical scholars of the creation of any family-law court.179 Even as other historians have criticized the limited nature of the new court’s substantive rules, they have generally viewed the improvements from Parliamentary divorce to the domestic relations court as so obvious as to require little scrutiny. The limited nature of the new court’s rights to divorce have been treated as social limitations inherent in nineteenth-century perspectives and not contained in the very existence of a family-law court. However, as I believe the data reveals,180 we cannot uncritically applaud the new court, or perhaps even its later manifestations, without examining the patriarchal underpinnings that influenced the belief that family law was a natural improvement over coverture.

B. Custody181

The overwhelming majority of the complaints by critics about the law of custody was that it protected mothers of illegitimate children

177. Horstman, supra note 1, at 169; Stone, Road to Divorce, supra note 6, at 388.

178. Matrimonial Causes Act, 1923, 13 & 14 Geo. 5, c. 19 (Eng.).

179. I make no claim to have read all the literature on the formation of family law, but with the exception of Michael Freeman I have seen little scholarship questioning the project of family law, though there is a great deal of scholarship criticizing family law for being patriarchal and unfair. See generally The State, the Law, and the Family: Critical Perspectives, supra note 35. Much of that criticism focuses on the constraints family-law rules place on women’s autonomy, but there is a growing body of literature focusing on the unfairness of family law to men as well. See generally Nancy Dowd, Redefining Fatherhood (2000); Judith Bond Jenison, The Search for Equality in a Woman’s World: Father’s Rights to Child Custody, 43 Rutgers L. Rev. 1141 (1991); Miranda Kaye & Julia Tolmie, Critique and Comment: Discoursing Dads: The Rhetorical Devices of Fathers’ Rights Groups, 22 Melb. U. L. Rev. 162 (1998). Because my aim is to explore the project of family law, as a set of rules centered on the sexual relationship, I am trying to avoid the conflicts between advocates of different manifestations of family-law rules.

180. See infra Part VI (analyzing the data from the first nine years of court records).

181. It seems self-evident to modern family-law scholars that one cannot fully understand the law of divorce and its effects without understanding the interplay of
and not mothers of legitimate children. Such an imbalance enabled husbands to use access to children to blackmail their wives into complying with unreasonable demands (either to gain access to separately held property or to acquiesce in husbands' sexual peccadillos or violence). Critics also used a rhetoric of motherhood, domesticity, and tender years to emphasize women's special childrearing abilities. How, asked these reformers, could the law not protect women in their one, principal duty—bearing and rearing children? Although

custody and property rules within divorce. Yet historians of the 1858 court notably have said very little about the court's treatment of custody and property, nor has any thorough study been undertaken of the law of child custody in the nineteenth century. As I began researching nineteenth-century custody laws, however, I began to uncover some strange disparities between what appeared to be very patriarchal rules on custody alongside historical claims about the liberalization and equalization of the law on divorce and marital termination. There existed a weird disconnect between the data I was uncovering on custody and the claims of twentieth-century historians about the positive effect of the divorce reform on women. And despite the existence of a few book-length studies of nineteenth-century divorce, none look closely at the interplay between divorce and custody. See, e.g., Graveson & Crane, supra note 33; Horstman, supra note 1; Stone, Road to Divorce, supra note 6. Moreover, only one book talks in any detail at all about custody law, and even that devotes only two short chapters to its nineteenth-century origins. See Maidment, supra note 43, at 89-148. That historical disconnect prompted this study into the divorce court's records, though the results have prompted far more questions than they answer. Tammy Moore has similarly noted the difficulty in studying child custody records before the courts regularly made custody orders and when a majority of couples separated by private agreement precisely to avoid the publicity of formal legal proceedings. See Moore, supra note 69.

182. See, e.g., Caroline Norton, Observations on the Natural Claim of the Mother to the Custody of Her Infant Children, as Affected by the Common Law Right of the Father 59 (London, Ridgway 1837) [hereinafter Norton, Observations]; Shanley, supra note 19, at 131-38.

183. This was called by Lawrence Stone the "kissed or kicked" phenomenon, in which husbands would either wheedle access to property out of their wives, or beat it out of them. As he explained,

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.


184. These doctrines have been identified by countless historians as fundamental to the social construction of women's identities in the nineteenth century, the naturalization of women's childrearing function, and the isolation of women in a separate, domestic sphere. See, e.g., A Widening Sphere: Changing Roles of Victorian Women (Martha Vicinus ed., 1977); Dally, supra note 92; Lasch, supra note 92;
the imbalance in the law of custody had been remarked upon by an anonymous female commentator in 1735,185 Mary Wollstonecraft in the 1790s,186 Caroline Norton in the 1830s,187 and numerous critics in the 1850s,188 the law of custody until 1857 was notoriously one-sided. If the mother challenged the father, he still received custody in all situations except when he posed a danger to the child’s life and limb.189 If third parties challenged a father’s fitness, however, he would routinely lose custody if the child was simply better off remaining with others.190 This latter situation often occurred when children went to live with wealthy relatives and the father sought to regain them in the hopes of gaining access to property that had been settled on the children.191

The arguments made by reformers concerned with custody focused heavily on a rhetoric of domesticity and the naturalness of the mother/child bond. For instance, Caroline Norton insisted that only a mother’s love for her child was pure, absolute, and uncompromising, unlike the sexualized love of a woman for a man.192 She argued that

[t]he daily tenderness, the watchful care, the thousand offices of love, which infancy requires, cannot be supplied by any father, however vigilant or affectionate . . . . 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 insufficient.

O’DONOVAN, SEXUAL DIVISIONS IN LAW, supra note 43; POOVEY, supra note 5; Kerber, supra note 92.

185. ANON., supra note 101.
186. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN, supra note 115; WOLLSTONECRAFT, MARIA, OR THE WRONGS OF WOMAN, supra note 115.
188. NORTON, A LETTER TO THE QUEEN, supra note 61; NORTON, ENGLISH LAWS, supra note 61; SMITH BODICHON, supra note 91; WESTMEATH, supra note 67.
189. See, e.g., In re Fynn, 64 Eng. Rep. 205 (V.C. 1848); Westmeath v. Westmeath, 162 Eng. Rep. 987 (Ch. 1829); Ex parte Skinner, 9 Moore 278, 27 Rev. Rep. 710 (1824); STONE, BROKEN LIVES, supra note 52, at 284-346 (discussing the WESTMEATH case); Wright, The Crisis of Child Custody, supra note 19.
192. See NORTON, OBSERVATIONS, supra note 182, at 52; Caroline Norton, Helen’s Tower: Erected by Lord Dufferin, in Honour of his Mother, at Clandeboye, Ireland, 8 MACMILLAN’S MAG. 150 (1863) (analogizing maternal love to “[a] watchtower in the weary strife;/ [w]here Fate’s rough billows run/. . . . Emblem of what a steadfast guide/A mother’s love may be!”) [hereinafter Norton, Helen’s Tower].
mother dangerous and unnatural, and such as must be immediately supplied by female guidance of some sort or other. 193

Fathers who denied their wives access to their children were viewed as harming both the children and the mothers. 194

Opponents to reform, however, believed that giving fathers absolute custody of the children would ensure that mothers would not forsake their homes and duties lightly. Sir Edward Sugden, a member of the House of Commons that debated the 1839 Custody of Infants Act, 195 was convinced that mothers would immediately leave their husbands' roofs for the most trivial reasons if they could have continued access to their children. 196 Sugden claimed that

[w]hen 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 [the Custody of Infants Act of 1839] to pass into law she would argue

193. Norton, Observations, supra note 182, at 51-52. This typical expression of maternal fitness came to be known as the tender years doctrine in England and the United States—a doctrine that preferred maternal custody in disputes involving children under seven years of age. England officially repudiated the doctrine in 1925 when it adopted the best interests standard, though the tender years doctrine continued to operate informally in decisions by judges who continued to believe it was in children's best interests to be cared for by their mothers. See Maidment, supra note 43, at 145-46.

194. Caroline Norton noted this, as did certain judges. See Ex parte M'Clellan, 1 Dowling's P.C. 81 (K.B. 1831); Norton, Observations, supra note 182, at 51-52.

195. It is perhaps not unusual for women to have protested the state of child custody laws two decades before they vigorously sought divorce reform. In the mid-1830s, a series of highly publicized cases forced Parliament into considering a bill that would give married mothers at least some legal right to petition for custody even though they were still married and therefore legally unable to sue their husbands under coverture. The King v. Greenhill, 111 Eng. Rep. 922 (K.B. 1836); Greenhill v. Greenhill, 63 Eng. Rep. 162 (1836); Ex parte M'Clellan, 1 Dowling's P.C. 81 (K.B. 1831). When the bill was considered in 1838, some legislators felt that giving married women rights to custody would lead to the breakdown of marriage and a destructive increase in litigation. 44 Parl. Deb. (3d ser.) (1838) 780-781; 40 Parl. Deb. (3d ser.) (1838) 1118. And to many, the 1839 Custody of Infants Act was the opening wedge in the gradual breakdown of coverture. See 40 Parl. Deb. (3d ser.) (1838) 1114-18; Hndley, supra note 74. Much of the anxiety that had accompanied the 1839 reform dissolved over the next eighteen years, however, as the courts essentially validated the paternal claims of control over the family and rejected the maternal claims of protection for childrearing duties. The courts refused to recognize any independent rights to custody in mothers while they retained the pre-1839 "life and limb" standard for paternal forfeiture. They used the Act to expand the jurisdiction of chancery to hear custody cases in a wider array of situations: younger and non-propertied children. This shift reflected a change in the attitudes of parents and courts toward the status of all children, and occurred in the power struggle between fathers and the state, not fathers and mothers. Mothers were given no new legal protections. For a detailed discussion of the role of child custody disputes in family law reform, see Wright, De Manneville, supra note 36; Wright, The Crisis of Child Custody, supra note 19.

196. 40 Parl. Deb. (3d ser.) (1838) 1116.
This behavior would tend to the destruction of the family because, as Sugden viewed it, only by manipulating children to force women to remain in their homes could Parliament keep a lid on women's irresponsible propensity to terminate their marriages. As another commentator argued:

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 least, not merely one out of a number, but the greatest, 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!

Access and custody of children were viewed as the final safeguard of women's fidelity to the home.

While the arguments in the 1830s were centered around a logic of domesticity, there was an obvious tension between the claims of mothers and the claims of fathers. Mothers felt that their all-important domestic duties could not be performed adequately if they did not have legal protections for their child-rearing duties when their marriages fell apart due to no fault of their own. Fathers felt that their control over the domestic sphere could not be maintained if wives had an independent right to leave the family home and retain access to their children. While mothers focused on child-rearing as a single, primary aspect of their domestic identities, fathers argued for an expansive understanding of the domestic sphere that aligned child-rearing, marital faithfulness, commingling of property, and a sanctified, protected space within the family home. Mothers viewed their need for legal protection of custody in terms of their activities and duties in the single issue of child-rearing; fathers viewed their need for legal protection of custody in terms of their holistic and physical control over the family and the homestead.

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197. Id.
198. Id.
199. Handley, supra note 74, at 280-81.
201. Handley, supra note 74, at 276-77.
203. This holistic view of fathers was reinforced by the law, which viewed custody of children as directly tied to the descent of property, protecting the family patrimony, and controlling the family honor. Prior to 1839, the Chancery's jurisdiction to even hear a custody dispute depended on the child having been made a ward of the court, which required the settlement of property on the child. In most instances, the court only addressed disputes over the eldest child or heir. After 1839, numerous mothers would settle property on all their children in order to bring them within the court's jurisdiction, but the court would actually resolve the case by giving the eldest
Even though the 1839 Act had given mothers a right to petition for access to their children, reformers in the 1850s realized that the Act had made virtually no improvement in the legal protection of maternal child-rearing.\(^{204}\) Hence, in the 1850s, women demanded a legal right to custody as part of divorce reform.\(^{205}\) As they argued, a wife should not have to suffer the dual injustice of being forced out of her home by her husband’s infidelities or cruelties, and also lose access to her children.\(^{206}\) However, even though women’s critiques of custody law in the 1850s continued to be centered on a rhetoric of maternal nurturance and care, a naturalization of mother’s love, and an inability to understand why mothers of illegitimate children had rights while mothers of legitimate children still did not, women delineated a difference between maternal responsibilities and marital responsibilities.\(^{207}\)

The reformers set their arguments within a broader acceptance of marital disruption, however. While the debates of the 1830s insisted that the cases were rare of separated parents, by the 1850s custody disputes were seen as a logical consequence to the growing numbers of marital separations. Not surprisingly, the 1850s Parliamentary debates subordinated custody to the issue of divorce and marital breakup. The holistic view of family control dominated the discussions as lawmakers focused on the breakdown of the family and its effects on social stability, rather than on the isolated issue of the special aptitude of maternal child-rearing abilities or providing for the

children to the father and the youngest to the mother. These earlier custody cases (pre-1800) showed a clear concern for control over the heir, while the handful of cases brought by mothers in the first half of the nineteenth century forced the courts to consider custody as distinct from control over the patrimony, and instead as a question of the companionate aspects of custody and access. Id. at 192-205.

204. See id. at 238-248; Shanley, supra note 19, at 136-38.

205. Shanley, supra 19, at 136-38.

206. For instance, Caroline Norton, who had finally received access to her children three years after the passage of the 1839 Act, was still embittered by the law’s unwillingness to protect mothers. In 1854, she asked:

[I]s there any reason why (to plead the cause of the inferior sex as humbly as possible) the laws and enactments for their protection should not undergo as much revision, with as fair a chance of beneficial alteration, as the regulations affecting the management of pauper children,—insane patients,—and the tried and untried prisoners who occupy our gaols?

Caroline Norton, Caroline Norton’s Defense: English Laws for Women in the Nineteenth Century 15 (Joan Huddleston ed., 1982) (1854). Norton realized much to her dismay when she finally was allowed access to her children in 1842 that she still was legally nonexistent. She wrote two pamphlets in the 1850s linking custody with other aspects of property, divorce, and contract law. See Norton, A Letter to the Queen, supra note 61; Norton, English Laws, supra note 61.

207. All of Caroline Norton’s pamphlets note this distinction, but the best expression is in Norton’s poem, “Helen’s Tower,” contrasting maternal love, “[a] watchtower in the weary strife,” to marital love, enamored and transient. Norton, Helen’s Tower, supra note 192.
The lawmakers in the 1850s continued to be worried that patterns of traditional family control would be undermined by the ability of wives to easily leave their husbands, and the effects on children were deemed only ancillary to the detriment women's freedom would have on society in general. Society and children would suffer from irresponsible women.

When the new court was given the power to make custody determinations under the 1857 Act, however, there already existed a large body of precedent from the 1830s and 1840s denying custody to mothers except in very unusual circumstances and no additional rights or protections were legislated by the Act. The court was given simply the right to make interim or final custody orders as it saw fit. With such little guidance and no new mandate to protect maternal custody, it is hardly surprising that the court's exercise of custody jurisdiction was tentative and sporadic and would require additional legislative reform into the 1880s. In one case, the court refused to make a final custody order for a mother whose husband had moved to the U.S. and committed bigamy. Without the power to modify a final order, the court felt it would be unable to grant the father custody or access later were he to ever repent and return. Without the creation of explicit maternal rights, which most women desired, divorce reform did little to protect women's access to their children, and did nothing to separate custody from other aspects of marital and familial autonomy.

208. The Marquess of Landsdowne argued that regularized divorce was far better for children than informal separation, 144 PARK. DEB. (3d ser.) (1857) 1716, and Mr. Spencer Walpole exclaimed that families in which adultery, cruelty, or desertion occurred were already "blighted, deserted, barbarous, and unchaste home[s]" and formalized mechanisms of divorce would therefore be a blessing, 147 PARL. DEB. (3d ser.) (1857) 881.

209. In the debates on the Custody of Infants Act in 1837 and 1838, Lord Lyndhurst and Sergeant Talfourd discussed at great length how giving mothers access to or custody of their children would ease their situations tremendously without causing social strife, while Edward Sugden declared that such access would destroy the social fabric. See 40 PARL. DEB. (3d ser.) (1838) 1114-22; 39 PARL. DEB. (3d ser.) (1837) 1087-89. But there was very little mention of children in the divorce act debates, except the Marquess of Landsdowne's comment that children would be better off if their acrimonious parents could separate. 144 PARL. DEB. (3d ser.) (1857) 1716. Of course, many of the comments about the destruction of the social fabric caused by easing the laws of divorce were aimed at women who, it was believed, would exercise these rights with regard only for themselves, and not for their families. See, e.g., 143 PARL. DEB. (3d ser.) (1856) 250-38.

210. See Wright, The Crisis of Child Custody, supra note 19.

211. 20 & 21 Vict., c. 85, § xv (1857) (Eng.).

212. See Re Agar-Ellis, 24 Ch. D. 317 (1883); In re Besant, 11 Ch. D. 508 (1878); Re Agar-Ellis, 10 Ch. D. 49 (1878); Cooke v. Cooke, 164 Eng. Rep. 1269 (1863); Curtis v. Curtis, 28 L.J.R. (n.s.) 458 (ch. 1859); Wright, The Crisis of Child Custody, supra note 19.

213. Robotham v. Robotham, 164 Eng. Rep. 190 (1858). The court was later given power to amend final custody orders in 22 & 23 Vict. c. 61, § iv (1859) (Eng.).

C. Property

Like custody, property settlements are intricately intertwined with divorce in modern family law. Yet in 1857 Parliament apparently saw little need to give divorcing women any property other than a return to *feme sole* status for future earnings and no property rights for married women in functioning relationships. In an analysis of the arguments offered by reformers for modifying the property rights of married women, we see similar complaints about the legal disabilities of coverture as were argued in the custody context.\(^{215}\) Caroline Norton and others spoke of coming to consciousness regarding their lack of property rights when they discovered they did not even own the clothes on their backs.\(^{216}\) But they expanded their arguments to use their domestic duties and the support of children to justify their need to earn money and have control over their own inheritances.\(^{217}\)

Wives' lack of property rights were also equated with their own status as property. As Eliza Linton argued,

> [If married women] were independent of man's support, and could feed and clothe themselves unhelped, and maintain their own social status unassisted, they could make better terms for themselves and compel a more just and liberal treatment . . . . As it is, men have the right to demand from their wives absolute attention to their wishes, because they are their property . . . . \(^{218}\)

Frances Power Cobbe criticized the situation of married women when she asked, "[w]hy is the property of the woman who commits Murder, and the property of the woman who commits Matrimony, dealt with alike by your law?"\(^{219}\) Many reformers could not understand why the law of coverture destroyed all legal rights for married women when criminals, adulterers, apprentices, servants, and military men retained numerous legal protections.

Although coverture did not make such a distinction, there existed a social distinction between allowing women to own their labor, their wages, and their personal property and allowing them to own and control real property that was settled on them by their parents or family or was acquired during the marriage.\(^{220}\) While control over wages and labor distinguished the slave from the free laborer and was

\(^{215}\) See generally Holcombe, *supra* note 54; Shanley, *supra* note 19, at 103-30.

\(^{216}\) See Norton, *A Letter to the Queen*, *supra* note 61, at 82-85.

\(^{217}\) Norton, *English Laws*, *supra* note 61, at 161; Smith Bodichon, *supra* note 91. Without access to property, it was believed women would be loath to leave their husbands' roofs. Additionally, limited property rights would be seen as necessary to allowing women to perform their domestic duties of running a household.


\(^{220}\) While wealthy women had the separate estate, recognized in equity, utilizing such protections required male control in the form of trustees. See Staves, *supra* note 61.
tied to individual autonomy and identity, control over real property inheritances and marital property was part of one's family identity and not seen as crucial to individual emancipation. Wages were about immediate individual support, while inheritances were imbued with complex notions of family identity. For women who did not actively function in the economic sphere, their ownership of real property was generally deemed a detriment, because family inheritances could pass outside a woman's family upon marriage.\textsuperscript{221} Even for those women who did own real property associated with economic production, like a rooming house or tavern, title generally was held by the husband or by trustees and a wife's income was often construed as a result of her husband's industry. Thus, separated women would be given a right to their wages before obtaining any rights to marital property, marriage settlements, or inheritances. An acceptance of this distinction pervaded the debates around divorce. In the end, the 1857 Act gave married women no rights to wages, marital property, or inheritances, and only gave divorced and separated women the right to wages after the date of the separation.\textsuperscript{222}

Once again, Parliament ignored the demands for women's individual legal rights within the domestic sphere, and opted instead for a holistic family law that would discourage women from choosing divorce and would not upset the patriarchal order that existed in the public sphere of male dominion over property. By not allowing married women a right to their own wages, Parliament guaranteed that male employers would deal principally with the husband in negotiating wages. By not protecting a wife's inheritance, Parliament guaranteed that middle-class wives would not be able to afford to divorce their husbands and live on their own property. By using alimony as the principal form of property adjustment, Parliament ensured that wives would be dependent on their husband's wages for support in the future, rather than on a division of marital property that might put wives in control of substantial amounts of real or investment prop-

\textsuperscript{221} Eileen Spring has made an intriguing argument that all major property doctrines were in fact created to avoid the situation of the heiress inheriting real property. \textit{Eileen Spring, Law, Land & Family: Aristocratic Inheritance in England, 1300 to 1800} (1993). The use, the will, the strict settlement, jointures, and even equitable estates were all motivated by the desire to avoid the heiress. The argument she makes in the book is in response to other interpretations. See Lloyd Bonfield, \textit{Affective Families, Open Elites and Strict Family Settlements in Early Modern England}, 39 \textit{Econ. Hist. Rev.}, 341 (1986); Lloyd Bonfield, \textit{Marriage, Property & the "Affective Family"}, 1 \textit{L. & Hist. Rev.} 297 (1983).

\textsuperscript{222} Women would be returned to \textit{feme sole} status so wages or inheritances post-divorce would be owned solely by them, but property brought to the marriage or earned during the marriage would remain owned by the husband entirely. 20 & 21 Vict. c. 85, §§ xxv, xlv (1857) (Eng.).
Such post-divorce dependence was bound to discourage women who wished to terminate their marriages.

When laws giving married women control over their wages and earnings were finally passed in 1870, little consideration was given to inheritances or other real property which was either owned and managed by the husband, or settled on grandchildren by fathers who did not want their estates to fall into the hands of their sons-in-law. Reform of inheritances and real property did not occur until 1882. Even though the 1857 Act allowed the court to make property settlements on divorced wives out of the marital estate, property was clearly subsumed in order to protect the integrity of the marital unit. The property provisions of the 1857 Act were so inadequate that a subsequent amendment was required in 1860 to give the court power to adjust marriage settlements. Moreover, in the first nine years of the court’s existence, fewer than 1% of wives received a property settlement or adjustment at the time of divorce.

D. Class

Today one cannot talk about marital property without some attention to the plight of working-class wives who were likely to leave a marriage with no property except the newly restored right to their own wages. But in the 1850s, working-class women, as distinct from working-class men, were not regularly discussed. The complaints about class by reformers and opponents to the bill were relatively uniform. All sides agreed that the law should not treat people of different classes differently, with some exceptions for the unruly working classes. During the course of the debates on the 1857 Act, Lord Campbell recounted a legal anecdote that had become a kind of urban legend. He related:

[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

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223. Married women could not buy property once married. So, unless they owned it before marriage, they would likely only acquire some limited interests in real property during life through inheritance. For a thorough discussion of married women's separate property rights, see STAVES, supra note 61.

224. Married Women's Property Act, 1870, 33 & 34 Vict., c. 93 (Eng.).

225. Married Women's Property Act, 1882, 45 & 46 Vict., c. 75 (Eng.).

226. 20 & 21 Vict., c. 85, §§ xxv, xlv (1857) (Eng.).

227. 22 & 23 Vict., c. 61, § 5 (1859) (Eng.).

228. Wright, Untying the Knot, supra note 42, at 1008 tbl.20.

229. It was not that legislators wanted separate class-based laws, but they often felt that it was acceptable to make legal remedies available to the respectable middle- and working-classes, but that all attempts should be made to discourage use of or access to the remedy by the unruly classes. See STONE, ROAD TO DIVORCE, supra note 6, at 384-85.
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 \textit{a mensa et thoro}. Having got that divorce, you should have petitioned the House of Lords for a divorce \textit{a 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.'

This anecdote was frequently recounted during the 1850s as evidence that the law of divorce was terribly unjust. While the lawmakers were not comfortable with equalizing the grounds of divorce between husbands and wives, they were most willing to make divorce available to some segment of the poorer classes if it was going to be available to the upper classes. Although there was some concern that the lower classes needed more stringent regulation of their sexuality, most lawmakers balanced that view with an understanding that the more improper the behavior of any spouse, the more imperative it was to free the innocent partner. Although working-class wives would seem to be particularly sympathetic due to middle-class views of lower-class sexual license, working-class wives also were caught up in stereotypical views of sexual degradation and sexual profiteering by both sexes.

To the extent discussions of class arose in the Parliamentary debates, they focused on two narrow issues: broadening the remedy beyond the aristocracy and making the remedy available outside London through the use of magistrate and county courts. Although lawmakers recognized that some poorer classes would not be able to seek a remedy if it were only available in London, there was much

\begin{itemize}
  \item 230. 142 Parl. Deb. (3d ser.) (1856) 1986.
  \item 231. 143 Parl. Deb. (3d ser.) (1856) 232.
  \item 232. 142 Parl. Deb. (3d ser.) (1856) 413-15.
  \item 233. Lord Brougham discussed the undesirable fate of the young heir lured across the border to Scotland who makes a hasty marriage with a prostitute and needs, upon sober reflection, to undo his mistake. See 142 Parl. Deb. (3d ser.) (1856) 423. In rejoinder, however, the Earl of Aberdeen asked how many young Dukes had done the trapping rather than been the prey, and he thought that for every one such thoughtless young man trapped into marriage, hundreds of innocent women had been trapped by "artful and designing men." 142 Parl. Deb. (3d ser.) (1856) 425.
\end{itemize}
concern that divorce would be too easy and unregulated if made available through local courts.\textsuperscript{235} By keeping the jurisdiction in London and requiring the intervention of a relatively high-level court, Parliament attempted to balance the need to provide a remedy for the egregious cases and yet keep a lid on what they thought would be uncontrolled and wanton dissolution by the masses. The hypocrisy in the proposed law was highlighted when one Member of the House of Commons, Mr. Bowyer, noted that it took only one judge to order death to a prisoner but three judges to order a divorce.\textsuperscript{236} In the end, the remedy was to be available to the middling classes and to some in the upper working class, but the fees would remain beyond the range of most working-class people until the twentieth century.\textsuperscript{237}

Again, we see in the reform arguments about class a tension between those who viewed divorce and marital fidelity as primarily a social issue, and those who viewed it as a private one. In a sense, class-based arguments posed the greatest difficulty for Parliament because they pitted male privilege within the private sphere against upper-class male social control—men against men. It was harder to justify a class-based double standard than a gender-based double standard because working-class men still expected the privileges of patriarchy that their higher-class brethren enjoyed. Statistics showed, however, that the vast majority of litigants were from London, were engaged in middle-class occupations, and could afford the roughly £100 fees necessary for a full divorce.\textsuperscript{238}

E. Reform and the Status Quo

The arguments for reform ran the gamut from complete gender equality to very limited and contained rights for those few special cases of women who were shackled to profligate and abusive husbands.\textsuperscript{239} While lawmakers were concerned with the high numbers of divorce petitions when they reached four per year, it was generally

\textsuperscript{235} The Bishop of Oxford was convinced that access to local courts would make divorces too easy and tempting. 142 PARL. DEB. (3d ser.) (1856) 1980.

\textsuperscript{236} 147 PARL. DEB. (3d ser.) (1857) 758-59.

\textsuperscript{237} Though there was some limited legal aid, some petitioners did apply for a waiver of court costs as in forma pauperis, but the numbers were few and did not affect attorney fees. See Wright, Untying the Knot, supra note 42, at 909.

\textsuperscript{238} The creation of the new court did result in a reduction of costs from roughly £1000 for a Parliamentary divorce to less than £100 for a civil divorce. Id. at 1009 tbl.22, 1010 tbl.23 and accompanying text.

\textsuperscript{239} There were lengthy debates in 1837 and 1838 on the Custody of Infants Act and whether or not the law should be changed to address just the few instances of injustice that a few women faced, or whether it should be changed for all because the presence of a few cases does not mean that all women are not living under tyrannical circumstances. See 42 PARL. DEB. (3d ser.) (1838) 1050-54; 39 PARL. DEB. (3d ser.) (1837) 1083 (Sergeant Talfourd exclaimed that “[t]he instances in which it is brought before the public cognizance may be few, but it is ever in the background of domestic tyranny, and is felt by those who suffer in silence”). Similar feelings were expressed about the wisdom of changing the law for a few dysfunctional couples. 144 PARL. DEB.
believed by most that the new civil court would see only a slight increase in divorces. After all, the substantive law would remain very much the same and the costs would put divorce out of reach of all but the most well-off working-class couples. And the middle class would, it was believed, continue to eschew the highly public process of legal divorce in favor of private separations. Given the slight modifications in substantive law, the prediction that the court would have very little to do was arguably rational. However, if Parliament thought four divorces per year was an epidemic, it was stunned when the court granted over 250 divorces in the first year. Moreover, that number would slowly rise over the next decade, forcing numerous bi-annual amendments to deal with procedural difficulties as well as jurisdiction over additional marital property.

The ultimate irony of the mid-nineteenth-century legal reform was that as progressives sought to eliminate the legal incapacities of coverture, they accepted socialized gender inequality and separate spheres. Similarly, reformers accepted the need for divorce reform while simultaneously accepting the sexual double standard. Due to naturalized gender differences and the propriety of separate spheres, most reformers felt that equal legal rights in both realms would not be exercised equally because women would not choose to venture into the public sphere to challenge the natural superiority of men. It was safe to give women some limited power because many felt they were incapable or uninterested in exercising it. Built into the reform, and consequently the new family law, was an understanding that because of women's different natures, their exercise of power within the domestic sphere would be significantly different from the way men exercised power. For instance, expectations surrounding univer-

(3d ser.) (1857) 1705. Margaret Oliphant also registered her opinion on this issue in The Laws Concerning Women, supra note 10.

240. There were numerous references to a belief that the court would not be very busy. 146 Parl. Deb. (3d ser.) (1857) 207; 142 Parl. Deb. (3d ser.) (1856) 404, 415.

241. See Stone, Road to Divorce, supra note 6, at 181-82.

242. 151 Parl. Deb. (3d ser.) (1859) 567; Horstman, supra note 1, at 85.


244. Their sense of equality insisted that women should be able to leave adulterous relationships even as they felt that adultery by women was a more egregious breach than adultery by men and the law could therefore treat them differently. See, e.g., 145 Parl. Deb. (3d ser.) (1857) 813-14; 147 Parl. Deb. (3d ser.) (1857) 393; 147 Parl. Deb. (3d ser.) (1857) 1643.


246. It would be hard to reconcile all the liberal, democratic rhetoric of the nineteenth century with laws that clearly disadvantaged one group solely on the basis of their status as wives or women.
sal male suffrage were that working-class men would grab and abuse the power that was granted to them, but expectations surrounding the reform of coverture were that few women would even notice the change. The entrenchment of the ideology of separate spheres and naturalized gender differences limited the expected effects of the reform and also justified the institutionalization of separate spheres and gender subordination in the new family law.

The reform debates were centered in private-sphere domestic values, and accepted the naturalized passivity of women. These debates illustrate that most people thought there would be little real change. The new law would help a few people at the margins of marital discord, but domestic life would be little altered because the constraints within the private sphere would keep in check whatever destructive tendencies women had. Even the most progressive reformers of the nineteenth century wanted to abolish coverture and replace it with legal rights protecting women's domestic activities—with a law that recognized and reified separate spheres even as it purported to give women power. There was such a strong acceptance of the sexual double standard and women's relegation to the domestic sphere that few critics thought giving women legal rights would make them claim an equality with men.

Women were seen as too silly and emotional. This was not because some people did not foresee the implications of the breakdown of coverture. In fact, some conservative members of parliament thought giving women a single thread of legal rights would cause them to destroy the entire social fabric. See, e.g., 145 Parl. Deb. (3d ser.) (1857) 279. But the majority of reformers and members of parliament viewed the changes as ones of form and not substance, that a few egregious situations would be avoided but that significant change would not occur. Lord Brougham’s view represented the vast majority in the body that voted for the Act. 146 Parl. Deb. (3d ser.) (1857) 205-07. And in many cases they were correct. The law creating the new court offered very little substantive change, but it did begin the breakdown of coverture. Yet even as coverture was eventually destroyed, the ubiquity of separate spheres has kept the lid on the effects of the change, as has the nature of the reform. The creation of a family-law court has institutionalized separate spheres, thus limiting the effects of the reform.

48. See Wright, The Crisis of Child Custody, supra note 19, at 217-20 (discussing Thomas de Quincey’s The Household Wreck, in which the idealized Victorian woman is exactly the kind of timid, child-like figure who is destroyed by contact with the boisterous world of courts and law). In debating the 1839 Custody of Infants Act, Mr. Shaw asserted that “no woman of a delicate mind would submit to call upon a court to interfere and to exercise these powers.” 42 Parl. Deb. (3d ser.) (1838) 1053. Some critics claimed that the influence of litigation is “deplorable and demoralizing” to women. Handley, supra note 74, at 301.

49. Not surprisingly, the legal debates were quite complex. On one extreme, many believed men and women were fundamentally different, that women were naturally inferior, and that therefore the laws of coverture wisely placed control in the hands of male decisionmakers. For these people, coverture made sense because men and women were naturally unequal, and allowing equity courts to handle the extreme cases made the law rational and just. Margaret Oliphant, for instance, argued against equality within the home as contrary to natural law. Oliphant, supra note 10, at 379-87. A less extreme position accepted the fundamental differences between men and women and women’s inferiority, especially in the public/business world, but advo-
to seriously consider themselves the equal of men. To the extent critics worried about the effects of legal rights for women, they feared wholesale destruction of the family from women's irresponsible exercise of rights rather than the social parity that we today view as the goal. Some critics also hoped that granting women domestic rights would satisfy them so they would not ask for additional rights like suffrage or equal participation in the public arena.

What is most notable about the arguments for reform and the law that was eventually passed were the gender differences that emerged in the former and the latter's conservative nature. While men tended to argue for an holistic family law that would integrate divorce, separation, custody, and property issues in order to keep the family intact, women reformers tended to argue for a more rights-based individualistic approach whereby the rights to divorce, custody, or property would be independently determined based on each woman's situation. Progressive reformers believed that women should not be subjected to the status-based disabilities of coverture. Married women, they argued, could continue to be individual actors with individual rights without upsetting the domestic sphere, the social order, or even patriarchal power relations. Ironically, while the new court more closely reproduced the integrated family law advocated by men than the individual rights-based approach advocated by women, it has been interpreted by scholars and historians to have been a liberal institution that paved the way for women's rights. However, before turning

cated a change in coverture to protect women's rights within their recognized domestic sphere. This position was expounded most forcefully by Caroline Norton, who thought that the purpose of coverture was to protect the inferior, the wife, just as other laws protected the servant, the apprentice, the sailor, and the infant. Law was to be protective, not empowering. See Norton, English Laws, supra note 61, at 2. These critics all believed coverture could be broken down and women would exercise their legal rights responsibly only in the limited domestic realm they already dominated. Giving married women rights to property, custody, and perhaps even divorce was seen as necessary to protect the family and the domestic sphere, but it was not expected to radically change male/female relations within that sphere.

These critics vociferously opposed any relaxation in the laws of coverture because they viewed women as reckless beasts who required the coercive force of coverture to retain their base and lustful natures. See Handley, supra note 74. Any decline in the laws would lead to social unrest and disaster. The Bishop of Oxford, for example, "believed that if facilities for divorce were once afforded the gravest dissatisfaction would be produced, unless those facilities were extended to the very lowest classes of society; and he contended that such facilities could not be given to the lowest classes without endangering the moral purity of married life." 142 Parl. Deb. (3d ser.) (1856) 1980. Ironically, it seems that these critics saw a link between the law of coverture and gender subordination and they believed that removing the legal barriers against women would unravel the contemporary social fabric. They did not think gender equality would be the outcome; rather, they believed social order would disintegrate if women's true natures were given free rein.

to the historical interpretations of the law, we must turn now to a
closer examination of the actual records of the new court.

VI. SOCIAL DIFFERENCES AND THE LIMITS OF LEGAL REFORM: THE
UNFULFILLED PROMISE OF FAMILY LAW

In Jane Austen's 1813 novel *Pride and Prejudice*, the odious Mr. Collins asks Elizabeth Bennet for her hand in marriage, but is promptly rejected because Elizabeth would rather live as a pauper spinster than be trapped with a man whose eye is more on the family plate than his potential wife's qualities. Mr. Collins, however, does not at first accept her rejection, explaining: "You must give me leave to flatter myself, my dear cousin, that your refusal of my addresses is merely words of course. . . . I shall choose to attribute it to your wish of increasing my love by suspense, according to the usual practice of elegant females." After remonstrating at length with Mr. Collins that she was not the usual kind of elegant female, Elizabeth withdrew, "determined, that if he persisted in considering her repeated refusals as flattering encouragement, to apply to her father, whose negative might be uttered in such a manner as must be decisive, and whose behaviour at least could not be mistaken for the affectation and coquetry of an elegant female."

Ironically, such was the precarious position of the Victorian maiden seeking matrimony as well as of the Victorian matron seeking divorce. In the new world of civil divorce, couples who wanted to be rid of one another must protest, but not too loudly. For if they successfully defended their spouse's divorce petition, they would find themselves in the undesirable position of remaining bound to an abusive or adulterous spouse. Just as it was the social custom to say no to an offer of marriage when one planned to say yes shortly thereafter, it was the legal custom to say no to a divorce when the parties had no desire of taking up cohabitation again.

Early civil divorce required constructing a narrative of fault and innocence out of a marital conflict that most likely found both at fault or both in favor of the suit. One could not be seen to agree to the divorce for risk of having it denied on the grounds of collusion, and one could not fight the petition too-stringently for fear of having the case dismissed. Even if both parties wanted out of the marriage, the respondent still had to argue against the petition for the sake of propriety as well as bargaining power, and the petitioner had to appear innocent and distraught by the respondent's actions. Not surprisingly, the law did not situate the parties equally and so success or failure, as well as who brought suit, could have significant consequences. The husband who brought suit and was successful got to retain his

253. *Id.* at 95.
254. *Id.* at 96.
wife's property, retain custody of the children, and would be relieved of supporting his errant wife in the future. The wife who was successful was relieved of her husband's company and might get de facto custody of the children, though the odds were against her receiving a final custody order that would protect her if he returned a "changed man." Moreover, only one in ten successful wives might get a small alimony order that the court would be reluctant to enforce if her husband refused to pay. Even worse, if the case were dismissed or abandoned, the parties would be on their own to negotiate a private separation that they and their family could live with, though few provisions would be enforceable if the husband changed his mind.

Very often, however, the cultural and legal rules do not adequately convey the complex variety of factors that influence different couples' decisions to divorce. To further understand how these rules played out in people's lives, I undertook an empirical study of the court's records for the first nine years (January 1858 to July 1866). Because of the legal double standard and the different socioeconomic situations of men and women, I was particularly interested in whether differently situated petitioners fared differently before the new court and to what extent their own demographics affected the cause of action, the grounds alleged, or the relief obtained.

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255. See discussion of alimony infra notes 352-376 and accompanying text.


257. Of the 2540 petitions filed during that time, I reviewed nearly one quarter of them, noting such details as: length of marriage, number of children, occupation, residence, and grounds for the action. I also analyzed the court's docket for every one of those petitions, which identified the final outcome of the case. Further, I studied a block of cases filed in the first forty months (January 1858 to April 1861) for interim motions for custody or alimony pendente lite, final custody or permanent alimony orders, as well as procedural issues dealing with jury trials and adequacy of service. I examined every petition by a petitioner whose last name started with the letter A, and then every fifth petition thereafter. This represented approximately 24% of the total number (2540) of petitions filed during those nine years. Not all petitions were for marital termination, however; they were for divorce, judicial separation, annulment, restitution of conjugal rights, protective orders for property, alimony, and legitimacy. The docket contains the court's records of the pleadings filed and the court's actions on each case. I examined every single case docketed for the period January 1858 to April 1861, when the court shifted to a different record-keeping system, which totaled 1154 cases. Where possible, I overlaid the information from the docket on the petitions. For a detailed breakdown of the petitions see Wright, *Untying the Knot*, supra note 42, at 992-97 tbls.1-6 and accompanying text.

258. From my research into the law that preceded the new court, I concluded that it enforced traditional gender roles and gender inequality within the family by giving only begrudging protection to certain wives and not to others, wives who conformed to the Victorian ideal of separate spheres and traditional domestic femininity. Child custody was an area of legal control of the family that allowed judges to impose certain social norms into the family through their defining of the welfare standard, and marital fault and custody were used to define motherhood and police the boundaries of acceptable maternal behavior. Wright, *The Crisis of Child Custody*, supra note
published preliminary findings in another article and will not repeat the general findings here.\textsuperscript{259} In this article I focus on how divorce, custody, and property rulings were intertwined with social differences and legal disabilities so as to disadvantage wives, even though the newly granted right to a divorce may have appeared neutral, or even favorable toward women.

The number of women who filed petitions in the court compared to men are staggering (1461 petitions filed by women compared to 1065 filed by men in the first nine years\textsuperscript{260}), especially in light of women’s exclusion from most legal remedies before 1858. From a “pure numbers” perspective, the court would appear attractive to women litigants.\textsuperscript{261} However, the relief requested and granted differed dramatically for women and men.\textsuperscript{262} Fifty-seven percent of women’s petitions were for some form of relief less than a full divorce with the right to remarry, while only 6% of men’s were for something less than full divorce.\textsuperscript{263} Although women’s divorces were slightly more successful (70% to 63%), women abandoned their suits at a significantly higher rate than men (29% to 18%).\textsuperscript{264} Since there are roughly equal numbers of wives as husbands in England at any given time,\textsuperscript{265} deviations in percentages of those seeking relief before the new court and those

\begin{itemize}
  \item 19. But to determine whether my interpretation of the law, which came from examination of case reports, diaries, and political writings, was consistent with the court’s day to day functions, I spent time over two summers analyzing the first nine years of the court’s primary trial records. I obtained this information at the Public Record Office in Kew, Richmond, which has retained only the petitions, answers, and affidavits for the roughly 10,000 petitions filed between 1858 and 1886. The petitions were filed by year in two separate sets of boxes, the first set covering 1858-1866 and the second covering 1867-1886. There were approximately 2500 petitions in the first set and 7500 in the second set. I have not even begun to research the second set. Unfortunately, many of the records Rowntree and Carrier were able to examine in 1958 have been destroyed, including marriage certificates, accountings, and pleadings other than the initial petition and answer. See Griselda Rowntree & Norman H. Carrier, The Resort to Divorce in England and Wales, 1858-1957, 11 POPULATION STUDIES 188 (1958).
  \item 259. See Wright, Untying the Knot, supra note 42.
  \item 260. I reviewed one petition for every 4.26 in the first nine years. Thus, I reviewed 343 brought by wives and 250 brought by husbands. Multiplied out they equal 1461 brought by wives and 1065 brought by husbands, plus a few miscellaneous causes of action, for a total of 2540 petitions in the first nine years. \textit{Id.} at 992 tbl.1, 995 tbl.4.
  \item 261. Husbands brought roughly 997 divorces while wives brought only 630 between 1858 and 1866. Wives brought an additional 532 separation actions, thus bringing 54\% of all marital termination actions. \textit{Id.} at 994 tbl.3, 995 tbl.4.
  \item 262. Women actually had a higher success rate than men in their divorce actions, though a lower success rate in separation actions. See \textit{id} at 996 tbl.5.
  \item 263. See \textit{id}. at 995 tbl.4, 1004 tbl.15.
  \item 264. Women’s judicial separations, moreover, were abandoned at a rate of 44\%, compared to husband’s judicial separations at 18\%. Divorces were abandoned at a rate of 18\% for husbands and 17\% for wives. The numbers identified here are the average of both divorces and separations. \textit{Id}. at 996 tbl.5.
  \item 265. Although there were a few claims of women committing bigamy, the numbers of bigamists are so few as to be insignificant.
\end{itemize}
obtaining it are likely to be based on legal barriers to one group, social differences that make legal solutions more attractive to one group over the other, or a combination of the two. Since women today continue to file more divorce petitions than men, at least some of these socio-legal differences may still remain.266

Unlike a civil or criminal suit, where the defendant usually does not want to be sued, the respondent in a divorce case may have willingly committed a marital breach in order to manipulate the case. Indeed, the respondent may be funding the litigation, and may be quite content that the parties can work out a more fitting resolution, regardless of the court’s orders. Even respondents who do not wish for a divorce generally will not reunite with spouses who want out of the relationship. Therefore, understanding the motives and actions of the men and women who sought the assistance of the divorce court requires reading the petitions carefully, recognizing that the allegations of either or both parties are likely to be exaggerated or false. A review of the divorce records requires an understanding that, in some cases, the stakes were very high and the discord was very real. In other cases, the court was merely rubber-stamping a voluntary and bargained-for separation.

In the following sections I discuss some of the actual cases I encountered to put a human face on the numbers and help us understand the motives and complexities of these legal controversies. I then analyze the cases for marital termination, child custody, and alimony along the axis of age of marriage in an attempt to tease out the interplay of custody and property with termination. Certain conclusions seem rather obvious—that denying a divorcing wife who was not at fault any further property adjustments will make it difficult for her to prove that custody of her children is in their best interests if she cannot support them. However, other conclusions are less obvious and are more central to my argument: by adopting a marital fault rule, tying custody and property to fault, and failing to accommodate the sexual double standard, women would not prove to be the favorites of the new family law.

A. Divorce

Marital termination actions in a fault-based267 system fall into one of three broad categories: those desired by the wife and not the hus-

266. Prior to 1923, when the grounds for divorce were equalized between men and women, women had a lower divorce rate, though when divorce and judicial separation were added together, their total termination rate was higher than men. See Act to Amend the Matrimonial Causes Act, 1923, 13 & 14 Geo. 5, c. 19 (Eng.). After 1923, women’s rate of divorce compared to men’s was over 50%, and rose above 70% in the 1980s. In 1986 the percentage of successful divorce petitions filed by wives was 73%. See Stone, Road to Divorce, supra note 6, at tbls.13.1 & 13.2.

267. There was much discussion in England and the United States when both moved from a fault-based to a non-fault-based system for divorce. In a fault-based
band, those desired by the husband and not the wife, and those desired by both parties. An imprecise overlay of these categories would be those cases in which the husband has committed a marital breach; the wife has committed a marital breach; where both have committed breaches; and where neither has done so. Even if one spouse did not seek the separation at the onset, by the time the suit reached the court, both spouses were likely to be either eager for or reconciled to the final decree. Yet under fault-based rules, at least one party, and sometimes both, had to appear unwilling to separate and unhappy at using formal legal mechanisms to make permanent that separation. Couples had to construct their cases around a model of fault and innocence, even when neither was at fault or both were at fault. Failure to construct the appropriate narrative of fault and innocence would result in the case being dismissed and the parties being forced to remain informally separated or to undertake a private separation agreement, both of which left them legally married and subject to the whims and anger of the other.

The importance of the petitioner maintaining an appearance of innocence and unhappiness at separating, even as he or she was filing suit, put the parties to a dissolution action in the crazy situation of having to say no when they really meant yes. At some level, all divorces are of couples in which both parties ultimately want relief; yet the court treated the divorce as a benefit to be meted out only to those petitioners who, unlike Elizabeth Bennet, fit the expected norm of elegant society and could say no enough times and in the right manner as to make everyone understand that she really meant yes. Moreover, a woman's language and manner had to conform to a complex code of social expectations and gender subordination in which her desires were never explicitly to be made manifest, because in a very real sense she was trading one bad situation for another, neither of

system, a spouse seeking a divorce would have to prove a marital breach on the part of his/her spouse. If that person had not committed adultery, deserted the family, or engaged in cruelty, the innocent spouse could prevent the divorce. In a no-fault regime, either party can unilaterally obtain a divorce, against the consent of the other spouse, regardless of innocence or fault. I find the shift to no-fault particularly interesting as a statement about the legal system's concern for innocent spouses. In a fault-based regime, an innocent spouse whose partner seeks a divorce can prevent it or demand property or custody concessions because he or she has not violated the marital contract. Under no-fault, the innocent spouse has no protection, and the party seeking to leave may do so without much cost. For interesting discussions of the move to no-fault in the United States, see Richard Chused, Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law (1994); Mary Somerville Jones, An Historical Geography of the Changing Divorce Law in the United States (1987); Lenore Weitzman, The Divorce Revolution (1985); B.H. Lee, Divorce Law Reform in England (1974); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 U. Cin. L. Rev. 1 (1987).

268. See supra notes 252-254 and accompanying text.
which was likely to represent her true desires. A woman seeking a dissolution generally wanted rid of her abusive and adulterous husband and she was willing to sacrifice property, perhaps her children, and certainly her future security to that desire. A man seeking a dissolution discarded an unfaithful wife. He also most likely retained the children and a significant economic advantage that allowed him the security to start a new family if he so desired.

For women, the court functioned much like the three-headed dog Cerberus who guarded the gates of Hell. A woman had to adhere to the strictest of social expectations which demanded she appear to be an innocent, abused wife who decried the step she was forced to take. She knew that any misstep might jeopardize her social and economic standing. A woman also had to satisfy legal rules which demanded that she be utterly without fault, but willing to take the drastic step of separating herself from her lord and master. She had to assume the contradictory role of passive victim of private wrong as she stepped into the public light to vindicate herself, a step that immediately marked her as undeserving because she was not content to remain in her proper sphere. Then she had to appease the economic reality which premised her reward on either her own labor or her own innocence, never on her own desire. A woman who successfully trod the minefield might receive her reward: separation from a violent or adulterous husband and freedom. But she received little else. A woman who failed lost all social, legal, and economic standing unless she could construct a narrative of greater fault on her husband’s part to preserve some informal social standing.

The following excerpt from a letter by Mrs. Allen, a fallen wife, to the husband she left is a poignant reminder of the fate of unsuccessful women.

It is now eight years since I saw my still beloved children, and the yearning desire I have once more to behold them, induces me to write to you. . . . Surely when in your prayers you ask to have your ‘trespasses forgiven, as you forgive others,’ you will not withhold yours now, from the Mother of your Children, however much you may consider it undeserved. I did not leave you for a life of gaiety, or pleasure, on the contrary toil and sorrow have been my portion ever since.

269. Elizabeth Packard, for instance, spoke of wanting to be married, not divorced, but she wanted assistance from the law to make her marriage function properly where her husband had behaved in violation of the norms. See Hendrik Hartog, Mrs. Packard on Dependency, 1 YALE J.L. & HUMAN. 79 (1988).

270. Allen v. Allen, J77-1-6. Hereafter, all cites beginning with J77 refer to the court files located in the Public Record Office (PRO) in Kew. J77 refers to the entire set of Divorce and Matrimonial Causes Court records from 1858 to 2002. These files were originally closed for ninety years. Now they are only closed for thirty years. The next number refers to the box in which anywhere from five to fifty petitions are contained. And the last number refers to the actual petition. All records surviving in the Allen case would be folded together under the box and case number (here 1-6).
She then explained that the man for whom she left her husband had died, that she had been unable to find employment, and she asked for the money necessary to return to England to obtain a situation as a housekeeper. Mrs. Allen only asked to occasionally see and communicate with her children. Mr. and Mrs. Allen had been married about twelve years when Mrs. Allen left with her lover. The adulterous couple lived in various English and Scottish locations prior to moving to the United States. She taught art to make ends meet. Mrs. Allen ended the letter with this plea: "Truly I thought my heart would burst. Is my crime so great that I am out of the pale of forgiveness by my nearest relations, and those calling themselves Christians?" Her husband's response to this letter was not to send her money to return home, but to file a petition for dissolution. He had her address for service of process and proof of her adultery. The court granted the dissolution, and the adulterous wife was allowed no financial support and no prospect of seeing her children again.

Yet if neither party was likely to seek reconciliation or would file for restitution of conjugal rights, what purpose did it serve Mr. Allen to obtain a dissolution at this time? It was most likely spurred by his desire to foreclose any possible financial claim she might make for support and to prevent her from seeing the children if she were able to scrape together the money to return to England. It is unclear whether the lawsuit was motivated by the wife's threats to return, or the opportunity that the new court allowed the husband to formally end their relationships so that he could remarry. Whatever his motive, however, the grant of the dissolution left the wife with no legal claim for financial assistance, or access to her children. As a final injustice, she would not be entitled to property from the estate of her deceased seducer since they were not married.

In addition to being able to maintain the necessary appearance of innocence to negotiate the delicate social and legal hurdles, the successful petitioner to a dissolution action reaped benefits that made the decision of who would file suit a serious strategic move. The double standard prevailed even more harshly when economic factors came into play, for husbands who proved the adultery of their wives and were granted a dissolution were better positioned—legally, eco-

Within each set of records there might be as few as four pages of a petition or as many as fifty pages containing petitions, answers, affidavits, and the court docket. The PRO does not number the individual pages within each case's records, so there are no further page references to be made. Furthermore, in my own research I simply took notes on each case, so I do not have the complete files available, though I do have substantial notes in my files.

Mr. Allen was a school teacher at the famous Walpole House, attended a few decades earlier by William Makepeace Thackeray and detested so strongly that he used it as the model for Miss Pinkerton's Academy in his novel Vanity Fair. Mr. Allen's wife was a drawing teacher, presumably at the same school.

272. The case was filed in February 1858.
nominally, and socially—than wives who divorced their husbands. Because a husband retained the property his wife brought to the marriage, even when he was at fault, the economic and legal reality conformed to social expectations that he remarry and support a new family. His former wife, however, was expected to fade into obscurity—the apparent fate of Mrs. Allen.273

These differences are the result of legal rules and social assumptions about the acceptability of adultery, as well as each person’s role within a marriage. We are familiar with the stories of fallen women cast out of their homes and social circles while men commit adultery with impunity. We also are familiar with the antics of couples scheming to construct their divorce cases by plotting for the husband to hire a prostitute, taking her to a country inn, and, lo, being discovered in bed together the next morning by a shocked chambermaid. The chambermaid then finds herself a star when she is served a subpoena, travels to London, and renders theatrical testimony on the stand. These images pervaded nineteenth- and twentieth-century English life and literature to such an extent that they influenced the lives of countless people. The record of Wallis Simpson’s second divorce, which forced a nation to face the realities and myths of marital breakdown when she then remarried King Edward VIII, followed a script so well acted that it competed with the best on West End stages.274

Fault-based divorce represents one of those anomalies in the law. The existence of the rule makes a statement that society dislikes the disruption of divorce, but the ease with which one spouse can commit a marital breach sends a clear signal that the law cannot stand in the way of those who truly seek to separate. Fault-based divorce laws did not deter marital termination; they merely adjusted the bargaining power of the parties.275 Very few angry couples, after a lengthy divorce proceeding, went home and made up when the court denied the decree on the grounds of collusion or failure to prove their case. Rather, the parties most likely committed more adultery, went on with their separate lives, or relied on the court’s dismissal to demand

273. Parliament considered at length prohibiting adulterous couples from marrying after a successful dissolution action, but declined in order to encourage seducers to marry the women they had ruined. While the discussion appeared to focus on incentives to make amends for the wrongs these men had done to seduced women, the law clearly encouraged remarriage for women so they would not be a burden to their ex-husbands. See 144 Parl. Deb. (3d ser.) (1857) 1702.

274. J162-1. Mrs. Simpson claimed the respondent committed adultery at the Hotel de Paris, Bray, in the County of Berks, with a Mrs. E.H. Kennedy. There is a transcript in which a waiter at the hotel states that he was working one of the rooms and that a man and lady occupied it and he took them their breakfast and they were in bed together. Although the Queen’s Counsel tried to intervene, the court rejected the evidence of collusion and granted the decree nisi in April, 1837. Simpson and King Edward were married less than two months later.

275. Though no one has directly proved the correlation, I believe that with the rise in no-fault divorce, and a relaxing of the courts’ concerns with collusion, the private separation deed has, not surprisingly, fallen into desuetude.
greater or fewer concessions in a private separation. When women's already meager bargaining power was combined with the socio-legal double standard, the new fault-based holistic family law did little to help individual women petitioners, and even less to improve women's position in a sex-segregated world.

It certainly did nothing for a wife, like Mrs. Allen, who was the only partner at fault. Consider the case of *Spratt v. Spratt & D'Auteri*\(^{276}\) in which the husband filed the initial petition for dissolution alleging adultery and desertion on the part of his wife. Mrs. Spratt had abandoned her husband to take up lodgings with Frederick D'Auteri, her husband's former pharmaceutical assistant. In Mrs. Spratt's answer we discover that the husband frequently abandoned his wife for days on end without money, that she was forced to ask Mr. D'Auteri for small loans, and that Mr. Spratt often sent his wife into their lodger's bedroom before he had arisen to request money. Mr. Spratt frequently asserted that Mr. D'Auteri "would do anything for" Mrs. Spratt.\(^ {277}\) We also learn in Mrs. Spratt's answer that Mr. Spratt had also been guilty of adultery, had fathered a child by a married woman, and had used instruments on his wife to procure an abortion. The couple had been married for nine years, though the allegations of adultery by both parties suggested they were both straying as early as five years into the marriage. An interim order of custody granted the seven-year-old daughter to the father, while the four-year-old son was allowed to remain with Mrs. Spratt's friends on condition that she not remove him.\(^ {278}\) The dissolution was granted after a jury trial, however, and the father received a final custody order for both children, thus rewarding the adulterous husband and not the adulterous wife.

Assuming that the Spratt's marriage had deteriorated, both parties had committed adultery, and they were living separate and apart for nearly four years, why did the husband bring suit and not the wife, and why then? It is likely that Mrs. Spratt could have met the higher burden of aggravated adultery by characterizing the abortion as cruelty, or casting the failure to support his wife as desertion. The timing is suspect; there must have been a reason she did not file first. The answer most likely is that her own adultery would have prevented the suit from being successful, even though her husband's adultery clearly did not prevent his suit from being successful. Even in a case of apparent equal fault, there were forces at work that prevented the effects of the law from being equal.

In a small sampling of twenty-four cases brought by husbands, twelve included responses by wives claiming that their husbands had driven them to commit the adultery through their own cruelty and adultery or denying the adultery altogether, and five of those twelve

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277. Id.
involved wives who filed a counter petition. Of those twelve, six were dismissed, four granted dissolution to the husband, one granted dissolution to the wife, and one was not continued. Moreover, the one case granting dissolution to the wife, Fisher v. Fisher & Fenner, involved a wife who filed her suit first; her husband's suit was an offensive response to her petition. It did not seem to matter to the court if the wife's adultery was the original marital breach as in Allen, or occurred in response to the husband's fault as in Spratt. Regardless of the cause, a wife's adultery would prevent her from obtaining a dissolution. And a wife's counter-allegation of adultery might be successful only if she disproved the charge against her. More likely, she would only succeed in having the case dismissed.

Dismissal, however, was no great victory to the wife. In the six cases where the court dismissed the husband's suit, presumably because the fault of both indicated collusion or condonation, the likely outcome would have been an informal separation or a private separation agreement that would place the wife in a dicey legal limbo. The parties would remain legally married in name with the husband owing his wife support, but at the same time retaining a proprietary interest in his wife's chastity. This control enabled him to fully divorce her later if she formed a liaison with another man. It was understood that separated wives had to remain chaste because their

279. This was a small sampling of cases obtained for other reasons, but a close analysis of the petitions showed that a large percentage of these wives not only had reason to leave, but fought the petition. Because they involved claims of custody, usually by mothers, the number of cases by husbands was low.

<table>
<thead>
<tr>
<th>Outcomes</th>
<th>Wife Opposed</th>
<th>W filed suit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce Granted</td>
<td>12</td>
<td>3</td>
</tr>
<tr>
<td>Divorce Abandoned</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Divorce Dismissed</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Other - RCR</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>24</td>
<td>7</td>
</tr>
</tbody>
</table>

*husband's suit dismissed and wife's counter-suit granted in one case

280. The twelve cases are Allen v. Allen & D'Arcy, J77-1-11 (dismissed); Carter v. Carter & Saunders, J77-9-60 (n/c); Cubley v. Cubley & Smith, J77-9-50 (granted for husband); Fisher v. Fisher & Fenner, J77-18-16 (granted for wife); Gibson v. Gibson, J77-20-32 (dismissed); Redfern v. Redfern & Balse & Browne, J77-45-42 (dismissed); Ryder v. Ryder & Watson, J77-44-35 (dismissed); Seddon v. Seddon & Doyle, J77-50-87 (dismissed); Spratt v. Spratt & D'Auteri, J77-49-20 (granted for husband); Stacey v. Stacey & Baldwyn, J77-55-216 (granted for husband); Thompson v. Thompson, J77-54-38 (granted for husband); Watson v. Watson & Wilkinson, J77-59-84 (dismissed). As a relatively random selection of petitions filed by husbands which were opposed sufficiently to have claims of custody, roughly half included counterclaims by wives of their husbands' adultery and cruelty.


282. See discussion of the difficulties of private separation, supra notes 70-71 and accompanying text. See also Norton, A LETTER TO THE QUEEN, supra note 61, at 38-40.
husbands could obtain a full divorce and be relieved of the obligation to support them if they later succumbed to the temptations of another man. This was true even if the wife had separated with the consent of a husband who had committed adultery himself. The social hypocrisy that permitted a separated man to live with another woman, but did not allow a wife to live with another man, stemmed in part from the legal double standard that allowed men to divorce their wives for simple adultery, but not vice versa.

The difficulty for women was compounded by the greater barriers they faced to earning an income. A woman who owned no property often required a man for support. If she did not have a father, brother, or son, and turned to another man, she risked divorce and the loss of what little she had from her first marriage. And if her new man would not marry her and take over her support she would be left in the position of Mrs. Isabel Carlyle, heroine of the wildly popular *East Lynne*, who was divorced by her husband for running off with another man.283 When the divorce was final, her seducer, who had just come into his own fortune, refused to marry her because now that he had secured his title it would be unbecoming for a man of his position to marry a divorced woman.284

This double standard was exacerbated by the husband's legal obligation to support his wife so long as she remained chaste. The obligation would cease upon her remarriage or commission of adultery. A separated wife, however, had no proprietary interest in her husband's post-separation chastity; even if she proved his adultery, that alone would not be grounds for a divorce. Because the one-sided obligation of support was premised only on the woman's behavior, her adultery had far greater implications for her future life as well as her treatment before the new court than did her husband's. A woman's adultery was an irretrievable fault upon which her entire future and her success before the court might depend, while a husband's adultery was merely an aggravating factor. Regardless of who initiated the divorce, society's aversion to female adultery meant that even where both had been guilty, the wife's trespass was more likely to influence the outcome than the husband's adultery. Whether the court dismissed the action or granted the husband's petition, mutual adultery meant that the wife would be condemned to a future of unimpeachable behavior or be cut off from all support. This applied even though her husband's cruel and adulterous behavior may have driven her out of her home. The only remedy to her was a successful divorce that she initiated.

However, even success did not always grant security. The double standard also disadvantaged wives when they initiated suit. In a somewhat random sampling of eighty-nine cases brought by wives, only one

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283. *MRS. HENRY WOOD, EAST LYNNE* (Richmond, West & Johnson 1864).
284. *Id.* at 100.
included an answer alleging the wife’s adultery; two were followed by a separate suit by the husband alleging the wife’s adultery; two were in response to suits by the husband for dissolution which alleged adultery; and ten alleged misbehavior, violence, intoxication, or other incompatibilities that drove the husband to his suit. The remaining seventy-three cases were either unopposed or included general denials of marital fault by the husband. If we omit the five cases in which both spouses filed petitions, and compare the success rate of cases with counter-allegations, women suffered from the allegations of fault more than husbands. This was true even when the fault was not adultery, but rather abusive language or intoxication. Of the eighty-four suits by wives that did not involve counter suits by husbands, a simple allegation of misbehavior by the husband in his answer dropped a wife’s success rate from 77% to 55%. If we include the double-suits, a wife’s success rate dropped to 44%. Husbands whose wives made counter-allegations of their husbands’ marital faults saw a relatively small drop in success rate from 50% to 43%. Although wives were more likely to have husbands who did not allege some aggravating factor on the part of their wives, when husbands made such allegations, the effect on the outcome was substantial.

287. Redfern v. Redfern & Balse & Browne, J77-45-42; Ryder v. Ryder & Watson, J77-44-35. These two “double-suits,” plus the three identified in note 286 above, were also included in the sampling of twenty-four petitions filed by husbands listed above.
288. A summary of the outcomes of these petitions is as follows:

<table>
<thead>
<tr>
<th>Petitions by Wives</th>
<th>Outcomes</th>
<th>Husband Opposed</th>
<th>H filed suit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dissolution Granted</td>
<td>42</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Separation Granted</td>
<td>21</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Divorce Abandoned</td>
<td>8</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Separation Abandoned</td>
<td>14</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Divorce Dismissed</td>
<td>3</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Separation Dismissed</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other - RCR</td>
<td>1</td>
<td>0</td>
<td>1*</td>
</tr>
<tr>
<td>Total</td>
<td>89</td>
<td>11</td>
<td>5**</td>
</tr>
</tbody>
</table>

*wife’s suit dismissed and husband’s granted
**3 suits wife filed first, 2 suits husband filed first.

289. Of the seventy-three that did not include counter-allegations by the husband, a wife’s success rate was 79% (fifty-six granted and fifteen abandoned or dismissed). Of the eleven cases with counter-allegations of the wife’s fault, a wife’s success rate was 55% (six terminations granted and five abandoned or dismissed). If we include the double-suits the number is even smaller, 47% (seven terminations granted and eight abandoned or dismissed).
290. Or from 50% to 33% if we include the double-suits.
Of course, even at their lowest success rate, wives were successful more often than husbands, so one is tempted to claim that the court was in fact much more responsive to women than men. But this overlooks the fact that men and women were differently situated. A quick perusal of Mrs. Allen's case reveals that, in a fault-based regime, unfaithful wives were relegated to the margins of society, cast off penniless and friendless. Unfaithful husbands could take the marital property and begin a new life, and only a few would be subject to a relatively small alimony obligation. The harshness of the legal and social response to female adultery would certainly operate as a deterrent to wives who were in unhappy marriages.

The large number of husbands who were successfully divorced by their innocent wives because of the husbands' aggravated adultery shows the extent to which women were forced to adopt traditional female roles of passivity, chastity, and innocence. When the wives' entire futures depended on allegiance to their marital vows, they were likely to restrain their own desires. It would be harder to prove they were at fault, and the small percentage of successful cases brought by husbands for their wives' adultery reflects this deterrent effect of the law. Because few consequences attached to adultery by husbands, there was little deterrence to the activity and thus more successful cases were brought by wives. Women's high success rate overall can be explained by the lack of deterrent effect of the law on male breach and men's lower success rate can be explained by the deterrent effect of the discriminatory divorce law on women's behavior. Together, women suffered the dual injustice of facing harsher penalties for infidelity than men, combined with far greater pressure to conform to a narrow range of domestic behavior.

Moreover, those differences are further exacerbated by counter-allegations of misbehavior when the parties began from different starting points due to the differential effects of the law. Female petitioners' success rate dropped twenty-two percentage points when husbands alleged that their wives were culpable because of misbehavior like abusive language and intoxication. This behavior did not rise to the level of marital fault sufficient to justify a divorce or separation. In contrast, male petitioners' success rate dropped only seven percentage points when their wives alleged that they were guilty of cruelty or adultery, allegations that would constitute marital fault sufficient for a separation or divorce. Thus, wives' counter-allegations of marital breach had less effect on husbands' petitions than husbands' counter-allegations of character flaws had on wives' petitions.

291. Wright, Untying the Knot, supra note 42, at 996 tbl.5.
292. My data show that only about 10% of wives who obtained their divorces or separations were actually awarded alimony, so 90% of guilty husbands got off without any financial obligations. See discussion infra notes 352-376 and accompanying text.
293. Supra note 289 and accompanying text.
294. Supra note 290 and accompanying text.
We can only conclude that the court was marching to the tune of the rest of Victorian society; it viewed an ill-tempered wife to be worse than an adulterous and violent husband.

This somewhat random sampling was compiled because I was analyzing cases dealing with requests for custody of children and not looking specifically to cases involving vigorous defenses. Nevertheless, the data show that a significant percentage of the cases brought by husbands against their wives for adultery (twelve out of twenty-four) may have occurred because the husband drove the wife out, or because they had mutually moved on to other relationships (i.e. both were at fault). Only a relatively small percentage of cases brought by wives included counter-allegations that the wives had contributed to the separation (fourteen out of eighty-seven).

This kind of careful attention to the petitions provides a deeper understanding of the raw numbers which merely revealed the number of cases filed by husbands and those filed by wives. Though wives filed more termination petitions, and may have had a higher success rate than husbands, the nature of their allegations were quite different. The effects of social expectations were clearly felt in the court's treatment of those petitions, and the different financial and custodial consequences meant that the effects of divorce were quite different. We cannot simply say that the court was good for women because more women found some relief there.\footnote{295. See Wright, Untying the Knot, supra note 42, at 992-96 tbls.1-5. Wives filed 630 divorce petitions, 532 judicial separation petitions, twenty-one annulment petitions, and sixty-four restitution of conjugal rights petitions for a total of 1247 petitions in the first nine years (these numbers are approximations from the numbers of petitions actually viewed multiplied by 4.26 to reach the total number filed). \textit{Id.} Their success rates for divorces were 70.42\% and for separations 40.19\%. \textit{Id.}}

In a case such as the Spratts', numerous forces were operating to influence which party sought the divorce, how much bargaining power each had, and whether the resolution would be ultimately satisfactory for either or both parties. The overwhelming numbers prevent me from individually analyzing each case, but certain patterns do emerge when we view the data as a whole. One axis that is particularly fruitful is length of marriage, not so much because older couples have different expectations than younger couples, but because age tends to affect attitudes toward reconciliation, economic resources, age of children, and preferred remedies.\footnote{296. I went through the petitions, answers, and affidavits to glean information about the people who were using the court, how long they had been married, how many children they had, their occupations, the grounds they gave for the marital breakup, and the relief they requested. I looked at petitions covering approximately nine years. Then I went through the court's docket, examining the process the court used to resolve the cases, how long it took, how often it granted alimony or custody, how often a jury trial was used, who the lawyers were, and the final outcomes. The docket consisted of seven folio books, of 350 pages each, which recorded all pleadings filed, all hearings, and the substance of all orders for the period January 1858 through April 1861. To date, I have been able to analyze the court docket only for}
and common stereotypes about divorce, adultery, and desertion onto nineteenth-century family breakdown, we might construct likely scenarios for different marriages. We might imagine that a wife in her first five or so years of marriage would have an infant child or two. When her marriage began to break down she would petition for a divorce rather than a judicial separation in order to remarry and, if possible, she would return to her parents' house for their financial assistance in the marital termination action. Her youthful idealism would make her unwilling to compromise on her legal rights and she would have every intention of starting anew in the marriage market. By contrast, a wife married between ten and twenty years would be likely to have some older children, might possibly receive the income from the older children's wages, and would be financially unstable if she were forced to support the entire family on her own. If her husband committed adultery, she would use a termination action for strategic reasons, primarily to get custody, alimony, or property settlements. She might be more willing to try to reconcile or seek other resolution mechanisms to spare the children, avoid the costs, or sidestep publicity. But property would be a primary issue if she were to maintain the family intact. And a wife at the later end of her marriage, greater than twenty years, would seem the most indifferent to whether she received a divorce or a judicial separation as she would have little likelihood of, or interest in, remarriage. She would be most successful because she would have the most economic resources at her disposal and her children would be grown so the family's expenses would be diminished. She would also be less interested in a property settlement if she had her own business or had some family or friends to support her because her expenses would be low.

Only a few of these assumptions are borne out by the early court's records. This may be because they are tinged with modern sensibilities or because additional social forces in the nineteenth century make many of these assumptions too simplistic. The data suggest that many of the assumptions just hypothesized are not justified, and that other social forces may have influenced the differences we see among different groups of wives.

the first three and a third years of the court's existence, but the docket fills out information not available in the petitions. Much of this data is further examined in Wright, Untying the Knot, supra note 42.
**Table 1: Wives: Length of Marriage, Grounds, and Outcomes (1858-1866)**

<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>Cause of Action</th>
<th>Grounds</th>
<th>Outcome - Div.</th>
<th>Outcome - J/S</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Divorce</td>
<td>J/S</td>
<td>Other</td>
<td>AC</td>
</tr>
<tr>
<td>&lt;5</td>
<td>25</td>
<td>25</td>
<td>6</td>
<td>20</td>
</tr>
<tr>
<td>5-10</td>
<td>34</td>
<td>28</td>
<td>5</td>
<td>21</td>
</tr>
<tr>
<td>10-15</td>
<td>43</td>
<td>19</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>15-20</td>
<td>20</td>
<td>18</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>20-25</td>
<td>15</td>
<td>15</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>25-30</td>
<td>6</td>
<td>11</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>&gt;30</td>
<td>2</td>
<td>9</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>unknown</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Total</td>
<td>148</td>
<td>127</td>
<td>23</td>
<td>99</td>
</tr>
</tbody>
</table>

297. This table breaks down the petitions by length of marriage, the grounds alleged for the dissolution petition, the grounds sought, and the outcome. The possible causes of action are a divorce, a judicial separation (J/S), or other (which includes annulment and restitution of conjugal rights). The grounds identified in the table are adultery (A), adultery mixed with cruelty (AC), cruelty alone (C), adultery or cruelty mixed with desertion (AD/CD), desertion alone (D), or other (which included the rare grounds of incest, sodomy, or bigamy). There were three possible outcomes; the petition could be granted (Gtd), dismissed (Dism), or abandoned (N/C). And I broke those outcomes down for both divorces and judicial separations since the outcomes were dramatically different. The total number of petitions in each age range is listed in the last column of the table.
According to the petitions, young wives were just as likely to request a judicial separation as a divorce (twenty-five & twenty-five), they would not continue more than half of their termination actions (twenty-seven), and cruelty was by far the most common complaint (thirty-seven), either alone or mixed with adultery. As the marriage progressed, ranging from five to ten years, the number of divorces requested outpaced the number of judicial separations (thirty-four to twenty-eight), but the number of cases not continued or dismissed was still higher than those granted (thirty-three to twenty-nine). Although there were more couples in this range than any other, the pattern for success rate and grounds most closely followed that of the youngest marriages. Slightly more than half (thirty-four out of sixty-seven) requested a divorce, and nearly half of all termination actions (thirty-three) were abandoned or dismissed. A notable distinction between the younger marriages and these cases is the increase in desertion as a ground for the divorce (nineteen out of sixty-seven compared to six out of fifty-six). In both groups, these couples were likely to have small children and to have fewer financial resources than older couples, and a separation (either formal or informal) was likely to have caused significant disruption to their lives.

Marriages between ten and fifteen years showed a noticeable shift in the relief requested. These wives were more than twice as likely to request a divorce than a judicial separation (forty-three to nineteen) and the overall success rate was significantly higher than the rate of non-continuance and dismissal (thirty-seven to twenty-five). These wives seemed particularly serious about wanting to obtain a full divorce, and they were least likely to abandon their case before completion. They alleged the most common marital faults—adultery mixed with cruelty—at a rate more than twice any other ground. These women are a particular anomaly. If the children's wages were critical to their livelihood, or their husbands had deserted them, we would imagine that these women would have less property with which to pursue the divorce. While most successful wives were entitled to have their costs paid by their husbands, the number of desertion cases (sixteen out of sixty-five) indicates that nearly 25% of these wives could not rely on this relief.

As we move into the later stages of marriage, fifteen to twenty-five years, the numbers of divorces and judicial separations shifted back toward equal numbers (thirty-five and thirty-three), and the success rate continued to be high (forty-two granted to twenty-six abandoned and dismissed). The most notable shift is in the increase in desertion claims and the relative decline in claims of adultery (twenty-three de-
assertion to thirty-three adultery). While the rate of success in the termination was roughly the same as for wives married ten to fifteen years, the number of suits dismissed by the court was at its lowest (five). Hence, these women may have been least likely to collude with their husbands, or they may have had the strongest claims. Did these women plan to remarry? Did they ask for the divorce simply because they could? Did they use divorce to seek alimony or property settlements? These women had the highest success rate of any set of claimants, yet they accepted a judicial separation at almost the same rate as divorce.

For women in the lengthiest marriages, over twenty-five years, the numbers shifted dramatically toward a greater percentage of judicial separations over divorces (twenty to eight). This confirms the stereotype that older women were not likely to be interested in remarriage. Adultery was the single most common ground given, with desertion close behind (fourteen to ten). Ironically, however, these women had one of the lowest success rates (37%), even though they were requesting primarily judicial separations.\textsuperscript{300} This may be because the court felt that the only practical result of a separation was to protect a wife's property, and that this could better be achieved through a protective order. Curiously, one would imagine these women to have had the highest success rate. They would not be likely to seek a divorce or judicial separation unless their relationships had been eroding for many years. They would have had a long time to amass sufficient evidence of marital fault.\textsuperscript{301} Since desertion was an important ground, one would think the court would have been liberal in granting these judicial separations. However, the low success rate and the high number of property orders to this group of petitioners indicate that the court preferred granting protective orders rather than separations to these women.\textsuperscript{302}

In viewing the data in its entirety, we see that, among the youngest wives, the high rate of judicial separation compared to divorces is quite odd (twenty-five and twenty-five), given the logical conclusion that younger women likely would be more interested in possible remarriage than their older counterparts. But to the extent these women were imbued with some sort of Victorian romanticism that

\textsuperscript{300}Although a judicial separation would prevent the errant husband from returning and demanding conjugal rights, it essentially foreclosed any sexual activity by these women. They could be charged with adultery if they took up with another man after their separation and might lose any alimony they had won in the separation suit. The preference for property orders over judicial separations further exacerbates the problem, most likely condemning many older women to celibacy.

\textsuperscript{301}This cuts both ways because there could be many instances in which adultery or cruelty that was not ongoing would be considered condoned by the innocent spouse and would not constitute grounds for termination.

\textsuperscript{302}See Wright, Untying the Knot, supra note 42, at 1006 tbl.17 (showing that women married five to ten years and twenty-five to thirty years had significantly more property orders than other wives).
rejected the idea of remarriage, the high rate of non-continuance may indicate that some other resolution took place. That resolution might have been a private separation or a reconciliation. To the extent dismissals by the court might indicate likely collusion, the rate was high enough among young couples to perhaps scare many collusive couples into dropping their petitions before they reached a final determination. The number of dismissals dropped dramatically for older marriages, which is difficult to understand. Because dismissal would occur if the petitioner failed to prove her case, if both were guilty, or condonation or collusion occurred, a low dismissal rate would indicate that these petitioners had stronger cases. Were older couples less likely to collude than younger couples or were older couples more likely to have adequate proof of marital fault?

Thinking back to the Spratt and Allen cases, we must consider the individual positions of these women. Under the prevailing legal rules requiring proof of aggravated adultery, wives had four choices, in ascending order of permanence, when seeking termination of their marriages. First, if their husbands had deserted them for at least two years and they had wages or other income they wished to protect, they could easily obtain a protective order for property that allowed them to continue to support themselves without fear of losing their livelihoods to returning husbands. A protective order was inexpensive, quick, and protected their income, but it gave them no other legal protections, such as custody of their children, the right to remarry, return of property they brought to the marriage, or any access to property earned during the marriage. Wives continued to live in a legal limbo, married in name only, with no financial support from their deserting husbands, and protected only in future earnings. For women whose husbands had moved to America or Australia, and who perhaps had entered into bigamous second marriages, or who had voluntarily agreed not to molest them, the property order gave them a certain modicum of independence, but little ability to form new intimate relationships.

303. Anne Bronte's novel, The Tenant of Wildfell Hall, tells of a young woman who had left her cruel and adulterous husband and taken their child with her, but while in hiding she never imagined herself married to another and divorce did not appear an option. Anne Bronte, The Tenant of Wildfell Hall (Harcourt 1962) (1848). In fact, when her dissolute husband was lying on his deathbed, she returned to nurse him until death, not because she wanted a reconciliation, but because her duties as a wife insisted that she remain committed to him until death. See also Wright, The Crisis of Child Custody, supra note 19, at 243-45.

304. See supra notes 270 & 276 and accompanying text.

305. The reality was, however, that these women could easily appear single or widowed and many may have remarried and hoped they would not be caught. See Wright, Untying the Knot, supra note 42, at 967 n.323. And this was at least part of the social ethos of the time, as we see it reflected in novels like Thomas Hardy's Mayor of Casterbridge and the fact that of 543 petitions examined that were filed by both husbands and wives, allegations of bigamy appear in ten, or nearly 2%. While that number is quite small, it only includes those cases in which bigamy was proved through
Second, for women in the upper and middle classes, and especially those with some property, a private separation agreement executed by the husband and trustees for the wife would have some binding legal authority. Many of the property provisions of these deeds were enforceable in Chancery, but provisions dealing with custody or upbringing of children were not. Most important, the deed was only enforceable so long as the wife remained chaste. She continued to be married to her husband in name, so she could not remarry. If she chose to take up relations with another man her husband then would have the power to divorce her entirely. These deeds really only worked to the extent the husband agreed to comply with their terms; if he chose to violate them, however, in issues regarding children or cohabitation, the courts were reluctant to enforce the wife's rights.

Third, a judicial separation would give women a right to support as well as a return to *feme sole* status for future earnings, and would be used mainly by women who presumably were not in a position to remarry. Their reasons could be that they were uninterested in remarriage or were unable to meet the burden of proving aggravated adultery. These women formed future intimate relationships at great risk of losing financial support and being divorced in a later action, at least in those cases where their husbands were providing such support. But while the separation granted them physical relief from abusive and adulterous husbands, and protection for earnings (though not property), the separation gave them little else.

Fourth, a full divorce with the right to remarry obviously provided wives with the most legal protections, but they were costly to obtain, did not guarantee financial support or custody of children despite the articulated rules to that effect, and placed the wives in a tenuous social position. They would not get return of any property they brought to the marriage, so remarriage might be difficult. The odds of receiving alimony were less than one in eleven. However, the records indicate that most of the women who successfully brought dissolution actions had been suffering violence at the hands of their husbands for many years, with bouts of adultery scattered throughout, and most had been forced to leave their husbands' house at least once prior to filing their petitions. They had been threatened with knives, canes

evidence of subsequent remarriage. I suspect that many of the desertion cases included bigamy, especially if one spouse had left the country. There were 121 of the 543 petitions that alleged desertion, or nearly one in four.

306. They were enforceable only in Chancery because they were the product of the court's equity arm. Staves, *supra* note 69.


308. See Wright, *Untying the Knot, supra* note 42, at 976-78.

309. See discussion on alimony *infra* tbl.3.
and pistols, pokers and fire irons; they were dragged downstairs and beaten with fists; they were routinely given venereal disease, doused with the contents of chamber pots, forced to undergo abortions, insulted and demeaned, locked out of the house at night, and had their jewelry pawned or stock in trade stolen. Thus, their commitment to obtaining the dissolution was quite high, and most appeared willing to obtain freedom at any cost.

It is this cost that is most troublesome, however. To say that a wife could not ever leave her husband is unquestionably harsh and unfair. But to say that she could leave her husband, but it was going to be difficult, costly, and dangerous, is perhaps even worse. If a husband drove his wife into the arms of another man, she lost everything. If she colluded in the action, she would be left with the vagaries of a private separation. If her children were over age seven, she lost them, even if she was innocent. After she walked the minefield of social and legal barriers, even the innocent wife was likely to lose custody of her children, receive no property settlement from the property she brought to the marriage, and most likely would not get any alimony. If she was lucky enough to get alimony, she had best be on her guard; remarriage or cohabitation with another man would terminate her husband's future obligations. If she had a bad temper, her case against her guilty husband would suffer. Wives were ultimately strong-armed into complying with complex social and legal expectations of innocence and forbearance while husbands were given the benefit of the doubt in nearly all legal determinations.

This is not to say that all wives were innocent victims and all husbands abusive adulterers. Approximately half of the divorce petitions brought by husbands were not contested and over 60% were granted. Many women found sufficient incentives in the arms of other men to risk being divorced and left destitute by their husbands. Husbands were entitled to a divorce only on the grounds of adultery and many women, like Mrs. Allen, fell in love with other men and chose to leave the safety of social and legal propriety for life with someone more compatible. But as Mrs. Allen's case revealed, adultery by a wife had very different consequences than adultery by a husband. An adulterous wife would be divorced, lose all rights to property and children, and would be able to secure a living only through her own labor or the generosity of her seducer. Mrs. Spratt's lover, Mr. D'Auteri, like Francis Levison in Mrs. Henry Wood's novel *East Lynne*, may have felt some reluctance in marrying a divorced woman, even if the divorce resulted from their own seduction. We see in *Spratt*, as in the novel, that after some time these seduced women are abandoned by their seducers and turn to a life of prostitution or menial labor to survive. In fact in *Spratt*, it appeared not to be Mrs. Spratt's affair with

311. Wright, *Untying the Knot*, supra note 42, at 996 tbl.5.
D’Auteri, or even her moving into lodgings with him that precipitated the divorce; rather, it was after she broke with D’Auteri and started seeing numerous men that Mr. Spratt felt it necessary to divorce her. A husband who left his wife for another woman, on the other hand, took his income and his social respectability with him. If his wife divorced him, he did not rely on an offer of remarriage or on the generosity of his mistress for support.

B. Custody of Children

Interpreting the data surrounding child custody orders is particularly difficult. Although the court had adopted a rule that the innocent spouse was entitled to retain custody, other considerations like the tender years doctrine, pre-existing rules on forfeiture of custody developed in the Chancery, and the realities of desertion and support make custody difficult to analyze. For instance, the substantive rule that prevailed in the Chancery before the new court was formed held that fathers would retain custody unless they were a danger to the child’s life and limb, even when the mothers were innocent. That presumption was difficult to break, especially by a court that had limited ability to amend final orders. Thus, in one case, a final custody order was denied to a mother because the court wanted the freedom to modify the order if the father were to ever return from the United States and take an interest in his children, even though he had abandoned them and entered into a bigamous marriage in his new country.

Rhetoric around the tender years doctrine slowly emerged during this time to recognize the bonds between mothers and infant children. We would therefore expect to see a greater percentage of custody orders for mothers of infant children than for mothers of older children, but such was not the case. Moreover, it is difficult to determine how many families were split up, with the youngest children remaining with the mother, and the older children being placed with the father or at school. The Spratts’ children, for instance, endured during the litigation, with the father obtaining custody of the seven year old and the four year old remaining with friends of the mother who allowed both parents access. Mrs. Spratt was eventually denied all access to both children even though she had had custody of both for the four years of the separation.

315. See discussion of tender years doctrine supra note 193 and accompanying text.
316. See infra tbl.2.
318. Id.
case, Wallis v. Wallis,\textsuperscript{319} the wife successfully obtained a judicial separation for her husband's cruelty and was awarded alimony, but was given custody only of an infant daughter and not of her three elder sons. The father was given access to his daughter once every six weeks, and the mother was granted access to her three sons at the same interval, though she was entirely innocent.\textsuperscript{320}

In addition, most of the men who deserted their wives also deserted their children, while few women who left their husbands left their children behind. According to the petitions that eventually resulted in a custody order, even the women who were at fault generally left their husband's domicile, taking the children. In the cases that produced the most conflict over custody of the children, the majority were in the possession of the mother at the time of suit. But one must remember that actual physical care of a child does not translate into legal rights if the father chose to challenge the mother's custody or child-rearing decisions. Moreover, a legal regime that failed to protect maternal custody except in very rare circumstances created an imbalance in the marital relation that gave fathers autonomy and power which they could wield against mothers if they were otherwise unhappy with the way their marriage was going.

One poignant case shows the difficulty mothers had in protecting their children. In Ryder v. Ryder \& Watson,\textsuperscript{321} the Honorable Frederick Dudley Ryder, the younger brother of the second Earl of Harrowby, sued his wife of twenty years for dissolution. Ryder alleged that she had committed adultery with the rector of the local parish, and had subsequently given birth to the rector's illegitimate child. The parties were married in 1839 and had ten surviving children. Mrs. Ryder's answer to the petition denies the adultery and makes her own very serious allegations. She revealed that while she was pregnant with her ninth child in 1853, Mr. Ryder committed incest with their eldest daughter. Upon discovering the incest, Mrs. Ryder refused to sleep with her husband and revealed his incest to her nurse as insurance should she die in childbirth. After she confronted her husband with the information she had, he criticized her for, as he put it, "awakening the perceptions of [their daughter] to the revolting and fearful character of her father's said offence and for reproaching him with the injury to her position and prospects in life, which it would occasion."\textsuperscript{322} When Mrs. Ryder refused further intercourse with her husband, he frequently forced himself on her.

\textsuperscript{319} J77-58-15.
\textsuperscript{320} Id. While I would be loath to suggest that all spouses who are responsible for the breakdown of a marriage would be unfit parents to have custody of their children, there are serious fairness issues in a legal scheme that grants an innocent mother access to her three sons for the same remarkably brief periods as the violent and abusive father has to the infant daughter.
\textsuperscript{321} J77-44-35.
\textsuperscript{322} Id.
Between 1853 and 1857, the Ryders continued to live in the same house and the husband forced himself on his wife numerous times, resulting in a tenth child, who was born in 1855. Throughout this period, Mrs. Ryder begged her husband to leave the family. Finally, through the intervention of relatives, Mr. Ryder consented to reside permanently abroad, leaving his wife in charge of their family and property. A deed of separation was then prepared, but Mr. Ryder ultimately refused to execute it. He returned in the fall of 1858 and again took into his own hands all the rents and profits of the family estates. He even withdrew money his wife held in trust for the Parish Clothing Club, which she eventually had to replace by selling a portion of her clothing. In the spring of 1859 Mr. Ryder proposed to renew cohabitation, and threatened to take the children from her if she refused. In June of that year, Mr. Ryder returned to their house with his brother and brother-in-law and again made the offer that they resume cohabitation. Upon her refusal, he took three sons and three daughters, leaving only the eldest daughter with her (the three eldest sons were at school). A month later, Mr. Ryder returned in the same company, and with two hired men, and demanded the eldest daughter, but agreed to return the two youngest daughters if she complied. Mrs. Ryder refused. The eldest daughter was forcefully removed and the mother was left alone, losing physical custody of both her female toddlers to a husband who had admitted to his sexual abuse of his thirteen-year-old daughter. In response to Mr. Ryder’s petition for dissolution, Mrs. Ryder filed her own petition for dissolution, alleging the above incidents and praying for custody of all ten children, even though the eldest was at the time twenty years old and two others were over fourteen.

At the end of the day, both cases were consolidated and ultimately dismissed. An interim order on custody left all children at school or at their uncle’s house (the husband’s brother), with access to be granted to both mother and father. In this case, the father had committed incest when his eldest daughter was no more than thirteen years old, yet the mother cohabited with her husband for another four years trying to persuade him to leave. It was another two years after they separated before the husband filed suit and formal legal channels were followed. Although the wife clearly had grounds to obtain a Parliamentary divorce, as well as the financial means, she chose not to seek legal intervention, relying instead on family pressure to effectuate a private separation.

The similarities between this case and the case of Abigail Bailey, written about at length by Hendrik Hartog in his most recent book, *Man and Wife in America,* make it tempting to imagine that the same

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323. The wife revealed in her answer that she was entitled to rents and profits from her father’s estate of £3000 per year, and this would not include any property owned by the husband in his own right.

lengthy processes were at work in Mrs. Ryder’s mind as in Abigail Bailey’s mind. Abigail Bailey married her husband, Asa Bailey, in 1767, and they had fourteen children together.\textsuperscript{325} After sexually assaulting two servant girls early in their marriage, Asa turned his interests to their oldest daughter, Phoebe, when she was about sixteen years old.\textsuperscript{326} Hartog recounts, from Abigail’s memoirs, the agonizing deliberations she went through in trying to reason with her husband to get him to leave peacefully and privately, and how long it took before she resolved to seek legal assistance or reconcile herself to a divorce.\textsuperscript{327} In the case of Mrs. Ryder, the husband initiated the legal action,\textsuperscript{328} perhaps because she had indeed had an affair with the rector, but more likely because he hoped to preempt a suit by his wife. However, it is quite clear that Mrs. Ryder, like Abigail Bailey, wanted her husband to depart quietly, leave the family in peace, and not force her to have to turn to the public world of law and courts to protect her eldest daughter.\textsuperscript{329}

In comparing the cases of Ryder and Bailey, we can clearly discern the differences between English and American law on child custody. Hartog was correct in noting that an American court, faced with Asa Bailey’s incest, would have readily granted custody of the children to the mother.\textsuperscript{330} An English court actually faced with Frederick Ryder’s incest, however, refused to grant custody to the mother and instead left the children with the husband’s brothers, the Earl of Harrowby and the Honorable Granville Dudley Ryder, both of whom had participated in the forcible removal of the children from their mother’s home.\textsuperscript{331} In deciding Mrs. Ryder’s motion for interim custody, the court left the sons at school, the remaining children at the homes of their uncles, and refused to make any order as to the three children over age fourteen.\textsuperscript{332} More importantly, the court held that the serious charges leveled by the parties against each other were not factors

\textsuperscript{325} Id. at 44-52.
\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} Ryder v. Ryder & Watson, J77-44-35.
\textsuperscript{329} While few people would choose immediately to go to court against a spouse, we must agree with Lord Lyndhurst that most women would choose litigation only after all other channels failed. 142 Parl. Deb. (3d ser.) (1856) 415. That tendency, which may or may not be true for husbands, certainly makes one wonder how many women would have had the grounds for a divorce but chose not to seek formal termination of their marriages at all.

\textsuperscript{330} Hendrik Hartog, Abigail Bailey’s Coverture: Law in a Married Woman’s Consciousness, in LAW IN EVERYDAY LIFE 63-108 & cases cited n.52 (Austin Sarat & Thomas R. Kearns eds., 1993).

\textsuperscript{331} Ryder v. Ryder, 164 Eng. Rep. 981 (D. 1861). The 1804 case of De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804), the first inter-spousal custody suit brought in an English court, also involved a father who had forcibly removed a child from its mother, and he too was granted permanent custody. See also Wright, De Manneville, supra note 36.

\textsuperscript{332} Ryder, 164 Eng. Rep. at 981.
to be considered in making the interim custody order. The court felt that doing so might improperly influence the later proceedings. Allegations of incest were thus deemed irrelevant in determining interim custody. In rejecting the Chancery rule that would remove a father who posed a danger to the life and limb of his child, this court apparently viewed the husband's brothers' homes to be safe havens from the possible abuse of the father.

In cases in which the custody of the children became a decided source of conflict, the court often separated the children as in Spratt, ordered them into the homes of relatives away from both parents as in Ryder, or ordered them to remain in the interim where they had been taken by the father, even though he had had threats of taking the children away to force his wife to comply with demands for property or to overlook his adultery. In one case, Cartlidge v. Cartlidge, the court denied the mother's interim custody petition, instead allowing the child to remain with the father who had ordered the wife out of the house and refused to allow her to take the seven-month-old infant with her. The court refused to interfere with the "natural right of the father," and held that

the petitioner must establish a case beyond the mere natural desire of a mother to have the custody of her infant child . . . it is quite clear to my mind, that the child is healthy, and at least as thriving as when the mother was with it. There is no proof that the mother's health is injured, or that she is capable of suckling the child. It being unnecessary then, on account of either the mother or the child, I think I ought not to remove it.

I examined the petitions for custody orders filed in the first nine years, and compared them to cases involving couples with children. Petitioners were required to indicate the number of children living in

333. Id.
334. Id.
335. In all likelihood, the father would have been living in the home of one of his brothers after being ousted from the family home by his wife. How the court could think it appropriate to leave the children in any home that might be visited by the father is hard to imagine if the best interests of the child is supposed to be the court's guiding principle.
336. In the case of Morris v. Morris, J77-35-65, the husband placed the children with his sister and forbade the wife from seeing them while he lived in adultery with another woman. The court ordered the children to remain with their aunt and allowed the mother access for two hours every two weeks until the case was resolved, at which time they were put into the custody of the mother. In the end, the mother received a judicial separation and custody, but no alimony, and the husband continued to live in adultery with his mistress.
338. Id. Eventually, the wife's dissolution was granted and she was given final custody, but in the interim of over two years the mother had very limited access to her newborn infant. Cartlidge v. Cartlidge, J77-10-100.
339. The dataset of cases involving custody came from every petition that included a request for custody somewhere in the body of the petition regardless of
any petition seeking marital termination, and of the 298 petitions filed by wives for separation, divorce, annulment, or restitution of conjugal rights, 168 had children. This amounts to slightly more than 56% of all female petitioners indicating that they had living children. Out of those 168 petitions, a total of forty-nine involved either a request for custody of the children in the prayer of the petition, or a later petition for custody that was either granted or denied. Of those forty-nine, only twenty-four were granted custody either in the final dissolution decree or in a separate interim or final custody order. 340 The remaining twenty-five were either abandoned (along with the termination petition) or were not granted a final custody order despite the termination petitions having been granted. 341 Thus, only approximately 14% of wives who had children received an order of custody (twenty-four out of 168).

### Table 2: Wives: Length of Marriage, Children, and Custody Orders (1858-1866) 342

<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>Total # of Cases</th>
<th># w/ Children</th>
<th># Receiving Custody</th>
<th># Custody Orders Abandoned or No Order</th>
<th>% of Total with Children</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;5</td>
<td>56</td>
<td>23</td>
<td>4</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>5-10</td>
<td>67</td>
<td>39</td>
<td>2</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>10-15</td>
<td>65</td>
<td>39</td>
<td>9</td>
<td>6</td>
<td>23</td>
</tr>
<tr>
<td>15-20</td>
<td>40</td>
<td>26</td>
<td>5</td>
<td>5</td>
<td>19</td>
</tr>
<tr>
<td>20-25</td>
<td>32</td>
<td>18</td>
<td>1</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>25-30</td>
<td>18</td>
<td>10</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>&gt;30</td>
<td>14</td>
<td>10</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Unknown</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>298</strong></td>
<td><strong>168</strong></td>
<td><strong>24</strong></td>
<td><strong>25</strong></td>
<td><strong>14</strong></td>
</tr>
</tbody>
</table>

whether it was granted, and every reference to custody in the docket for the first three and one-third years.

340. Three of the twenty-four custody orders were for interim custody and were not followed by any final custody order. We can assume that they resulted in custody for the mother, however, because if she obtained interim custody she would be likely to come back to court if the father removed the children and denied her custody after the termination.

341.

### Wives’ Custody Petitions Compared to Success in Termination Action

<table>
<thead>
<tr>
<th>Cause of Action</th>
<th>Granted</th>
<th>Not Continued</th>
<th>Dismissed</th>
<th>Custody Granted</th>
<th>No Order on Custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>20</td>
<td>6</td>
<td>1</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Separation</td>
<td>10</td>
<td>10</td>
<td>2</td>
<td>10</td>
<td>12</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>30</strong></td>
<td><strong>16</strong></td>
<td><strong>3</strong></td>
<td><strong>24</strong></td>
<td><strong>25</strong></td>
</tr>
</tbody>
</table>

342. In this table, the first column lists the total number of petitions in the nine-year period that I examined, and the second and third columns identify the total
What is notable is that the percentages of women with children who received custody differed dramatically between women married less than five years and those married five to ten years—the years one would expect to see the most number of custody orders. In fact, the highest percentage of orders to petitioners with children came in the ten-to-twenty year group. The tender years doctrine appears to have influenced the court to rule favorably for those very youngest marriages (and presumably youngest children), but the group of wives with the largest number of petitions (five-to-ten year range) had the lowest success rate in their custody requests.343 And yet the majority of their children were likely to be under seven years of age.

Custody was also denied to numerous women who requested it and should have had it granted them because they proved the grounds for their termination. For instance, in Brown v. Brown, Harriot Brown obtained a judicial separation from her husband on the grounds of cruelty, but she was not granted custody of the children, even though her husband was currently imprisoned with hard labor for his violence toward his wife. Notably, in Brown, we can assume that the mother received no legal protection for her children. She filed in forma pauperis, and presumably could not afford to follow up her suit with multiple petitions for custody. And she probably had actual custody and merely wanted the legal protection of a final order in case her husband returned. In Ryder, however, where there was substantial wealth, the court’s dismissal of the action likely precipi-

number of those petitions that indicated the presence of children and for which a custody order was granted. The fourth lists the number of custody petitions that were abandoned, denied, or no order was given and the fifth gives the percentage for each age group of custody orders granted per total number of couples in that age group with children.

343. This is also odd because children over age fourteen were generally allowed to choose which parent he or she wanted to live with and custody orders were likely to be informally modified as the child was able to express a preference for custody. See Rex v. DeLavel, 97 Eng. Rep. 913 (1763). At the same time, however, there was a legal preference that children between seven and fourteen years of age would reside with the father (who could best coordinate education or professional training), while children under seven would be awarded to the mother (who could best provide for the nurturing care of infants). Though we cannot assume that women married fifteen years, for example, would have children in their teens, the high percentage rates for the young marriages corresponds to the tender years doctrine, but the high percentage rates for wives married ten to twenty years does not correspond to the custom that fathers would receive custody of children over seven. Nor does the low percentage rate for women married five to ten years make sense if younger children were likely to be given to the mother. In any event, it is important to remember the distinction between the formal rules giving fathers custody in most instances of dispute, the tender years doctrine as a rule of thumb adopted by the court to protect infant children, and the cultural reality that mothers probably ended up with actual physical custody in a majority of the cases in which they were not at fault, but no legal protection if the father later showed up and demanded access or custody.

344. J77-2-44.
tated a private separation agreement. This agreement may have provided the wife with some rights to custody or access to her children. Nevertheless, the refusal of the court to affirm custody of any of the children in either wife meant that Mrs. Ryder probably had to surrender property to her husband in the private separation to obtain better custody terms, and Mrs. Brown would have had to constantly watch over her shoulder for the return of her angry husband.

A careful review of the twenty-four petitions in which the wife received an order of custody reveals that many of the couples already had separated. Two husbands were in jail for violence to their wives; twelve involved either wives leaving because of violence and abuse, or husbands deserting their homes with a mistress; one husband was a gambler and another a sodomite; and an additional eight involved cruelty and adultery in the home that involved periodic separations, though it is unclear if the parties were separated at the time the petition was filed. And while custody was challenged only in a small handful of these cases, the vast majority did not appear to be contested by the father.

There were some cases in which no custody orders were made because the termination suit itself was not continued. But there was a sufficiently large number of cases where prayers for custody were made in the petitions, the termination petitions were granted, and inexplicably nothing was done about custody by the court. One reason could have been, as articulated in Robotham, that the court did not want to issue final orders that could not be modified if the parties' circumstances changed. Other reasons might have been that the husband had not challenged custody, or the parties had agreed informally to custodial arrangements and neither side felt like risking a negative final decision by the court that would be unalterable. However, the data reveal that approximately 86% of married women with children did not request custody, or did not receive it if they requested it. This does not mean that all of these women lost access to or custody of their children in fact. But even if most retained de facto custody, or settled for custody in private separation agreements, these mothers were likely to have no legal rights if the father should return later and demand the children. Certainly, not all children would be the subject of great legal disputes, like the Ryder sons who were potential heirs to the title and estates of the Earl of Harrowby. Husband like Mr. Spratt, who had tried to force their wives to have an abortion, were unlikely to present an image of the devoted father. Yet even Mr. Spratt ultimately received custody of both children because

345. See discussion supra note 321 and accompanying text.
347. This occurred in In re Besant, 11 Ch. D. 508 (1878), Ryder v. Ryder, 164 Eng. Rep. 981 (D. 1861), and to some extent in the case of Abigail Bailey. See Hartog, supra note 330.
348. See discussion supra note 321 and accompanying text.
his wife had to commit adultery to survive. The bar against awarding custody of children to an adulterous wife was not removed until 1873.349

The lower numbers do not ignore the fact that some women, in fact more women than ever before, received a final custody order for their children, and the recognition that they had the legal rights to make medical, educational, and religious decisions on their children's behalf.350 But the uneven application of the law, including the ban against adulterous wives receiving custody, again forced women into traditional domestic roles, precluded their forming new attachments, and dramatically hampered their ability to seek support from male friends during the termination process. When the dictates of title and property prevailed over the safety of a daughter who was being sexually assaulted by her father, and when the paternal right to control the education of his children so dominated the law that the court would split the family to protect husbands who had violently threatened and abused their wives, women were no doubt discouraged from bringing suit, they were denied anything like legal rights in their children, and the cycle of familial abuse was unlikely to be broken.351 And to add insult to injury, most of these wives would receive no alimony or financial support to enable them to survive. They would subsist solely on the generosity and intervention of family or friends.

C. Property

One of the harsher aspects of coverture is that all property a woman brought to her marriage immediately became owned by her husband. Upon marital termination, that property remained his. The law treated her property—be it real or personal, rents or profits, annuities or bonds—as his legal right upon marriage and therefore not to be interfered with upon divorce. Moreover, the 1857 Act did not grant the court jurisdiction to modify any pre-existing property settlements. Consequently, when a husband was entitled to keep the property a wife brought to the marriage, and he was found guilty of a breach which entitled his wife to a divorce, alimony was the only

349. Custody of Infants Act, 1873, 36 Vict., c. 12 (Eng.).
350. Of course, when the total number of mothers receiving custody in the fifty years before 1858 was in the single digits, twenty-four orders in nine years may seem like a sea change. See Wright, The Crisis of Child Custody, supra note 19, for a thorough discussion of the pre-1858 custody cases. Mrs. Ryder and Mrs. Spratt, however, were unlikely to view the law reform favorably as they watched their vulnerable children removed by violent and abusive fathers, all with the blessing, or at least the forebearance, of the court.
351. In three cases in which the court split custody, granting the eldest to the fathers and the youngest to the wives, the fathers had violently abused and beaten their wives so badly that the wives had been forced to leave their husbands' roofs. See Martin v. Martin, J77-35-40 (two sons split between parents); Mead v. Mead, J77-35-60 (three sons to father, youngest daughter to mother); Wallis v. Wallis, J77-58-15 (three sons to father, youngest daughter to mother).
mechanism for an innocent wife to receive any financial return from the property she once owned. But as we know all too well today, alimony poses significant problems for couples who want no more communication with each other after the divorce is granted. When emotions run high, and both parties blame the other, alimony is often viewed by the husband as a galling reminder of his ex-wife's failures. Out of spite, he often refuses to pay it. In the nineteenth century, as today, collecting on alimony, as on child support, could be very difficult, especially if the husband had left the country or simply chose not to pay.

The wife who was found guilty of adultery would not be entitled to alimony, though the court did have the power to settle damages awards on the wife if they were collected from the co-respondent. Although this was actually done more often in Parliamentary divorces, there is some evidence that the court applied small damages settlements on wives who might have had no other means of support.

Yet alimony was by far the most common tool for restructuring marital property, and permanent alimony awards were allowed only for wives who ultimately prevailed in their suits. I examined the court's records detailing alimony orders for the first three and a third years. And once again, the court's record is disappointing.

352. The court's ability to modify property settlements was amended by statute in 1860. 23 & 24 Vict., c. 144 (1860) (Eng.).

353. Only successful wives were entitled to alimony, and her own adultery would preclude a wife's grant of a dissolution. But the court could settle property damages awards on the wife according to 20 & 21 Vict., c. 85, § xxxiii (1857) (Eng.).

354. See Wright, Untying the Knot, supra note 42, at 1007 tbl.19.

355. Of course, it is an oxymoron to call the property "marital property," for the law treated all property owned by the couple as exclusively the husband's. The wife was entitled only to support and she could often obtain credit in her husband's name to enable her to purchase necessary goods. But if a husband advertised that he was no longer supporting her, merchants sold wives goods on credit at their own risk. See Stone, Road to Divorce, supra note 6, at 160-62.

356. The numbers for alimony are obtainable only from the docket and thus represent a significantly smaller sample. While there were fifty-six wives married less than five years in the petitions covering nine years, only twenty-one of those same cases were identified in the docket, and for those twenty-one only two received alimony.
Table 3: Wives: Length of Marriage, Property, and Alimony (1858-1861) 357

<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>total # of petitions analyzed</th>
<th># of same petitions also in Docket</th>
<th># in Docket that rec'd alimony pendente lite only</th>
<th>Amount of Alimony</th>
<th># receiving permanent alimony</th>
<th>Amount of Alimony</th>
<th>Cause of Action Granted</th>
<th>Cause of Action Dismissed</th>
<th>Cause of Action Not Continued</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;5</td>
<td>56</td>
<td>21</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>30,40</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>5-10</td>
<td>67</td>
<td>30</td>
<td>6</td>
<td>3</td>
<td>5, 21, 45</td>
<td>150</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>10-15</td>
<td>65</td>
<td>26</td>
<td>5</td>
<td>3</td>
<td>30, 52, 60</td>
<td>100, 100</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>15-20</td>
<td>40</td>
<td>18</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
<td>0</td>
</tr>
<tr>
<td>20-25</td>
<td>32</td>
<td>18</td>
<td>5</td>
<td>2</td>
<td>15, 16</td>
<td>175</td>
<td>3</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>25-30</td>
<td>18</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>80</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>&gt;30</td>
<td>14</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>13, 25, 30</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
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<tr>
<td>unk.</td>
<td>6</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>298</td>
<td>127</td>
<td>22</td>
<td>11</td>
<td>11</td>
<td>11</td>
<td>4</td>
<td>7</td>
<td></td>
</tr>
</tbody>
</table>

357. This table is a little difficult to understand because it compares information from both the nine-year petitions database and the three and one-third year docket database. Thus, the first column “total # of petitions analyzed” indicates the total number of petitions filed by wives that I analyzed in the nine-year period. Of those petitions for which I have length of marriage data, the second column “# of same petitions also in Docket” indicates the number that I also have data on from the second docket database which covers only three and one-third years. One can tell that, for instance, twenty-one of the petitions for wives married less than five years were filed in the first three and one-third years, and of those twenty-one petitions, only two received an award of alimony. Of the sixty-seven petitions filed in the nine years for women married five to ten years, thirty were filed in the first three and one-third years, and of those thirty, only six received an award of alimony. Since I have not analyzed the docket for the period after April 1861, we can only guess whether the rates of alimony orders would remain the same as in the first period. If so, we would assume that of the fifty-six petitions for women married less than five years, only five would receive an alimony award. Perhaps, however, the court became more liberal with such awards. Until I do further analysis, we cannot know for sure. But in the first three and one-third years, less than 10% of wives filing petitions who were married less than five years received an award of alimony.
Only twenty-two out of 127 female petitioners obtained an alimony order, and eleven of those twenty-two received only temporary alimony during the pendency of the suit. The law entitled every single wife, whether she was the petitioner or respondent, to alimony during the pendency of her suit (pendente lite), but very few women asked for it, and even fewer received it. And the temporary alimony would terminate upon completion of the litigation. The average amount of alimony *pendente lite* was significantly smaller (£28 per year) than the permanent alimony awards made by the court (£81 per year). This may indicate that women of slightly more means had the ability and incentive to pursue their case to full termination and an order of alimony, rather than settle for a temporary award that might only tide them over for a year or eighteen months. Yet of the twenty-two alimony orders granted, only four equalled or exceeded £100. In contrast, Mrs. Ryder brought real property whose rents and profits were roughly £3000 per year to her marriage. Clearly, the very wealthy couples did not seek the court’s oversight in property matters, and the court’s inability to resettle pre-marital property arrangements may be one reason these couples ultimately sought resolution elsewhere. Mrs. Ryder’s case was dismissed, most likely followed by a private separation agreement that would return to her the profits of some of her property and would settle the remainder of her property on her children at her death. Wealthy fathers would strive to ensure that

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358. These temporary alimony orders most often occurred in cases that were ultimately dismissed or not continued. It is unclear if the failure of the underlying termination action resulted in discontinuance of alimony payments, or if, as Lawrence Stone suggested, women used filing these actions to get alimony awards. Stone, *Road to Divorce*, supra note 6, at 183. Eleven alimony awards out of 127 petitions, however, is not such a great success rate that we can assume that most women were using the court to obtain alimony. All we can be sure of is that only eleven of the sixty-nine petitioners who were granted their divorce or separation (out of the 127 petitions in the docket), received an award of permanent alimony, though all sixty-nine were entitled to it.

359. Twenty-eight pounds in 1860 is roughly equivalent to £1320 in 2004, or $2500. Eighty-one pounds in 1860 is roughly equivalent to £3820 in 2004, or $7,258. The British pound was worth more in 1860, however, being worth roughly $4.85 while today it is worth about $1.90. In any event, it would be hard to imagine anyone, much less a mother with small children, supporting herself comfortably on anything under £100 per year.

360. The average time from filing to final termination was 356 days for dissolution and 268 days for separation, with many cases taking over a year if there were custody or alimony petitions.

361. Ryder v. Ryder & Watson, J77-44-35.

362. After the court could rearrange property settlements by virtue of the amendments of 1860, it did make settlement orders in thirteen cases, out of a little more than one thousand termination actions. The percentage is so small as to be insignificant as an indicator of the court’s willingness to rearrange marital property or as an indicator of a couple’s willingness to ask the court to do so. See Wright, *Untying the Knot*, supra note 42, at 993 tbl.2, 1008 tbl.20.

property settled on their daughters would not remain in the hands of estranged sons-in-law. But women like Mrs. Spratt or Mrs. Allen, who did not have powerful fathers who could protect their daughters' property, could not count on receiving assistance from the court.

Unfortunately, few petitions reveal much information regarding either the social class or property owned by the parties. Although the marriage certificate cited the vocations, if any, of the husband and the fathers, it is difficult to glean the financial position of the couple after perhaps many years of marriage. Periodically, a petition reveals some of the more common human behaviors that occurred under the stress of a disintegrating marriage. In the case of Cartlidge v. Cartlidge, the wife accused her husband of using abusive and insulting language, trying to strike her with his umbrella, telling her "to go and lodge with the Irish people up the yard," threatening her with commitment in an asylum, and ordering her to leave the house. Mr. Cartlidge would not let his wife's mother speak to her in the home, but rather made her speak through the window (he felt his mother-in-law was stirring up trouble between them). But what seemed most galling to Mrs. Cartlidge was that she was displaced in the home as mistress by her husband's sister. The sister presided at table and was her brother's partner in a drapery business. Mrs. Cartlidge filed her petition for dissolution on March 10, 1862. Shortly thereafter, a notice appeared in the local paper which read:

Great and Important Sale. In consequence of unforeseen circumstances, and over which the proprietor has no control, the whole of the large and valuable stock of Linen and woolen drapery belonging to J. Cartlidge, High Street, will be offered immediately for a clearance sale... the Stock will be remarked in plain figures, at prices which will ensure a speedy clearance, as the proprietor is determined to clear out as speedy as possible.

In a subsequent series of affidavits, only a few of which remain, the wife denied the husband's charge that she had an income of £700 per year, but admitted that she had £75 per year, plus an interest in some property worth £5 per year that she had to sell off to pay the expenses of the suit. She referred to the proceeds of the sale as that "which her husband should have to pay, but he made himself bankrupt and sold his business to his sister." Apparently, the proprietor did not "clear out as speedy as possible;" rather, he got his business out of his name so the court would have nothing to attach if he failed to pay any alimony award.

Of course, it is a common problem today in divorce situations that one party, usually the husband, will attempt to hide assets from

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364. J77-10-100.
365. Id. The shop was to be closed between April 2nd and April 5th at which time it would be reopened with new prices for inspecting the stock. Id.
366. Id.
the other's discovery. Mr. Cartlidge was not the only respondent who avoided an alimony order by transferring his property into another's name, though it was not common. The most common way to avoid alimony during the nineteenth century was simply to desert one's wife and children, which occurred in nearly one-quarter of these cases.\textsuperscript{367} In the end, Mrs. Cartlidge received her divorce on the grounds of cruelty combined with adultery; she also received custody of their infant child, but she did not receive any maintenance or alimony order. And when she attempted to visit the sister at her drapery business, she was refused entry.\textsuperscript{368}

Not surprisingly, a wife who was granted an order of permanent alimony retained it only so long as she remained chaste and unmarried. In \textit{Fisher v. Fisher} the court discussed at length the history of alimony and maintenance. It explained that in the ecclesiastical courts, when a divorce \textit{a mensa et thoro} was granted at the suit of the husband, no alimony was awarded. When the ecclesiastical courts granted a divorce at the suit of the wife, alimony was often ordered because she remained his wife and her husband was legally obligated to support her. The practice in Parliamentary divorces was that maintenance might be provided for the adulterous wife, though often it was out of the damages awarded in the criminal conversation action through the interposition of the "Lady's Friend."\textsuperscript{369} The \textit{Fisher} court felt that these situations were inapposite to a wife's petition in the new court because, as Sir Cresswell Cresswell stated, "[t]he husband elected to have the marriage dissolved, and to be again free from all marital obligations. He therefore was at liberty to take what he asked upon the terms offered."\textsuperscript{370} Sir Cresswell Cresswell could find no instance of a wife obtaining alimony who sought a Parliamentary divorce, so there was no precedent to follow when she sought the termination.\textsuperscript{371} Thus, in deciding whether an innocent wife who elected a dissolution over a judicial separation should be entitled to alimony, he stated: "the Legislature no doubt intended that she should not seek a remedy at the expense of being left destitute . . . on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie."\textsuperscript{372} For Sir Cresswell Cresswell, the issue appeared to be the wife's election of a formal dissolution rather than a judicial separation. Because the wife could have chosen merely the separation, and thus remained married and enti-

\begin{flushleft}
\textsuperscript{367} Desertion was a stated ground in seventy-five out of 298 actions. \textit{See supra} tbl.1.

\textsuperscript{368} Cartlidge v. Cartlidge, J77-10-100.

\textsuperscript{369} \textit{See} Wolfram, \textit{supra} note 2, at 161 n.22. The Lady's Friend was a functionary appointed by the House of Commons to represent the wife's pecuniary interests during a Parliamentary divorce.


\textsuperscript{371} \textit{Id}.

\textsuperscript{372} \textit{Id}.
\end{flushleft}
tled to support, the logic was that she did not need alimony. In con-
trast, if she chose a full divorce, the court concluded that she was
willing to forego the benefits of that support in exchange for full free-
dom, including the freedom to remarry. Ironically, therefore, we see
the court more willing to grant alimony in cases of separation where
the marital fault was less severe than in divorces where the husband’s
marital fault was quite egregious.

Mrs. Fisher received £100 alimony, to be reduced to £80 upon the
death or marriage of their daughter, “so long as [she] leads a chaste
life and remains sole and unmarried and maintains the daughter.”373
Thus, to avoid creating incentives to terminate their marriages, the
court would grant an innocent wife only the barest amount necessary
for survival and only so long as she behaved in compliance with the
social and legal expectations of a wronged wife. The separated wife
had to remain chaste to avoid being divorced and left destitute, and
the divorced wife had to remain chaste to maintain her alimony. Even
post divorce, men retained an interest in their wives’ chastity, while
women were never allowed a correlative interest in their husbands’
chastity. Perhaps to avoid the surveillance or inconvenience, or be-
cause the cause was worthless, most wives simply did not ask for ali-
mony, especially if they had adequate support from family or a future
husband.

Those wives who were deserted or whose husbands had such un-
certain income as to make an alimony order useless were on their own
after they elected a divorce.374 In addition, many wives whose husbands
were violent, and especially those whose violence centered around
poverty or difficult financial circumstances, would be unlikely to de-
mand alimony because they wished to avoid further violence and con-
frontations with their angry husbands. Wives like Elizabeth Aitken
faced a difficult decision when opting to terminate their marriages.
Elizabeth owned her own shop through the 1850s, and after 1853 she
often separated from her husband because of his violence and adul-
tery. However, James, her husband, routinely entered her shop, beat
her, and took what money or stock she had available. He was twice
bound over at the police court to keep the peace, yet he still felt no
compunction demanding that she turn over money she had saved.
Once, when he demanded thirty shillings and she refused, he beat her
in front of her shop girls. He then stole seven pounds of inventory
and left, returning twenty minutes later again demanding the thirty
shillings. This time she gave it to him to avoid more violence.375 Eliz-
abeth received her dissolution, and custody of her four children, but

373. Id.
374. The court had the ability to grant a protective order for property that would
return a wife to feme sole status for past and future earnings, set back to the date of
desertion by her husband. But it was applicable only in cases of desertion. See Wright,
Untying the Knot, supra note 42, at 1004 tbl.15.
375. Aitken v. Aitken, J77-1-34.
no alimony. And a wife like Elizabeth Laxton, who received her divorce on the grounds of adultery and cruelty, obtained no alimony order even though her husband was a barrister with chambers in the Middle Temple.376

In the end, alimony and property settlements were clearly inadequate to enable a wronged wife to pursue her legal rights to divorce in the absence of family and friends. It is outrageous that a judge would parse out the alimony award to the least penny necessary so as not to create an incentive for wives to divorce their violent and adulterous husbands. The levels of violence reflected in the petitions, even allowing for some exaggeration, was depressing in frequency and intensity. Yet few studies of the court, and no parliamentary returns, have focused on the violence and abuse in these families. Naturally any violence would be a great disincentive to a wife who contemplated pursuing her legal rights and remedies against a guilty husband because violence often increases when a wife tries to escape through separation or divorce. Alimony awards were rare because a large percentage of the population lived at or near the poverty level. But these awards were made even more rare by the niggling opposition of the court, the rules of coverture that ceded all power over marital property to the husband, fault-based rules that denied unfaithful women any financial support, and the reality of violence that forced women into the arms of other men. When Mr. Spratt's violence and adultery forced his wife into the arms of Mr. D'Auteri, she had nowhere else to turn.377 But once she did, she lost her support, her children, and her home by a fault-based law that allowed men to retain a property right in their wives' chastity even as they flagrantly violated their own marriage vows.

D. Analysis

What this data reveal is important for understanding the diverse scope and effect of legal reform. While lawmakers thought the court would have a lot of free time because very few English wives or husbands would need its services, the tremendous increase in cases is not surprising to modern historians who are comfortable with the existence of divorce as a remedy for broken marriages. Over a nine-year period, close to 400 women asked for and received divorces, while an

376. Laxton v. Laxton, J77-32-35. The Middle Temple, the Inner Temple, Gray's Inn, and Lincoln's Inn are the four inns of court, surviving since the medieval period, that originally served as law schools and professional associations for barristers, and today survive as associations in which membership is required before being called to the Bar. They also serve as the body that disciplines barristers and they provide different chambers that, like American law firms, choose the young apprentices they will hire.

additional 170 received separations.\textsuperscript{378} The former met the stringent grounds of proving aggravated adultery; only about 14\% of those with children received legal custody and less than 9\% received any permanent alimony. Despite the law that all women were entitled to temporary alimony during the proceedings, and all women who were granted their separation or divorce were entitled to their children and permanent alimony, orders to this effect rarely issued from the court. More importantly, wives' success rate differed dramatically by the length of their marriage, as did the remedy they requested and the grounds for relief. Differences in length of marriage across groups of women appear to have been important in the relief they requested. Such differences compel us to examine more closely the ways in which different marriages age and the effectiveness of the law for different groups of women.

Women in the middle range of marriage (ten to twenty years) were the most successful in their divorces.\textsuperscript{379} This indicates that the law somehow resonated better with these wives than with wives at the early or the late stages of marriage. The court was particularly hostile to women at the latest stages of marriage (twenty-five years and over), granting their petitions in only 36\% of cases, while they granted them in 61\% of cases for women married between ten and twenty years.\textsuperscript{380} Perhaps the older women were more likely to use termination petitions for strategic reasons, such as to obtain property settlements or alimony. Older wives did have a higher rate of alimony orders, receiving it in 29\% of cases while women married ten to twenty years received alimony in only 11\% of cases.\textsuperscript{381} But the older wives also had more allegations of desertion than their younger sisters, which was the ground for obtaining a protective property order.\textsuperscript{382} Thus, the connection between property and marital termination is unclear. Those women who seem most in need of property were least likely to get it, and those most likely to deserve termination were least likely to get it. Did the court not grant either set of claims because they were weaker claims, or because it felt the claims violated certain social norms?\textsuperscript{383}

Wives at the earliest stage of their marriages are also an anomaly, for they brought equal numbers of separation as divorce petitions,\textsuperscript{384}
though the separation was a particularly problematic remedy, because they would be a group most likely to remarry and most harmed by the legal limbo of a separation. They had one of the lowest rates of alimony orders and yet one of the higher rates of custody orders,\footnote{385. See supra tbls.2 & 3.} so if they did get their children they did not seem likely to get any property to help support them. They had a very low success rate for judicial separations (eight out of twenty-five for those married less than five years, and eight out of twenty-eight for those married five to ten years), matched only by the rate of the oldest wives married longer than thirty years (two out of nine).\footnote{386. See supra tbl.1.} Nearly half, however, of wives married fifteen to twenty years were successful in their separations (seven out of eighteen).\footnote{387. Id.}

The data illustrate that we cannot explain the high rate of divorce petitions and high success rate for certain marriages, and the low rate of divorce petitions and low success rate for other marriages, simply by reference to the creation of the court in 1858. While the court gave women a chance for divorce that they never before had, the court functioned differently for married women in different demographic categories. Women without children had a slightly higher success rate in their divorces and separations than women with children (52% to 49%), though the difference may not be statistically significant.\footnote{388. For the 280 divorces and separations granted in which the number of children was known, there were eighteen (6%) for which the presence or absence of children was unknown, yielding a margin of error greater than three, which is the difference between the two categories of wives.} Of those married women who received alimony in the docket, slightly over half (fourteen out of twenty-two) had children and half did not, though most with children were clustered in the early stages of marriage while those without children were in the later stages.\footnote{389. See supra tbls.2 & 3.} The presence or absence of children had little to do with whether or not alimony or a divorce would be awarded. At the same time, women in different age groups clearly sought different forms of relief in the new court based on quite different grounds. While cruelty predominated in the early years of marriage, desertion predominated in the later years of marriage as aggravating grounds.\footnote{390. See supra tbl.1.} And one important difference is the number of cases that were abandoned: twenty-two out of fifty in the first five years of marriage compared with fifteen out of sixty-two in the middle years of marriage.\footnote{391. Id.}

Most important, this data show that custody of children and alimony were not awarded regularly enough to have had much impact on a woman’s decision to terminate her marriage. Even looking at women married twenty years or less with children, only twenty out of
127 mothers received a custody order (16%), thirteenth out of ninety-five received alimony (14%), while 113 out of 212 (53%) were granted their divorces or separations. And while one might think these numbers are tremendously high compared with the complete lack of custody and alimony orders prior to 1858, we must compare them to the law that granted all successful wives both custody and alimony. If only 16% received custody and only 14% received alimony, how did the rest of the separated wives survive and did they not receive custody and alimony because they did not ask for them? If so, why did they not ask? Or did they have de facto custody because the father had not threatened to interfere and the only property that mattered was their future earnings, which would be protected by the dissolution or separation?

Moreover, these numbers on custody and alimony pertain only to those women who were granted their marital terminations; a full 130 out of 275 women, nearly one-half, either abandoned their termination suits or had them dismissed. That number is troubling because of the socio-economic impediments that existed to a wife’s ability to complete her suit; she may have lacked the economic resources, been pressured by family or friends to reconcile, felt societal pressure to conform to expectations of feminine passivity, or received the benefit she sought and thus dropped her case. For those women who were unsuccessful in the court, the law provided no formal protection and most likely exacerbated their difficult relations with their husbands. Wives who had strong families or fathers who would act as a trustee in a private separation agreement may have felt that the legal protections offered by the court were not worth the publicity, cost, and delay. If their husbands ultimately complied with the terms of the agreement, their futures might have been relatively peaceful. Such wives still were foreclosed from entering new relationships, and contractual terms about custody and upbringing of the children would not be enforceable, but these women might have achieved a certain amount of peace. Caroline Norton, for instance, found her

392. See supra tbl.2.
393. See supra tbl.3.
394. See supra tbl.1.
395. Although the court docket indicates alimony and custody petitions when separately made, they did not identify them if they were incorporated in the initial petition or another motion. Sometimes an order for custody or alimony would be noted in the docket when no request appeared to have been made and other times when it had. Presumably, many requests were made orally or were embedded in other motions that were not summarized fully in the docket.
396. See supra tbl.1. Of course, when we extrapolate that out for the nine years, roughly 542 out of 1146 female petitioners would have their suits dismissed or would abandon them.
397. Until the divorce or separation, coverture remained a very real impediment to a wife’s ability to pay an attorney, pursue her own calling, or make decisions about childcare.
later years to be more serene once the children were grown and her husband had devoted his attentions to a new family. 398 But this precarious peace highlights a serious failure in the law. If as many as half of the petitioners did not follow through on their petitions, and instead turned to informal mechanisms, the law failed them precisely because they could not get what they wanted through formal legal channels. 399

In discussing this data with a number of historians, a few have suggested that I am making mountains out of molehills. In fact, they assert, most wives used a divorce pleading to get better terms in private separations and so the grounds and success rates should not be of concern because women were ultimately better served in their informal arrangements by the ability to file even if they did not follow through on their petitions. Such responses merely mask the point I am trying to make, however, which is that the enforceability or nonenforceability of certain legal rights may have undermined women's ability to negotiate marital breakdown in ways that were satisfactory to them. Women who were using the formal law strategically to achieve other ends usually did so because the formal ends were either unavailable or unattractive. It does not matter if 50% of female petitioners did not obtain relief either because they got what they wanted in a private separation or they simply failed in their cause of action before the court—either way the law failed them. It forced them to accept informal terms through private separations that had tenuous enforcement rights, or it simply failed to give them the relief they really wanted. If the court were providing adequate relief for these wives, i.e. the relief they wanted, then they would have pursued the ends they desired and obtained them, rather than being forced to use unsatisfactory legal procedures to get something better, or perhaps worse, in informal arrangements. 400 An inadequate formal rule fails both those who take advantage of the rule and get less than what they want or need, as well as those who use it for other ends if those other ends do not include adequate enforcement mechanisms. But despite the limitations of the 1858 court, women filed more petitions than men in every year studied, 401 apparently willing to pay the cost of losing custody and alimony in order to be free of their husbands. The question for the historian then becomes whether or not a different set of legal rights would have better satisfied the needs of those women

399. Caroline Norton spent a significant amount of time recounting the difficulties of the separated wife who has no legal power to protect herself, and no husband willing to bother protecting her. See NORTON, A LETTER TO THE QUEEN, supra note 61, at 39-40, 57. See also Lord Lyndhurst in the Parliamentary Debates. 144 PARL. DEB. (3d ser.) (1857) 1705; 142 PARL. DEB. (3d ser.) (1856) 410.
400. Formal arrangements must have been less attractive because so many women failed to follow through with their divorce or separation petition. And though many family-law scholars advocate the value of informal arrangements and mechanisms, the lack of enforcement with informal arrangements is rather troubling.
401. Wright, Untying the Knot, supra note 42, at 996 tbl.5.
who were successful before the new court as well as those who were not.

VII. Law's Innocence: The Liberalization Narrative and the Apology of Family Law

The cases discussed above reveal one thing quite clearly: the wives who came before the court and asked to have their marriages terminated had little ability to restructure their lives as they desired. The law protected their bodies from violence and abuse, but it did not give them the power or autonomy to determine the parameters of their day-to-day existence. Progressive reformers believed that legal rights to divorce would allow women to control their husbands or escape them if they could not, that legal rights to their children would allow them to choose how they would be mothers, and that legal rights to property would give them the autonomy to define their daily lives. Instead, wives were blamed for their husbands' breaches, they suffered even if they were not at fault, and their husbands' actions could condemn them to a future of loneliness, dependence, and celibacy. If a mother did get custody of her children, which most did not, she raised them under the shadow of her husband's ever-present power to regain them at age seven, to claim them if he decided to "reform" and return to his family, and to control their education and upbringing if a private separation was her remedy. She lived in constant fear that he would re-enter her life and get the children back. She had limited ability to gain and control property. Her employment opportunities were necessarily limited by her gender, what property she may have owned and might even regain would be in trust or without the power of control and disposition, and if she did get alimony it would be premised on her remaining chaste and unmarried. Even if she did find a new husband who could give her economic security, she would certainly risk losing her children if she remarried. For a woman whose entire life was defined by her worth in the marriage market, the fault-based interdependent family law that arose to replace coverture gave her very little power to control her destiny.

The disjuncture between the meaningful legal rights that reformers sought and the limited reforms that occurred is best understood as a tension between what I call domestic rights and family law. Domestic rights, like any legal rights in the public sphere, would have granted women the power and autonomy to define their lives in their domestic world just as men were able to define their lives in the public

402. Although wives could sue before a magistrate if her husband had struck her, her right to bodily integrity did not, for instance, include the right to prevent her husband from imprisoning her so long as he provided sustenance for her, nor did it include the right to be free of sexual assault through the marital rape exemptions.

403. See Wright, Untying the Knot, supra note 42, at 1008 tbl.20.
world. Mrs. Spratt, Mrs. Ryder, and Mrs. Fisher did not obtain domestic rights, for domestic rights were individual legal entitlements that would have enabled each woman to structure her own life within the scope of her economic and personal means. Family law, on the other hand, was a newly evolving set of legal rules that privileged the family over individual members, that protected socially preferred relationships and persons and not others, and that used denial of rights and power to enforce conformity to a particular vision of social order. Family law perpetuated coverture, patriarchy, and separate spheres by denying women domestic rights and granting them to men.\textsuperscript{404} I have suggested elsewhere in the context of inter-spousal custody disputes, and I now extend my claim to include the rise of family law, that just as women were able to use the rhetoric and language of rights to demand power over their domestic lives, the dialogue shifted to one of duties, obligations, and the best interests of others.\textsuperscript{405} In that vein, women's demands for rights and autonomy were constructed as antagonistic to the interests and needs of husbands and children, as well as to the social order. The demand for rights was, and continues to be, vilified as destructive of the collective good, just as women were poised to claim the same legal rights that men had enjoyed for centuries.

Numerous historians and family-law scholars have noted the limited autonomy the new court gave to Victorian women.\textsuperscript{406} Mary Shanley wrote that the "Divorce Act also sanctioned and perpetuated a patriarchal understanding of the marriage bond."\textsuperscript{407} And Gail Savage

\textsuperscript{404} Although the domestic realm was not identified with men, men's control over the family property, the children, the domicile of his wife, and a whole host of legal relationships meant that men remained in control over the domestic realm under family law just as they had under coverture.

\textsuperscript{405} This could be a claim of conspiracy. Women demanded certain legal rights and male legislators gave them something that looked like legal rights, or a literal version of those legal rights, but without the power and autonomy needed to make those rights effective. Once that sleight of hand occurs, an academic or historical justification is required to excuse the inadequacies of the law. When the desired outcome does not in fact come to fruition, there must exist a scapegoat, a narrative that places blame for the failure, not in the undermining of the legal rights that was built into the reform, but on some other excuse—social or ideological constraints that are outside the power of law to change. Such is the nature of power. It fights the ceding of power and when it must do so, it musters all available resources to limit the damage and potential for real change that the relinquishment of power made possible, even as it restructures the narrative to imply that great change has occurred. \textit{See also} Wright, \textit{De Manneville}, \textit{supra} note 36, at 302-03.

\textsuperscript{406} \textit{Cornish} \& \textit{Clark}, \textit{supra} note 34, at 386-90; Shanley, \textit{supra} note 19, at 167; Stone, \textit{Road to Divorce}, \textit{supra} note 6, at 388-90.

\textsuperscript{407} Shanley, \textit{supra} note 19, at 48. Mary Shanley's study of the elision of the married women's property movement with divorce reform in the decade preceding the 1857 Divorce Court Act mirrors the claim I've made in the custody context, that coverture would be slowly dismantled but at the same time property and custody would be tied to marital performance in such a way as to reproduce patriarchal authority within the family through an interdependent family law. In the early 1850s, spurred perhaps by the passage of a married women's property act in New York in
has stated that the "law did not by itself materially affect either the behavior of families or the status of women during the Victorian and Edwardian periods." But my critique goes further than asserting that the newly evolving family law did not do much for women. Rather, it is that the project of family law was inherently destructive of women's interests. Nineteenth-century women wanted power to structure their domestic lives; instead they got family law which denied them even the moral authority to demand the autonomy and the legal rights needed to define and protect their family relationships. Considering the historical consensus that the new court perpetuated the patriarchy of coverture, it seems odd that there has been little critique of the overall enterprise of family law. Most historians and legal scholars accept the underlying importance of the emergence of a separate family-law court as crucial for protecting the separate interests and concerns of women. A new law of the family that valued and protected the special place of family in society was viewed then, as it is today, as a step away from coverture and toward equality, important for the family and society, and by inference important for women.

The contradiction should be obvious. The dominant narrative about the rise of family law is that because women are so strongly identified with the family, and because their interests lie in the family, a separate law of the family is good for women. The question that is rarely asked is whether or not women's interests are located in the family as the result of the coercive aspects of a patriarchal family law

1848, a group of women began advocating for property law reform to change the law of coverture that gave all of a wife's property, earnings, and debts to her husband upon marriage. Id. at 29-35. In 1856 the group presented a petition to Parliament, in which they had gathered 29,000 signatures, asking that Parliament recognize that "married women, like all other adults, had an inalienable right to their own property and the fruits of their own labor." Id. at 33. What they asked was that all married women would be protected in the ownership and management of their own property. But by the spring of 1856, "the issues of married women's property and divorce law reform were inseparably linked." Id. at 35. As the 1857 Act eventually provided, only divorced, separated, or deserted wives would be allowed to own their own separate property; married women who did not petition the court would remain in a state of coverture with regard to their property. Only the very small handful of women, the few hundred who could appear before the new court, would receive any rights to their own separate property, and those rights would be inextricably linked to marital fault. It was not until 1870, and then more fully in 1882, that married women would gain the right to own their own property, and only under extraordinary circumstances. Id. at 49-78, 103-30. See generally The Langham Place Group, supra note 132.


409. This is not to say that there haven't been important works criticizing the patriarchal aspects of family law. See Eekelaar, supra note 35; O'Donovan, Family Law Matters, supra note 35; The State, the Law, and the Family: Critical Perspectives, supra note 35. Even in their critiques, only O'Donovan seems to address the underlying issue of how family law is constructed to perpetuate patriarchal power. See O'Donovan, Family Law Matters, supra note 35, at 10-29.

410. See infra notes 412-418 and accompanying text.
or because of other socio-economic forces that are beyond the law's control. The existence of family law encouraged women to remain in the domestic sphere and be content with the protections they had acquired, rather than demand rights in the public sphere that might conflict with the small protections they had gained. Moreover, to the extent family law is constructed as advantageous for women, its role in the disempowerment of women and in gender inequality is obscured. Ultimately, the liberalization narrative serves to obscure the way family law institutionalizes coverture and rewrites law and legal reform as innocent in the coercive embodiment of gender inequality.

The liberalization narrative of the rise of family law posits that in the shift from coverture to family law, women's interests in the domestic sphere were recognized and protected, they acquired enforceable legal rights through the 1857 legislation, and as a result of those legal rights they become more empowered within their domestic sphere. This liberalization narrative is an historical construct of gradually evolving gender equality through the legal protection of the domestic sphere. Ultimately, it is suggested that family law gave women the power within that sphere to disagree with their husbands, control their own lives, and ultimately claim parity and power outside the domestic sphere. The liberalization narrative, therefore, claims that the abolition of coverture and the rise of family law is a two-part process of empowerment for women, first within the family, and second in the public sphere through exercise of domestic rights.411

Not surprisingly, there have been few book-length studies solely on the transition to family law, so identifying this dominant historical narrative has required piecing together historical claims about the new court and the law that arose from it.412 For instance, Alan Horstman summarized the 1857 Act as “the most successful piece of legisla-

411. In its simplest form, the liberalization narrative goes something like this: changing the old laws that categorized married women with infants, lunatics, and criminals certainly improved women’s lives. The form those changes took—a domestic relations court that would govern issues of child custody, marriage, and family property—has been a positive step toward validating women’s lives and agency by acknowledging and protecting those primarily female spaces and interests. It was a new social experiment, one that would not be fully duplicated in the United States until well into the twentieth century, revealing England’s lead in the march toward women’s equal rights. Under the new English system, some women received what I call domestic rights, custody of their children, rights to control their own property, and agency in terminating marriage. According to this liberalization narrative, once some women got rights, all women would get them.

412. See, e.g., Graveson & Crane, supra note 33; Horstman, supra note 1; Lee, supra note 267; O.R. McGregor, Divorce in England: A Centenary Study (1957); Stone, Road to Divorce, supra note 6. While these books and others have been written on English divorce, the focus has not been on the actual working of the divorce court, so much as on the general changes wrought over the past century and a half.
tion in the nineteenth century." R.H. Graveson wrote that this "taste of independence gave to Victorian women, married and unmarried, an appetite for equality with men in other legal respects." And Roderick Phillips stated that the court's "domestic and global implication... endowed it with importance quite out of proportion to its intrinsic significance." Even earlier critics were quite unabashed in their praise of the shift. De Montmorency asserted that "[t]ime brings its revenges even to women," and "[o]ne might almost now say, inverting Rousseau's famous phrase: woman was born in chains, and behold now on every side she is free."

The general praise of the family-law court by most historians is premised on a belief that as women gained power to exit intolerable relationships, they also gained power within both functional and dysfunctional relationships, and that power within their family would eventually radiate outward into the public sphere. As Debra Friedman claims, "[d]omesticity became the ideal of womanhood, and the home her exclusive domain, leading to a redistribution of authority in the household, with the wife becoming the equal of her husband." Once wives were equal with their husbands in the domestic realm, they would be able to claim power and parity in the public sphere. But of course, even the most woman-centered family law has not resulted in gender equality in the public sphere.

This is the contradiction at the heart of family law; the law is viewed as transformative and impotent at the same time. The law was to transform women's lives by abolishing coverture and giving them domestic rights and power within the domestic realm. But when the transformation did not occur, the blame was laid not on the ineffectiveness of the domestic rights, or the idea of a separate law of the family that would institutionalize separate spheres, but rather on deeply rooted gender differences and inequality that pervade social and economic, but not legal, relationships. This is the apology of family law. While it held such promise, its failure is attributed to non-legal factors that the law cannot change. By failing to question how family law contributes to gender inequality, historians and scholars construct a narrative of innocence. The liberalization narrative asserts that family law is trying to help women achieve gender equality, not perpetuate it, and thus is innocent in the very real inequality that exists.

One example might help. Consider Herma Hill Kay's pathbreaking study of the shift from fault-based to no-fault divorce. Kay con-

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414. Graveson & Crane, supra note 33, at 16.
417. Friedman, supra note 94, at 37-38.
418. Kay, supra note 267.
cludes that no-fault divorce helps two-career couples without children, but actually disadvantages women who have been married longer, have children, and subordinated their careers to their family.419 Kay's solution: teach women not to choose traditional family roles that sacrifice their earning capacity for their husbands and children.420 At no point does Kay assert or imply that the problem might very well lie in the artificial dichotomy of fault-based and no-fault divorce.

It is family law that positions divorce and the heterosexual couple at the center of a series of legal duties and obligations that are treated quite differently from, say, the fiduciary obligations of trustees or board members. If the marital unit were treated more like a corporation, for instance, in which board members who violate their fiduciary and contract obligations are held individually liable, the conundrum created by fault-based and no-fault divorce would disappear. If we did not use social and legal rules to create a system whereby men but not women are encouraged to go forth and begin new families when the old ones fall apart, and if women were not punished for subordinating their family relationships to their careers, we might be able to construct a set of legal rules governing intimate relations that does not turn on female subordination, the perpetuation of the separate and devalued domestic sphere, or the punishing of all family relationships that violate whatever contemporary norm is laid down by our legislators, politicians, and judges.

There exists in most family-law scholarship today a profound belief in the legitimacy of family law. The family, like a business or a piece of real estate, is viewed as a discrete entity that requires its own set of legal rules. It is an entity that is fluid but ultimately coherent. But why must it be centered around the sexual relationship of husband and wife and not, for example, around community groupings, neighborhoods, or church membership? Why is it concerned with custody of children and not with homelessness for those same children? Why is child sexual abuse, hunger, or health insurance not at the center? Family law continues today to focus on the heterosexual couple, expectations about gender roles, and the use of property and power to coerce the perpetuation of a narrow ideology of the Victorian nuclear family that is ultimately concerned with fault, breach, control over wives and children, and inter-generational transfers of property. Family law is about protecting the sanctity and privacy of a man's home and not about survival, flourishing, or autonomy of all people, including women and children. It continues to be used to punish those who fail to fit a particular model of monogamous household formation, and it denies the multi-faceted communal needs that most people have. It also contributes to the double-bind faced by most Anglo-American women, which is that in order to fully control

419. Id.
420. Id.
and exercise domestic rights in choosing a family they most often forego rights and opportunities in the public sphere.

Besides the formal legal barriers inherent within family-law rules, there are informal barriers to women who try to fulfill their traditional domestic duties and also claim equal rights and equal access to gender equality in the public sphere. Women who have entered the public sphere are often denied domestic rights while women who claim and receive domestic rights are essentially barred from participation in the public sphere. Women who have busy careers will be denied custody of their children while fathers with busy careers will not, and women who take time off from work to have families will be penalized when they seek to return. Separate spheres lives on in the formal rules of family law, in informal barriers to women crossing over into the public sphere, and in the absence of adequate legal protections for women's participation in male-dominated arenas. I assert that we cannot have an egalitarian and successful family law that does not have, at its core, a focus on the right and ability of all adult members to participate fairly and equally in the public sphere to earn the resources necessary to support their family. How can it be that scholars recognize the gendered constraints on women of the early family law and yet applaud its creation as a recognition of women's needs when it continues to be based on the disempowered domestic sphere as the natural place for women?

The liberalization narrative is quintessentially a narrative of legal innocence. It tells women that since the laws have changed and they are still disadvantaged by their domestic activities, the law is not at fault. But the law is at fault. Katherine O'Donovan has put it quite well:

421. O'DONOVAN, FAMILY LAW MATTERS, supra note 35, at 75-79; O'DONOVAN, SEXUAL DIVISIONS IN LAW, supra note 43, at 166-76.

422. One need only recall the turmoil surrounding the custody dispute between Marcia Clark, the prosecutor in the O.J. Simpson case, and her husband. Marcia's custody was challenged on the grounds that her job was too demanding to allow her to satisfactorily tend to her children's needs. See Margery Eagan, Maybe Moms Just Have to Know Their Limits, BOSTON HERALD, Mar. 24, 2002, at 015; Melody Petersen, The Short End of Long Hours; A Female Lawyer's Job Puts Child Custody at Risk, N.Y. TIMES, July 18, 1998, at D1; Julie Gannon Shoop, Working Mothers See Double Standard in Custody Cases, TRIAL, Oct. 1, 1995, at 12.


424. This is, perhaps, the impossible task of feminism—a desire to legitimate and empower women’s ability to move beyond the domestic sphere and compete equally with men at the same time that it aims to legitimate women's agency and protect them in their domestic choices. Feminism wants women to have full equality with men in the public sphere and also be protected when they choose to devote their time to children, family, and home.

425. Perhaps a simple way of putting it is this: When women’s subordination was sanctioned by the laws of coverture, it was easy to see how law institutionalized gender inequality. They were directly linked. The liberalization narrative posits the shift from coverture to family law as removing the legal impediments to gender equality. But because family law derives from and creates separate spheres, and because the
Gender ideologies and identities ensure that the resulting inequality is accepted as natural and inevitable. The law’s role in this is active, despite its absence from the personal. For it constructs gender ideologies and identities for the private as well as public structures which determine the relationship between the sexes.

What we learn from the divorce court records is that the nineteenth-century answer to women’s demands was nearly as limiting and constraining as coverture. So why would we think that today’s answer to women’s demands, relatively unfettered domestic rights through family law, is any more successful in empowering women, especially in light of the very real evidence that women today have not achieved the level of gender equality they deserve?

Family law contains within itself the elements of women’s subordination. There is an inherent incongruity between legal rights, which are the currency of the public sphere, and a separate legal system of the family that purports to use rights to regulate what society and the law tell us are at heart interconnected relationships. Legal rights within the domestic sphere have no purchasing power because the private sphere is constructed in opposition to the public sphere; because of that socially constructed difference, those inhabitants who want to use legal rights to define their private lives are legally and socially disempowered to do so. Many people sense that a law that recognizes a separate family realm, and treats it differently, somehow perpetuates inequality to the extent women’s legal rights are located within the family and men’s legal rights are located outside the family. At the same time, many family-law scholars and the majority of the population also feel that the family is a fundamentally distinct realm that should be governed by different laws and different procedures, and an emphasis on mediation processes and not adversarial litigation. Is the answer to this tension simply the claim that the family is different, that the law must recognize difference and accommodate it in order to protect social order? Such would be the position of cultural feminists who would structure legal relations around the reality of gender difference.

But in a post-modern world, the reliance on difference to justify family law ultimately demands a more critical analysis of the power and dominance of male interests in constructing that

private sphere is constructed around the denial of rights as the currency of power, the shift was a change in name only. Law continues to institutionalize gender inequality. Only now there is needed some institutional narrative to deny law’s role in maintaining women’s subordination in order to avoid having to make meaningful changes. The liberalization narrative, therefore, provides a story of law’s innocence to deflect criticism away from legal institutions and toward other social constraints.

427. See Carol Gilligan, In a Different Voice: Psychological Theory and Women’s Development (1982). Gilligan is considered the founding mother of the cultural or relational feminists. Cultural feminists argue that women require special treatment in law in order to overcome the biological and natural differences that render them unable to function equally as men in a male-defined world.
difference. To the extent family law derives from and helps create separate spheres, one cannot help but question the underlying commitment to gender equality.

The literature from the period, as well as the law that emerged from the 1858 court, reveals significant differences between conservative and progressive reformers as to the nature of the changes being sought in abolishing coverture. Yet, the family law that eventually arose was notably very similar to the substantive law that existed prior to 1858. The 1857 Act may have tolled the death-knell of coverture, but separate spheres, the holistic family law, a conservative first judge, and the minimal substantive changes all worked to undermine the efficacy of the change for women. To the extent the new court tied custody and alimony to marital fault, it forced on women traditional family roles and perpetuated patriarchal relations between husbands and wives. Separate spheres and other socialized constraints limited women's abilities to take advantage of the new court in its first decade, and the formal legal hurdles also placed women in vulnerable positions if they tried to end their marriages through informal means.

The domestic rights women achieved under the 1857 Act not only were not liberalizing and empowering, but in fact were quite limiting and constraining. The liberalization narrative suggests that although the early manifestation of family law was flawed, the enterprise was not, and that over time the law would overcome its flaws. As we have come to understand the legal constraints of the early law, so the narrative goes, we have removed them. And implicit in most of the

428. See Catherine MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987). MacKinnon is the founding mother of radical feminism, a theory that gender difference is constructed by men in order to dominate women. Only by deconstructing the way in which gender difference is socially constructed can feminists uncover the power lying at the root of gender inequality.

429. The first judge of the new court, Sir Cresswell Cresswell, was notoriously conservative even though he did venture beyond the old common-law rules to exercise some modicum of discretion granted by the Act. See Wright, Untying the Knot, supra note 42, at 910-13.

430. Eventually the constraints and limits of the 1858 court have been ameliorated and the promise of family law fulfilled according to the liberalization narrative. For instance, what began in 1857 with the court's jurisdiction to give custody to mothers finally ended in 1973 with legislation giving mothers equal legal rights to determine their child's upbringing. Guardianship Act 1973, c. 29, § 1 (Eng.). What began with the right to award support or maintenance in 1857 finally ended in 1882 with the Married Women's Property Act, 1882, 45 & 46 Vict., c.75 (Eng.), or in 1925 with the Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23 (Eng.), where the rules of intestate succession placed husbands and wives on an equal footing. The historical arguments almost uniformly contend that the law has eventually buried all the detrimental vestiges of legal coverture; what began in 1857, and has taken a century and a half to complete, is the equalization of women's legal rights within the domestic sphere by the recognition of independent domestic rights for women. Married women have the domestic rights that Caroline Norton, Emily Westmeath, and the covered women of the nineteenth century sought for themselves.
histories of the last century and a half is a belief that in removing the patriarchal constraints of the 1857 Act we have fully abolished coverture. Women today do have the domestic rights that Caroline Norton, Emily Westmeath, and Barbara Smith Bodichon desired. Women today have a preference for custody, are entitled to ownership of marital property, and can get a divorce as easily as men. Their legal rights are the same as men's, even if the consequences of those rights are not.

Even still, at the beginning of the twenty-first century we continue to have a set of legal rules and courts that treat the domestic sphere differently than the public sphere, maintaining separate spheres and identifying women's interests as primarily within the home. More importantly, we have been unsuccessful in breaking the double bind, the fact that women who choose to participate in the public sphere face enormous challenges if they choose also to have a family. Marriage and motherhood is still deemed by most employers to be inconsistent with top-level performance in the workplace and its corresponding top-level wages. While women are still struggling to get out of the home, and criticized if they do successfully enter the public sphere, the law has been slow to reciprocate by empowering women with legal rights in male-dominated arenas. The problem inherent in the domestic rights granted to women under early and contemporary family law is that the exercise of those rights still precludes the exercise of rights and economic success within the public sphere. But the liberalization narrative tells us that that contradiction is not legally constructed.

When we consider the demands of many of the nineteenth-century women reformers—indeed, independent rights to custody and property, regardless of marital status or fault—the creation of the 1858 court actually appears insidious. It gave women what they demanded—access to their children, divorce from abusive husbands, and limited control over property—but only if they remained locked in their domestic world. The reform gave them part of what they asked for, but without any power that would translate outside the domestic sphere, it had limited effect. Likewise, now that critics have seen how the nineteenth- and early twentieth-century family law did not empower women as they had desired, the liberalization narrative attempts to deflect criticism away from the constraints of family law and onto the empowerment of it. This deflection occludes the role of law in maintaining gender inequality by telling women that the law empowers them; it is the broader social climate that law cannot address which constrains them. It convinces them that the law, especially family law, is not a party to the disempowerment women face in the public sphere. And that is precisely the problem. In challenging the accuracy of the liberalization narrative and asking why it has become such

431. Women who are successful in their careers often put off having children, perhaps indefinitely. And women who do have children are either forced to leave the workforce or are passed over for promotions that would have put them in more demanding and time-intensive jobs, which happen to pay the best.
a pervasive explanation for women’s domestic lives, I suggest that we are still living the myth that family law destroyed coverture.

VIII. CONCLUSION

In 1982, Michael Freeman questioned what he saw as a nearly uniform acceptance of the need for a family court that would temper the “impersonality, insensitivity and remoteness of law, not to say its excessive rigidity and formality.”\textsuperscript{432} Freeman warned that the push for a sensitive and less adversarial court that would be “responsive to the perceived needs of the family,” would bring with it a highly bureaucratic and therapeutic state that would result in “greater surveillance and more intense supervision.”\textsuperscript{433} With a family court, the family would come under greater supervision and control from a monolithic, centralized state that would protect certain family structures and destroy others.\textsuperscript{434} And while few critics would deny that family courts today are awash in social workers, professional counselors, and quasi-medical experts, there is little critique of the underlying institution being administered to—the family—and the extent to which the law of the family produces the dysfunctions that are later analyzed, regulated, and controlled.

Family-law scholars have been quick to point out the variety of ways in which contemporary family law reinforces certain traditional family forms, privileges certain relationships, and also subjects the family to the surveillance of a highly bureaucratic state. Legal historians have also criticized the early family law that evolved out of the 1858 Divorce and Matrimonial Causes Court for reinforcing traditional patriarchal relations between men and women. But there is little evidence that the two groups have come together to closely examine how the early family-law court functioned and what legacy that court has provided in the precedents and the structuring of family disputes for today’s family law. This study illustrates one way in which the family law of today has adopted a narrative of innocence and women’s agency in the gender inequality they face. While this study is partly about understanding the underlying workings of the nineteenth-century court, any study must be done in light of the historical interpretation that has been placed on the court’s actions. In many respects, the issues and prejudices at stake in 1857 set the stage for the new family law, which continues today to be rooted in the values of the Victorian era.

What I have endeavored to do in this article is take a closer look at the shift from the debilitating constraints of coverture to the so-

\textsuperscript{432} Michael D. A. Freeman, Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?, in THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES 8 (John Eekelaar & Sanford Katz eds., 1984).
\textsuperscript{433} Id. at 8-9.
\textsuperscript{434} Id.
called liberality and feminization of family law. And what we discover from a close analysis of the early court’s records is that it indeed reinstated and reproduced the patriarchal conditions of coverture. Despite women’s demands for domestic rights, they received begrudging protection only from particularly abusive husbands, and a majority of women who asked for and received that protection most likely lost custody of their children and a vast majority lost all legal claims to marital property. Moreover, while some women seemed to be well-situated to benefit from the court’s new rules, there were others who were not. And the rather inexplicable differences between what different women requested and what they received makes it impossible to speak of the law having any kind of uniform effect on all women. Placing the law’s effects within the context of the reform debates allows us to see the ways in which the new family law gave women what they asked for but not what they wanted. It gave them some protections within their domestic sphere but no legal rights. The ostensible protection of women’s domestic world came at a cost of remaining in the private sphere without the rights and economic resources that were the currency of the public sphere. Coverture was reproduced through the discretionary power of state officials who would reward certain socially-accepted domestic behaviors and penalize deviations from others.

Probably more interesting than the reproduction of coverture in the early family law is the dominant historical narrative about this rise of family law as empowering for women and that the limits of the early family law have been overcome for the most part by the recognition and protection of robust domestic rights in today’s family law. This liberalization narrative is, I argue, a narrative of law’s innocence in the gender inequality women face inside and outside the home. The dominant historical narrative recognizes the limits and constraints of the early family law, but it asserts that family law in essence has been an empowering force in women’s lives. But just as the nineteenth-century court’s actual operation undermined the power and protection the law supposedly granted women, the liberalization narrative obscures the way in which domestic rights and family law undermine women’s ability to operate equally inside and outside the private domain. Insofar as this narrative is a legal/historical myth of evolving gender equality and the law’s concern for women’s domestic interests, the overwhelming ubiquity of the narrative in the face of strong evidence to the contrary suggests that the narrative itself serves to deflect critical attention away from the legal roots of the early family law and onto other purported sources of gender inequality. By obscuring family law’s role in maintaining inequality, the liberalization narrative...
deflects criticism and reform activities onto other sociological grounds.

As we study how family law replaced coverture and how it subsumed women's demands for independent rights into a dependent domestic sphere, we can see how the liberalization narrative about the rise of women's rights deflects their demands for equality and power in the whole of their lives, not just their intimate family lives. Just as the court acted as gatekeeper in the nineteenth century, so that women who ventured too far beyond their allowed scope of acceptable behavior would be denied access to the remedies and protections of the family law, the liberalization narrative functions as gatekeeper today. By setting up the domestic and public spheres as legally separate, independent zones of activity, the liberalization narrative obscures the legal interconnectedness of the two spheres. It encourages women to exercise their autonomy within the domestic sphere, assuring them that they are helping the cause of equality, while occluding the way in which their choice to exercise domestic rights bars them from meaningful public participation.

But how can we see from the tension between the claims of women reformers and what they got in the limited, interdependent family law, that the liberalization narrative allows modern family law to reproduce the constraints of coverture? In other words, how do we know that the contradictions in the nineteenth-century family law continue today, when women have been granted the "domestic rights" that nineteenth-century reformers wanted? The interdependent family law of the nineteenth century aggregated certain behaviors and then premised legal rights on conforming to socially acceptable norms. That has not changed. There still continues the desire to protect and support those spouses who behave according to acceptable norms, and the desire to keep the family intact at the expense of those spouses who want out. Society has a strong interest in supporting properly functioning families. They are the easiest and most efficient way to raise children, have a smooth inter-generational transition of property, and provide incentives for productive labor. But the idealized family, with the woman relegated to the domestic sphere and subordinated to the wishes and demands of the male breadwinner, only functions efficiently when women accept their subordinate roles. And that occurs only through a complex series of laws and social norms that deny women individual rights. This is why the debates around divorce reform are so crucial. Just as women were demanding individ-

enforced by legal rules, in the public sphere. By creating a narrative of disconnection, agency, and choice within the domestic realm, the law tries to convince women that their acceptance of that power has no cost, and is not forbidden fruit that once they bite into will bring death to their public lives. It is the law of the family that helps maintain the separate spheres as interdependent realms of limited agency while simultaneously producing a narrative of independence and empowerment that hides the links between the two spheres.
ual rights to determine their own lives and that of their children, the 1857 law created an interconnected family law that denied legal rights while it claimed to protect women's interests. And when the law consistently respects the individual rights of men even if they conflict with the welfare of their family, but refuses to recognize individual rights of women except when they happen to correspond to the welfare of their family, the law can be seen as critically complicit in creating and maintaining the patriarchal family. This differential treatment is the outcome of an interdependent family law.

While much remains to be done with the data on the early court, it forces us to rethink the liberalization narrative about the naturalness of family law which unquestioningly praises its creation and continuation. In the end, I hope this data encourages us to look beyond simple conclusions that posit the court as a benefit for women, and instead allows us to see the court and the family law that emerged as complex, coercive institutions that produce a particular form of family relationships that they will protect, and that allow nonconforming men and women to fend for themselves without the protection of the law. To the extent that women are more likely than men to be left to fend for themselves, we cannot claim that the weaker sex is a favorite of our law.