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"for every wrong there is a remedy": Changing Law And Fleeing Wives in Nineteenth-Century America

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Changing Law and Fleeing Wives in Nineteenth-Century America

I. "... but little uniformity": The (il)Legality of Wife Abuse

Wife abuse came increasingly before the public in the nineteenth century. The temperance movement publicized it; women's rights activists called attention to it and mobilized to empower women, and wives brought the matter into the courts.[2] Although it was usually carried out behind closed doors, it was not a hidden crime. And the heritage of the colonial period remained intact: wife abuse was illegal, the lead in so defining it having been taken by seventeenth-century New Englanders. Puritans denounced it,[3] influenced no doubt by leading clergy in England who more and more were promulgating the virtues of companionate marriage and by awareness that English ecclesiastical courts had long punished abusive husbands.[4] "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assalt," declared the Massachusetts Body of Liberties of 1641.[5] (The Body of Liberties addressed other forms of violent behavior: if parents "exercised any unnatural severitie" towards their

children, the children could complain to the authorities "for redresse"[6]; "no man" was to "exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use.")[7] But even three years before the adoption of that fundamental code, a Massachusetts man had been charged with beating his wife.[8] Massachusetts and Plymouth passed the first laws against spouse abuse anywhere in the western world, Massachusetts in 1650 imposing a fine of up to £10 or a whipping and Plymouth in 1672 punishing wife beating with a £5 fine or whipping.[9] Indeed, a few years before Massachusetts set its fine, the native Americans gathered at Nonanetum under the influence of John Eliot had agreed to a 20*s* fine for wife beating.[10]

But the nineteenth-century situation was, to say the least, muddled, sufficiently so that even some genuinely concerned citizens were wrong about the law while others were unsure. Turning to legal manuals would have been no help. The wording in the 1803 *Conductor Generalis being a Summary of the Law relative to the Duty and Office of Justices of the Peace*..., frequently reappeared well into the century. Battery, "in a reasonable manner, " could be justified by a parent, by a master, a schoolmaster, by a gaoler over people in their charge, "and even [by] a husband his wife, *as some say*."[11]

There is the possiblity also that some people who knew better just stretched the truth for effect, thereby misleading countless others. Writing in 1837, Sarah Grimké noted that it was not true, as some said, that the old law which allowed a husband to moderately correct his wife was "a dead letter." "Many a husband... exercises the right given him by the law, of degrading woman by personal chastisement."[12] In a widely circulated 1845 publication,

“Wives and Slaves. A Bone for the Abolitionists to Pick,” an anonymous Connecticut resident (W. J. F.) noted that, regardless of the law, a husband could adopt “*any act of physical coercion* which does not endanger the life or health of the wife, or render cohabitation unsafe.”[13] Although the law did not permit “such things,” a beaten wife might not have the requisite proof, “*and she may not swear against her husband*.” If he does not beat her in public, “he can laugh at her accusation.”[14] A speaker at an 1850 Woman's Rights Convention agreed that the common law "is not altered," but thought it "inoperative."[15] In a satiric letter to the feminist newspaper, *The Revolution*, Mrs. Petroleum V. Nasby (presumably David Ross Locke who usually wrote as "Petroleum"), "not so well edicated as Mr. Nasby," argued that "scripter and law" dictated that wives were in subjection to their husbands, that "the law sez a man and wife is wun, and that wun is the man," which meant "I have a rite to whip you if I don't use a stick no biggern my thum...."[16]

When in the early 1870s, New Jersey Senator Frederick Frelinghuysen got a bill through the United States Senate extending the common law to the territories, the *Woman's Exponent* informed readers that that common law allowed for moderate correction of a wife.[17] In her 1883 address, titled "Is it a Crime to be a Woman," Lillie Devereux Blake, as author and orator one of the most active supporters of woman suffrage, commented, "every woman in this country is treated by the law as if she were to blame for being a woman," which she supported with numerous points--including that "a man may beat his wife all he pleases."[18] Susan B. Anthony was more sweeping in a speech she delivered scores of times

before going on trial for voting in the 1872 federal election:

> **By the law of every state in this Union to-day, North as well as South, the married woman has no right to the custody and control of her person. The wife belongs to her husband; and if she refuses obedience to his will, he may use moderate correction, and if she doesn't like his 'bed and board,' the husband may use moderate coercion to bring her back. The little word 'moderate,' you see, is the saving clause for the wife, and would doubtless be overstepped should [the] offended husband administer his correction with the 'cat-o'-nine-tails,' or accomplish his coercion with blood-hounds.[19]**

Henry Blackwell thought he knew better, but he was not quite certain. "The right of a husband to use personal coercion," he wrote Lucy Stone about Ohio, "is I believe disallowed."[20] That same year, 1853, Thomas Wentworth Higginson noted his belief that the "courts would hardly sustain the opinion of the English Justice Buller, that the husband might lawfully 'correct' his wife with a stick not larger than his thumb."[21]

Of course, some people got it right. *Lily*, the woman's temperance newspaper, most consistently and accurately emphasized existing law. The law no longer recognizes "any right in the husband to chastise his wife," it noted first in 1854,[22] repeating the sentiment in 1856 when it too optimistically added that any husband who did beat his wife would be "dealt with summarily" by the community.[23] More specifically, the paper reprinted a speech about Rhode Island laws pertaining to women given at an 1855 Woman's Rights Convention. "The spirit of progress," said Paulina Wright Davis, "has rendered obsolete the right of a man to whip his wife."[24]

But exception had to be made for North Carolina, the one state which from the mid-19th century on consistently rationalized wife abuse, or what it referred to as "chastisement,

" as a means of governing wives,[25] a position reaffirmed by a lower court as late as 1890: " while it was indictable for a husband to chastise his wife with a whip or stick out of pure malice, a husband has, nevertheless, a right to chastise his wife for the purpose of correction...."[26]

Elsewhere, in fact, when called on, higher state courts generally, often systematically, declared wife abuse illegal. The Maine Supreme Court in 1877 for example, noted that " undoubtedly," the law of all American states was that a husband could not "strike his wife, to punish her, under any circumstances...."[27] A circuit court judge in Alabama in 1871 instructed a jury that the notion that a husband could moderately chastise his wife was "no part of the law of Alabama, although," he added, avoiding the error the Maine court would make, "it might be of North Carolina or Mississippi."[28] In 1884, the Iowa Supreme Court was just as definite, dealing with a case in which a husband admitted having struck his wife once with a whip. The wife's conduct, the court acknowledged, had been "quite aggravating, to say the least," but still it noted, "we cannot believe the defendant was justified in striking his wife with a whip, or anything else. We are not prepared to say that there can be any justification for such conduct."[29] As one person writing about Virginia noted, late in the century the Virginia legislature had refused to consider a bill repealing "the alleged common law right of the husband to chastise" his wife because the doctrine had "long since faded from the rulings of the court."[30]

Women were failed less by the law than by their own, their lawyers's and sometimes even judges's lack of knowledge and by the entirety of the legal system. But "generally"

obscures a great deal. Despite the existence of a new national government and constitutional promises about establishing justice, promoting the general welfare, and securing the blessings of liberty, marriage, its definition, its regulation, indeed all things related to the institution, perhaps most importantly divorce, remained a concern of the separate states.[31] Despite some similarities, and even some uniformity provided by state judges conversant with the decisions of judges in other states, women's experiences, women's fate, their protection, and hence at times their very lives, varied, not just from time to time but from place to place.[32] Protections offered women in one state might be denied a few miles away across an invisible border. In a lengthy section on "Husband and Wife," with its hundreds of citations, the *Corpus Juris Secundum* illustrated the point with regard to maintenance cases, suits brought by wives for support outside their homes. "Several authorities [i.e., courts] require that the complaint allege... that complainant was without fault... [while] other authorities do not regard such an allegation as essential."[33] Likewise some jurisdictions allowed wives to flee their homes for cruelty which might not be severe enough to justify divorce. Other courts ruled that the cruelty "must be such as would entitle her to a divorce."[34]

There was disagreement among the states over a related issue, whether a woman who fled her husband could sue for support and maintenance without suing for divorce. The Nebraska Supreme Court in 1889 called attention to the disagreements. The Chief Justice approvingly cited decisions in California and Mississippi which allowed such suits and then buttressed his argument with references to other state cases: "See also Almond v. Almond, 4 Rand. (Va.), 662; Purcell v. Purcell, 4 Hen. & Munf., 506; Jelineau v. Jelineau, 2 Desaus. Eq.

45; Prince v. Prince, 1 Rich. Eq. Rep., 282; Graves v. Graves, 36 Iowa 310; 2 Bishop on Marriage and Divorce, sec. [*10] 354, et seq.; Glover v. Glover, 16 Ala. 440; Wray v. Wray, 33 Ala. 187.)"[35] In all fairness, the Chief Justice also noted that "the cases cited in defendant's brief show that the states of Indiana, New Hampshire, Missouri, New York, Massachusetts, New Jersey, Michigan, and Louisiana have held to the opposite doctrine."[36] Sometimes, but only sometimes, the differing opinions were based on differences in state law; sometimes they represented only differences in the willingness of particular judges to act where the law was silent or unclear.**

As a lawyer pointed out in an 1851 Texas case: "The language of the statute is broad enough to cover this case, giving to each word its true natural signification. The language used is not the same used in the English books, or the statutes of most of the States, but is much broader and more comprehensive. Then why give it the same interpretation? why not enlarge the meaning in the same proportion that the terms are enlarged? To do otherwise is surely illogical."[37]

It was not only the luck of marriage that determined a woman's fate, but also the luck of birth, of place, of her husband's residence, of lawyers, and of judges.

A North Carolina court expressed well the confusion about state variations and the luck of residence in 1868, referring to England, Ireland, Scotland, to Mississippi where it found courts accepting the idea that husbands could correct their wives, and to other states where that notion found "but little favor." "In looking into the discussions of the other states," the court noted, "we find but little uniformity." It was a subject "at sea," not surprisingly, "for it will always be influenced by the habits, manners and conditions of every

community."[38]

Similarly, just a year later, while considering whether a wife could receive alimony without requesting a divorce, the California Supreme Court noted first that in England decisions "have been by no means uniform," some "eminent judges" saying yes, others doubting it, some saying no.[39] "In America, there has been a similar diversity of opinion," the court continued, listing only those states where Supreme Courts had upheld that right: Virginia, Kentucky, North Carolina, South Carolina and Alabama.[40] (Perhaps the court was not aware that less than a year earlier, Massachusetts's court had denied the right.[41])

Throughout the nineteenth century, husbands were jailed, wives won divorces, alimony, support, and, indeed, in many states, a clear right to run away and to enlist the help of neighbors, relatives, and friends, although none of those protections separately, and not all of them together, effectively protected wives from husbands who wanted to beat them. Illegality was simply not enough for protection, and certainly not when abuse was lightly punished. Moreover, the widespread incidence of abuse led to legal confusion, or at least led many people to the wrong conclusions. If abuse was so prevalent, some seemed to reason, it must have been legal. Illegality, then, did not adequately define how Americans understood or responded to wife abuse. Court rulings did not adequately reflect either the pervasiveness of abuse or society's toleration of it and its consignment of abused wives to continued pain and often horrific suffering. Wife abuse had a resiliency that the law was hopeless to overcome.

Still, court decisions need to be considered if only to highlight the suffering--often vividly pictured[42]--and the tragedy. Indeed, this is a story with a great many 'if onlys'

centered around the legal system, alternate scenarios which might have flowed from openings provided by humane judges: their decisions, their sometimes eloquent words, might have penetrated peoples's psyches if only they had been publicized, made part of the public record by mainstream newspapers or those devoted to women's oppression; they might have filtered down to lower courts, to magistrates, to justices of the peace, to anyone responsible for maintaining order. Unfortunately, however, often only the horrible was publicized. Judicial attacks on wife abuse scarcely made it out of the legal environment, never had a chance to alter peoples's consciences.

II. "... law fit for hell!"

A. A Sampling of Scary Decisions

Throughout the century, and throughout the rapidly expanding country with its multiplicity of jurisdictions, courts handled countless cases dealing with wife abuse. Often, judges, especially southern state judges, were unsympathic to wives, their decisions at times startlingly callous.[43] Some of these cases have been frequently cited and quoted, as precedents in other cases, by nineteenth-century women's rights activists, and by historians and legal scholars, perhaps none more than two southern cases, *Calvin Bradley v. The State,*[44] a Mississippi case from 1824 and *The State v. Jesse Black*,[45] an 1864 North Carolina case, cases in which the courts both deplored the idea of abuse AND, while finding the husbands guilty, accepted the idea of moderate correction in part because homes needed to be closed to public scrutiny. The law, North Carolina's Chief Justice Richmond Pearson ruled, permitted a husband to use "such a degree of force, as is necessary to control an unruly

temper, and make her [his wife] behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain."[46] .

There were other cases equally horrendous but not nearly so well known. Indeed, two years before *Black*, in *Joyner against Joyner,*[47] a case involving more serious violence than that charged in *Black,* the North Carolina Supreme Court issued a decision grotesque in its unapologetic acceptance and justification of wife abuse. A lower court judge had granted a woman alimony pending the outcome of her divorce petition. She had charged her husband with numerous acts of verbal and physical violence which forced her to leave his house. Once he had attacked her with a horse-whip and once with a switch. The husband appealed the temporary alimony award.[48]

Far more fully than he later would in *Black*, and indeed more fully than any nineteenth-century court would, Chief Justice Pearson explained the court's concept of marriage and the place of physical correction in it. Despite noting that "it is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex,"[49] the North Carolina court unabashedly labeled wives inferiors who could be controlled violently when husbands deemed it necessary.[50] "This is law fit for hell!" noted one reader of the decision.[51]

The court adopted what would seem to be a very peculiar reading of the North Carolina divorce statute, which provided that the cause for which a divorce was requested

had to be set forth "'particularly and specially.'"[52] After commenting in general on the need to specify time and place in various pleadings, the court declared that neither time nor place was of the essence in the case under consideration, that is, there was nothing to show "that the blows were inflicted at a time when the wife was in a state of pregnancy" or that they were inflicted "in a *public* place, with an intent to disgrace her and make her life insupportable."[53]

Still, the court believed that the "particularly and specially" provision of the state law had not been satisfied. The wife had not specified the circumstances "under which the blow with the horse-whip, and the blows with the switch were given,"[54] by which, incredibly, the court meant that she had not spelled out what "she [had] done, or said, to induce such violence on the part of the husband."[55]

Then followed the court's description of true marital relations, which could be traced back to "the beginning of the human race,"[56] although it supported its long backward vision only with the much-used section of Genesis: "'Thy desire shall be to thy husband, and he shall rule over thee.'"[57] Since a husband was responsible if his wife slandered or beat a neighbor, he clearly had to have the means to control her. A wife had to be subject to her husband, the governor of the household. If he submitted to a wife's "unruly temper" or "unbridled tongue," to her disrespect, he would lose the respect of his family and his neighbors.[58]

Not having proof of what had in fact occurred in the case at trial, the court generalized, imagining possible scenarios, which, the manuscript record of the case shows, it

took almost word for word from the accused husband. What was a husband to do after all should he return home some day to be greeted by a wife who verbally abused him, calling him a scoundrel and wishing he were dead?[59] If, provoked, he struck her with a horse-whip he happened to be carrying and later expressed regret, could he be blamed? Or, supposing they had a difference of opinion and she lost her temper and accused him of telling lies and she repeated the accusation after being warned not to, and he struck her several blows?[60]

The court answered its own questions in a manner both specific and general. This wife was not entitled to a divorce, essentially because, in the absence of specifics, the court did not know what her responsibility for the violence had been, which led logically enough to the court's more general conclusion. It had demonstrated to its own satisfaction "that there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks, and these acts do not furnish sufficient ground for a divorce."[61]

In a somewhat similar fashion, the Alabama Supreme Court ruled in 1855 that it would not listen to the complaints of a wife who brought on the behavior of which she complained. When Milly David was granted a divorce "on the ground of cruel and inhuman treatment," her husband appealed.[62] The Supreme Court did not deny the abuse, even accepting some errors in the wife's cataloging of the violence she had suffered. "Here, one of the charges made by the complainant is, that the defendant struck her several times with a stick, drew his knife, and threatened to cut her throat; and the evidence is, that he choked her, struck her with the whip he used for the correction of the negroes, and pulled her hair."[63]

The court accepted the seriousness of the violence, which, *"under ordinary circumstances"* would have justified divorce.[64] But not in this case. To begin with, "not every instance of harsh, or even unmanly violence" should necessarily lead to divorce.[65] Cruelty was relative, class being the determining factor: "Between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty; while between persons of a different character and walk in life, blows might occasionally pass without marring to any great extent their conjugal relations, or materially interfering with their happiness."[66] Moreover, Milly David herself had a "most violent and aggravating temper" and her "ill-treatment" was largely the result of "her own misconduct."[67] To reward her with a divorce would suggest that a wife need only "aggravate her husband beyond endurance, and then complain of the treatment of which she alone was the cause."[68] One sentence summed up the court's conclusion: "[I]f a woman chooses to unsex herself, and forget that she is a female, she should not complain if others do not always remember it."[69]

There were horrendous cases in the north also. If one Mrs. Poor, who was suing for divorce, had been in the New Hampshire court in 1836 when the judgment in her case was issued, she would have learned immediately that she was in serious trouble. Although Chief Justice Richardson noted that her husband had "a hasty and irritable temper,"[70] he quickly turned to her, possessed as she was of "a high, bold, masculine spirit; somewhat impatient of control; in a high degree jealous of the liberty that belongs to her as a wife, and not always ready to submit, even to the legitimate authority of her husband,"[71] a characterization he kept returning to in his lengthy decision. Even her affidavit betrayed "any thing rather than

a meek and quiet spirit."[72] He referred to her "stubborn obstinacy," to her "rebellion against his authority."[73]

In his full and descriptive decision, Richardson probably imagined himself even handed. He was highly critical of Mr. Poor's actions, occasionally holding him responsible. Indeed, he was quite blunt, in terms both general and specific. Old law books notwithstanding, a husband had never had "the right to reduce a refractory wife to obedience by blows."[74] "[A] wife is neither a slave nor the servant of a husband."[75] He referred to Mr. Poor's "misconduct,"[76] to his "unjust and tyrannical" actions.[77] But at other times, and in fact, overall, Mrs. Poor was held to account. Sometimes, Richardson made his attitude clear in a few words. The Poors were married in 1816 and apparently lived in harmony until 1830, when she became "a professor of religion," one Mr. Poor disapproved of. That was the source of all their troubles, of, in Richardson's words, their " quarrels, squabbles and encounters,"[78] summary words which hardly fit the violence the judge detailed: that Mr. Poor had on separate occasions whipped and horse-whipped his wife, each time leaving marks on her body.[79] Once too when she found her house door fastened she took a crow bar to it and was "roughly handled"[80] in the ensuing skirmish. To Richardson, that encounter served mostly to allow him an unattributed literary illusion. " She seems to have enountered some of

_____'The perils that environ

The man that meddles with cold iron.'[81]

One of the conflicts between the Poors arose over Mrs. Poor's desire to attend church

on the Sabbath, a simple exercise of every wife's "religious liberty."[82] Chief Justice Richardson denounced Mr. Poor's actions, denying his wife horse and carriage and hitting her,[83] but his sympathy for Mrs. Poor's plight evaporated quickly. He used the incident not to highlight Mr. Poor's abusive nature but Mrs. Poor's shortcomings. She had been presented the perfect opportunity to demonstrate her Christian duty to submit and she failed miserably.

> **The very essence of the religion she professes is, that charity that suffereth long and is kind, which vaunteth not itself, doth not behave unseemly, is not easily provoked, and not only believeth and hopeth, but *beareth and endureth all things*.[84]**

Her responsibility was clear; in Richardson's words "there cannot be any diversity of opinion" on the matter.[85] "If when ye do well and suffer for it,... this is acceptable with God, says the bible."[86] "If she could not obtain his consent by kindness and condescension, she should have submitted in silence to the wrong he was doing her."[87]

On another occasion, Richardson concluded, Mrs. Poor should have "avert[ed] the gathering storm by meek and submissive behavior."[88] At the time, however, Mr. Poor was more than likely "driven to violence" by his wife's "provoking taunts–taunts which," Richardson actually said, Mr. Poor may have found "the more provoking, because he felt in them the sting of truth and justice."[89]

No part of Richardson's conclusion could have been a surprise. He rejected Mrs. Poor's divorce suit, admonished her husband not to be provoked into "unmanly acts of

violence,"[90] reminded her of her duty to submit, and informed people around them to remember that "'Blessed are the peace makers.'"[91]

B. The Wrong Publicity

Fortunately, as numerous as are these cases subjecting women to abuse from which they could not escape, they were not the norm. Most courts in most states did considerably better. But they have not been given their due. Condemned often by contemporaries and looked upon unfavorably by many historians and legal scholars since, their attacks on wife beating have generally been overlooked. In 1856, for example, the year after *David v. David*, the Alabama Supreme Court considered another appeal from a husband whose wife had won a divorce, this time upholding the decree.[92] Margaret King was "not without blame,"[93] but her "failings" were "inordintely resented, and visited with intemperate violence and inexcusable harshness."[94] When the husband's passions are "so much out of his own control, that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated."[95]

For understandable reasons, women's rights activists focused on court decisions which made the oppression and suffering of women most apparent and grievous. So, in an item titled "Wife Whipping Legal in this Country," the *Woman's Journal* in 1871 supported its legitimate point that without constitutional provisions or state laws decisions about wife beating were left to individual judges ("in the absence of express statutes, the breath of the judges ... is the law of the land") by juxtaposing against a recent strong statement from the Alabama Supreme Court that wife beating was "barbarous" and had never been law in the

state, the Mississippi decision in *Bradley* that a husband should "*confine himself within reasonable bounds*" when he chastises his wife, without informing readers that that decision was more than 40 years old.[96] Three years later the newspaper quickly published news about a North Carolina decision which rejected the idea that a husband could punish his wife with a stick no bigger than his thumb but accepted the notion that the court was not going to get involved in trivial complaints.[97]

Even foreign cases were publicized. An 1826 Canadian case, which highlighted the obstacles an abused woman could face, was described briefly five years later by a Philadelphia publication, *The Ariel.*[98] Mrs. Ham left her husband because he had "beaten her with a horsewhip." Her parents took her in and her father sued for her maintenance. The Chief Justice of Upper Canada was unsympathetic, arguing that "a man had a right to chastise his wife *moderately*– and to warrant her leaving her husband, the chastisement must be such as to put her in jeopardy." "The law," the judge said, "was decidedly hostile to the practice of wives running away from their husbands," and he continued by "expressing his disapprobation, in the strongest terms, of the officious meddling of the parents of Mrs. Ham." *The Ariel* did not report how the case ended, but it did close the article by noting that "Pennsylvania wives" need not fear the publicity given to that case, "as the gallant President of the Philadelphia Court of Common Pleas, Judge King, has ruled the point in a different manner."[99]

In 1884 *The Woman's Tribune*, put out by the Nebraska Woman's Suffrage Association, called attention to a recent decision by a magistrate, another Canadian. A pregnant wife who had been "beaten black and blue and locked out of her own house by her

husband" had appealed for protection. The magistrate refused to act, relying on his understanding of the old common law allowing husbands the right of moderate correction. "'It is not... for a magistrate or court to step in and interfere with the rights of a husband in ruling his own home."[100] The *Woman's Journal* publicized the Jackson case in England; according to the paper, Mr. Jackson forcibly abducted his wife as she was leaving church and locked her in a barricaded house. He and friends "withstood a regular siege" from friends and relatives trying to rescue her. A court refused to grant a writ of habeas corpus to compel Jackson to produce his wife in court, saying that if the wife were mistreated she could apply for protection before a magistrate.[101]

Lillie Devereux Blake forcefully expressed her disdain for how courts handled abuse cases in her 1874 novel, whose title left nothing to the imagination: *Fettered for Life: or, Lord and Master*. Blake first cited the by then fifty year old *Bradley* decision and then moved to a more recent Pennsylvania case, *Richards v. Richards*,[102] in which, she notes, the court declared that "'it is a sickly sentimentality, which holds that a man may not lay his hands rudely, if necessary, on his wife.'" And, she wrote, she could multiply those examples indefinitely.[103] Whether she could or not, and certainly there were other horrible examples to choose from, when, nine years later, she delivered her extraordinary lectures on *Woman's Place To-Day* in response to the series of lectures by Rev. Morgan Dix, she again relied on *Bradley* and *Richards*.[104]

Nineteenth-century court critics have been joined by numerous scholars. So, for example, one legal scholar has written, in what is in many ways a fine study, that the Massachusetts Supreme Court did not reject a husband's right to chastise his wife until

1871. And in general, only by the end of the Civil War, had "the American legal system repudiated the doctrine of marital chastisement,"[105] and even then, though "jurists and lawmakers vehemently condemned chastisement doctrine,... [they] routinely condoned violence in marriage."[106] Moreover, there seemed even to be a kind of backsliding. After the Civil War, judges premised their decisions--in the process developing "a body of divorce law... on the assumption that a wife was obliged to endure various kinds of violence as a normal--and sometimes deserved--part of married life."[107]

Courts, too, relying on the investigations of others, have perpetuated an inaccurate version of the past. In 1984, the United States District Court for Connecticut cited Del Martin: "In our own country a husband was permitted to beat his wife so long as he didn't use a switch any bigger around than his thumb. In 1874 the Supreme Court of North Carolina nullified the husband's right to chastise his wife 'under any circumstances,'" although it then went on to qualify its own ruling.[108]

III. "under the continuous pressure of judicial interpretation": The Courts Do Better

Neither the nineteenth-century activists nor the historians who followed were totally wrong; but they were and are misleading. Even the usual focus on the 1824 Bradley decision in Mississippi is misleading, both for what it omits and because it overlooks other court action in the state. While the Supreme Court did permit husbands to 'chastise' their wives, it did not challenge the lower court judge who had accepted the idea that an assault on a wife might be a crime, calling marital violence a "remnant of feudal authority,"[109] nor

did it overturn Calvin Bradley's conviction. Looking backward in 1893, the Mississippi Supreme Court noted that the "ancient" common law's allowance of domestic brutality, " strangely recognized in *Bradley v. State "* had "never since received countenance."[110] *Bradley*'s "blind adherence... to revolting precedent" had "long been utterly repudiated."[111]

There were numerous cases between *Bradley* and the 1893 case suggesting the court's later summary was accurate. In *Dewees v. Dewees*, for example, the Supreme Court ruled in 1877 that a wife who had been driven from her house by her husband who had sued for divorce on the grounds of desertion was entitled to alimony *pendente lite* (pending the litigation). "Very great suffering and privation might have been imposed on her if this course had not been adopted."[112]

Nor was *Richards v. Richards* quite what Blake and others made it out to be. In overturning a lower court verdict allowing Elizabeth Richards a divorce, the Pennsylvania Supreme Court said roughly what Blake attributed to it, although it had referred not to a "sickly sentimentality" but rather to a "sickly sensitivity which holds that a man may not lay hands on his wife, even rudely...."[113] But Blake took the quotation seriously out of context, distorting it by omitting key words, and making it into a justification of abuse, a statement that abuse would be tolerated. And it was not that.

Hearing the case initially in the Court of Common Pleas for Crawford County, the presiding judge very clearly instructed the jury: "The time has passed by when the barbarism of the right of the husband to inflict bodily or corporeal punishment on the wife obtains a place in our law."[114] If the jury were satisfied the husband had committed the violent act he was accused of, then the verdict, the judge said, leaving the jury little option,

should be for the wife. The jury was, the verdict was.[115]

On appeal the Supreme Court rejected the instructions and ordered a new trial,[116] which again ended in a divorce decree. Again the case was appealed.[117] The Supreme Court seemed out of patience, for the lower court judge seemed to have essentially repeated his earlier instruction, for which "he had no authority."[118] The Supreme Court ordered yet another trial.[119]

According to the printed court record, which presumably was at most what Lillie Devereux Blake had available to her, all witnesses testified that William Richards had never abused his wife, never laid hands on her except for the one time which was at issue and which prompted her suit.[120] That time, he put his hand on her face, apparently pinching or pulling her nose. And that he did because his wife and his sister were arguing, and his wife was threatening his sister with a knife. He intervened.[121] And for that the judge told the jury that if it believed he had committed that act of barbarism, Elizabeth Richard was entitled to a divorce.[122]

Reviewing the case initially the Supreme Court summarized Pennsylvania law, which allowed divorce for barbarous treatment which endangers life, or behavior which made a wife's condition intolerable and her life burdensome.[123] "It is quite possible," the court declared, "that a single act of cruelty, on a single occasion, may be so severe" as to justify divorce. But, it added, "it is not every single touching of the wife's person in anger, at a moment of sudden excitement or passion, that should bring down on the husband a sentence of separation more cruel than the act that induced it."[124] The judge ought to have reminded the jury of what had caused the husband to behave as he did.[125]

Towards the end of its decision, the Supreme Court stated:

> **It is a sickly sensibility which holds that a man may not lay hands on his wife, even rudely, if necessary, to prevent the commission of some unlawful or criminal purpose, or the use of a butchers-knife against a relative....[126]**

It may well be that there was more in this case than was evident; it might well be that Elizabeth Richards had good reason to want a divorce, although she had told one witness her husband "always treated her well, drunk or sober"[127] and that the court was not sufficiently sympathetic, operating as it did with the general notion that divorce should not be "easily obtained."[128] Events needed to be seen in context, the court noted. "We do not divorce savages and barbarians because they act as such towards each other."[129] But it is worth noting that the Supreme Court did not take issue with the trial judge's strong condemnation of wife abuse. It merely said that one act of twisting a wife's nose while she was brandishing a knife (which the trial judge failed to note in his instructions to the jury [130]) did not warrant divorce under Pennsylvania law.

Lllie Devereux Blake was not the only one to get *Richards* wrong. In *May v. May*, another Pennsylvania case (1869) one of the counsel cited *Richards* as authority for two of his arguments: that "cruel treatment must endanger life" to warrant divorce and that "a single act of violence is not sufficient ground for divorce."[131] Of course, the lawyer might have known that while his first argument was only partly accurate, his second was a clear distortion of *Richards*; if he was hoping to mislead the court, he failed. "A single act of cruelty, on a single occasion as suggested in *Richards*... may be so severe... as might, under

the fair and liberal construction of the act, justify a divorce." [132] Moreover, in reality, cruelty did not have to endanger life in order to warrant divorce. "If the husband should be in the habit of whipping his wife with a cowhide, from time to time, it might not seriously endanger her life or health; but would not such treatment render the condition of any woman of ordinary sensibility and delicacy of feeling intolerable and her life burdensome?" [133]

In this large, governmentally complex country, where every state adopted its own laws regarding marriage and divorce, where separate courts struggled with interpretations and grappled with issues they considered fundamental to society and to government, there were ample examples of a far more sympathetic approach to wives's positions than has generally been acknowledged, which, of course, is not to argue that even the most understanding and sympathetic decisions went far enough. Often courts tried to find a way to do the right thing, and sometimes justices were moved less by the law than by their consciences and their humanity. The Kentucky Supreme Court declared in an alimonny case that in the absence of legislation it was not acceptable that "grievous wrongs might exist without remedy,... -which is against a well known principle, ripened into a maxim";[134] where there were "strong moral claims" the Chancellor had the power to act without waiting for the legislature, an argument approvingly quoted at length by the California Supreme Court in 1869.[135] All in all there was much justification to a Connecticut judge's claim that a husband's right to chastise his wife under English common law ended not because of "direct legislation" but "under the continuous pressure of judicial interpretation

or indirect legislation."[136]

Four cases, from four parts of the country, spread over a hundred years suggest the sympathy, even empathy, that judges displayed at times in a willingness to make or bend law. In the earliest, *Jelineau v. Jelineau*, a frequently cited southern case from 1801–but not well-known in historic literature--, Chancellor Hugh Rutledge of South Carolina, speaking for the three man equity court declared: "Hard indeed would be the lot of the fair sex, if they alone were to be excluded from the protection of the laws in this country, and if from the fear of infringing on the marital rights of the husband, the wife must submit to all his brutal treatment, without any redress whatsoever."[137] So, he went on to say, even if there were no precedents justifying action in the case at hand, the court would make them "rather than so wanton an abuse of power by a husband... should escape with impunity."[138]

A little more than half a century later, a New Hampshire judge instructed a jury on the difficulties of defining the 'ill treatment' which would legally justify a wife's flight; he ran through a number of specifics, including "blows," "choking," "every species of personal outrage," and "threats and abuse of every kind," and then offered a quite remarkable guide to assist them, which could have no standing in law: "no better rule could be given to the jury than to consider if they would feel that a daughter or sister of theirs ought to remain in the house...."[139]

Across the continent, in 1869, the California Supreme Court sustained the award of alimony to a wife who was not seeking divorce, a type of case that would come up frequently in numerous states.[140] In a lengthy dissent, one judge argued that common law denied a wife the right to maintain an action against her husband for any purpose. While

some states specifically authorized such alimony suits, California did not, providing only for alimony in conjunction with proceedings for divorce.[141]

At greater length, the court majority explained its decision. It went back not to Genesis like the North Carolina court but only to "the early days of English jurisprudence" when a wife was so much under the "dominion and control" of her husband that he could "administer reasonable personal chastisement for her offences."[142] Fortunately, because of "the advancing march of civilization" (interestingly, religion is not mentioned, as it would be in many cases) both parties in a marriage secured rights "which the law would protect."[143] The majority did not feel bound to inaction in the absence of a law covering this case. Many courts in both England and America had handled similar cases; there was a "diversity of opinion." Some Courts of Equity granted the relief requested.[144] Quoting at length that 1823 decision of the Kentucky Court of Appeals,[145] the California court likewise felt that the "conflicting authorities" left it "at liberty to choose [sic] and decide according to the principles of equity and reason of the case."[146]

And 101 years after *Jelineau*, in 1902, an Illinois Appellate Court rejected a husband's appeal, brought in part because his wife's assertion that he had beaten her was uncorroborated.[147] Justice Brown was unconvinced, very pointed, and very understanding about one aspect of abuse. The wife, he wrote, "was not beaten by her husband upon the public streets. He did not summon the neighbors to witness the acts of brutality... which she says were inflicted when they were alone in the solitude of the home. The fact that she did not exhibit the evidences of his misconduct, but bore her sadness and suffering in silence,

does not militate against the truth of her testimony."[148]

There was little that any court could do to 'solve' the problem of wife abuse, to affect its prevalence. But judges could, indeed they very often did, find the means to ease the pain of married women whose violent stories reached them individually, no doubt hoping that they were helping to establish a new societal norm, a woman's right to a life free of domestic physical danger. Simple as the idea might seem, from a legal perspective there was much involved, even given the colonial legacy: the relationship of English precedents and English legal authorities to American law following independence, similarly the reception and continuing role of English common law, and even a kind of judicial revolution, a judicial activism perhaps made possible--some might even have argued demanded--by the American Revolution and the founding of new American governments. It was a matter of faith for some American jurists that "for every wrong there is a remedy" courts could provide,[149] which contrasted neatly with the famous remark of Sir William Scott that courts "do not pretend to furnish cures for all the miseries of human life."[150]

A Pennsylvania case from 1824, *James against the Commonwealth*,[151] involving a woman's oppression but having nothing at all to do with wife beating, although the judge brought it in, illustrates well the changing mode of thought that separated nineteenth-century judges from their colonial predecessors and from English jurists who were constantly cited and against whom Americans sometimes seemed to measure themselves. Nancy James was convicted of being a common scold and sentenced to be ducked three times. She appealed on the grounds that the punishment was cruel and unusual, violating both the United States Constitution and Pennsylvania's.[152]

In the kind of display of obscure and often ambiguous legal points which bothered many citizens of a young nation and more specifically numerous critics of the legal profession and the courts, both James's lawyer and the opposing attorney general referred to an English statute, English practice, and the common law, each finding support for his own position and challenging the other's explanation of the precedents.[153] The Attorney General added an argument--on the surface seemingly persuasive--that the legislature had adopted a new penal code in 1790 and did not rule out ducking even though that punishment "had been recently publicly inflicted in the place where the assembly was then sitting."[154] The plaintiff's counsel was not impressed: "[N]one of the judges who pronounced those sentences were lawyers, and ... this court was not bound to receive as law, their crude, and ill digested opinions on this subject."[155]

Judge Duncan went over much the same ground as the opposing lawyers, and, speaking for the court, overturned the lower court decision, an action predictable from the opening description of ducking as "revolting to humanity," an invention of "an age of barbarism."[156]

Duncan talked about the common law, the history of ducking in Pennsylvania, English precedents, and the like.[157] But more to the point he talked at length and unambiguously about equality under the law and women and the law. "The learned Judge Blackstone seems to consider the female sex a great favourite of the law of *England*," Duncan noted, "yet his more just editor, *Christian*, in his notes, expresses a fear that there is little cause to pay a compliment to our laws, for their favour and respect to the female sex."

158 To some extent, a woman was her husband's slave, common law allowing her to be beaten by him, "*ex causa regiminis et castigationis*" (for the sake of guidance and correction). "Civil law allowed the husband a larger authority over his wife, permitting him for some misdemeanors, '*flagellis et fustibus acriter verberare uxorem*'" (to stingingly beat his wife with whips and cudgels).159 Common law denied even learned women benefit of clergy, dooming some "to die on the gallows," while for the same crime "their more ignorant husbands, who could with difficulty read even the neck verse, were [only] burnt in the hand with a cold iron."160

"We must never forget," Duncan continued, "that the law professes *equality* of punishment;... the common law... stamps freedom and equality upon all who are subject to it, which protects and punishes with an equal hand the high and the low, the proud and the humble...."161 "Professes equality" was, for Duncan, the key phrase and "professes" the operative word. Ducking, for example, he pointed out,"was never intended for the rich, and never was inflicted on beauty and youth."162 So much then for equality of treatment.

Nor was ducking inflicted on men. Indeed, noted Duncan, about the crime itself, being convicted of being a common scold, "It must strike all, as a peculiar feature of this offence, that it is of the feminine gender," an act for which a "scolding woman" is ducked, "while the most scandalously abusive and railing man goes unpunished."163 And all of that, Duncan rather remarkably pronounced, "degrades woman to a mere *thing*, to a *nuisance*, and does not consider her as a person." To Duncan, "the iniquity and injustice" were "very striking."164

News of the *James* case spread throughout the states. A notice in the *Boston Commercial Gazette* indicated that James's conviction was "in no manner agreeable to the ladies," one of whom asked "whether '*male*' scolds are not to be similarly punished?"[165] And when the Supreme Court reversed the lower court's decision, a Virginia newspaper printed a brief summary of Duncan's opinion, making the point that even if ducking had ever been punishment imposed on common scolds, "it had, by implication, been repealed by the general spirit of our mild Penal Code."[166]

IV. "whatever may be the common law":
Post-revolutionary America's New Legal Environment

A number of developments came together in post-revolutionary America to improve the legal condition of beaten wives. In part, what was at work for Americans was the perhaps surprising continuation of an old idea, not normally associated with post Revolutionary America--filled as it was with relatively new notions of individualism--that governments functioned to order and regulate society for the benefit of all: *salus populis suprema lex est* (the welfare of the people is the supreme law). The concept, treated with great incisiveness by William J. Novak,[167] was expressed in numerous ways. South Carolinian Thomas Cooper noted in 1826 that "the great object of all laws is the general welfare.... There can be no rights inconsistent with this. If a man cannot be safely trusted with liquor or with arms, he has no right to them."[168] The argument of Nathaniel Chipman, a Vermont Chief Justice and author of *Principles of Government,*[169] his lengthy critique of the 'state of nature,' was that "man, sociable by the laws of his nature, has no

right to pursue his own interest or happiness, to the exclusion of that of his fellow man,"[170] that state and local government existed "to protect their respective citizens in the secure enjoyment of all their personal rights... to cherish and protect all the social relations...."[171]

These comments, essentially describing what was known as a government's police power, reflected long-standing beliefs. What was different for the late eighteenth and nineteenth centuries was that in some, but only in some, situations women, and most notably married women, were more frequently included in the definition of 'people' and were seen as a part of the 'community' whose rights and welfare were also to be protected, although--for the most part--they were not to be given sufficient power to protect themselves. As Linda Kerber has shown, the Revolution left largely unchanged the system of coverture and the law of domestic relations. But, at the same time, it made women citizens, and "the fact of women's citizenship contained deep within it an implicit challenge to coverture,"[172] which may help explain, for example, Hugh Rutledge's disregard of any " fear of infringing on the marital rights of the husband."[173] Rutledge's unambiguous remark highlighted an ambiguous legal question: if a court could ignore a husband's marital rights were they still marital rights? Small numbers of women began to talk of their own rights, the discussion becoming more widespread after the publication of Mary Wollstonecraft's *A Vindication of the Rights of Women* in 1792.[174] Wollstonecraft "*speaks my mind*," said Elizabeth Drinker.[175]

The late eighteenth and early nineteenth centuries were a transition period for American families, although the change in ideology often outpaced reality. In general

terms, there was a movement away from a patriarchal structure to a more Republican one, the onset and speed of change varying from region to region. It involved more family privacy and, while males still dominated, greater equality, as befit a democratizing society. Moreover, wives, in their role as mothers, assumed greater importance, indirectly guaranteeing the continued existence of the revolutionary experiment. There was a widely accepted belief that the Republic would last only if its citizens were morally responsible, a way of behaving developed in childhood. The primary responsibility of married women became the raising of virtuous sons. The Republican Mother was born. "Motherhood," Linda Kerber has written, "was discussed almost as if it were a fourth branch of government...."[176] Wives's status improved, but not their political power.

In part, no doubt, the American Revolution had a liberating effect in law, allowing Americans to move in a new direction. Neither the states, nor judges, nor lawyers totally severed their connections to English common law or to their perceptions of that common law. But participants in the system were at least emboldened to question, challenge, and reject what appeared outmoded, unsuited to the newer more liberal environment. After referring to English precedents and "the law of England as it existed at the time of our separation," a New York chancellor in an 1831 case involving husband abuse said that common law gave a husband adequate power to control his wife, but that, in fact, the common law was inoperative because "whatever may be the common law on the subject, the moral sense of this community, in our present state of civilization, will not permit the husband to inflict personal chastisement on his wife, even for the grossest outrage."[177]

In some cases, immediately after the Revolution, judges simply did not have the

requisite knowledge to be bound by English precedent. Some, like Samuel Livermore, New Hampshire chief justice in the 1790s, had no "law learning." "Musty old worm-eaten books" is how Livermore described English authorities.[178] John Dudley, farmer, trader, and associate justice alongside Livermore, rejected Coke and Blackstone as authors of "books that I never read and never will."[179] Dudley went further. Lawyers "want to govern us by the common law of England," but, he thought, "common sense is a much safer guide for us."[180] Early in the nineteenth century, a Pennsylvania radical working to reform his state's judicial system referred disparingly to "lawyers law,... a mass of opinions and decisions, many of them contradictory to each other, which courts and lawyers have instituted themselves, and is chiefly made up of law reports of cases taken from English law books."[181] Decades later a Georgia judge continued the attack on English law. In a book published in 1870, Garnett Andrews described a case of his from "about forty years ago." The case was still going on late at night, when he read something from the Court of King's Bench. The judge interrupted him:

> **"What court was that you read 'Squire?" "I read a decision, may it please your worship, made by the Court of King's Bench, the highest court known to criminal jurisprudence." "Well, it is not prudence to read it to this court. What book is that you are reading anyhow?" "I read from Lord Hale's Pleas of the crown, may it please your worship, the greatest authority we have on criminal law." "King's Benches courts, and Lord's law books! I should like to know what we fout for ef we are to have Kings' law and Lords' law books; and what the Georgia Justice was made for ef it aint the law in Wrightsboro"– bringing down his hammer fist on the "Georgia Justice."[182]**

There was very clearly a tension in American law; on the one hand was the doctrine of *stare decisis*, which obligated courts to follow precedents established by courts of equal or

higher authority. Many judges probably felt comfort in the security of what had already been established and what they were used to. In 1823 a Connecticut Supreme Court judge, rejecting the idea that a court "can promulgate as law any provision which will meet a particular mischief," approvingly quoted Lord Kenyon: "'by my industry, I can discover what our predecessors have done, and I will servilely tread in their footstep.'"[183] It was difficult for some to give up a habit of thought so thoroughly engrained--even in the face of obvious failure. As Nathaniel Chipman wrote, "men correct, or give up with reluctance, those things which have cost them much pains, in learning."[184] That obligation, and that desire to preserve an old way of thought, was undermined somewhat in the early Republic by the condition of the courts, the absence of law books and collections of cases, and the background of some of the men appointed to the bench. And as the country expanded, the courts in new western and southern states were less tied to English precedent, to some extent because, like the eastern states in their infancy, they lacked the printed documents.[185]

Garnett Andrews, admitted to the bar in the early 1820s, noted that when he started "and for years after, we had no digest of the laws."[186] He highlighted another, specifically Georgia problem, the lack of a Supreme Court, which magnified legal difficulties. Each circuit judge was "supreme in the counties over which he presided." That meant there were no precedents "to be relied on as guides." "A lawyer was in the dark, often, how to conduct his pleadings or prepare his interrogatories. The consequence of this was, that hardly half the litigated cases were tried on their merits."[187]

But there was more than ignorance of old law at work; there was also design, intent.

Until a substantial body of American case law was created, *stare decisis* obviously meant giving weight to English precedent. That seemed inappropriate. The hostility to English common law was so great that New Jersey, Delaware, Pennsylvania, and New Hampshire did not allow their courts to cite post-revolutionary English decisions.[188] In a 1799 New York case dealing with maritime insurance, Judge Radcliff explained the court's new direction:

> **If authority alone is to govern, and some of the late decisions in England are deemed to apply and to prescribe the rule, there can be no use in further discussion. We must then pursue the beaten path, however crooked it may be. I entertain a high respect for the decisions of the English courts, but I do not feel myself, in this instance, shackeled [sic] by their authority.... Should we implicitly follow precedents, on occasions like the present, we must hope for little improvement.... These considerations, I think, are sufficient to authorize a freedom of opinion.[189]**

Many Americans argued that precedents needed to be re-examined as society changed, which, surprisingly, was not apparent to everyone. After George Wythe was appointed Professor of Law and Police at William & Mary (1779), he formed a mock legislature and had the students debate revising common law.[190] St. George Tucker, Wythe's student, followed him as Professor of Law and pushed the idea of judicial activism.[191] Proprietary law schools created after the Revolution likewise stressed innovation. At Virginia's Winchester Law School, students were taught to work backwards; they were to determine the results they wanted, what they sensed would be right, and then they were to find the authorities, legal and non-legal, to support their position. Their purpose was to improve the law.[192]

Chipman dealt with the subject at length in "A Dissertation on the Act adopting the Common and Statute Law of England." While he wrote it specifically for Vermont, it had application all over. "The common law of England," he wrote, "is a system of rules, supported by precedents, handed down from remote antiquity. These precedents have, by the body of the law, as is common enough with professional men, been held in too great veneration."[193] The lengths to which Chipman went presumably said something about the continuing opposition he sensed.

Numerous precedents, Chipman wrote, "have been held... decisive," though the principles on which they were based were "obscure or uncertain."[194] Whereas Blackstone argued that precedents were to be followed out of deference, "'unless flatly absurd or unjust, '" even if the reasoning behind them was not obvious, Chipman was only prepared to acknowledge that those precedents had once served a purpose for the society in which they arose.[195] In fact, Chipman sounded somewhat like Lord Mansfield, lord chief justice of England, who had noted in the 1780s: "As the times alter, new customs and new manners arise; these occasion exceptions; and justice and convenience require different applications of these exceptions...."[196] In England's "conservative legal climate of the period 1790 to 1830,"[197] Mansfield's views quickly fell out of fashion.[198]

"A high body of priests," was the way Peter S. Du Ponceau described the guardians of English common law in 1824.[199] But in America times had changed. "The opinions of English jurists and the decisions of English Judges so long regarded among us with implicit deference, are now scanned with greater freedom and with the spirit becoming an

independent nation."[200]

Blackstone's critics were doing more than declaring legal independence from England; they had something positive in mind. In urging that law meet the needs of a new and different kind of society, a more democratic one, many were suggesting that morality be a standard; natural law and an idea of justice were called into play.[201] A very brief report of a Massachusetts wife abuse case from 1809 showed the new principles in operation. Nabby Perkins sued for divorce *a mensa et thoro* (from bed and board),[202] from her husband Daniel, charging him with using "brutal language" and making "violent threats of personal abuse."[203] And, "about six years since, he unjustifiably assaulted and beat her; after which fact the parties continued to reside together...."[204] The husband's argument was simple: his violent behavior might have justified a divorce "if it had been seasonably prosecuted,"[205] but his wife had "pardoned the outrage" by continuing to live with him.[206] She had, in other words, condoned his behavior.[207]

The court bluntly rejected the argument. It was true that when a wife sued for divorce *a vinculo*[208] charging adultery the court always refused her request if she had continued to live with her husband, but, the court said, "this rule cannot be applied to a case of the kind now before us. The patience and forbearance of a wife, and her endeavors to prevent the scandal of an open rupture, ought not to operate to her prejudice."[209] The opinion cited no precedents and no laws. No citations were needed. Nabby Perkins was granted a divorce because she *ought* to have been entitled to one. The startling nature of the decision was captured by an editorial footnote entered by the law report's editor, Dudley

Atkins Tyng.[210] Citing a number of English cases, Tyng noted that the Massachusetts court "labored under a misapprehension of the law as administered in the Ecclesiastical Courts. For there may be a condonation in case of cruelty as well as in case of adultery."[211] Tyng's comment notwithstanding, there is no evidence in the printed report of the case that the Massachusetts court was at all interested in the rulings of English courts. It seemed perfectly content to find its own way to the natural justice of the case and to make its own law.

Responding to humanitarian concerns, many judges were attempting to do the right thing, following their hearts rather than their heads, which is the way Peter Karsten has described the tension in American law. "No man can be great in... the law, without *a soul of benevolence and truth*.... The affections of the heart have... much to do in sustaining right," said Justice Hugh Henry Brackenridge in 1814.[212] Ten years later, New York Chancellor James Kent told Columbia University students that "Wisdom is as much the offspring of the heart as of the head."[213] It was heart rather than head which led the New Hampshire judge to tell jurors they were to be guided by empathy in dealing with a wife who fled a violent home, asking them how they would feel if it had been "a daughter or sister of theirs?"[214]

Karsten, in his perfectly titled book, *Heart versus Head: Judge-Made Law in Nineteenth-Century America*, argues that while most judges conservatively deferred to English precedent and affirmed common law practices, many were "driven by conscience and principle to alter certain common-law rules in order to produce 'justice.'"[215] They changed the rules "to aid the weak and the poor,"[216] including in those categories

overlapping groups of common laborers, women, slaves, children, and accident victims.[217] But they were not alone in their humanitarian concerns. Juries in their courtrooms demonstrated their benevolence by awarding personal injury victims more money "than the stoical English."[218] Judges may also have been part of and were certainly witness to the rapid growth of evangelical churches, which for many people involved caring about the well-being of others. Christianity, wrote one minister in 1849, was the "fortifier of the weak, [and] the deliverer of the oppressed."[219]

Nor could judges escape the demands of the woman's rights movement which, to a significant extent, focused its attention on the sufferings of married women, especially the beaten wives of drunkards. In 1851 Lydia Jane Pierson identified the need to change public opinion so that women would not be considered angels for accepting the "outrageous abuse" of drunken husbands. "Take away the stigma of separation, and many a tyrant and inebriate would find himself minus a patient wife...."[220] Whether or not the stigma remained, "separations percolated" through the judges's work.[221]

Many judges were forced to pay attention by a changed political scene: by the 1840s and 50s, judges in many states were elected. As one Ohio constitutional convention delegate put it in 1850: judges running for office would "take care their opinions reflect justice and right, because they cannot stand upon any other bases."[222]

Given the increased privatization of the family--with its concomitant gradual decline of community involvement--and the nation's newly discovered dependence on Motherhood there was a perceived need for some form of government oversight, a need increased by

husbands's resistance to their wives's demands for more rights. The judiciary was well-situated to fill the role. As an independent branch of state governments, its status had risen. Judges were able to translate their higher status into "policy-making powers" still denied English judges.[223] Judges, according to Michael Grossberg, "took the lead in devising policies gove doctrines," wrote Morton Horwitz, "with the self-conscious goals of bringing about social change."[225]

That courts existed where judges were guided by their moral sense to right wrongs when the law was lacking was not in itself revolutionary. That was the function of equity and of the chancellors who, without juries, applied it. In the mid-seventeenth century, Roger Williams called the Court of Chancery a "Mercy-seat" which moderated "the rigor of Laws."[226] Equity, wrote the eighteenth-century Scottish philosopher and judge Lord Kames, "enforces benevolence where the law of nature makes it our duty." It "enforces every natural duty that is not provided for at common law."[227] The concept was an old one. Equity, for Aristotle, was "the correction of strict, that is, of legal justice, which often needs to be modified...."[228] Laws dealt with generalities; equity's focus was on the particular circumstances of individual cases.[229] According to Jean-Etienne-Marie Portalis, a key figure in drawing up France's Civil Code under Napoleon, there were "a multitude of circumstances in which a Judge finds himself without law." It was "proper to leave to the Judge the power of supplying the law by the natural lights of reason and good sense."[230] The Code itself demanded that judges make decisions: "[T]he Judge who should refuse to decide, under the pretence of the silence, obscurity, or imperfection of the laws, should be subject to prosecution, as guilty of a denial of justice."[231]

At least in theory, equity involved treating all groups of people equally. It was an opening that would greatly benefit women--who could not sue their husbands at common law–if they happened on sympathetic chancellors. When Maryland's governor Samuel Ogle took his oath as chancellor in 1731 he swore to do "equal Right to all his Majesty's Subjects," determining "all matters... according to Equity and good Conscience."[232] Similarly the oath of office adopted in revolutionary Virginia invoked "equity and good conscience" and called on chancellors to do "equal right to all manner of people, great and small, high and low, rich and poor."[233] The duties of the chancellor generated high expectations and inspired lofty language. "A Chancellor is... a high functionary: His court, a noble tribunal. How revered should be an officer, who attempts to imitate the justice of the Supreme Being: and an institution, which affects to be the representative of moral justice!"[234]

Quite obviously, since chancellors had the power to do good where the law was silent, everything depended on their characters, a point made in the *Southern Quarterly Review*:

> **We often hear the inquiry made, "Is such a chancellor a good lawyer?" This is the last question that should be asked. "Is he a good man?" is vastly more important.... He should be a man of delicate moral sentiment, as well as great firmness, and a robust determination to do right....[235]**

Of course, 'good' people might be driven by different moral codes and have dfferent sensibilities; Blackstone had warned about the uncertainties that would follow. Though " law without equity... [was] hard and disagreeable," he wrote, it was preferable to the dangers that would ensue by "considering all cases in an equitable light," which would leave decisions "entirely in the breast of the Judges,"[236] a point verified by South Carolina's

chancellors who evidently disagreed about the right and wrong of slavery. John Belton O' Neall managed by way of "equitable discretion" and "tortured" readings of state manumission laws to honor testators's wishes to free some of their slaves,[237] while Henry William DeSaussure, who stretched laws to help beaten wives, like most other chancellors limited options for slaves by imagining the intent of state legislators where laws were silent. [238]

Two antebellum Southern cases highlight radically different approaches to the exercise of judicial power, focusing on an important issue for divorce-seeking wives: could they receive alimony to support themselves and their children and pay their legal costs while their trials were underway. In *Wilson v. Wilson*, Justice William Gaston, an anti-slavery slaveowning member of the North Carolina Supreme Court who defended the rights of freed slaves, took a narrow stand regarding the alimony question.[239] In England, Gaston wrote, ecclesiastical courts granted such alimony but North Carolina's divorce legislation made no mention of it and the court would not infer it. Then, trivializing the consequences of North Carolna policy-- "It may be, that inconveniences are sometime sustained by an injured woman ... for want of a provision for support before sentence,"[240] Gaston rationalized the court's inaction:

> **It is probably better for both parties, that pecuniary means for carrying on the domestic war should not be furnished by law. The prospect of such a supply may subject the husband to vexatious and unfounded suits, and prove a mistaken kindness even to the wife, who has just cause of complaint.[241]**

In 1851, fourteen years after *Wilson*, Justice Eugenius Nisbet of the Supreme Court

of Georgia took the rare step of bluntly criticizing an opinion from another state, focusing attention on *Wilson* and Gaston, whom he mentioned six times. In their "domestic war," Nisbet declared, husbands and wives should "stand equal before the law."[242] Gaston would deny wives necessary money, forcing them to beg or to forego their rights "rather than submit to humiliation so great."[243] "This *policy* of the North Carolina Court arms the husband with a fearful advantage over the wife. *He* has the money and plays the tyrant–*she* has none and becomes a slave."[244] Fortunately Gaston stood largely alone, opposed by "an invincible array of authority."[245]

In Georgia, by state law, juries awarded alimony after a divorce was granted. "But what kind of alimony?" Nisbet asked and then answered, "very plainly, permanent alimony."[246] Temporary alimony to support a wife during her suit was not authorized by statute; but, Nisbet emphasized, it was not prohibited. "We look out of the Statute book for its source– that is, out of the express provisions of the Statutes."[247] It was not "unreasonable" to conclude that the Legislature "intended" courts to support wives; otherwise their "right" to divorces would be nothing more than "a bitter mockery."[248]

In the aftermath of the revolution, equity courts flourished.[249] By 1840, Chancellor Theodorick Bland of Maryland could testify to the consequences for married women. " [T]hose stern and ungallant general rules of the common law, by which marriage so sinks the wife under the absolute sway of the husband have been made, in many respects, to yield to a better feeling, and have undergone many wholesome modifications chiefly by the direct, or indirect application of the principles of equity."[250] As proof he noted changes in rules

regarding property and new policies in some American states which made it easier for wives who fled violent husbands to secure separate maintenance than it was in England.[251] In 1868 a beaten wife noted in her petition to the Massachsetts Supreme Court that common law was of no use to her, that she "could have relief only in a court of equity,... where the court has ever extended its aid to married women, the feeble and friendless'...."[252]

Chancellor Bland's explanation for the difference between England and America was simple. In England ecclesiastical courts had "exclusive cognizance of all matrimonial cases." Àlimony, that is separate maintenance, could not be allowed until after a divorce was granted. English courts of equity, unlike those in America, had no jurisdiction over divorce.[253] Most commentators agreed with Bland's analysis. "Separate maintenance as an independent action, of which courts of equity take cognizance of their own appropriate jurisdiction, is a right of purely American origin and growth," *The American State Reports* noted in 1901.[254] In 1849 an Alabama court quoted that "learned commentator upon equity jurisprudence, Mr. Justice Story." Story, after examining English court cases, concluded: "In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity...."[255]

In part, the different approaches reflected a simple difference of opinion over what was possible and what was desirable. "[T]he general happiness of the married life is secured by its indissolubility," Sir William Scott wrote in *Evans v. Evans*.[256] "When people understand that they *must* live together ... they learn to soften ... that yoke which they know they cannot shake off."[257] Having noted that courts cannot cure "all the miseries of ... life,"

[258] Scott added that "there may be much unhappiness in ... [the world] which human laws cannot undertake to remove."[259] Similarly, Lord Chancellor Eldon explained that his desire to make marriage "indissoluble" led him to leave the ecclesiastical courts in charge of matters of separation.[260]

Some Americans obviously agreed, like the Connecticut judge who in 1845 repeated the notion that indissolubility was the key to marital happiness, adding "Necessity is a powerful master in teaching the dictates it imposes."[261] That view, however, was challenged in America, perhaps most directly in a remarkable statement by a lawyer in the relatively new state of Texas who was representing a woman suing for divorce on the grounds of cruel treatment.

> **Human happiness is the chief end of human existence. It is the will of God.... Man ... was not made that he might marry, but made that he might be happy. Happiness is the great end, and marriage only the means. Listening to some of the modern rhotomontades upon the indissolubility of the marriage relation, one would suppose that the Bible, and the common sense of mankind had been all along wrong, and that man's chief end is to marry, and that all other things are to be sacrificed, in order that this relation may be maintained indissoluble.[262]**

With regard to the legal standing of wife beating, higher court judges both led and followed public opinion; at times they proudly distanced themselves from English authorities and from what they understood to be English tradition and at times they buttressed their stands with weighty citiations and lengthy quotations from carefully selected English precedents. An Alabama judge, for example, incorporated into his roughly six page opinion, a two page quotation from Scott's 1790 opinion in *Evans*. As he explained

it:

> **We have been induced to make this long extract, not only from its exquisite beauty and justness of thought, and language, beyond any thing we could furnish, but because it places in the clearest, and strongest point of view, the law, and the reason upon which it is founded, and has, ever since it was pronounced, been considered as settling the rule in England, as to what constitutes legal cruelty, in cases of this kind.[263]**

But English precedents were hardly needed. For those judges who felt uncomfortable moving into new territory, the multiplicity of American jurisdictions was a help. Across state lines, state courts provided judges with the precedents they needed to do what they wanted to do. Judges were molded not only by their immediate environment and broad cultural trends, but by their professional environment and by legal trends. And then, moved by the stories they heard, they talked empathetically about the women they faced. Sometimes they expressed their anger, sometimes their frustration; and often they tried to guarantee the safety of wives.

In fact, while Americans frequently noted conflicting English legal opinions about wife abuse, they might not have grasped the total confusion of the English legal scene. In *Purcell v. Purcell*, an 1810 Virginia case, a chancellor said: "If the jurisdiction of this court were now to be settled upon English precedents, there might be some doubt about the question, from the cases, ... but I shall leave this clashing of English Judges to be reconciled among themselves."[264] In this case too, the court very clearly expressed the function of a chancery court. "In every well regulated government there must somwhere exist a power of affording a remedy where the law affords none...."[265] Since, in law, husband and wife are

considered one, "the law can afford no remedy; which is universally admitted to be a sufficient ground to give this Court jurisdiction."[266]

V. "*... eloped from her Husband*"

A. The Law of Flight

Much can be learned about how nineteenth-century courts dealt with wife abuse by examining a little known, little studied aspect of wife abuse law: the issues which arose when beaten wives fled their homes, always bearing in mind the very real and well-known danger of flight, with or without divorce, from pursuing and often murderous husbands.[267] Eighteenth- and early nineteenth-century newspapers carried many notices placed by husbands announcing that their wives had run away, "eloped," and that they would not be responsible for their debts. Richard Compton's 1739 notice was typical. His wife, Lydia, had run away, so he took the precaution to "forwarn all Persons" not to extend her credit.[268] In 1761 Joseph Grainger placed a straightforward notice in *The Pennsylvania Gazette*: " WHEREAS Elizabeth Grainger... eloped from her said Husband... from which Conduct I have Reason to fear she Intends doing me Damage, by Contracting Debts on my Account; and to prevent any Imposition of that Kind, this is to caution and forewarn all Persons not to credit my said Wife, as I am determined to pay no Debts of her contracting after the Date hereof."[269]

Obviously, some of those wives were fleeing violent husbands and obviously too those husbands did not identify themselves as abusers, even if they might have thought that prevailing attitudes would have dictated that wives accept their correction. Indeed, husbands often made a point of proclaiming they were without fault. In a notice headed "*a wicked, bitter Woman, eloped from her Husband,*" one man announced that his wife, Hannah,

had acted "without the least provocation."[270] According to Samuel Lloyd, his wife Mary ran away "without any just cause." He was "determined not to pay any debts of her contracting."[271] Samuel Martin was more blunt. His notice, in 1809, "cautioned" people not to give his wife credit. She had run away "without cause."[272] More than fifty years later a Vermont husband notified newspaper readers that his wife had left "without any cause or provocation on my part."[273] In a slight variation, John Fannigan abandoned his wife, Trecy, and five children in North Carolina. Her 1808 petition noted that during the first months of their marriage he "treated her extremely ill." Probably desperate, she sought him out; "he then abused her, and cruelly beat her." And then he warned "all persons from harbouring her, in their houses, or letting her stay therein." She was left "rambling about the Country in the utmost distress."[274]

Whether the husbands proclaimed their innocence or not, other beaten wives could read between the lines and probably found encouragement in the runaway notices. The occasional responses of the fleeing wives would be even more suggestive. "I was reduced to the hard necessity of making my Escape from the most brutal Treatment," Marcy Aldrich announced, offering as details that her husband threatened her life, kicked her, and hit her with his fists.[275] Dorothy Fisher left her husband "owing entirely to his brutality; I could not stay any longer with a person who threatens my life."[276]

While the notices suggested, or rather the husbands wanted them to suggest, that they were in and of themselves the end of the stories, that is that husbands had no further interest in their wives and, more relevant for this story, no further responsibility for their

well-being or maintenance, it was obvious that was not the case. Husbands warned off merchants and others because their runaway wives did, in fact, find people to extend credit to them which they had no way of satisfying. Moreover, husbands suggested they knew there were legal issues when they began to announce publicly that they had done no wrong. Their efforts to absolve themselves notwithstanding, lawsuits were inevitable.

Nineteenth-century courts frequently confronted the interwoven issues of fleeing wives, debts, and the options available to relatives and friends. Popular belief seemed to be that a wife fleeing abuse or cruel treatment was on her own, that she could not be protected, that no one could afford to be actively sympathetic or even financially helpful for fear that husbands would refuse to settle debts or worse that husbands would sue for damages. Clarina I. H. Nichols[277] spelled it out clearly shortly after the Civil War. Writing in 1868 from Kansas to a newspaper in her native Vermont, she noted that when a wife flees her husband's "brutality or neglect, to earn her bread in more genial conditions, he can legally collect her wages, ... and even bring action for damages against the friends who 'harbor' her."[278] The next year, she buttressed her argument by referring to an unnamed case, making current those familiar eighteenth-century notices. "I frequently read in the *Phoenix* notices like the following,--'Whereas Mary Ann, my wife has deserted *my* bed and board, this is to forbid all persons from harboring or trusting her on my account. A.B.' One such advertiser in the *Windham Co. Democrat*, I recollect, sued and recovered for his wife's services and clothing, from a son by her former husband to whom she fled for a home and protection from his drunken abuse."[279]

While Nichols focused on Vermont, a woman suffrage advocate speaking in

California addressed the supposed powerlessness of similarly situated women throughout America. If a beaten wife should "attempt to escape" her husband, she noted, "he could follow her, point her out to an officer of the law, could have her arrested and restored to his custody."[280] In her pathbreaking study, *Woman's Life & Work in the Southern Colonies*, Julia Cherry Spruill found such a case, a rare one she thought, in seventeenth-century Virginia. "Whereas it appears to this Court yt Sarah ye Wife of Paul Littlefield hath demeaned herself very scandalously, and refuseth to live with her husband; It is ordered yt Wm. Flowery Constable... take ye sd Sarah into safe Custody & convey her unto ye next Constable for so to be carryd from Constable to Constable untill she be deliv'd unto her sd Husband...."[281]

Perhaps not surprisingly, Matilda Joslyn Gage[282] was most forceful in describing what she saw as the legal plight of fleeing wives, like Nichols referring to Kansas where in 1886 a husband paid $50 for the capture and return of his fleeing wife.[283] Gage referred also to an unnamed New York case in which a husband was awarded $10,000 because his wife's relatives "'harbored and sheltered' her" "at her request."[284] What sets Gage's account off from others was her willingness to accuse Christianity of ultimate responsibility. Advertisements about fleeing wives, "seen in the daily and weekly press of the country, are undeniable proofs of the low condition under the law, of woman in the marriage relation, and ... [read] very much like the notices in regard to absconding slaves a few years since."[285] Gage had no doubt that the Christian church was at fault. "The Christian principle of man's ownership of woman ... rendered the party giving shelter to a fleeing wife liable to the

husband...."[286]

Husbands, however, were not as powerful as those newspaper notices suggested or as Nichols, Gage, and others argued–at least not legally. Certainly, in the eighteenth century it was understood that sometimes women would simply have to flee for their safety or their lives. Two mid-century Maryland cases heard by governors in their capacity as chancellors made that clear. In 1746 Mary Scott[287] charged her husband with behaving "with so much cruelty and inhumanity that she could not cohabit with him...."[288] "Driven out of doors almost naked," she was forced "to fly for refuge and subsistence to her friends."[289] She was awarded £30 current money yearly, and her husband was ordered to pay court costs.[290] Five years later Anne Govane successfully sued for annual support after she fled from her husband's threats and his "cruel and unprovoked beatings and whippings."[291] In addition, she felt obliged "to swear the peace against him."[292]

The Scott and Govane cases suggest that wives had at least some recourse; husbands, it seems, could not be certain of escaping financial responsibility if their wives fled their abusive behavior. They also suggest that husbands might not be legally empowered to cast off their wives with a simple declaration of non-support nor add to their wives' distress by preventing others from assisting them.

Two late eighteenth-century English cases, seldom cited in America except by New York courts, set out general principles followed, perhaps independently, by many states: the right of a wife to run away from abuse and to be received in other peoples's homes. In *Philip v. Squire*, in 1791, a husband sued the man who harbored his wife even after he was

notified not to.[293] The fleeing wife was related to the harboring man's wife. The wife "represented herself to have been very ill used by her husband, who, she said, had turned her out of doors."[294] Apparently, there was no proof that he had.

Even so, the court rejected the husband's case, Lord Kenyon ruling that the truth of the wife's allegations of abuse was irrelevant; what was important was what the person receiving the wife believed--and that person's motive. "Where she is received from principles of humanity the action cannot be supported"; otherwise, Kenyon wrote, "the most dangerous consequences would ensue, for no one would venture to protect a married woman."[295] Five years later, Lord Kenyon revisited the issue and made the point more narrowly, referring to cases where the abuse was not to be doubted: "if a husband ill-treats his wife so that she is forced to leave his house through fear of bodily injury, a person may safely, nay honourably, receive and protect her."[296]

There is a tantalizing reference in an 1815 South Carolina case,[297] referring back to a 1785 decision that seemed to anticipate at least part of the decision in *Philip v. Squire*, and perhaps all Kenyon's followup decision. In this case, a "wife [who] was free from all blame" [298] fled from her husband, legitimately the court thought; the court ordered support and, as summarized in 1815, decreed that the husband "be enjoined from proceeding at law, against any person for receiving or entertaining" his wife.[299] It was a significant decision, identified and singled out in another opinion by a South Carolina court. According to *Hair v. Hair*:

> **In South Carolina, at a very early period after the revolution, the Court of Equity,**

> **without any Legislative act, or other authority, began to exercise jurisdiction in cases for alimony, *Brown* vs. *Brown*, 1 Eq. R. 196. A. D. 1785, not as in England, as incident to suits for divorce, (for no divorce has ever been allowed in this State,) but as a separate and distinct ground for equitable relief.[300]**

Cases dealing with the flight of abused wives involved either wives suing for support, husbands suing for damages, or third parties suing husbands for the cost of maintaining their wives. Most often husbands, of course, claimed they had been abandoned, an argument courts generally dismissed out of hand. Then, in the process of working out a policy regarding fleeing wives, courts ended up considering a whole range of issues about wife abuse: the nature of cruelty, what might be legitimate grounds for flight, the role that neighbors and relatives, especially parents might play, the matters of enticement, provocation, condonation, and the relationship between the right to flee and the right to collect alimony with or without divorce.

Divorce was not an option in South Carolina, which prided itself--"It is one of her boasts," said one judge in 1858--on not allowing the permanent breakup of unhappy marriages.[301] A small number of abused wives, however, obviously limited by class and their husbands's circumstances, fled and sued for support. When, in 1801 after little more than a year of marriage Elizabeth Jelineau sued for alimony there was ample evidence her husband had treated her "with great indignity and impropriety, and had degraded her... below his slave," but no proof of physical violence or that he had "actually turned her out of doors,"[302] the same terminology used in *Philip v. Squire*. The husband's lawyer apparently relied on two arguments: that the South Carolina Court of Chancery had no power to grant a wife separate maintenance "though she has been ever so harshly treated,"[303] and a 1747

English case, *Head v. Head*,[304] which, as summarized by Chancellor Marshall on the *Jelineau* brief, "compels the wife, however reluctantly, and not withstanding the most barbarous and inhuman treatment on the part of the husband, to go back to him, merely because he makes an offer in court to take her back. This is called enforcing the marriage rights."[305] Marshall, one of three chancellors hearing *Jelineau*, set South Carolina apart from England, where "the Court of Chancery touches this business of alimony and maintenance with a delicate hand," essentially leaving it "to the ecclesiastical courts."[306] Having no such courts, Marshall said, we "must take it on ourselves."[307]

Speaking for the court, Chancellor Hugh Rutledge justified the court's intervention. First noting how hard would be the lot of an unprotected wife, Rutledge said that even if there were no precedents (and he cited a few), the court would make them "rather than so wanton an abuse of power by a husband... should escape with impunity."[308] And he rejected the precedent of *Head v. Head*. Mr. Jelineau said he would take his wife back if the court ordered him to (of course the wife was not asking the court for that), but that he would be happier without her. Rutledge decreed: "It would be absurd after what he has sworn to... to suppose they could ever live happily together...."[309] The court ordered that the wife be granted relief and maintenance.[310]

While the South Carolina court was prepared in the absence of precedents to move in a new direction, the Kentucky Court of Appeals was prepared in 1823 to act in the absence of an authorizing statute. *Butler v. Butler* involved a wife's suit for alimony without divorce.[311] She charged her husband with desertion; a lower court granted her the money.

[312] Although the Appeals Court overturned the decision–on the facts of the case–it steadfastly defended the lower court's right to have made the award. If one can trust its summary of the evidence, the husband had simply moved to another house on the same farm, driven out by his wife's "insufferable" temper and physical and verbal abuse, "and in one case she appears to have resorted to weapons...."[313] But he continued to support her, although not at a level which would excuse her "from that kind of labor which suits her sex," which in itself was no more than would be asked of her if they were still living together. [314]

Undoubtedly there is more to this story of marital conflict than is in the printed record. As it appears, there was no cruelty by the husband, no desertion, no lack of support. The Appeals Court, having decided that the husband had no choice but to leave his wife's company, "as it became a torment instead of conjugal happiness," could easily have dismissed the case out of hand.[315] What makes the decision of particular interest regarding wife abuse is the court's reasoning about its own rights to decide such an alimony case, its conclusion and its words adopted wholesale by the California Supreme Court almost fifty years later.[316]

As was so often the case, the court began with reference to English practice, highlighting, as other American courts also felt called on to do, the distinction in England between ecclesiastical and common law courts. In England, the power of granting alimony belonged to the chancellor, who was restrained by the fact that alimony could be granted only after the parties had agreed to it or after a separation *a mensa et thoro*, which could only be decreed by an ecclesiastical court.[317] The chancellor could not take up a case

originally. But, the Kentucky court hastened to add, there were contradictions. In at least two cases chancellors seemed to have acted in the absence of prior separation or agreement.[318] Apparently, then, if English precedents were to be binding, the "conflicting authorities" would allow American courts to choose "according to the principles of equity and reason of the case."[319]

But what was the case in America? As far as the court knew, in no state was a court allowed to grant a divorce, either *a mensa et thoro* or *a vinculo*, unless it had been given that right by the legislative authority. But supposing a husband abandoned his wife without support, leaving her "to the humanity of the world."[320] Again referring to England, the court said that perhaps a chancellor would have no right to interfere, not having " concurrent jurisdiction."[321] But there were no ecclesiastical courts in America, and "no boundaries... to notice."[322] If a court did not act until the legislature specifically authorised court action "grievous wrongs might exist without remedies,... which is against a well known principle ripened into a maxim."[323] Abandonment might actually lead to starvation. Necessity and morality had to determine the case. "We, therefore, conceive that the chancellor, before the statute, and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched...."[324]

Three years later, in 1826, the Virginia Court of Appeals went into even more detail about English practice, citing and quoting from numerous cases, in the end like Rutledge in *Jelineau* rejecting the precedent of *Head v. Head* and the usefulness of a husband's offer to

receive back a wife he had driven away: surely a court would not refuse to grant such a wife maintenance, "and thus force her either to hazard her life, or to depend on charity."[325] It quoted Lord Roslyn: No court in England, "not even the Ecclesiastical Court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter."[326] Not so in Virginia. "In practice," the court said, Virginia County Courts, "sitting as Courts of Equity," had already "assumed the power of giving separate maintenance in cases of separation,"[327] a practice "sustained by the Chancellor of the Richmond Chancery Court."[328] In cases of voluntary separations, everyone agreed that contracts could be enforced. "But, suppose a husband to turn his wife out, or to treat her so cruelly that she cannot possibly live with him...."[329] "Surely, in a civilized society," decreed Judge Carr for the Virginia court, sounding much like Rutledge in *Jelineau*, and the Kentucky court in *Butler*, neither of which he cited, "there must be some tribunal to which she may resort. She cannot be out of the protection of the law; an outcast, dependent on the charity of the world...."[330] Again like Rutledge, he would, "in such cases, unquestionably stretch out the arm of Chancery, to save and protect her."[331]

The suggestion in *Jelineau*, following English practice, that a wife might be ordered to return to an abusive husband, presumably on his promise to reform, was a disquieting note. That possibility was soon explicitly stated in two other South Carolina cases, *Prather v. Prather* and *Devall v. Devall*,[332] both from 1809. In each case the husband was ordered to pay his wife alimony or maintenance while they lived separate or until "he shall agree to cohabit with her, and treat her as becomes a man to treat his wife."[333] Apparently, if

applied properly, it was not simply a matter of a husband's promise, as was spelled out in an 1826 decision.[334] A husband might come to court professing that he has changed his behavior; "the court will grant the relief only upon his faithfully performing the condition," which certainly implied a testing period.[335] In *Almond,* also in 1826, the Virginia Court of Appeals agreed: faced with a husband who when drunk "was a madman,... his anger particularly pointed at his wife," it would not accept his offer to take back his wife; it would not refuse her support, forcing her "either to hazard her life, or to depend on charity."[336]

Nowhere, however, in this legal doctrine, was a wife given a clear choice. Still, there was recognition that courts might be powerless to effect reconciliations. As one judge noted in 1858, "the utter inefficacy of a judicial decree to restore harmonious relations to, and enforce the obligations of the married state," was the reason no state had adopted "the proceeding of a suit for the restitution of conjugal rights." Instead, most, but not South Carolina, allowed divorce as a remedy for desertion.[337]

In 1815, six years after *Prather* and *Devall*, in *Threewits vs. Threewits*, a case emphasizing a husband's abusive alcoholic behavior and a wife's frequent flight and return, Chancellor Henry William Desaussure referred to numerous South Carolina cases, approvingly citing Rutledge in *Jelineau* and his own decision in *Prather,* in which he justified his court's intervention lest the wife "be left remediless in one of the most important particulars of human life."[338] In *Threewits* he also acted, "else forlorn would be the condition of the female sex, and disgraceful the inefficiency of the laws."[339] And he much more sympathetically dealt with the issue of a wife's return to her abusive husband.

In this case the wife, Catharine, was "blameless, and even meritorious";[340] her husband's, Lewellin's, lawyer argued that she wanted to return again, "but that she was over-ruled by her brother, and her other relations."[341] Moreover, bringing up a point that would reappear numerous times in cases throughout the century, he argued that the wife's return to her husband "after the most atrocious instances of ill conduct was a waiver of all objections up to that time"; given her return, she was not justified in leaving again because her husband's subsequent behavior "was not so harsh or severe" as it had once been.[342]

Desaussure rejected the notion that friends and relatives were keeping the wife from returning;[343] like the judge in the 1785 case, he enjoined the husband from "proceeding at law" against anyone "receiving or entertaining" his wife,[344] perhaps thinkng Catharine Threewits would again need the aid of friends, since he was unimpressed with the husband's promised reform and willingness to treat his wife kindly.[345] Even though her husband's most brutal behavior had occurred before her last return, and even though he was now careful not to mistreat her in public, he was still repeatedly drunk. "Under these circumstances," Desaussure ruled, "I cannot do as I am desired to do; I cannot separate the evidence of his conduct at different times; I cannot shut my eyes to the light of the truth disclosed by the whole evidence."[346] He agreed, "to be sure," that if a wife forgave her husband's "ill usage" and returned to him, she could not use that past mistreatment against him if his "promises [of good behavior] had been faithfully kept";[347] a wife could not, in other words, take back forgiveness. But, Desaussure continued,"a breach of promises, and some actual ill usage," freed her from further obligation. "She is not bound to wait for

extremities as in the first instance.... She has a right to judge of the future by the past; and the court will connect the whole of his conduct, in order to form a correct judgment."[348]

B. "a refuge from evil":

Enticement or Assisted Flight

One argument in *Threewits* was that friends and relatives had discouraged the wife from returning to her abusive husband. A few years earlier, in 1808 and 1809, one of the earliest of New York cases involving a fleeing wife introduced the idea of more direct engagement: a person who may have encouraged a wife to leave, hence the issue of enticement. This case, *Hutcheson v. Peck*,[349] did not involve physical abuse, but the principle could easily carry over. Husband Hutcheson brought an action of trespass against one Peck, his wife's father, for enticing away his wife, for loss of services and comfort.[350]

Many of the facts of the case were not in dispute; the plaintiff husband had few resources. After he and his wife spent some time at her father's the husband announced he was going back to his mountain farm. At that point, the defendant father announced that if his daughter left with her husband, to "live like a squaw in a wigwam,"[351] he would essentially cut her off, never to allow her return and never to be visited by him or her mother. If she stayed, "he would do by her as he did by the rest of his children, and as he had done before she was married."[352]

Justice Van Ness bluntly told the jurors the evidence supported the husband. They might find for the defendant only if they thought the husband so poor that the defendant was saving his daughter from distress.[353] "But if that was not the case, the poverty of the

plaintiff was no justification, but rather an aggravation; for it was the duty of the wife, in such a case, to live with and assist the plaintiff...." It would, however, be a mitigation of damages if the jury thought the father motivated by parental affection without intent to hurt the plaintiff.[354]

The Dutchess County Circuit Court jury awarded the plaintiff an impressive $1,200.[355]

On appeal, the Supreme Court ordered a new trial.[356] The defendant's lawyer cited *Philip v. Squire*, noted that "anciently... the husband had power to chastise the wife; but that the severity and strictness of the ancient law seemed to be relaxed in modern times," argued that even a stranger would not be severely punished for harboring a wife with her consent, and that a father should certainly be given the utmost indulgence.[357] At the very least, the damages were excessive.[358]

Again hearing the case as a member of the appeals court, Justice Van Ness justified his decision. He had no doubt that husbands have actions against people unlawfully persuading their wives to live apart,[359] and indeed, quoting another case, he noted that "Every moment that a wife continues absent from her husband (without justifiable cause) without his consent, is a new tort...."[360] *Philip v. Squire* would have been relevant had the father simply received his daughter.[361] The decision of the jury had to be final regarding the cause of the separation (and in fact he felt the jury was correct in its assessment).[362] Lastly, though he regretted the damages were so high, he could not "agree to bend the

settled rules of law to grant relief against the hardship of a particular case."[363]

Four other justices disagreed. All agreed that the defendant had been motivated by parental affection.[364] If a stranger had done what the father did, one justice said, it might have been improper, but "a father is bound, by the laws of nature, to afford protection and comfort to his child."[365] And while he seemed to be agreeing that to act would be to bend the law, he also seemed to echo the sentiments of the South Carolina judges who thought their courts needed to find a way to see justice done. This was "one of those cases, in which a due regard to the ends of justice, and a discreet exercise of the power of the court, fully warrant us in sending back the cause to another jury."[366]

Chief Justice Kent was equally committed to a rehearing of the case, and he added judicial error to his reasoning. Van Ness had told the jury that if the defendant had not been motivated by improper motives that would mitigate damages. In fact, Kent declared, the instruction should have been that if the motives were not improper, the verdict should have been for the defendant.[367] Morever, he concluded, "bad or unworthy motives cannot be presumed."[368]

Kent agreed that he might not interfere if the case had not involved the wife's father. This was the first such case he had ever met with. And he was very sensitive. "A father's house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum."[369]

Parents's rights were reinforced and explained in more detail, again in New York, in

Bennett v. Smith and others, an 1856 case which made full use of *Philip v. Squire* and *Hutcheson v. Peck*. The case involved a fifteen year old female who married against her parents's wishes.[370] The husband sued and won damages when the parents first compelled their daughter to return while they sought proof of the marriage and then prevented her from rejoining her husband. The circuit court judge instructed the jury that while the parents and others helping them were justified in their initial action they were liable for their subsequent action once the marriage was proved.[371] Persuading a wife to stay away from her husband was unlawful. Moreover, he wrote, seemingly rejecting *Hutcheson v. Peck*, "motives or intentions" were irrelevant; "the law imputes an unlawful purpose to all persons doing an unlawful act...."[372]

On appeal, the decision was overturned and a new trial ordered. Justice T.R. Strong completely rejected the reasoning of the circuit judge, who, following the implications of his rejection of motive as any defense, had excluded all evidence of the husband's drunkenness and generally lascivious behavior, which had informed the parents's objections and behavior.[373] Strong agreed that a husband was entitled to his wife's "society and services" and that he could maintain an action even against a father for encouraging his wife to live separately. "The wife owes to the husband the duty of living with him."[374] But still, parents, even parents of married children, have obligations recognized by common law, which allow them to act in ways not allowed others. The law of nature, cited by at least one judge in *Hutcheson*, obliges parents "to protect their children from injury and relieve them when in distress," and "their natural affection for their offspring," which Kent, referring to Lord Coke, had also cited in *Hutcheson*, "dictates and prompts to such action."[375]

Where a husband does or threatens to do wrong to his wife, where his conduct "is

such as to endanger... [her] personal safety, or is so immoral and indecent as to render him grossly unfit for her society" so that she would be justified in leaving him, her parents not only had the right to receive her, but a right "also to advise her to come."[376] No parent, Strong continued, would hesitate to so act, and common law would not hold the parent liable. And indeed, even if a parent were mistaken, he (or she) was blameless. "It is enough for his protection that he was warranted in such belief, and acted from pure motives."[377]

Strong cited not only *Philip v. Squire* and *Hutcheson v. Peck* but another New York case, *Schuneman v. Palmer*,[378] which had been tried in 1848. At least in printed form this was not a very dramatic case, perhaps the drama hidden in some innocuous language: "It appeared that the plaintiff and his wife had lived unhappily together for several years."[379] In this case a husband brought an action against a neighbor for "enticing away and harboring" his wife.[380] As in *Philip v. Squire*, the wife was related to the defendant's wife, "the only relative she had in the neighborhood."[381] For a number of years, the defendant had been taking the plaintiff's wife home with him, where she would remain for several days. In 1846, the plaintiff served him with a written notice "not to harbor his wife." The very day the notice was served, the plaintiff's wife had tried to enter her house only to discover the door fastened on the inside. She asked the defendant to take her home with him; he did, apparently reluctantly, and the next day advised her to return to her own home.[382]

The judge refused to instruct the jury that the action amounted to harboring. The jury found for the defendant and the plaintiff appealed--and lost. True, the new judge

noted, a "husband has a right to the society and assistance of his wife,"[383] and it was also true that whoever "knowingly and intentionally assists" a wife who had no justifiable reason for "abandoning" her husband was liable for his actions.[384] But *intent* was all important. In this case the wife said she could not get into her house. The defendant had a right to take her home, "notwithstanding the notice not to harbor her."[385]

At first, *Schuneman* seems to have been misapplied. It came up four years later, in *Barnes v. Allen*, an enticement case involving not a parent or even a relative. Two years after the alleged actions, Henry M. Barnes sued Thomas N. Allen "for counseling and attempting to induce the plaintiff's wife to leave him," for carrying her away, and "for breaking up his family."[386] Allen had deliberately gone with a horse and carriage to pick up Barnes's wife and child--although he had not gone on to their property and indeed had not even helped the wife into the wagon--and had carried her to her father's.[387]

Allen, who thought Barnes a troublesome neighbor, "denied the allegations," even though witnesses testified that he told them that he had advised the wife to leave and that he was going to help her. His justification was Barnes's violent and cruel behavior, which had begun when he first married. "It was generally reported and believed that the plaintiff ill treated, beat and abused his said wife, and... that it was unsafe and dangerous" for her to live with him.[388]

A jury awarded the husband $800. The judge's jury instructions, with the defendant objecting, had leaned heavily on the husband's side, drawing a distinction between passive and active behavior. "What would excuse a man for harboring a wife will not excuse an act

of interference in the husband's affairs," he had argued.[389] If she had met her neighbor "casually," and if she had complained of her treatment, "he would have been justified... in taking her away."[390] But to go there by arrangement, "by appointment to carry her away," changed the very nature of the case. It no longer mattered that the wife accused her husband of bad treatment or that it was true. The burden shifted to the interfering neighbor; "he must show that she was abused to justify" his actions.[391]

The New York Supreme Court, on appeal, affirmed the judgment with costs. Without mentioning intent, the judge hearing the case noted that anyone assisting a wife not justified in leaving her husband was guilty of wrong. What would excuse a man from harboring a wife would not excuse him advising her to leave.[392]

Still convinced of the legitimacy of his actions, the defendant carried the case further. In 1864, in a sweeping and lengthy statement which discussed the relations between husbands and wives, motives, and evidence, the Court of Appeals reversed the decision and ordered a new trial. Regarding much of the Supreme Court decision, Justice T. A. Johnson declared: "This cannot be the law."[393]

With what seemed some degree of sarcasm, Johnson noted that the wife had left, taking one child, and leaving one or more, that she had stayed at her father's for nearly two years before the case was initiated, and still "it is assumed that she had no good cause,... that her statements were either false or of no consequence,"[394] and that the defendant was liable unless he could prove her charges true. That, said Johnson, would be the case "if the wife were the chattel of the husband, over which he had complete and perfect dominion as

property."[395] But she was not, "happily for the interests of society."[396] Despite her marriage and consequent merging with her husband, she was still an individual with certain rights, one of which was the right to receive protection "from others, even strangers, against the oppression and cruelty" of her husband.[397]

A husband has "no legal right to... [a wife's] society or services if he treats her with cruelty."[398] Nor can he complain that she has left, if "his own misconduct" brought about her departure.[399] At her request anyone may "harbor or assist her."[400] Relying on *Philip v. Squire*, on *Hutcheson v. Peck*, on *Schuneman v. Palmer*, and for the first time on an 1807 Massuchessetts case, *Turner v. Estes*, Johnson reaffirmed the importance of motive. The previous judge was simply in error in overlooking motive and in placing on the defendant the burden of proving the husband's abusive behavior.[401]

The same cases and arguments entered into another New York enticement case in 1878, although there was a slight twist to it. Silas W. Smith sued his father-in-law, James H. Lyke, for enticing away his ill wife.[402] Smith's counsel objected to the judge's jury instructions, which noted that a person who believed a wife to be the victim of her husband's cruel treatment was justified in harboring her. According to Smith's counsel, all such previous cases had involved only either harboring or advising a wife to leave, not, as in this case, "actively invading the plantiff's rights, by taking his wife from his house."[403]

The judges hearing the appeal were unimpressed. The ill wife could not leave without assistance. Since her father would have been justified in receiving her, he was "as fully justified in removing her."[404]

C. "...a victualler, a merchant, a dressmaker":

Eloping Wives and Their Husbands' Credit

The principle, then, was well established–at least in New York: wives who fled were entitlted to assistance, which itself could be more than passive. But assistance, understood a different way, emerged in another issue precipitated by flight: how would wives who left their homes support themselves and perhaps their children? Who would pay for shelter, food, clothing, and other necessities? That was the issue raised directly by husbands asserting in those numerous newspaper notices that they would not be responsible for their wives's debts.

The frequency of such notices notwithstanding, husbands were sued by third parties--their wives's creditors--and by wives where divorce was not an issue. Desaussure first outlined the general principle in 1809 when he noted that a wife who fled for her safety had a right to run up debt; he understood, however, that the result might be "constant litigation."[405] More than sixty years later an Iowa court chose to make the same point more emphatically, with specificity:

> **...a victualler, a merchant, a dressmaker, a milliner, a shoemaker, a laundress, a physician, a lawyer, or any dealer in the necessaries of life may severally supply the wife with the articles needful and proper in her situation, and may respectively maintain their actions against the husband for their value.[406]**

A concentration of third party suits around the middle of the century illustrates the right in action. One of the most revealing cases was tried in Massachusetts in 1855. Caroline W. Burlen sued Oliver N. Shannon, her brother-in-law, for the board of her sister, his wife. The complicating factor was that after fleeing her home, the wife had filed a libel

for a divorce from bed and board, alleging extreme cruelty, and had lost.[407] Shannon's argument in the new case was that his victory in the divorce suit should have barred "further consideration of the matters therein decided"; and he objected to the use of any evidence regarding acts of cruelty.[408] The judge both allowed the suit and admitted the evidence, but after a verdict for Burlen, "reserved the question" for the full court.[409]

Chief Justice Shaw removed all suspense by affirming the original decision at the start of the full court's opinion. Most obviously, he pointed out, the suit was not between the same parties.[410] All that had earlier been decided was that the husband and wife were still husband and wife. Everybody was bound by that decree. Still, that judgment could not be evidence in another suit except in cases between the same parties on the same subject.[411]

The new case involved a "wholly distinct" issue.[412] Extreme cruelty, the original charge, in 1855 Massachusetts meant, according to the court's reading of earlier decisions, "personal violence, or such acts and conduct as to show actual suffering or great personal danger."[413] Burlen's sister was unable to prove her claim to the court. But Burlen's suit was "to recover for necessaries furnished to the wife when, ill treated, neglected and unprovided for by her husband, she is compelled to leave his house."[414] While it was obvious that the same acts which would prove extreme cruelty would justify a wife in leaving her home, "evidence of misconduct" not that serious might still be sufficient to justify flight. A wife may, indeed, be "in such a condition of suffering or danger as would render it justifiable to leave her husband's house, without having suffered extreme cruelty."[415]

Curiously, the court might have used and extended the logic of *Philip v. Squire*, the English precedent from the 1790s. Someone acting on a good faith belief in a wife's account of her suffering would have been justified in taking her in, even if that faith were misplaced. And if protecting her were acceptable, even honorable, then the associated costs ought to have been recoverable. The Iowa court had identified lawyers as among those whose services might be needed. Certainly, in suits for alimony legislatures and courts would deal with lawyers's payments. In an interesting fashion the issue came up in New Hampshire in 1859.[416] The decision cited numerous precedents from other states and from England, including a recent Queen's Bench decision. The case did not initiate in a libel for divorce or even for support and maintenance. In *Morris v. Palmer*, Morris, a lawyer, was appealing a decision which had cost him $21.83, his fee for services rendered a beaten wife who had come to him for help.[417]

As a result of Morris's help, her husband, Palmer, was arrested, tried before a magistrate and "ordered to recognize for his good behavior until the next term of the Supreme Judicial Court" for the county. And he was to pay the costs of the prosecution.[418]

The husband defaulted and was committed to jail. On his application, however, the Supreme Judicial Court discharged him. Whatever the court's reasoning, and it may simply have been that that particular court thought the husband had been punished enough, perhaps because it did not take wife beating seriously, the court complicated the lawyer's life and the lives of other abused wives by ruling that a husband was not liable for legal fees run up without his consent.[419]

The lawyer appealed, arguing that the wife "was compelled" by her husband's abuse

either to leave her home and family or "exhibit articles of peace" against her husband.[420] The husband now argued that he was discharged from imprisonment without being ordered to pay any costs, so if the lawyer was going to be paid, it would have to be by the county.[421]

Hearing the appeal, the court acknowledged that a state statute required a complainant to pay legal costs attending the arrest of an offender, unless relieved of the costs by the state, "a salutary check upon indiscreet and hasty proceedings."[422] But a wife's complaint against her husband was different. Citing numerous precedents, the court noted that a husband was responsible for his wife's necessaries and sends his credit with her when he abandons or sends her away. And in a case of personal violence, "she may make a complaint against him for a breach of the peace, and be a witness to sustain the complaint." That was allowed, "*ex necessitate*, for the personal safety of the wife."[423]

Highlighting one of the difficulties faced by abused wives, the court pointed out that state counsel "seldom if ever interfere to order a complaint for a breach of the peace."[424] No one was required to make out such a complaint without compensation. In various ways, then, the court came back repeatedly to the same conclusion. It was just as important that a wife "be protected from brutal outrage and violence" as that she be clothed and fed;[425] indeed "the case of violence... would seem to be one of the greater necessity."[426] A married woman cannot make a contract binding her husband without his agreement except for necessaries. If being free from violence was not considered a necessary, a wife would be remediless.[427] Its conclusion was forceful.

The husband may commit such outrages upon his wife's person, or, by his threats

> **and violent conduct, place her in such personal peril, that assistance and protection shall become her most pressing necessity; and it would be extraordinary if the same just principle which allows her in such a case to supply her wants at the cost of her husband, should stop short of allowing her legal aid, under similar circumstances, at his expense.[428]**

Massachusetts courts continued to deal with issues of support, ruling in 1857 that someone supplying a wife who had left home because of cruelty, though she had not been subject to personal violence, was entitled to repayment of physician's fees.[429] In 1860 a state court hearing an appeal affirmed a lower court order of support payments for a wife and her eleven year old daughter.[430] The husband appealed. He had thought the judge should have instructed the jury that it had to be convinced that personal violence sufficient to justify a divorce was inflicted; that the creditor suing for payment had to have knowledge of a justifiable separation, and that if the wife voluntarily returned that was condonation and ended any arguments about liability.[431]

The judge did none of that, but he did say that the plaintiff had to establish that ill treatment had driven the wife away, which again was more than asked of those people who simply sheltered fleeing wives, who only had to establish their good intent.[432] The appeals court in familiar terms affirmed earlier cases establishing a husband's liability when a wife found it necessary for her safety to leave.[433] It went to greater lengths to justify making the husband liable for child support. "By the common law the father is usually... entitled to the custody of children." But that was not an absolute right. If he was unfit, a wife might take them and on his credit get the necessaries for their maintenance.[434] In this case, the father knew where the child was and never made any attempt to reclaim her. In fact, he never did

anything to "relieve it from... absolute destitution."[435] Under Massachusetts law, a father can never "be absolved from the obligation of... contributing to the maintenance of his child."[436]

Nor was a husband absolved from funeral expenses. Between June and September 1864 Michael Cunningham provided lodging and board for the wife of Dennis Reardon.[437] She had arrived ill with consumption having been compelled to leave her husband because of his cruelty. He never visited her, asked her to leave, or provided for her. When she died, Cunningham took care of her burial, "at reasonable expense," without notifying Reardon.[438] Apparently at the Superior Court, Reardon did not argue that his wife's flight had been unjustified; nor did he object to paying for her support. He objected only to paying the funeral costs, and he appealed when he lost. For the appeals court Judge Hoar announced that the responsibility to reimburse any person who furnishes necessaries to a wife driven away by cruelty extended beyond her life to include "decent burial when dead."[439] And it was not a matter of a wife being her husband's agent and therefore allowed to procure items of need. That agency did expire at death. Rather it stemmed from a husband's legal responsibility to provide for his wife and for "the care of her lifeless remains."[440] It was "but an incident to the obligation to furnish bodily support."[441]

Nor was the court impressed by Cunningham's failure to inform Reardon. "It would seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life."[442]

VI. "Forbearance for a season....":

Condonation

One of the issues which came up repeatedly in separation and divorce cases was the matter of condonation. Adultery as well as cruelty could be condoned.[443] With regard to cruelty, it allowed husbands to admit to violence without justifying it in any way: a husband who had stopped beating his wife could argue that her continued cohabitation with him implied, and indeed demonstrated, forgiveness. The argument, as framed by one husband's lawyers and summarized by a court, was that his wife could not maintain her petition for divorce because "she had slept too long upon her injuries."[444] Sometimes, the argument seemed ludicrous. Phebe Gardner specified numerous violent acts by her husband between 1848 and 14 April 1853.[445] (She filed for divorce from bed and board on the 18th.) Johnson Gardner's lawyer did not deny the abuse. He simply argued that since Phebe had slept in the same bed as her husband the last time he had allegedly been violent she had in effect condoned "all previous acts of cruelty."[446]

Potentially, condonation was a serious trap for wives who were beaten repeatedly before they escaped and for the many women who fled their homes only to return, whether from fear, from necessity. or because they were lured back by their husbands's promises of reformation. Catharine Threewits, for example, "took shelter with her relations" but returned home on her husband's "repeated solicitations, and professions of better behavior."[447] Once wives returned, they could not, for legal purposes, have a change of heart, they could not dredge up past abuse. Unless, that is, their husbands gave them cause.

Early in the century, judges began to limit the application of condonation. As they continued to apply the rule, they seemed to give expanded explanations–or, at least, expanded explanations appeared in the printed court records. In *Threewits*, Chancellor Desaussure rejected the argument of the defendant's lawyer that Catharine Threewits had no legal grounds to leave since her husband's behavior was not as harsh as it had been before she first left.[448] Desaussure agreed that Lewellin Threewits's brutal treatment of his wife, often if not always associated with his habitual intoxication, had not yet been repeated. But the potential for violence remained real because Threewits had violated his promise and was again repeatedly drunk, apparently even during the trial.[449] Both she and the court were entitled to presume he would again ill use his wife.[450]

Whether husbands's lawyers were ignorant of the legal precedents or simply hoped judges were, they continued to offer the same defense, as in an 1842 New York case. *Burr v. Burr* was a separation suit filed by a wife six years after leaving her husband and after more than forty years of a marriage full of physical and sexual abuse.[451] The wife won the suit and her wealthy husband was ordered to pay $10,000 a year alimony.[452] Each party appealed, the husband from the whole decree and the wife because she wanted a lump sum.[453] Vice Chancellor Willard marveled at the wife's staying power. She had suffered with " patience and meekness."[454] According to the trial record, "immediately" after their 1799 marriage, "the defendant caused an injury to his wife, unintentionally as he alleged."[455] The injury, a sexually transmitted disease, "render[ed] her an invalid forever after."[456] She had first fled around 1812, then again around 1829, returning either because of her children

or because of her husband's promised reformation. After several days of abuse, she left for good in 1835.[457] Willard referred to her husband's "severe and brutal usage... in some instances too loathsome to disclose."[458] He was "petulant, capricious and cruel."[459] On appeal, the chancellor was convinced that the husband had subjected his wife "to the most degrading and sometimes the most disgusting services, many of which were rendered necessary by his own vicious indulgences."[460] She fled for the last time after acts "too degrading to human nature to admit of a particular detail."[461]

Both the vice chancellor in the original case and the chancellor on appeal addressed the matter of condonation. "Improper and indecent" as the husband's conduct was in 1835, the defense counsel argued, it would not have been sufficient to support a decree of separation. Since his wife had returned to live with him, his earlier "acts of violence" could not "be revived" and used against him.[462] Vice Chancellor Willard, citing only English precedents, "familiar to the profession," perhaps a rebuke to the defense lawyer, rejected the argument.[463] Condonation, said the chancellor, was only "conditional forgiveness."[464] He, too, cited English cases and concluded that "former injuries will be revived by subsequent misconduct of a slighter nature." If that were not the case, he explained, a wife would have difficulty getting legal relief; her "laudable efforts" to get better treatment from her husband would be held against her; she could not "connect his last ill treatment with his previous acts of violence and cruelty."[465]

Both Burrs lost their appeal, the separation and the alimony standing. Willard closed his decision by justifying his monetary award:

> **although money cannot compensate for blighted hopes, a broken constitution and a broken heart, it is all the resource which human laws have provided for such a case. As a means of punishment to the defendant who is proved to be in the wrong, and for the sake of public example, it affords a more ample weapon; especially when applied to one whose money is his god.[466]**

A similar position was taken in 1851 by an Alabama court on appeal, overturning a decision of the Chancery Court of Montgomery which denied a woman's divorce suit. Citing one of the standard English cases, the court repeated the usual "well settled" rule regarding the conditional nature of condonation.[467] The limits on condonation were explained more fully in *Robbins v. Robbins*, or more accurately *Mary A. Robbins v. Horace Robbins* and *Horace Robbins v. Mary A. Robbins*. In this combined 1868 Massachusetts case, husband and wife sued each other for divorce, the wife for desertion for five years, arguing that her husband's extreme cruelty drove her away, and the husband for desertion without cause.[468] The wife testified to a number of acts of personal cruelty, only one of which was corroborated. She continued to live with her husband, who, for six weeks before she left him, stopped speaking to her.[469]

Horace Robbins's lawyer argued that after one has condoned earlier acts which would have supported a divorce, one should not be allowed to use uncorroborated testimony regarding new acts. Moreover, any new act needed, in and of itself, to be sufficient to support a divorce from bed and board. Silence did not meet the standard of cruelty.[470]

The courts disagreed. It was only a general rule of practice, noted Judge Gray, that a divorce would not be granted on the libellant's uncorroborated testimony. While it was "

not ordinarily safe or fit to rely" on it, sometimes that was all there was. And if the witness was credible, it would suffice.[471] Moreover, condonation, being conditional, "any breach... will revive" earlier offenses.[472] It did not take violence to call back violence. "Harshness or rudeness... may receive a different interpretation and effect upon the question of condonation, after proof that the husband has previously gone to the length of positive acts of cruelty."[473] For Gray, the husband's prolonged silence suggested that "his smothered anger would break out again into acts of cruelty."[474]

Two years later, in another Alabama case,[475] the defendant based his defense in part on condonation. But he also claimed that his wife's attempt to divorce him, to get alimony, and to prevent him from selling off property was too late, since he had gotten a divorce from her in Indiana.[476] The court would have none of it. Ann G. and Matthew Turner had married in 1853. She filed suit in 1867.[477] Ann charged her husband with adultery (in 1856 or 1857 she had caught him with a "colored woman Sally") and with cruelty.[478] He denied the cruelty but noted that his wife had forgiven him for the adultery.[479] Judge Peters rejected the husband's defense. If the Indiana divorce was valid, "it unmarries him." "But it does not settle her right to alimony," or any of her other financial claims. Alabama would protect its citizens.[480]

And Peters detailed some of the abuse: Ann Turner had been beaten until a third of her face was black and blue and choked and nearly suffocated.[481] Then, repeating the idea that condonation was conditional, the judge quoted from an earlier Alabama case,[482] in

which the "distinguished chancellor" noted the difficulty of establishing a "fixed general rule. "[483]

> **The wife, who is timid and fearful, shrinks with horror and dismay from the odium which attaches to a separation from her husband, and becomes the patient martyr of his tyranny and brutality, rather than seek peace in a separation, unless a time should arrive in the history of her sufferings, when, justified by the opinion of the world, and sustained by the counsel of friends, she might seek freedom in abandoning him. Such patient endurance would not amount to condonation.[484]**

Neither *Robbins* nor *Turner* was cited in *Sharp v. Sharp*, an Illinois case of 1886, in which the husband's last offending act was also silence, "the silent period of their marriage" lasting for two and a half years.[485] There had been "two principal acts of physical violence, " one in 1872, one seven years later.[486] Occurring so many years apart and so long before the case was initiated in 1883, the violence, the court noted, might not have been adequate grounds for divorce. One might concede that the wife had condoned the first act of violence by her continued cohabitation; but the second act revived the first.[487] Though there was no proof of subsequent violence, William Sharp's behavior was "a breach of that kind of treatment implied in every act of condonation."[488]

Citing an Illinois case from 1874, which itself had cited *Threewits* and a number of other cases, the court in *Sharp* pointed out that condonation depended on "future good usage and conjugal kindnesss. If it were not so, this whole doctrine would be a fatal snare to all who, with honest purpose, endeavored to perform their marital obligations."[489] For reasons not disclosed in the printed trial record, William Sharp had decided not to talk to

his wife, Emma. After about five months of silence, she asked him if he was ever going to speak to her. He responded, "'he didn't see but matters were going well enough.'"[490] Sometime later, she wrote him a letter and put it on his dinner plate. He did not reply to it; apparently for the next two years he said not one word to her, "in anger or in kindness," behavior which "surely is not that conjugal kindness implied in every act of condonation." [491]

Fortunately judges sometimes recognized the bind beaten women were in. While continuing to cohabit after a beating suggested condonation, flight was dangerous and impractical. Judge Dewey in *Gardner* was succinct: "Condonation is not so easily to be inferred against the wife, from her cohabitation, as it might be against the husband."[492] Her opportunities to escape "the scene of discord and violence" differed from her husband's. "Forbearance for a season may be not only a justifiable, but a necessary step on the part of the wife...."[493] In mid-century Pennsykvania, Justice Coulter asked, rhetorically, why "a woman who had been ignominiously kicked, and often choked till her neck was black; who was seen, after abuse, with blood on her face,"[494] would follow her husband to Ohio and whether that amounted to condonation. His answer was simple: "Because the crushed heart requires relief- some word of kindness– some look of compassion."[495] Though there was little evidence of subsequent acts of violence, Coulter was not convinced the husband had reformed. "Few men are so entirely barbarous as not to have some moments of humanity, some oasis in the desert."[496] Besides there were "a thousand ways, which cannot meet the eyes of witnesses," by which a husband could wound his wife.[497] This wife had done her

duty, which was to "forbear long," to try to "reclaim" her husband. Her "patience and fidelity" was not condonation and should not deny her a legal remedy.[498] Coulter, citing *Perkins*, affirmed a lower court's decision awarding the wife a divorce from bed and board and alimony.[499]

VII. "It would be but mockery....": Wives Go to Court

Fleeing wives, who for whatever reason were not interested in or able to secure divorces, still demonstrated their desperation, their courage, and their survival instincts in the very dangerous act of running away. Fortunately relatives and friends were often present and willing to shelter them and to extend credit, though at times they must have been uncertain about being repaid. But wives often did more than run away and more than throw themselves on the mercies of families and merchants prepared to take some risk; they took their husbands to court and sued them for regular maintenance, for themselves and their children.

The eighteenth-century Maryland cases and all the South Carolina cases previously discussed were suits--successful ones--for alimony without divorce. In a number of ways, the 1809 *Prather* case was the most explicit of the early cases.[500] First, in the heightened rhetoric of Chancellor Desaussure's judicial response: "This bill," he said early in his decision, "makes a very shocking case, outrageous to humanity, and disgraceful to civil society,"[501] a belief he held so strongly he felt compelled quickly to repeat it:

> **It is shocking to think that such conduct, so inhuman in itself, so injurious to innocent and helpless women, and so mischievous to society, should pass**

unheeded and unchecked in a civilized society.[502]

Secondly, in his need to act, to protect, which he stated more forcefully and explicitly than Rutledge had in *Jelineau*. His thoughts and ultimately his actions were also in direct opposition to a philosophy laid down by an English judge, Sir William Scott, in one of the most frequently cited English cases, *Evans v. Evans*, decided in 1790. What others " complained of," Scott accepted, that "by the inactivity of the Courts much injustice may be suffered." But there was more. He accepted also the hard reality that by court inaction " much misery [was] produced."[503] On the contrary thought Desaussure, his ideas and words perhaps reflecting the optimism of a young country: "It is the boast of our jurisprudence, that for every wrong there is a remedy, and for every injustice an adequate and salutary redress."[504] As was first noted in *Jelineau*, alimony and maintenance were, in England, handled by ecclesiastical courts, which, of course, South Carolina did not have.[505] Since husbands's lawyers kept objecting to court intervention, judges had to keep explaining their actions. Clearly, Desaussure wanted to act, to redress "the enormous evils" and "the gross injuries" suffered by Jennet Prather.[506]

According to William Prather's counsel, ecclesiastical courts could only award alimony after they had granted a divorce. And they could grant separate maintenance only incident to another issue: if a wife applied for security against her violent husband and "it is necessary that she live apart."[507] Desaussure gave honor to the English authorities cited, "these are great names undoubtedly," and then found alternative precedents and readings.[508] True, Jennet Prather had not applied for a writ of *supplicavit*, a form of security of the

peace against her husband, but she had detailed "ill usage, turning out of doors, threats against her life";[509] in other words, he seemed to be saying, since she would have been granted security of the peace had she asked for it, his court would act as though she had. In fact, Desaussure went one step further, ordering Jennet Prather's lawyer to amend the bill of complaint to ask for security of the peace,[510] in response to which the court ordered the sheriff to take a surety of peace from the defendant in the amount of $1,000.[511] Although it is not noted in the decision, Desaussure was also clearly modifying the terms of *supplicavit*, which as noted in Bread's case from seventeenth-century Maryland prohibited a husband from doing damage to his wife except what he could lawfully do in order to govern her.[512] Desaussure never referred to a husband as governor; rather, he talked only of a wife being used "ill."[513]

Desaussure acknowledged that in some earlier South Carolina cases wives receiving separate maintenance had brought considerable property into their marriages. But bringing property to a marriage only strengthened a wife's position. A wife, "while she demeans herself correctly," acquires the right to support and "enjoyment of her husband's property."[514] If her husband deserted her, she could even exercise that right "in an irregular, unsettled, vexatious manner," and he would be liable for her necessary expenditures.[515]

From that right, Desaussure explicitly moved to a wife's right to regular, predictable support. While a wife would be entitled to run up debts for which her husband would be liable, that might be a meaningless right, for the uncertainty of payment without law suits

would make people reluctant to extend credit. "I do therefore think that when a husband uses his wife ill,... she may... claim the protection of this court, and have relief by a separate maintenance."[516] Desaussure thought of himself as "an enemy to innovation, unless well considered," and he "deprecate[d] the assumption of unwarrantable powers." But he would give relief when no other relief was available and where the power of "this court could be made to apply."[517] And the court followed through. When the case was next heard, Judge Thompson awarded alimony of $100 a year. And the defendant was ordered to pay the costs of the suit.[518]

Jennet Prather also asked for custody of a young daughter and that her two sons be taken away from their father and placed out as apprentices so that she could have access to them. Desaussure did not feel "at liberty" to go that far, first noting that a father was "the natural guardian, invested by God and the law of the country" with custody, which he was entitled to keep unless he "monstrously and cruelly abused" his power, which had not been charged. But since the mother also had rights she was to have access to the children at all times.[519] But then, or several months later--the printed decision is unclear--recognizing that it was "treading on new and dangerous grounds," the court ordered the father to surrender the infant daughter to her mother.[520]

Desaussure revisited many of the same issues in the 1815 case, *Threewits vs. Threewits*, introducing his account of the case with an extraordinary statement, the full import of which would not become apparent until later in the century, when the issue it addressed reappeared sometimes in less satisfactory form. "This," wrote Desaussure, "is one of those unhappy cases in which courts of justice are obliged unwillingly to enter into the privacy of

domestic life" to judge the behavior of people whose conduct ought to have been guided solely by "that pure and strong affection, which is the guarantee of domestic felicity."[521]

Catharine Threewits said that she had brought a personal estate valued at $3,000 into her marriage, that her future husband promised her certain property.[522] But if she was expecting a life of comfort that expectation ended when her husband took to drink; "her life was frequently in danger" from his repeated abuse. She sought refuge with friends, but repeatedly returned to her husband on his promises to reform, promises he never fully kept,[523] though he seems to have tempered his behavior, perhaps because "she had bound him over to the peace."[524]

Citing numerous cases as precedents, referring again and again to the husband's drunkenness, his past drunken behavior, and the likelihood that it would be repeated, Desaussure refused to adopt the principle (as it had come to be known in South Carolina) of *Head v. Head*, despite the husband's newly given promise to treat his wife affectionately. "It would be a miserable elusion of justice, to permit the defendant to disarm the court, and to send back his wife to his cruelty, on the faith of promises so often broken."[525] Desaussure ordered a settlement. He also ordered sureties to keep the peace, enjoined the husband from suing anyone receiving his wife, and again made a husband liable for his wife's legal costs.[526]

The general guidelines the South Carolina courts had established in those early cases were outlined by Chancellor Desaussure in an unsuccessful alimony suit in 1826, in *Rhame v. Rhame*.[527] As worded, they seemed to allow courts considerable leeway. First, a wife

"must come into court with an irreproachable character for purity and correct conduct." [528] Next, without her having caused it, that is "without any grave faults on her side,"[529] her husband must have treated her with sufficient brutality that it was not safe either to her person or her feelings to remain with him, "and that he has really driven her off by such ill usage."[530] While this statement treats separately the danger to body and feelings, Desaussure, in the same decision, linked them. The court would grant an "entirely blameless"[531] wife protection and relief on the basis of such "ill conduct as deeply afflicts the feelings of the wife... on moderate proof of bodily injury."[532]

In *Rhame* Desaussure tried to take the court in a new direction. First, he rejected Rebecca Rhame's request for alimony, finding that she had left her husband voluntarily, that she had not been driven away "by violence, blows, or any other outrageous means, or even menaces."[533] Despite the absence of cause, the chancellor ordered Bradley Rhame to receive his wife back (which was not her request); if he chose not to he was to provide for her "comfortable subsistence,"[534] in the meantime paying her $45 quarterly.[535] In other words, even though Rebecca Rhame had no cause to leave, her husband would have to support her unless he was willing to take back a wife who did not want to live with him.

Desaussure's denial of alimony was upheld on appeal, but Judge Nott, for the higher court, took issue with the rest of his decision. The court approved the doctrine as laid out in English cases, repeating the information that alimony was awarded only incident to divorce. South Carolina did not allow divorce, but it would grant alimony for the same causes for which English courts would award divorce.[536] On the one hand it said that courts would

only grant relief for bodily injury; on the other hand, the bodily injury could be "either actual or menaced."[537] The court repeated the oft-quoted words of Sir William Scott in *Evans*: "What merely wounds the mental feelings is, in few cases, to be admitted.... Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion... do not amount to legal cruelty."[538] Nott concluded that Rebecca Rhame was trying to provoke her husband "to turn her out."[539] Failing, she left. The court had no authority in such a case to award alimony.[540]

In 1858, adhering closely to the wording in the English cases and its use in *Rhame*, another South Carolina judge dealt with the issue. A wife was not justified in leaving her husband for hurt or even tortured feelings; there needed to be either physical injury "or a well grounded apprehension of such."[541] However, menacing words, "intimating a malignant intention to inflict personal injury" would justify flight and alimony. A court must not wait; it must act where there was "a reasonable apprehension of personal violence... [which] excite such terror as to make life intolerable."[542]

Of course, South Carolina court decisions provide no evidence that the state's abused wives were protected; on a large scale that was clearly a matter for the legislature and not the courts. It was the legislature which chose not to allow divorce. But the cases demonstrate that for some women who knew their rights or whose lawyers were familiar with where the courts--under those judges who were sympathetic--were prepared to go there were some protections; wives could flee and get support, husbands could be required to give bonds for good behavior. Embodied in the court opinions was an awareness that wife

beating was serious and outrageous, that it was by no means associated exclusively or even primarily with the lower class or for that matter with alcohol. It just seemed to be something that some men did.

Obviously, the absence of divorce as an option hurt South Carolina women; curiously, however, one Massachusetts woman would have been better served by South Carolina's more limited approach. In 1868, thirty years into her marriage, Laura A. Adams went to court, charging Samuel Adams with acts of violence towards her between February and October 1866 which caused her to fear for her life and led her to "fly from his house."[543] It is unclear whether she returned home, but following her complaint, the Boston municipal court required her husband to give sureties of the peace. Nevertheless a few days later, he threatened her and in July 1867 he again assaulted her. Shortly thereafter he informed her he would not provide food or clothing for her or their daughter despite her repeated requests. She further declared and charged that "his property, with which hers was intermingled, was kept concealed by him," and he was wasting and removing it.[544]

Laura Adams's problems were compounded by her religious scruples, which denied her the "usual statute remedy of divorce, to obtain alimony." She could not have been alone in this situation. Instead of divorce, she sued for support, her petition sounding as though it had come from a South Carolina case. Since common law was of no use to her, she turned to a court of equity, "where the court has ever extended its aid to married women, the feeble and friendless," asking for a writ of *supplicavit* to bind her husband to provide for her and their child, to abstain from personal violence to her, and to prevent him from squandering their estate.[545]

On first hearing, the judge confirmed Laura Adams's religious beliefs and acknowledged that her husband's behavior would have justified a divorce from bed and board. But the question of a remedy, he left to the full court.[546] Adams's lawyer supported her petition with wide-ranging precedents, including *Prather*, an "almost identical" case.[547] Numerous states, he argued, "either by statute or in chancery," allowed alimony without divorce, obtainable on "allegations of cruelty."[548]

Anticipating opposing arguments, Adams's lawyer rejected the idea that *supplicavit* was obsolete even if rarely used, agreed that almost always divorce was preferable,[549] although some wives would prefer to hold on to the hope they could reclaim their husbands, and dismissed the idea, based on England's experience and South Carolina's, "that all Roman Catholics who have domestic difficulties" would overcrowd the court with the kind of business from which the legislature intended to free it.[550]

He added two arguments, not strictly legal. He reminded those who thought the petitioner's request against public policy that divorce was still legally frowned upon. But despite the fact that "the law looks with no favor on divorce," it was growing increasingly easy in some states to obtain a divorce, which suggested that any process which recognized "the solemnity of the marriage contract" should be welcomed.[551]

Besides, he argued, to be stopped from action by the objections would have an unacceptable consequence; it would mean that "a strong religious feeling of the sanctity of marriage may prevent a wife from obtaining the rights which marriage was to bring."[552] Or, in other words, in a manner that might have appealed to the South Carolina justices, the

court should find a way to do the right thing.

It did not, refusing to issue the writ of *supplicavit*, which the court had never issued. Besides, citing many precedents, it noted that the writ was never meant to allow a wife to live separate but only to bind the husband to good behavior.[553] Ultimately the court concluded that the judiciary could not make law; "it can only decree what the law is."[554] And the law provided a remedy for Laura Adams--divorce, her religious beliefs notwithstanding. The law, as the court interpreted it, left this particular abused wife without the protection afforded by separate maintenance.[555]

Ironically, Oliver Shannon's wife had fared better at the hands of a Massachusetts court in 1855. Because his abuse was not sufficient to warrant a divorce from bed and board, his wife was left to take advantage of her right to flee; she was entitled to support and her sister was entitled to be repaid for the expenses of boarding her.

Abused wives in California and those in Iowa had a much clearer right for regular support, alimony, without divorce. In *Galland*, that 1869 case in which the California Supreme Court referred to "the advancing march of civilization" which had improved the lot of married women, the court majority argued that there could be "no diversity of opinion " on the "thoroughly well settled" point that a wife whose husband does not suitably support her has a right to purchase necessities on her husband's credit.[556] But that was not nearly adequate. For a wife, it was, "at best, a most humiliating, unreliable and precarious means of subsistence."[557] Fortunately, the court ruled, the law "affords an appropriate remedy," although it is really unclear whether it was the law, that is legislative act, or the law as announced, or almost as written, by the court.[558]

By state statute the court could grant temporary alimony, *pendente lite* (pending the

litigation), to a wife suing for divorce if her husband had deserted her for two years–and permanent alimony if she obtained the divorce.[559] Nothing in that statute or any other authorized alimony except in connection with divorce, which, in this particular case, the husband's lawyer seized on, perhaps with some confidence. The court refused to be limited, rejecting the maxim, "*expressio unius est exclusio alterius*" (express mention of one is the exclusion of the other). The statute dealt only with divorce, in that context defining the court's power "over the allowance of alimony."[560] But it said nothing about alimony in other cases, or, in other words, no statute denied the court the power to act.[561]

The right to grant alimony it derived from the general powers of a Court of Equity, although it openly acknowledged that opinions on that particular point varied considerably both in England and in other states.[562] But there was another tack: Courts of Equity enforced voluntarily made separation agreements between husband and wife, with separate maintenance, where divorces were not requested, even to the point of departing from the agreement "in awarding an allowance to the wife."[563] If a court had jurisdiction when a wife agrees to separate, surely it had jurisdiction when a wife is thrown out of her house. A wife who agreed to separate from her husband should not "stand on a more favored footing than one who clings to him in spite of his ill-usage until she is driven from his house." "It is better, in our opinion," said the majority of the California Supreme Court, "to abandon the subterfuge, to which Courts have sometimes resorted in such cases, 'as a pretext for jurisdiction,' and administer the appropriate relief without the 'pretext.'"[564]

Apparently some people were arguing that the court's ruling might prompt "

discontented wives" to flee on "frivolous pretexts." Perhaps so, but the court turned the argument around. If it did not act, a husband would be free to abuse his wife stopping just short of the cruetly which would justify divorce. Faced with the possibility that either party might pervert the court's action, the court chose to side with wives. "The Courts must deal with human nature as they find it; and no system of jurisprudence can be so administered as to avoid possible abuses in exceptional cases.[565]

Two dissenting judges, citing numerous authorities, thought otherwise, " notwithstanding the apparent hardship in exceptional cases."[566] They were unwilling to proceed in the absence of legislative authority;[567] and they were unwilling to challenge common law, which prohibited a wife from suing her husband for any purpose. If she could not sue, she could not demand alimony, not that is without a divorce.[568] Protection would have to come from creditors individually suing a husband, the system the court majority had labeled "precarious."

In 1873, just five years after the *Adams*' decision in Massachusetts denying alimony to a woman who refused to request a divorce, an Iowa court faced with a similar request for alimony from a woman who probably could have secured a divorce had she wanted one came to an opposite conclusion, basing its actions to some extent on Iowa precedents, on *Galland*, and, without mentioning it, on Desaussure's reasoning in *Prather*. *Graves v. Graves* did not involve physical abuse, but rather just a husband who seemed to tire of his wife. They had married in New York and moved to Wisconsin.[569] According to her, he requested that she return to friends in New York where she remained with their daughter. She accused him of adultery. Because she was in "destitute circumstances," she asked for

support and attorney's fees.[570] He expressed doubts that he was the child's father; furthermore, he announced that he had obtained a divorce in another Iowa county.[571]

The district court found for the wife, ruling the divorce fraudulent, and awarded her a lump sum for her earlier expenses, and a reduced amount for attorney's fees and monthly expenses.[572]

In rejecting the husband's appeal, the Supreme Court accepted the legitimacy of alimony without divorce, carefully explaining its actions. Despite "the great weight and number of the English authorities" and "possibly the preponderance of the American authorities" who denied that a court of equity could grant alimony alone, others affirmed the jurisdiction, including Justice Story, who found "'so much good sense and reason in the doctrine that it might be wished it were generally adopted.'"[573] While other American courts (it did not single out the one in Massachusetts just a few years before) had followed the precedents of "the mother country," the Iowa Supreme Court found those precedents "contrary to the better reason and to principle."[574]

A husband was bound "in law and in equity" to support his wife.[575] If his conduct made it unsafe for her to remain at home, or if he behaved in an immoral manner, she could leave and carry his credit. Then, where Desaussure early in the century had chosen to make a point in very generalized fashion--that people might be reluctant to extend credit if it was likely to involve law suits--the Iowa court chose to strengthen its argument with those specifics about the victualler, merchant, dressmaker, and other "dealer[s] in the necessaries of life" who would have to individually sue an errant husband.[576]

Obviously, as Desaussure had said, under those circumstances a woman might find it difficult to get what she needed. That was enough to justify action by a court of equity.[577] And though the husband's conduct might justify a divorce, "an affectionate, devoted and hopeful wife" might still cling to the idea that she could reclaim him.[578] So, on "well-settled equity principles" and on "considerations of public policy" alimony without divorce was appropriate.[579]

Without mentioning the dissenters in *Galland*, the court dismissed any blanket common law objection that a wife could not sue her husband. Iowa courts had ruled that a wife driven from her home without cause could sue in her own name to recover furniture she had brought into her marriage.[580] "It seems to us, that upon well-settled equity principles, as well as upon considerations of public policy, the action may be maintained...." [581]

The Supreme Court denied the lump sum for expenses prior to the suit, but approved the award of a monthly allowance and the money for the attorney, which is to say that the husband paid for the attorney who sued him on his wife's behalf, as did the husbands in *Prather*, *Devall*, and *Threewits* and as would a husband in New Jersey, who was also ordered to pay alimony in an abuse case, in which he too accused his wife of adultery. [582] The Iowa Supreme Court revisited the issue in 1883 in another suit for alimony without divorce and for attorney's fees. Husbands were not required by statute to provide wives the means of prosecuting divorce. "It would be but mockery," noted the court, to allow a wife to sue for separate maintenance "but deny her the means of prosecuting it." And it was of

no matter that no statute covered the matter, for, as the court acknowledged, no statute authorized it to grant alimony without divorce, but it did anyway.[583]

The court's approach in *Graves* was reaffirmed in 1885.[584] Again the immediate issue was a wife's suit for alimony without divorce, but to the court a number of other issues inspired additional commentary. The Platners were married in 1868; they separated in 1880. According to the wife, her husband's early abuse, which began in 1870, resulted in the delivery of a still-born child. On several occasions from then until 1878, he struck and kicked her, "and threatened to shoot and kill her." And during that time, he accused her of adultery.[585]

At the trial the defendant denied abusing his wife, apparently unconvincingly since the court found it "scarcely possible she could have made up the story and sustained herself as well as she did on cross-examination."[586] Perhaps pressed, the husband granted that his wife was a "'good woman,'" presumably contradicting his charge of infidelity, while at the same time arguing that she was "hard to manage," which the court thought might be true, "when the means employed by him are considered."[587]

So far the case was fairly typical, as was most of the decision. The Supreme Court affirmed the lower court decision awarding alimony[588] and commended the plaintiff for not seeking a divorce despite her legitimate claim to one. "It is the policy of the law to discourage rather than encourage divorces," the court noted,[589] in words that certainly would have satisfied Laura Adams and her lawyer in Massachusetts in the 1860s. But the court could have been less sympathetic; it could have followed the reasoning of the

defendant's lawyer, who, while not arguing that condonation was involved, pointed out that since the alleged violence had last occurred in 1878 and the wife had not left until 1880, she was not entitled to relief.[590] But the court chose not to reward the husband for simply giving up violence. Nor did it punish the wife for being hesitant. Yes, she could have left earlier and perhaps should have. We "wonder why she did not...." But staying behind did not imply forgiveness. She "simply endured until it ceased to be a virtue."[591]

There were two matters of complication. The defendant announced that he had divorced his wife in 1882, in Ohio, a state many husbands fled to to sever their marriage bonds. His wife did not admit the divorce, but argued anyway that if it existed it was void for lack of jurisdiction and because it would have been fraudulently obtained.[592] The court essentially disregarded the husband's claim for lack of substantiation.

The second item was a matter of property, which the court went into in great detail, in the end concluding that the plaintiff was fraudulently conveying his property in an effort to deny his wife relief.[593]

VIII. "no palliation, justification or excuse": Wives' behavior and desertion

Cases of wives who fled their husbands and sued for support occurred throughout the century in many states. State courts usually relied on their own state precedents, perhaps borrowing ideas from other state courts, sometimes citing them. There was growing consistency. In their 1862 edition of Tapping Reeve's *Law of Baron and Femme*, Amassa Parker and Charles Baldwin concluded that family law cases showed "great

unanimity among the different courts, which could have been obtained only by a proper respect for the judicial decisions of sister states....”[594] An Illinois court in 1874 noted the “ good sense" of the decision in the *Threewits* case in South Carolina in 1815.[595] In 1903 a South Carolina court likewise approvingly cited Desaussure's *Threewits*' decision, by then eighty-eight years old.[596] What varied in these cases was not so much the citations or the results, but the explanations the courts gave to particular items as they announced their actions. An 1888 Iliinois case,[597] for example, is most helpful in understanding a particular concept which kept appearing, that of the blameless wife. Earlier cases had referred to a wife who "demeans herself correctly,"[598] one with "irreproachable character for purity and correct conduct," one "without any grave faults," and to an "entirely blameless" wife, [599] phrases which of course were also used in other types of wife abuse cases. Recognizing wives's legal vulnerability, husbands had often justified their actions by their wives's bad behavior, charging bad temper, alcoholism, and most seriously adultery; hence, the emphasis on "purity." The courts, however, at least in the cases of wives who fled their homes, rarely illustrated what they had in mind, although they acted as though they clearly knew.

***Johnson v. Johnson* is a useful exception. Anna C. Johnson sued Matthew Johnson, "in the usual form for separate maintenance."[600] She won in the Circuit Court, in the Appellate Court, and again when her husband appealed that decision.[601] The printed version of the case is quite full, rehashing many of the points made in earlier cases. It contains a lengthy list of precedents cited by the husband's lawyer to show that courts did**

not encourage married persons to live apart, that a wife must be without fault, and that she have sufficient reason to leave, which would mean she had suffered bodily harm or a reasonable apprehension of it;[602] moreover, she could not have redress in court for cruelty which was a "natural rebound of her own ill-conduct."[603]

About much of that the court agreed. "No encouragement can be given the living apart of husband and wife. The law and good of society alike forbid it."[604] A husband was only liable for supporting his wife outside the home if their separation was by consent or if his "willful" behavior drove her out and she was without fault.[605] In this case, the courts saw their way clearly. The Johnsons lived together from their marriage in 1881 until Anna Johnson left in 1885. Apparently they were not well matched, the court concluded, citing "dissimilarity of tastes, arising partially from disparity of ages," and more importantly "different habits of life."[606] He was jealous and could not accept her statement that she had been pure when married and remained loyal afterwards. "No man can tell when a woman is pure," he countered.[607] She accused him of four acts of violence, which he denied.[608]

As far as the various courts were concerned, though there was contradictory testimony, the wife proved her case. Despite the "widest range" being allowed Matthew Johnson to attack his wife's chastity, even to the point of investigating "hearsay statements," no suspicion could be cast on her virtue.[609] Even worse for the husband, he had tipped his hand by acknowledging that from early on in their marriage he had kept a diary listing his wife's "bad conduct,"[610] which for the court proved that he was preparing

the way for a separation. Indeed, a witness testified he had said "'he would try to get rid of her some way.'"[611]

The court agreed, as had others before, that "trivial difficulties," even "occasional ebullitions of passion," did not justify separation. But a wife herself not at fault was not bound to live with a husband who endangered "her life, person or health," or one whose "persistent, unjustifiable" conduct rendered her life "miserable, and living as his wife unendurable."[612] If a husband voluntarily behaved in a manner that justified his wife to leave, the court concluded that that was precisely what he wanted to do, "on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions."[613] And if the husband drives her out, so that she leaves him, that is to be considered "desertion on his part, and not by the wife."[614]

Desaussure had talked about a wife who was "entirely blameless." In *Johnson* the court concluded that Anna Johnson "was not wholly blameless, at all times," nor was she "as patient under provocation as some women would have been."[615] She herself was guilty of "occasional sallies of passion and the use of harsh language."[616] That behavior could not be approved, but it was "no palliation, justification or excuse,--if, indeed, anything could be--of the personal violence" inflicted by Matthew Johnson.[617] In other words, just as bodily harm meant more than it seemed, meant in fact the danger of bodily harm, without fault meant something other, perhaps something less, than it seemed. As a South Carolina court explained in that 1903 case, *Levin v. Levin*, "it is not meant... that a wife must be perfect--her conduct absolutely free from fault--in all distressing circumstances."[618] In

Levin, the wife's faults were judged excusable, and "insufficient to deprive her of support for herself and child."[619]

In *Johnson* the court approved the allowance of $80 a month out of Matthew Johnson's ample $3,000 annual income.[620] It also approved $725 in legal fees for Anna Johnson's solicitors, which in Illinois, unlike Iowa, was covered by statute, so as "'to enable the wife to prosecute her suit, as in cases of divorce.'"[621]

Although Anna Johnson had left her husband, her husband's actions led the court to rule that he had in effect deserted her. That way of defining desertion had long since appeared and, of course, would keep reappearing, as it did in New York in 1897. *Gloster v. Gloster* involved a thirty-seven year old saloon keeper whose eighteen year old wife became pregnant soon after their marriage.[622] Although she was slight and in ill health, he forced her almost to the day their child was born to do heavy labor. Her protests brought on verbal abuse. Once, after about four months of marriage she left him, but returned on his promise to treat her better, a promise he quickly broke.[623] Two weeks after their child was born she went to her mother's for three days. When she returned, her husband told her she could not live with him "unless she gave up her people."[624] She said she could not; he said "Get out, then."[625] Sounding much like courts earlier in the century which discussed the natural ties between parents and children, even their married children, the court found his action, "refusing her the right to live with him" because she would not "entirely abandon her own people, the mother and father who gave her life, and cared for her in her infancy," constituted "legal abandonment."[626]

Levin v. Levin from 1903 serves well as a summary of nineteenth-century suits by wives for support, all that was available in South Carolina since the state, after a brief post-Civil War interlude, was again not granting divorces.[627] Hyman Levin from Charleston, South Carolina, and Dora Friedman from New York were married in 1899. After a brief "bridal trip" they returned to her parents's home. When he left for Charleston, she refused to go.[628] He blamed it on her parents, a charge the court found difficult to accept, concluding that it was "against nature" for parents to "separate a daughter from her husband and thus wreck her life."[629] Dora sued for alimony on the grounds of cruel and inhuman treatment, charging that on their trip her husband had hit her in the face, nearly pushed her down stairs, and "forced sexual intercourse against her will."[630]

The court cited the reasons for which alimony could be granted in South Carolina: a husband's desertion without just cause; real or threatened personal violence which affected life or health; and the practice of "obscene and revolting indecencies."[631] While agreeing with earlier judicial rulings, such as that in *Rhame*, qouting *Evans*, that "what wounds the mental feelings" is seldom sufficient to justify separation and alimony, it noted that one of the exceptions is language which "strikes at the vital point of female character by making and maintaining the charge of unchastity."[632]

Apparently, the court found there was insufficient evidence to determine whether the non-sexual violence had occurred,[633] but it was convinced of and horrified by the husband's "grossness of conduct" on their trip and back in New York, when he "insisted on

sexual intercourse at a time when his wife's physical condition made his doing so indecent." [634] The testimony on the point, "a mass of nauseous testimony," [635] was "too revolting to be recited." [636]

The issues were clear. Were conditions such that life would be intolerable for the wife? did she desert or contribute to the alienation, making her claim for support illegitimate? did she condone his behavior? did he discharge his obligations by inviting her to his home as his wife? [637]

Taken separately, the husband's acts might be considered bearable; together, however, perpetrated on a young wife who had a right to expect "at least respectful consideration" the court found inescapable the conclusion "that they amount to intolerable cruelty, justifying her separation from him." [638] Her refusal to leave for South Carolina was due to sickness and "her aversion to him arising from ill-treatment." [639] Nor was there condonation. It would be mockery of "a wife's patient endurance" [640] not to consider cruelties that have been forgiven when they are followed by others. Last, citing the obvious precedent, *Threewits*, the court defended both its and a wife's right to judge the future by the past. Since, in this case, the husband had never admitted any wrong doing, [641] his wife had no reason to trust him and the court would not put her in danger. She was entitled to alimony and to attorney's fees. [642]

IX. "the progress of society":

Conclusion

In 1845 Connecticut's "W. J. F." published a comparative description of what (s)he perceived to be the similar living conditions of Southern slaves and Northern wives. (S)he admonished abolitionists to address the evils in their own society before rushing off to right wrongs elsewhere. "[H]ere, at home, at their own doors, beside their own hearths, and beneath the very curtains of their domestic sanctuary, there exists a slavery in *principle* as real, and, in fact, as extended as any they would go abroad to abolish... *the slavery of wives*."[643] Regarding violence towards wives (s)he wrote:

> **... and when, as happens every day, a wife is chastised, not with "*moderate*" correction merely, but with *immoderate* correction, with "beating, bruising, wounding, and most villainous ill-treating," let her be consoled with knowing that the law does not permit such things, but highly disapproves and disavows the proceeding, shaking its reverend head in grave displeasure; yet let her not appeal to its tribunals for protection, for they will require proof– *and she may not swear against her husband*.... [H]e has only to indulge his fancy for domestic justice, or his love of matrimonial whipping, in the privacy of his chamber, in the still and dark night– alone without a witness and without succor. So that her cries disturb not the public peace, the public will not disturb itself about her sufferings.... [I]t matters little that she is theoretically under legal protection from personal violence.[644]**

Court cases concerning wives who fled their homes and were sheltered by family or friends and/or of those who sued for maintenance or alimony hardly went far enough to protect the mass of abused wives "W. J. F." wrote about. Courts dealt with women only one at a time, however broadly their rulings might apply. And the only wives who could possibly benefit, as "W. J. F.' also pointed out, were those whose husbands had financial resources.[645] "[A]lmost always," the United States Supreme Court said in 1858, "the alimony commonly allowed [a wife] is no more than enough to give her a home and a scanty

maintenance... necessarily short of that from which her husband has driven her."[646] But some women were helped–Mary Garland was one of them--because courts found a way to intervene. Mary married in 1855 and lived with her husband until 1867 when they signed a separation agreement, Mary agreeing "because of the threats, persecution and insufferable conduct" of her husband.[647] Soon, however, they got back together and 'cohabited" until 1871. At some point, like many eighteenth- and early nineteenth-century husbands, William Garland published in their local Mississippi newspaper "a notice to all persons not to give credit to any one on his account."[648] Mary sued for support without asking for a divorce. On numerous grounds, including that the court had no jurisdiction to grant separate maintenance in the absence of divorce, William objected to the suit. In a lengthy opinion for the Supreme Court, Judge Jonathan Tarbell affirmed the chancery court's authority and remanded the cause, justifying his decision with a sweeping summary of relevant cases in England and America, referring to America's "changed judicial system, ... the condition of the country, and the wants of our society."[649]

Tarbell noted that American chancellors had consistently found English equity decisions about matters that were first the concern of ecclesiastical courts contradictory, " clashing" was the word used in *Purcell v. Purcell.*[650] But while he was prepared to acknowledge "that practice has not been uniform,"[651] Tarbell seemed to believe that the English chancery courts were more active than they had been credited with being, that they "not only have not abstained from interference in favor of the wife, but they have absolutely and affirmatively seized upon every excuse, even the slightest pretext, for taking

jurisdiction, with a view to her protection and her support."[652] But even he was confused. After noting that "reason, philosophy and the conscience ... are the basis of equity," he concluded that "English equity, as between husband and wife, has been partial to the former, and has denied to the latter a just, reasonable and clear equity."[653]

Because of the multiple and independent state jurisdictions, American courts were divided. Tarbell found support for his decision "as one eminently equitable"[654] in Virginia, South Carolina, Kentucky, Alabama, New York, New Jersey, California, and Maryland, citing and quoting from specific cases, some of which "reviewed and criticized [English decisions] as irreconcilably antagonistic,"[655] and he dismissed opposing court decisions out of hand. " [T]he argument is believed to be unanswerably with those assuming ... jurisdiction," at least partly because it was advanced "by courts, judges, and chancellors of exalted character."[656]

Common law offered these abused wives no solution. "The credit of a man, stubbornly determined not to support his wife, will not feed the hungry nor clothe the naked."[657] The remedy was simple: chancery compels the husband to support his wife. Simple though it be, Tarbell took no chances. He repeated powerful remarks from similar cases in other states: from *Jelineau* (South Carolina): "If there were no precedents... we must make them, rather than so wanton an abuse of power by a husband over his wife should escape with impunity."[658] From *Butler* (Kentucky): "suppose... the wife is left to the humanity of the world, without support, has the chancellor... no authority...?"[659] From *Glover* (Alabama): "No one will deny but that the husband is bound by the strongest obligations... to support his wife. And if ... no court can enforce its performance or

compensate for its most cruel and flagitious violation, then indeed has one class of cases been found, which falsifies the posted maxim, 'that for every wrong there is a remedy....'"[660]

And then Tarbell concluded: "And thus it is, that in the progress of society, the fictions, technicalities and pretexts of the past, give way, one by one, as hindrances and embarrassments to the due administration of justice."[661]

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As sympathetic to beaten wives as higher court judges often were, they rarely expressed frustration at their inability to deal with the problems they faced; at least in their published decisions no judge offered any commentary about the sweeping changes that society would have to make to end the violence or to give wives the tools they needed to effectively combat their abuse. Their actions were beneficial and paternalistic. In a patriarchal manner they helped people along towards the idea of equality in families, away from the old hierarchical structure. Ironically, the closest most came to any kind of call to action was when they took a hard and unsympathetic position and refused to use the language of various married women's property acts to allow beaten wives to sue their husbands for their injuries. Those acts fairly uniformly gave a wife the right to "bring and maintain an action in her own name for damages, against any person ... for any injury to her person or character."[662] Most judges chose to read "any person" as excluding husbands. If legislators had wanted to allow wives to sue their husbands for abusing them, they should have been clearer. In other words, many judges argued, since legislators had not explicitly indicated that they wanted to give women a potentially useful weapon to fight

their abuse, they, in turn, would not pretend otherwise.[663]

A few judges, most notably John Brady of the New York Supreme Court, seized the moment. In a decision[664] ultimately overturned by the Courts of Appeals,[665] Brady called wife abuse "inexcusable, contemptible, detestable."[666] He rejected outright the notion that allowing a wife to sue her husband would destroy family harmony, stating the obvious, that the abuse was "more destructive."[667] Fortunately, he thought, but prematurely it turned out, "[t]he rules of the common law on this subject have been dispelled, routed, and justly so.... They have gone to that bourne from which no traveler returns, where they must rest forever, undistinguished by a single tear shed over their departure."[668]

There was, then, a limit to how far judges were prepared to go. They used the flexibility equity allowed them to relieve individual women, filling their opinions with their outrage and their sincere beliefs about rights and equality. Because of their humane innovations, their willingness to alter rules, many groups benefited. "'[T]he poor,' 'the weak,' common laborers, and children," Peter Karsten concluded, "were better off under the rules of common law and equity by the 1890s than they had been in the 1790s...."[669] Without question, so too were married women; dealing with women who "eloped" judges were forced to consider ever more issues. Their responses increased the rights of married women and set the stage for more radical change.

It came in 1914 with two cases. Judges had most difficulty giving up the idea of coverture, the notion, simply put, that when a man and woman marry they become one, the one being the husband. Since one could not sue oneself a wife could not sue her husband. In

1914 Connecticut's Supreme Court of Errors, following the logic of Judge Brady in *Schultz*, allowed a wife to sue her husband for assault and battery: if she can sue him "for a broken promise, why may she not sue him for a broken arm?"[670] Oklahoma followed Connecticut. Citing the state constitution and various statutes, the state Supreme Court affirmed the right of a woman whose husband attacked her with a shotgun to sue him.[671]

> **[W]e think it is clearly manifest that the legislative intent has been an endeavor to shake off the shackles of the common-law rules as to the rights of married women and to clearly define such rights. Besides, many of the more modern decisions on this question either offer an apology or give way to expressions of regret that the earlier decisions of their respective jurisdictions had announced a doctrine in which they did not fully concur but by which they felt themselves bound.[672]**

The changes that came about by judicial interpretation, allowing neighbors and relatives to assist beaten wives and even to encourage them to flee, the granting of both temporary alimony *pendente lite* and of alimony without divorce, allowing wives to testify against their husbands, ultimately allowing them to sue their husbands for the violence committed against them, flowed logically– but not inevitably– from the actions taken by the abused themselves, starting with the desperate act of running away, risking poverty, isolation, and, of course greater violence, and even death. Of course, there is no way of knowing how many wives were intimidated or how many bore their abuse as though it were their Christian duty to suffer.

Roxanna Fuller felt no such duty. In September 1804 her husband placed a notice in the *Providence Gazette* (and hung some in public houses) announcing that she had left his bed and board and warning people not to extend her credit. One week later she replied that, in fact, the bed she had left was one she had brought into the marriage and that she

doubted she could get credit in his name. And then she noted the violence. "During the whole Time since our Intermarriage, I have been subjected to a servile Fear, treated as a Slave, and in the most brutal and degrading Manner.... [O]f late he has added Insult to Abuse, Bestiality to Cruelty, and Violence to Outrage; so that I have been obliged, for the Preservation of my own Life, to abandon his House."[673]

Roxanna Fuller's story was a common one. Countless wives sought to preserve their lives by abandoning their homes. It was never easy, but at least some were not themselves abandoned by the courts. More and more over the course of the century and over a widening area chancellors and common law judges could be heard to denounce both wife abuse and the abusers. By the end of the century, they had come to reject any notion that provocation justified or excused abuse, that a wife who was not without fault forfeited her right to be free from violence, that staying with an abuser was condonation. Through judicial activism, some wives found safety and support.

1 This quotation and the quotations in the section headings will be identified when they appear in the text.

2 Jerome Nadelhaft, *Wife Torture: A Known Phenomenon in Nineteenth-Century America,* 10 J. AMER. CULTURE 39-59 (1987).

3 For "a man to Beat his Wife," said Cotton Mather, "was as bad as any Sacriledge. And such a Rascal were better buried alive, than show his Head among his Neighbours any more." Quoted in LYLE KOEHLER, A SEARCH FOR POWER: THE "WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND 49 (1980).

4 ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 20- 23 (1987). In 1599, an English Puritan, Henry Smith wrote: "If hee cannot reform his wife without beating, he is worthy to be beaten for choosing no better." Quoted in KOEHLER, *supra* note 3, at 49. For the treatment of abusers in England s*ee id*. at 50; Koehler notes that Charles II prohibited wife beating. *See also* also Koehler's ch. 5, *Marital Tension in Early New England: When the Ideal Goes Awry*, at 136-165.

5 Printed in DONALD S. LUTZ, ed., COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 81 (1998). The Body of Liberties

continued: "If there be any just cause of correction complaint shall be made to Authoritie assembled in some Court, from which onely she shall receive it."

6 ***Id*****.**

7 ***Id*****. at 92.**

8 Brenda D. McDonald, ***Domestic Violence in Colonial Massachusetts*****, 14 HIST. JL MASS. 53 (1986).**

9 KOEHLER, ***supra*** **note 3, at 137; PLECK,** ***supra*** **note 4, at 21-22.**

10 DANE MORRISON, A PRAYING PEOPLE: MASSACHUSETTS ACCULTURATION AND THE FAILURE OF THE PURITAN MISSION 71 (1995).

11 CONDUCTOR GENERALIS BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, CONSTABLES, JURYMEN, OVERSEERS OF THE POOR, &C.&C... 46 (1803). Emphasis added.

12 Letter XII, ***Legal Disabilities of Women*****, in SARAH GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND OTHER ESSAYS 74 (Elizabeth Ann Bartlett ed., 1988).**

13 W.J.F., ***Wives and Slaves a Bone for the Abolitionists to Pick*****, 17 THE UNITED STATES MAGAZINE, AND DEMOCRATIC REVIEW 267 (October 1845). The author is quoting a legal authority, [Charles] Petersdorff. [S]he acknowledged that regarding the legal position of wives the references were to Connecticut but [s]he thought the principles applied in all other states. GUOIN GRIFFIS JOHNSON, ANTE-BELLUM NORTH CAROLINA A SOCIAL HISTORY 242 (1937) for wide circuulatn.**

14 W.J.F., ***supra*** **note 13, at 269. The Maine Supreme Court had addressed W.J.F.'s point in 1828. If a wife was not allowed to testify her husband could "torture her" without fear of punishment. Since beaten wives could "exhibit articles of peace" against their husbands and have them imprisoned it would be "a legal inconsistency" not to allow their testimony. Soule's Case, 5 Me. 407, at 408.**

15 H. H. Amringe's speech is printed in the PROCEEDINGS OF THE FIRST NATIONAL CONVENTION 41 (1850).

16 THE REVOLUTION, 26 Aug. 1869.

17 WOMAN'S EXPONENT, 1 April 1873

18 3 HISTORY OF WOMAN SUFFRAGE 1876-1885, 258-259 (Elizabeth Cady Stanton et al. eds., 1886). ***See*** **the entry on Blake by William R. Taylor in 1 NOTABLE AMERICAN WOMEN A BIOGRAPHICAL DICTIONARY 167-169 (Edward T. Jones et al. eds., 1974).**

19 ***Address of Susan B. Anthony*****, in ANTHONY, THE TRIAL OF SUSAN B. ANTHONY 171 (2003).**

20 July 2, 1853, in LOVING WARRIORS : SELECTED LETTERS OF LUCY STONE AND HENRY B. BLACKWELL, 1853 TO 1893 47 (Leslie Wheeler ed.) 1981.

21 WOMAN AND HER WISHES AN ESSAY 20 (1853).

22 LILY, 1 Sept. 1854

23 ***Id*****. 15 March 1856**

24 ***Id*****. 15 Nov. 1855; THE REVOLUTION, 26 March 1868, noted that a husband's common law right to chastise his wife had been repudiated in all courts.**

[25] Jerome Nadelhaft, *"The Public Gaze and the Prying Eye:" The South and the Privacy Doctrine in Nineteenth-Century Wife Abuse Cases*, 14 CARDOZA JL LAW & GENDER 556-574 (2008).

[26] State v. McAfee, 107 N.C. 812.

[27] Abbott v. Abbott, 67 Me. 304 at 307.

[28] Fulgham v. the State, 46 Ala. 143 at 144.

[29] Marsh v. Marsh, 64 Iowa 667 at 668.

[30] S.S. Pateson, *The Law for Married Women*, 14 VA. LAW J. 538 (1890).

[31] For a succinct summary of state control of the rules of marriage *see* HENDRIK HARTOG, MAN AND WIFE IN AMERICA A HISTORY 11-23 (2000).

[32] Similarly, there were conflicting state opinions regarding wives's powers over their equitable estates. Norma Basch, *Equity Vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson*, 3 J. OF THE EARLY REPUBLIC 301-303 (1983).

[33] 42 CJS §629, 237

[34] 42 CJS §611, 205.

[35] Earle v. Earle 27 Neb. 277 at 282.

[36] *Id.* at 283.

[37] Wright v. Wright, 6 Tex. 3 at 19.

[38] State v Rhodes, 61 N.C. 453 at 454.

[39] Galland v. Galland, 38 Cal. 265 at 268 (1869).

[40] *Id*.

[41] Adams v. Adams, 100 Mass 365. The Massachusetts case was actually about a request for a writ of supplicavit, a wife's attempt to bind her husband to keep the peace.

[42] For example:

> **Rarely, if ever, has a case come before the court appealing more strongly to the law for protection. The conduct of the defendant towards his wife, if true,... was unmanly, wicked and cruel. He called her a fool and made against her the unfounded charge of theft. While she was lying prostrated by sickness, he cursed her and threatened to whip her as soon as she recovered sufficiently to bear it; and, as if with the premeditated purpose of carrying his threat into execution, he procured a large switch and put it away for the purpose of using it on such occasion as his bad temper might dictate. Upon the slight provocation of correcting one of his children for indecent conduct, the switch was sought, and with it a severe castigation inflicted upon the petitioner by the defendant; at each blow saying, "damn you, take that." He struck her at the same time in the face with his fist, leaving bruises on her face and back, and causing permanent injury to one of her eyes; and when she attempted to escape from his fury, he caught and carried her back and locked her up during the night, and would not permit anyone, calling at the house, to see her for two weeks. At another time, being enraged with the petitioner, he seized her by the hair, choked her and struck her several blows....After this, he threatened to hang her, and said she ought to be**

treated like a certain woman who, with her child, had been murdered by her husband. Gordon v. Gordon, 88 N.C. 45 at 52-53 (1883).

43 Nadelhaft, *supra* note 25, at 556-565, 578.

44 Calvin Bradley v. The State, 1 Miss. 156 (1824).

45 The State v. Jesse Black, 60 N.C. 262 (1864).

46 *Id*. at 263.

47 Joyner agst Joyner, 59 N.C. 322 (1862).

48 *Id*. at 322-323.

49 *Id*. at 325.

50 *Id*.

51 I simply couldn't resist using that description though I have absolutely no idea who made it or when it was made. It is a handwritten remark on the first page of the decision on the microfilm copy of 6 Jones Eq. that I used at the NYU Law School Library.

52 *Joyner*, 59 N.C. at 323.

53 *Id*. at 324.

54 *Id*.

55 *Id*.

56 *Id*. at 325.

57 *Id*.

58 *Id*.

59 *Id*. at 326; Joyner v. Joyner, Box 315, Case #8061, Supreme Court Original Cases, 1800-1909, North Carolina Archives.

60 *Joyner*, 59 N. C. at 326.

61 *Id*.

62 David v. David, 27 Ala. 222 at 223 (1885).

63 *Id*. at 224.

64 *Id*.

65 *Id*.

66 *Id*. at 225.

67 *Id*. at 227.

68 *Id*. at 225.

69 *Id*. at 227.

70 Poor v. Poor, 8 N.H. 307. at 308 (1836).

71 *Id*.

72 *Id*. at 309.

73 *Id*. at 313.

74 *Id*.

75 *Id*. at 315.

76 ***Id*****. at 312.**

77 ***Id*****. at 317.**

78 ***Id*****. at 308.**

79 ***Id*****. at 313-314.**

80 ***Id*****. at 311.**

81 ***Id*****. at 311. Samuel Butler's words are: "Ay me! What perils do environ/The man that meddles with cold iron!" HUDIBRAS, Part i. Canto iii.**

82 ***Id*****. at 312.**

83 ***Id*****.**

84 ***Id*****.**

85 ***Id*****.**

86 ***Id*****.**

87 ***Id*****.**

88 ***Id*****. at 319.**

89 ***Id*****. at 319. In a South Carolina case of 1856, *Converse v. Converse*, Judge Dargan found the husband at fault, his violence "perpetrated without adequate or palliative cause," while acknowledging that the wife did not bear "her wrongs with lamb-like patience and meekness." Indeed, "her spirit and pride" were such that she could not suffer in silence. 9 Rich. Eq. 535, at 536, 539. Profs. Bill and Jane Pease provided me with a copy of this case.**

90 ***Poor*****, 8 N.H. at 320.**

91 ***Id*****.**

92 King v. King, 28 Ala. 315.

93 ***Id*****. at 320**

94 ***Id*****.**

95 ***Id*****.**

96 WOMAN'S JOURNAL, 12 August 1871. Italics in the *Journal.* The Alabama case referred to, unidentified by the *Journal*, was *Fulgham v. The State*, 46 Ala. 143. The quotation is at 147. Interestingly, Blackstone had written about the danger "of considering all cases in an equitable light" which would leave " every question entirely in the breast of the Judges." Quoted in HENRY WILLIAM DESAUSSURE, *Introduction* to 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA xxxv (1817). One wonders whether the *Woman's Journal* was being delicate.

97 WOMAN'S JOURNAL, 7 March 1874.

98 An account of Hawley v. Ham was printed in the KINGSTON CHRONICLE, 15 September 1826; THE ARIEL. A SEMIMONTHLY LITERARY AND MISCELLANEOUS GAZETTE, 23 July 1831.

99 ***Id*****. To illustrate a parent's appropriate response, the Chief Justice told a story: a moderately chatised wife ran home to her father. He pretended outrage**

and said since her husband had beaten his daughter he would have his revenge by beating his son-in-law's wife. The Philadelphia judge was Edward King, who was twice nominated for the US Supreme Court by President Tyler.

100 WOMAN'S TRIBUNE, 1 June 1884.