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'The Public Gaze and the Prying Eye': The South and the Privacy Doctrine in Nineteenth-Century Wife Abuse Cases

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**“THE PUBLIC GAZE AND THE PRYING EYE”:
THE SOUTH AND THE PRIVACY DOCTRINE
IN NINETEENTH-CENTURY WIFE ABUSE CASES***

Nineteenth-century American courts often dealt with wife abuse. In some respects their first and most important decision was a matter of general policy: regardless of the law, judges asked, should courts become involved at all with what many considered private matters? Early in the century, the legacy of the colonial period fresh, this may have been less of an issue, although one could see the tension as early as 1815. Threewits vs. Threewits was, according to South Carolina judge Henry William DeSaussure, “one of those unhappy cases in which courts... are obliged unwillingly to enter into the privacy of domestic life.” Later, as families became more private and governments seemingly withdrew their attention, the notion that privacy was a positive good was pushed to the forefront, although it was not without its critics. The battle over prohibition highlighted the conflicting views.

* I benefited greatly from Linda Kerber’s close reading of a draft of this article. Also helpful were the comments of Michael Grossberg, and retired colleagues William and Jane Pease, and David C. Smith. Ruth Nadelhaft improved the many drafts. I am grateful for the assistance of the interlibrary loan staff of the University of Maine’s Fogler library.

Its vocal opponents, mostly men, believed more was to be lost than gained in opening homes, even troubled homes, “to the public gaze, and the prying eye.” Prohibitionists, on the other hand, both men and women, emphasized the dangers of secrecy, of locked doors, behind which a tyrant “forges chains of oppression for his subjects.”¹

In referring to “the privacy of domestic life,” and more particularly to the court’s grudging interference in family matters, DeSaussure raised the issues which would trouble some judges throughout the century and sometimes cloud their judgments—at least about wife abuse. Few judges dissented from the characterization of wife beaters as despicable beings whose behavior should not be tolerated, a view which seemingly dictated an answer to a broad question: should people, in this case women, be allowed to suffer or should they be protected by law? But some judges found a way to complicate matters by raising another question: whether families were best served by disclosure or, despite the abuse, by secrecy, which would require courts to ignore the abuse for some imagined greater good. And that, in turn, suggested other questions: whether the public was served at all by publicized news of domestic turmoil, and, in the broadest sense, whether private suffering caused public pain, public discord.

Legislatures incorporated provisions about cruelty into divorce laws, but it was judges who gave meaning to the word and prescribed for married people what they had to endure. “It is difficult to define with precision what is and what is not extreme and

¹ Threewits v. Threewits, 4 S. C. Eq., 560 at 561; the “public gaze” quotation is from Maine governor John W. Dana’s veto message of a prohibition bill, “Message to the Senate and House of Representatives,” No. 2, May 7, 1850, Documents Printed by Order of the Legislature... (Augusta, 1850), pp. 1-2; Report of the Executive Committee of the American Temperance Union, 1839, p. 19.

repeated cruelty,” an Illinois judge noted in 1882.² Throughout the century, some courts, fortunately only a minority, acted in accordance with the words of an anonymous author of an 1831 piece in the Carolina Law Journal: “The indurance of partial suffering, from incompatibility of tempers, or vicious habits, among married people is an evil vastly less... than that which arises” from easy divorce.³ Judicially, for some courts the tone had been set by an often cited late eighteenth-century English case, Evans v. Evans. In a long drawn out judgment, Sir William Scott had declared: “the happiness of some individuals must be sacrificed to the greater and more general good.” In New York in 1863 Hannah Solomon accused her husband of attempting to break her arm, of pulling a chair out from under her while she was holding her child, and of kicking her several times. The judge was not convinced she was telling the truth, but in the end he decided it really did not matter. If true, this “single instance” of cruelty “should receive the reprobation of every just person,” but still, it ought to be forgiven. Husbands and wives “should bear long and patiently with each other.”⁴ As Iowa Chief Justice Day put it in 1871, “married couples, for the good of their common offspring, the conservation of social order, and the maintenance of general morality, must bear with patience and composure the occasional disquietudes growing out

² Ward v. Ward, 1882, 103 Ill. 477, at 483.

³ Carolina Law Journal, I(1831), 378. “The happiness of the married life is secured, by its indissolubility,” noted a Connecticut judge in 1845, referring to a well-known decision in an English case. He went on: “Necessity is a powerful master in teaching the dictates it imposes.” Shaw v. Shaw, 17 Conn. 189, at 193. The English case was Evans v. Evans.

⁴ Evans v. Evans, 1790, 1 Hag Con. 35, at 37; Solomon agt. Solomon, 1863, 28 How. Pr., 218, at 220.

of inharmonious tempers and dispositions.”⁵ Ruling in an 1890 case which involved at least one act of violence, “outbursts of temper,” an undescribed incident with a poker, the display of a pistol, and a broken promise not to drink, a New York Supreme Court overturned a lower court’s grant of separation. It might well be disagreeable for a woman to continue an association with such a man, but “the necessity to endure... is one of the evils attending the marriage state.” Or, as Sir William Scott had put it one hundred years earlier, marriage was “for better, for worse,” to be “submitted to with patience” even when it “exhibit[s] a great deal of the misery that clouds human life.” ⁶

About matters such as these, there was considerable judicial confusion and geographic variation. The necessity to endure had not stopped judges from sanctioning the flight of abused wives from their homes. By 1897 a New York Supreme Court judge could confidently call attention to what had long been true, that whatever the case elsewhere and at other times, and even with the absence of easy divorce, that “in this jurisdiction, at the present day, meek submission and patient resignation are not a wife’s sole resource.” That particular case involved a wife’s action for separation and her husband’s countercharge of abandonment. The judge thought the husband guilty of “deliberate cruelty,” even subjecting her “to the infamy of a public advertisement” so that no one could “safely supply the necessities of life,” a tactic long since rejected by courts.⁷

⁵ Day, in Knight v. Knight, 31 Iowa 451, at 456.

⁶ McBride v. McBride, 1890, 9 N. Y. S., 827, at 828-829; Scott, in Evans v. Evans, 1790, 1 Hag Con 119;

⁷ Fitzpatrick v. Fitzpatrick, 1897, 47 N. Y. S., 737, at 737-738.

Still, many judges clearly held marriage to be sacred, something which created an entity which took on such significance for society that the individuals involved were not allowed the normal freedoms to decide their own fates. As North Carolina Chief Justice Thomas Ruffin put it in an 1845 case, “the welfare of the community” was more important “than the wishes of the parties.”⁸ Extreme statements about the positive good of marriage were common. In 1847, the Alabama Supreme Court, for example, after noting that marriage was “the most important of all social relations,” argued that the ease of getting divorces generated discord in families “by removing restraints which necessity imposes” when people knew that their marriage was “indissoluble.” But more than that: divorce “leads to licentiousness, and the disregard of the offspring of the marriage, and thus [it] saps the very foundation of domestic happiness, and public peace.” And there was more even than that: “Historians trace the decline of public morals, in ancient Rome, to this cause, more than to any other....”⁹ Twelve years later the court denied a woman’s petition for custody of her children, although it found the husband “was in the habit of drinking freely” and that his language to and about his wife was “rude, harsh, and indecorous.” But it was not convinced he beat his wife; all that was proven was that he slapped her—“in a laughing and playful mood.” Sympathy for wives in such positions had to give way “in

⁸ Wood v. Wood, 27 N. C. 674, at 682; my attention was called to this case by Victoria E. Bynum’s discussion of Ruffin’s attitudes towards women in Unruly Women: The Politics of Social & Sexual Control in the Old South (Chapel Hill, 1992), p. 68.

⁹ Moyler v. Moyler, 11 Ala. 620, at 623. J. Ormond went on to note: “it cannot be doubted that the State in its political capacity, has a deep interest in this question.” This was an appeal of a chancellor’s denial of an abused wife’s suit for divorce. Even with the appeal court’s strong defenses of marriage, it reversed the chancellor’s decision.

deference to the great social interests, and wise public policy, and biblical precepts, in which are founded general rules consulting for the permanency and stability of the marriage institution.”¹⁰ Clearly, in such remarks, judges were consciously imposing the greatest burdens on women.

Marriage was similarly exalted by the Virginia Court of Appeals in 1871, not long after the end of the Civil War and the radical social and economic changes it brought, and little more than a year after the end of reconstruction government and the assumption of power by a conservative government.¹¹ Bailey v. Bailey was a husband’s appeal of his wife’s suit for a divorce *a mensa et thoro* (from bed and board) and an award of alimony. At the end of a lengthy decision full of citations to English cases, cases from other American states, and references to Bishop on Marriage, the Court of Appeals, not content just to affirm the lower court’s award of divorce, proudly announced that there had been few such cases in the state because Virginians recognized that marriage was “the very basis of the whole fabric of civilized society.”¹² Then it closed with a fulsome endorsement of marriage as social salvation:

¹⁰ Bryan v. Bryan, 1859, 34 Ala. 516-522. “Even the beasts and the birds... ‘pair off’ by mutual consent,” the Alabama court noted in 1870. Among people of all nations, marriage was associated with sacred rites. And some people, the court continued, even believe in its continuing influence after death, “that it is indispensable for happiness in the life to come,” a sentiment certain to terrify some people. Goodrich v. Goodrich, 44 Ala. 670, at 672-673.

¹¹ Jack P. Maddex, Jr., The Virginia Conservatives, 1867-1879 (Chapel Hill: The University of North Carolina Press, 1970), ch. 7, “The Walker Administration, 1869-1873,” pp. 86-103.

¹² Bailey v. Bailey, 1871, 21 Gratt. 43, at 46.

We regret that this first case must be put on the record of reported cases in Virginia, and in conclusion we express the hope that such cases may be in the future as infrequent as they have been in the past; that, amid the whelming tide of social and political revolutions which threaten to sweep away all the forms of our cherished southern civilization, one pillar at least of the social fabric may still stand firm, and that the time may never come when the sacred bond of matrimony can be lightly broken, or the holy duties and high obligations it imposes, can be disregarded with impunity; but that marriage may in the future, as it has been in the past, be ever recognized in Virginia as an institution to be cherished by laws and sanctified by religion, as one upon which alone the happiness and purity of social and domestic life must ever depend.¹³

These concepts, marriage as salvation, marriage as a sacred institution, the good of the community vs. individual rights, came to the fore in a number of court decisions in the middle of the nineteenth century. Seizing on the notion of privacy, justices sometimes referred to it to justify inaction and sometimes to explain why, having acted, they would rather not have had to. Some hundred and fifty years later, within the last decade, a new paradigm has emerged around these cases, and it has been applied broadly to explain the fate of beaten wives in post-Civil War American courts. Set forth first by Reva Siegel in 1996, the argument is simply stated. During the nineteenth-century the old common law sanction of a husband's right to abuse his wife—under the guise of household governance—was gradually repudiated; more and more, judges declared wife beating barbaric. But, the argument goes, that clear rejection of the right to abuse scarcely benefited married women. Following the Civil War, appellate judges quickly undermined those decisions, showing their true sentiments by enunciating a new doctrine, that of domestic privacy. While abuse was not acceptable, and indeed was punishable, society,

¹³ Bailey v. Bailey, 59.

judges now argued, would be harmed by the public invasion of a married couple's domestic space. In Siegel's words, courts "could repudiate chastisement, and, at the same time invoke concepts of privacy to justify giving wife beaters immunity from public and private prosecution." Courts no longer needed "to justify a husband's acts of abuse as the lawful prerogatives of a master. Rather," Siegel pointedly concluded, "the state granted a husband immunity to abuse his wife in order to foster the altruistic ethos of the private realm."¹⁴

While Siegel's lengthy article remains the most cogent and detailed explication of the idea, there has been a litany of agreement from legal scholars, historians, political scientists, and feminists--in overlapping groups--all tracing their ideas back to Siegel.¹⁵ The unanimity

¹⁴ Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," The Yale Law Journal, 105: June 1996, pp. 2117-2207. The quotations are on pages 2153 and 2169-2170.

¹⁵ Historian Nancy F. Cott, also noting the common-law acceptance of the right to abuse, likewise found that post-Civil War courts, influenced by "the discourse of Christian civilization," denounced the privilege as barbaric without changing "the law's support of the husband's marital governance." Rather, they "stressed the public interest in shielding interactions between husband and wife from public view." Public Vows: A History of Marriage and the Nation (Cambridge: Harvard University Press, 2000), p. 162. In the Family Law Quarterly, Katharine T. Bartlett concluded that the law had traditionally viewed domestic violence as a private matter. There was a reluctance to intrude, "for fear of exposing the family to 'public curiosity and criticism.'" Katharine T. Bartlett, "Feminism and Family Law," Family Law Quarterly, 33, no. 3, Fall 1999, p. 495. Citing Siegel at length, Elizabeth M. Schneider referred to the "'new doctrinal regime couched in discourses of affective privacy that preserved, to a significant degree, the marital prerogative that chastisement rules once protected.'" Battered Women & Feminist Lawmaking (New Haven: Yale University Press, 2000), p. 17; see also chapter six, "The Violence of Privacy."

More recently, Kristin A. Kelly, a political scientist, noting the "rejection of the legal doctrine of chastisement," pointed out that "judges faced a dilemma," that is, how to "evaluate acts of violence in the home." "Intervention ran counter to a range of still popular and important cultural norms about the nature of the family. First and foremost, it threatened the status of the family as a private association." [63-4] Hence, a new

with which scholars have accepted Siegel's argument is testimony to the coherence of her writing and the thoroughness of her research. And, reasoning both forwards and backwards, her conclusions simply made sense. Certainly one could in mid-nineteenth-century America find judicial commentary denouncing wife beating; how then could one explain the failure to put a dent in the problem? If today and in the recent past, reformers have been stymied by a societal belief in family privacy, then perhaps one might assume the notion appeared as a kind of official response to the rejection of the common law justification of wife abuse.

But did it? Accepting the argument that courts found a new way to protect husbands from punishment for their in-home violence depends on agreeing to a number of points: first, that earlier in the nineteenth century, appellate courts had been so reluctant to interfere in abuse cases that wives were unprotected; second, that privacy meant freedom to abuse; and last that the privacy issue came to dominate.¹⁶ In fact, however, no one of those assertions is accurate. But there is another, more fundamental problem with the 'privacy'

justification for nonintervention. Domestic Violence and the Politics of Privacy (Ithaca: Cornell University Press, 2002), pp. 62-64. The most recent work on the subject is Elizabeth Pleck's new edition (2004) of Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to the Present (Urbana: University of Illinois Press). Her 1987 book was an excellent introduction to the subject. In the new introduction to what is otherwise a reprint of the original work, Pleck reiterates her earlier findings and succinctly summarizes the research which followed publication of her book, much of it indeed inspired by her book. Reva Siegel "provided a detailed account of the shifting basis for the Family Ideal as found both in appellate court cases involving wife abuse and in tort cases." By the 1870s, "virtually no American judge accepted the argument that a husband had a right to administer moderate correction of his wife." Instead, they "retreated to rationales about privacy and domestic harmony." p. xiii.

¹⁶ Courts in many states often acted to protect abused wives. It's a complicated story which I cover in a larger manuscript.

argument. Scholars who have adopted it have generalized from much too narrow a base, citing very few wife abuse cases, and always the same ones, from the hundreds that exist and without appearing to notice a crucial pattern: that virtually all the so-called privacy cases were southern, and virtually all of them from North Carolina. Siegel does refer to “these North Carolina cases,” but she does not see that concentration as significant.¹⁷ There was, in fact, something else at work in those cases. Indeed, if one looked at the entire country rather than at one section, it would be fair to turn the privacy argument around. What is most surprising, given the increasing societal privatization of the family, is how little that influenced the courts, at least the higher courts. At least with regard to wife abuse, there was less debate in the courts about the value and claims of domestic privacy than there was in society at large. Siegel’s linking of privacy and the practical right to abuse, well understood by contemporaries, holds, but only applied to one area of the country. And even there the courts never completely surrendered the notion that the right to abuse or--as the courts would put it--the right to chastise flowed naturally from the right to govern.

Hinted at in Threewits (South Carolina), privacy first became a determining factor in a Mississippi case, Calvin Bradley vs. The State (1824). The case made its way to the Mississippi Supreme Court because a lower court judge, rejecting the advice of a defense lawyer, had instructed a jury that, indeed, “a husband could commit an assault and battery on the body of his wife.” The higher court did not repudiate the lower court judge for accepting the notion that wife abuse might be a crime, but at the same time it referred to Blackstone and to “the old law” allowing the “moderate correction” of one’s wife. Then, it

¹⁷ Siegel, “The Rule of Love,” p. 2158.

said, if Calvin Bradley had been reasonable when he chastised his wife, it “would deliberate long” before affirming his conviction, clearly an unsatisfactory remark but by no means an outright acceptance of any level of marital violence, which it labeled a “remnant of feudal authority,” although it followed the denunciation by declaring that husbands could indeed be “permitted to exercise the right of moderate chastisement” in great emergencies, without defining either chastisement or emergency.¹⁸

In permitting that “moderate chastisement,” the court ventured into new territory, not relying on the old rationale, that husbands were responsible for their wives’s behavior. Rather, it declared, despite the abhorrence “of every member of the bench” to a husband’s infliction of “pain and suffering,” “every principle of public policy and expediency... would seem to require the establishment of the rule we have laid down.” “Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy.” To expose household conflict would result in “the mutual discredit and shame of all parties concerned.” Rather, “unhappily situated” husbands and wives were to be “screen[ed] from public reproach” by allowing husbands to “use salutary restraints” without fear of “vexatious prosecutions.” (Public reproach, of course, was one protection for abused wives.) Interestingly, and almost as an aside, Calvin Bradley’s conviction was affirmed.¹⁹

The focus on the Bradley decision is somewhat misleading; its influence seems to

¹⁸ Bradley v. State, 1 Miss. 156, at 157-158.

¹⁹ Bradley v. State, 158; Christopher Morris, Becoming Southern The Evolution of a Way of Life, Warren County and Vicksburg, Mississippi, 1770-1860 (New York: Oxford University Press, 1995), p. 60.

have been limited. That the privacy doctrine was not meant to hide serious abuse was evident in 1831 when the Mississippi Supreme Court granted Louisa Holmes a divorce from bed and board and a financial settlement. And adultery was not involved; the only charge was cruel behavior. No man who behaved as viciously as her husband was “fit to *rule* and have *dominion* over a lovely and dependant female,” the court declared, although it had earlier noted that the plaintiff’s conduct had, “to say the least,” been “imprudent” at times. The court did not mention Bradley or the notion of privacy.²⁰ Perhaps more tellingly, in 1893 the Mississippi Supreme Court said that the “ancient” common law’s allowance of domestic brutality, “strangely recognized in *Bradley v. State*” had “never since received countenance.” Bradley’s “blind adherence... to revolting precedent” had “long been utterly repudiated.”²¹

The privacy issue itself did not reappear for almost thirty years after Bradley, then surfacing in North Carolina. Between 1852 and 1886, the North Carolina Supreme Court handled numerous cases in which it connected the matter of abuse with the issue of domestic privacy; in reality the emphasis on privacy was not a new way to justify not acting to prevent and punish actions deemed illegal; rather it was a new rationalization unique to North Carolina for a greater willingness than evident in other state courts to continue a never repudiated tolerance of wife beating—and of violence in general. Thomas Ruffin, who would be chief justice of the North Carolina Supreme Court from 1833 to 1852, noted in an 1827 wife whipping case before the Warren County Superior Court, that while it was

²⁰ Louisa Holmes v. William Holmes, 1 Miss. 474-476.

²¹ Miles Harris v. The State, 71 Miss. 462, at 464.

considered “disgraceful for persons in elevated situations to lift their hands against their wives,... the law was made for the great bulk of mankind.” In the case at hand, the jury had only to consider “whether the whipping was excessive, barbarous and unreasonable.”²²

In many respects, the higher court’s basic position on domestic violence was most clearly set forth ten years later in a case involving a teacher’s beating of a six or seven year old girl. According to the record, Rachel Pendergrass had first tried mild correction of one of the small children in her school; when that failed she whipped her with a switch. The marks disappeared in a few days, except for two on her neck and arm, “apparently made with a larger instrument.” Those lasted a few days longer.²³ The judge instructed the jurors that a teacher had the same to right to chastise a child as a parent; they needed to be “cautious” in determining whether there had been excessive punishment. At the same time, however, he seemed to be directing a verdict, saying that if they believed the teacher was responsible for the marks described, which seems to have been acknowledged, then she was guilty. She was convicted.

The Supreme Court reversed the decision, citing the judge’s erroneous instructions. Unless the correction had produced or had been intended to produce lasting injury, the teacher had not exceeded her power. “However severe the pain inflicted, and however in

²² Quoted in Guoin Griffis Johnson, Ante-Bellum North Carolina A Social History (Chapel Hill: University of North Carolina Press, 1937), p. 242. Walter Clark, whose long-time service on the North Carolina Supreme Court began in 1889, published a history of the court in The Green Bag (October-December 1892). It was reprinted in Aubrey Lee Brooks and Hugh Talmage Lefler, eds., The Papers of Walter Clark (2 vols., Chapel Hill, 1948-1950). E. Osborne Ayscue, Jr. provided me with a copy.

²³ State v. Pendergrass, 1837, 19 N. C. 365; 1837 N. C. Lexis 42; 2 Dev. & Bat. Law 365.

their judgment it might seem disproportionate to the alleged negligence or offence of so young and tender a child,” the jury was obligated to acquit the defendant.²⁴

The higher court’s reasoning was clear. It spoke to hierarchy and order and responsibility. It justified placing almost unlimited powers in the hands of parents, and by extension in the hands of husbands, and, of course, slaveowners. Judge Gaston began his opinion noting the difficulty of stating “with precision” the power teachers had to correct their students, but it was, indeed, analogous to that of a parent. And, he continued:

One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary....

For the child’s welfare pain could be inflicted. However severe the correction, if the pain which followed was only temporary, the punishment could not be judged excessive, unless the teacher had been motivated by malice, “gratify[ing] his [or in the case at hand, her] own bad passions.” While that might seem an important restraint, the heart of the decision indicated that the teacher’s judgment could scarcely be questioned.

Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary, and like all others intrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose. The best and the wisest of mortals are weak and erring creatures, and in the exercise of functions in which their judgment is to be the guide, cannot be rightfully required to

²⁴ State v. Pendergrass, 19 N. C. 365, at 367-368.

engage for more than honesty of purpose, and diligence of exertion. His judgment must be *presumed* correct, because he is *the judge*, and also because of the difficulty of proving the offence, or accumulation of offenses, that called for correction....

Ending the Supreme Court's opinion, Gaston virtually gave teachers—and others with dominion over subjects—license to abuse.

We think that rules less liberal towards teachers, cannot be laid down without breaking in upon the authority necessary for preserving discipline, and commanding respect; and that although these rules leave it in their power to commit acts of indiscreet severity, with legal impunity, these indiscretions will probably find their check and correction, in parental affection, and in public opinion; and if they should not, that they must be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress.²⁵

The most important point about the North Carolina privacy cases, which began after Pendergrass, is that, at least initially, the Supreme Court openly defended abuse, though not by that term, as a positive tool to enable masters (husbands) to govern their domestic subjects (wives) and noted that abuse which did not threaten a wife's life or render her "condition intolerable, or her life burdensome," was not serious enough to warrant a court's interference, the court of course reserving for itself the right to determine what was tolerable and what was burdensome.²⁶ Unlike the higher courts of other states—outside the South—which often tried hard to protect beaten wives, North Carolina's high court busied

²⁵ On the violence of school discipline in North Carolina see Johnson, Ante-Bellum North Carolina, pp. 326-327. Johnson calls attention to a teacher in 1848 who listed forty-seven offenses he punished with whippings of up to ten lashes.

²⁶ State v. Rhodes, 1868, 61 N. C. 453, at 455.

itself at first overturning decisions of local courts punishing wife beaters, until, that is, the lower courts learned to follow the higher court's interpretation of state law. The judicial attitude is clearest in the 1862 case, Joyner v. Joyner, when the court, without mentioning privacy as a reason not to interfere, declared bluntly and positively that "there may be circumstances which will... justify the husband in striking the wife" and even leaving bruises.²⁷ In subsequent cases Joyner was not repudiated.

But the notion that domestic privacy had positive value may have swayed some judges in Joyner, even though it was not mentioned, for the North Carolina run of privacy cases had already begun, in 1852, with State v. Hussey. Beulah Hussey brought an indictment for assault and battery against her husband--and she testified against him. The dull language of the printed report of the case notes that William Hussey, unprovoked, kicked her on the leg and struck her on the head with his fist, from which she suffered "considerable pain" but no lasting injury. The manuscript record of the case depicts the events in greater detail and more vividly. Drinking to excess for several days, William Hussey threatened violence a few times. He was still intoxicated, or intoxicated again, the day of the attack. There were two blows to the head, both "violent"; the second one stunned her and "deprived her of her senses a short time & produced a contusion which remained for two weeks."²⁸

Following the logic of Pendergrass and, indeed, citing it, the husband's counsel

²⁷ Joyner v. Joyner, 59 N. C. 322, at 325.

²⁸ State v. Hussey (1852), 44 N. C. 123; State v. William Hussey, Supreme Court Original Cases, 1800-1909, Box 246, Case #6471.

“insisted” that every husband had “the same right to give to the wife moderate chastisement [sic] that a parent has to inflict punishment on his child.” Moreover, the husband was “by law constituted the judge as to the extent of the punishment he may inflict,” and he was not criminally responsible when there was no permanent injury or threat of it. And, he said, while Beulah Hussey was a competent witness to prove the assault on her person, she was not competent to prove lack of provocation on her part.²⁹

The judge first hearing the case refused to instruct the jury that the wife could not be a witness on her own behavior, but he did note that, indeed, “by law” a husband could beat his wife “to enforce obedience to his lawful command,” but he could not beat her “from mere wantonness and wickedness.” However, he added, if the violence was “inflicted without cause,” the husband was guilty. And so the jury found him. William Hussey appealed.

On appeal, the husband’s lawyers, citing numerous precedents, noted that since husbands were responsible for their wives’s behavior they could legitimately exercise power over them, even greater power than over servants and children. Moreover, in general, a wife could not be a witness for or against her husband, and this case was no exception. And, in somewhat veiled form, they brought up privacy, that is to say that to allow the wife to testify would be to let in the evils the rule of law was meant to prevent, ““impairing thereby the great principles which protect the sanctities of the marriage relation.””³⁰

²⁹ State v. William Hussey, Supreme Court Original Cases, 1800-1909, Box 246, Case #6471.

³⁰ State v. Hussey, 123-125.

Chief Justice Frederick Nash began his decision by denying any need to deal with the abstract question of whether a husband could strike his wife, although if the court had found the lower court judge's declaration on the subject inaccurate it could clearly have taken the opportunity to set the record straight. Instead, the court focused on two related questions: could a wife testify against her husband and, more particularly,--in this case involving two "violent" blows to the head--could a wife "be admitted to testify against him for an ordinary assault and battery on her?" The court's general answer to both questions was 'no.' To allow wives to testify would, as the defense lawyers said, "break down or weaken the great principles which protect the sanctities of the marriage state." In the more specific case of abuse, the court cited an important English case which allowed a wife's testimony, but essentially dismissed it because the husband in that case had been charged with committing an "atrocious felony" on his wife. The court also rejected a comment in Greenleaf on Evidence which specifically allowed such testimony ("it is utterly impossible that the principle can be true") and then concluded that while a wife could from necessity "exhibit articles of the peace against her husband" and even be a witness against him "for an assault and battery which inflicted or threatened a lasting injury," she could not in "cases of a minor grade."³¹

³¹ State v. Hussey, 125-127. Simon Greenleaf's A Treatise on the Law of Evidence (3 vols., Boston, 1842-1853) was for years a standard reference. Its influence was recently discussed in an Oregon case involving punitive damages: Frank Leon DeMendoza & Javier DeMendoza v. Bruce Huffman, William Huffman & Evelyne Huffman, 2002, 334 Ore. 425. The English case referred to in Hussey is Lord Audley's case, 1631.

When the court brought up the matter of privacy, it did not claim that the principle was such that it would justify overlooking wife abuse. “We know,” the court declared, “a slap on the cheek,... indeed any touching of the person of another in a rude and angry manner--is in law an assault and battery.” But not between husband and wife. “In the nature of things it cannot apply to persons in the marriage state,” which is tantamount to saying as the lower court had, and as the Supreme Court would later do in both Joyner and State v. Black, that wife abuse was not illegal in North Carolina. In effect, the court was saying that there was no such crime as wife abuse. The court did go on to argue that to make assault and battery a crime within marriage

would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.³²

And then it added: “It must be remembered that rules of law are intended to act in all classes of society,” perhaps, as Reva Siegel notes, a warning or a threat that if courts were to look into the homes of the lower class they would also be obliged to open the doors of the wealthier.³³ Neither in Hussey nor in any subsequent case did the Supreme Court ever explain how public opinion might moderate domestic abuse if homes were closed to “the gaze of the public.”

Ten years after Hussey, in Joyner (1862), without considering privacy, the court

³² State v. Hussey, 126; Joyner v. Joyner, 59 N. C. 322; State v. Black, 1864, 60 N. C. 262.

³³ State v. Hussey, 126; Reva Siegel, “The Rule of Love,” p. 2153.

overturned a judge's grant of temporary alimony to a wife seeking a divorce, again declaring a certain level of abuse to be not only a legal part of marriage in North Carolina, but a necessary part, so that a wife would "know her place," a stand it reiterated in Black, two years later, when it overturned another lower court decision convicting a husband of assaulting his wife, this time reintroducing the matter of privacy without, however, rejecting the notion that force and the responsibility of governing go together. A husband was responsible for his wife's acts; because "he is required to govern his household" the law allows him to use "such a degree of force, as is necessary to control an unruly temper, and make... [his wife] behave herself." Unless the violence was excessive or inflicted by a husband "to gratify his own bad passions," the law would not "invade the domestic forum, or go behind the curtain."³⁴ Again, the doctrine of Black is not that the courts will overlook abuse because of some overriding belief in the privacy of the home, but that the law, wisely, allows husbands to be violent, to utilize "a degree of force."³⁵

North Carolina's bald declaration of the legality of abuse set it apart from other states, as its judges understood. Chief Justice Reade in State v. Rhodes (1868) noted at first that there was little uniformity in how state courts looked at the matter of 'correction,' although acknowledging that outside Mississippi it found little favor but not noting that even the Mississippi decision was over thirty years old. He ended Rhodes by announcing his state's uniqueness. "Our opinion," he noted, "is not in unison with the decisions of some of the sister States," a statement which actually obscured North Carolina's isolation by

³⁴ Joyner v. Joyner, 59 N. C. 325; State v. Black, 60 N. C. 263.

³⁵ State v. Black, 60 N. C. 263.

suggesting, without any substantiation, that numerous state courts were in agreement with it.³⁶

Rhodes did, however, mark a change in the rationale for the court's acceptance of wife abuse. In part basing its action on Hussey and Black, although failing to mention that courts in both cases concluded that a certain level of abuse was allowed by North Carolina law, the Supreme Court this time--and without noting any changes in law--suggested that abuse was not lawful. Ironically, however, wives were better served by the earlier decisions--at least on paper. Flat out, the judge first ruling in Hussey had noted that while the law allowed correction, a husband was guilty of assault and battery if there had been no provocation.

When Rhodes was first heard at a session of the Superior Court of Wilkes County, the jury concluded that the defendant had struck his wife, but, being unclear about the law, it threw the matter back to the judge. There might well have been some trickery involved. One version of the jury decision notes "three licks with a medium sized switch without any provocation." But in that handwritten document 'medium' is crossed out, 'small' written above it, and a phrase is inserted to define 'small': "not as large as a mans thumb-switch about the size of one of his fingers." Reworked, the jury's summary of events made it easier for the judge to fall back on the old notion "that the defendant had a right to whip his wife with a swith [sic] no larger than his thumb" and, since "he did not inflict upon her a permanent injury" he was not guilty. That change in wording might also have reflected an

³⁶ State v. Rhodes, 61 N. C. 453, at 456 and 459.

understanding of wife abuse custom peculiar to North Carolina. The Raleigh Register had noted in 1825 that a man could “chastise his wife, provided the weapon be not thicker than his little finger.”³⁷ Regardless, the state appealed the Rhodes decision.

In Rhodes the Supreme Court concluded not only that there was no pretense of provocation, but that a husband had no more right to whip his wife than “a wife has a *right* to whip her husband,” a position which effectively did away with the older argument that the right to abuse stemmed from the right to govern. Still, the court refused to sanction punishment of this abusive husband, even while noting that the same level of violence “would without question have constituted a battery if the subject of it had not been the defendant’s wife.”³⁸

In a perverse way, the court’s opinion evoked the Declaration of Independence, the court holding wives to the standard Jefferson had set down, although nowhere did the court mention either Jefferson or the Declaration. It was prudent, Jefferson had written, that “long established” governments not be changed for “light and transient causes,” which people seemed instinctively to know, since they are “more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.” Only “a long train of abuses” designed to “reduce them under absolute despotism” justified

³⁷ State v. A. B. Rhodes, Supreme Court Original Cases, 1800-1909, Box 373, Case #9368. The Raleigh Register is quoted in Johnson, Ante-Bellum North Carolina, p. 242. Reference to thumbs as allowable standards for the size of weapons brings to mind the oft-used phrase, “rule of thumb.” For an examination of that so-called ‘rule,’ as well as of English Common Law and Roman Civil Law and Canon Law, see Henry Ansgar Kelly, “*Rule of Thumb* and the Folklaw of the Husband’s Stick,” Journal of Legal Education, 44: 1994, pp. 341-365. Kelly also briefly discusses some of the North Carolina cases.

³⁸ State v. Rhodes, 459, 454.

drastic change.

A number of times the court indicated it would not intervene unless “permanent or malicious injury” was “inflicted or threatened,” or where life became “intolerable” for the complaining party; sometimes, though, the Supreme Court noted, courts would not grant divorce even for “repeated violence.” The court took note of the arguments used in the case at issue, that the violence was both excessive and malicious because it was unprovoked; and that “every one... should be able to purchase immunity from pain,” but gave away its general attitude with its references to “trivial complaints,” “trifles,” “trifling cases,” “every trifling family broil,” and even “trifling violence.”³⁹ Without saying it, the court was indicating that since it would not intervene, wives might just as well take to heart part of the message of the Declaration of Independence, that patient suffering through temporary discomfort was appropriate behavior.

The link with the Declaration of Independence is clear in the concluding paragraph of Rhodes. The law notwithstanding, this court, unlike some earlier courts which had intervened in wife abuse cases but called attention to their reluctance to do so, showed no hesitation in refusing to help, glorifying its inaction, its newly invoked rationale for protecting abusive husbands, by mimicking the Declaration. “A decent respect to the opinions of mankind,” Jefferson had written, required that Congress list its reasons for separating from England. Similarly, out of “a decent respect for the opinions of others,”

³⁹ State v. Rhodes, 455, 457. Words trivializing wife abuse are scattered throughout the decision.

Justice Reade and the North Carolina Supreme Court took pains to explain their actions.⁴⁰

One of the court's arguments was, in fact, quite reasonable, but grossly misapplied. The courts would not get involved, Reade noted, if two young boys got into a fight in a playground, not because the boys had a right to fight, any more than a husband had a right to whip his wife, but rather "because the interests of society require that they be left to the more appropriate discipline of the school room and of home."⁴¹ Of course, that was hardly an applicable analogy. The court could readily offer alternatives for dealing with aggressive boys. It had nothing to offer wives except more abuse.

The court argued that it was serving a greater good, and it required similar service from wives. "It will be observed that the ground upon which we have put this decision, is not, that the husband has the *right* to whip his wife much or little...."⁴² Rather, the court argued that while family government was subordinate to state government, it was not going to "allow a conviction of the husband for moderate correction of the wife," even unprovoked, because the evils resulting from the infliction of "temporary pain... are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber."⁴³ The difficult, the impossible line the North Carolina Supreme Court was trying to draw is perhaps best

⁴⁰ State v. Rhodes, 459-60.

⁴¹ State v. Rhodes, 459.

⁴² State v. Rhodes, 459.

⁴³ State v. Rhodes, 457; the Rhodes decision was essentially repeated in State v. Oliver, 1874, 70 N. C. 60 (see below).

indicated by an incomplete crossed out sentence which concludes the handwritten decision: “But we by no means commit ourselves to the doctrine that in this enlightened & christian age a husband has”—and there it ends.⁴⁴

However unsatisfactory the decision in Rhodes, it did at least mark the first time North Carolina’s Supreme Court declared that husbands had no right to beat their wives. In two succeeding cases, the court made stronger statements, which it then again muddled by reference to the privacy doctrine. State v. Mabrey in 1870 involved a husband, “a man of violent character,” who had threatened to kill his wife with a knife he was brandishing. He was stopped by a bystander. In a lower court, Ridley Mabrey was acquitted. Just as in Rhodes, the jury first hearing the case could not come to a conclusion. “If the court shall be of the opinion that the defendant is guilty, then they find that the defendant is guilty. If the court shall be of the opinion that the defendant is not guilty, then they find the defendant

⁴⁴ State v. A. B. Rhodes, Supreme Court Original Cases, 1800-1909, Box 373, Case #9368. The Chicago Legal News publicized the Rhodes decision. The Supreme Court had noted that Rhodes had beaten his wife with a switch about the size of one of his fingers, but not as large as his thumb, which prompted the paper to suggest North Carolina women might owe thanks to the court for reducing the standard of measurement for an allowable weapon. Chicago Legal News, vol. 4, p. 476. The Chicago Legal News was founded by Myra Bradwell in 1868. The paper is a major source of information about women and the law, as well as about other legal issues in the state and the nation. Bradwell had a remarkable career. After the Illinois Supreme Court denied her admission to the state bar because she was a woman, she appealed to the United States Supreme Court, which upheld the state court. Before it ruled, however, the Illinois legislature passed an act allowing all people the freedom to choose their occupations. When Bradwell died in 1894, the Illinois State Bar Association noted that “No more powerful and convincing argument in favor of the admission of women to a participation in the administration of government was ever made, than can be found in her character, conduct, and achievements.” Quoted in Dorothy Thomas’s excellent entry on Myra Bradwell, in Edward T. James, et al., eds., Notable American Women: A Biographical Dictionary (3 vols., Cambridge: The Belknap Press of Harvard University Press, 1971), I, p. 225.

not guilty.”⁴⁵ Not guilty, said the judge. The state solicitor appealed.

Chief Justice Reade seemed truly incensed by the case, by what he saw as a blatant misreading of Rhodes two years before. Though Mabrey did not actually strike his wife, Reade found his life-threatening behavior “savage and outrageous” and “not to be tolerated in a country of laws and Christians.” In Rhodes the court had declared that it would not get involved with “trifling cases of violence in family government”; but that ruling was here perverted to mean that regardless of the nature of the weapon used, or of the motive or intent, the court would do nothing unless “permanent injury were inflicted.” “We repudiate any such construction,” Reade concluded.⁴⁶

Four years later, North Carolina’s stance on wife beating was explained anew, in a decision which at one and the same time both reaffirmed the privacy defense of wife abuse and demolished it, although that part of the decision has often been overlooked, not only by scholars but more unfortunately by subsequent courts. According to the trial record, Richard Oliver got drunk after breakfast, cut two switches and told his wife he was going to whip her, because “she and her d---d mother had aggravated him near to death.” He did, apparently stopping only when witnesses intervened. He was tried, found guilty, fined ten dollars, and he appealed.⁴⁷ The courts, the Supreme Court said, had “advanced from that barbarism” which allowed a beating with a switch no larger than a thumb. That was no

⁴⁵ State v. Ridley Mabrey, Supreme Court Original Cases, 1800-1909, Box 382 Case #966.

⁴⁶ State v. Mabrey, 1870, 64 NC 592, at 592-593.

⁴⁷ State v. Oliver, 1874, 70 NC 60-62.

longer law in North Carolina. Indeed, “the husband has no right to chastise his wife under any circumstances.” Again, however, the court fell back on the notion that it was best for public health that the court not listen to “trivial complaints.” “If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain....” But, and this is not always noted, in the case under review the court ruled that there had in fact been malice, and it upheld the conviction. More importantly, it went beyond the facts of this particular case and almost totally rejected the very notion that it had just announced, that abuse might be tolerated if there were no malice: “In fact, it is difficult to conceive how a man, who has promised, upon the altar to love, comfort, honor, and keep a woman, can lay rude and violent hands upon her, without having malice and cruelty in his heart.”⁴⁸ If, then, the court was declaring that virtually all wife beating involved malice, there could be no toleration of abuse.

Unfortunately, North Carolina’s Supreme Court backed away from that understanding description of the nature of wife abuse. It sought a way to measure malice, to quantify the abuse. Malice was not, as the court had just ruled, an inherent aspect of wife abuse; it was a function of severity. State v. Simpson Pettie reached the Supreme Court in 1879. Pettie had received a two year sentence for beating his wife “with a stick larger than the middle finger.” “Her left arm, shoulder, and back were covered with bruises.” The day after the beating her parents “found her in bed and unable to raise herself up without assistance.” Four weeks later she still could not do any work; she was “brought to court with great trouble.” The argument on appeal was that the sentence violated the

⁴⁸ State v. Oliver, 61-62.

constitution, its length being cruel and unusual.⁴⁹

The Supreme Court denied the husband's appeal. A year earlier the court had dealt with what from the record seems to have been a physically less serious case of wife abuse, at the time ruling that a five year sentence in a county jail was excessive, noting instead that the punishment should be no more than a month. There was a limit to a judge's power, "even when it is expressly left to his discretion," and even though that limit "cannot be prescribed."⁵⁰ At least in the printed report of the case privacy was not mentioned.

Considering Simpson Pettie's two year sentence, Judge Dillard returned to the privacy doctrine. As a matter of public policy, the "settled law of this state" was that courts would not "invade the domestic forum," would not interfere with a husband's ever present right to govern his family. It was best not "to take any cognizance" even when a husband chastised his wife unless there was permanent injury, or "an excess of violence" or unless there was "such a degree of cruelty as shows that the chastisement was inflicted to gratify his own bad passion." That, indeed, the court ruled, was true of Pettie. The severity of his actions indicated malice; for the protection of his wife and "the good order of society," he

⁴⁹ State v. Pettie, 80 N. C. 367.

⁵⁰ State v. Driver, 78 N.C. 423, at 429. Giles Driver had, "while under the influence of passion and the effects of intoxicating spirits," whipped his wife, leaving marks which had lasted two weeks. There had been other less serious chastisements. Too poor to have legal services, he had pleaded guilty. In recommending a maximum of one month, the Supreme Court cited various authorities on constitutional protections, the state's Revised Code, and noted too both "that the oldest member of this Court did not remember an instance where any person had been imprisoned five years in a County jail for *any* crime however aggravated," and, rather remarkably, that one's life was "in jeopardy" in a county jail.

needed to be made an example of.⁵¹

In 1886 the court returned to the matter of domestic privacy in two cases, neither of which involved wife abuse. Each, however, like Pendergrass almost fifty years earlier, reemphasized the dangerous position wives were in. Fred Jones had been convicted of beating his sixteen year old daughter. She testified that his bad temper led to frequent beatings “without any cause.” Outside their house, using a switch or small limb “about the size of one’s thumb or forefinger,” her father first gave her about twenty-five blows, “with such force as to raise welks upon her back”; shortly after, he hit her five more times, choked her, and threw her to the ground. Jones testified that the beating was for correction; his daughter had stolen money and was “habitually disobedient.” The presiding judge refused to instruct the jury that proof of permanent injury was required for a conviction. Instead, while noting that parents had the right to correct their children, he informed the jury that the defendant was guilty if the jury deemed the punishment excessive and cruel or inflicted to gratify malice.⁵²

Relying on Pendergrass, the Supreme Court ordered a new trial, objecting to the wide latitude given the jury to determine the meaning of cruel and excessive. “It is quite obvious that this would subject every exercise of parental supervision in the correction and discipline of children—in other words, domestic government—to the supervision and control of jurors....” That would remove restraints from children and subvert or impair the

⁵¹ State v. Pettie, 368-370.

⁵² State v. Fred Jones, 95 N. C. 588; State v. Pendergrass, 19 N. C. 365; and see also, State v. Alford, 68 N. C. 322

“efficiency” of family government. To defend himself, a father “would be compelled to lift the curtain from the scenes of home life,” perhaps “exhibit[ing] a long series of acts of insubordination.” The evil resulting from that exposure was “irreparable,... far transcending that to be remedied by a public prosecution.” Fred Jones’s beating of his daughter seemed to have been “needlessly severe,” but the court would not view it as criminal; rather it belonged “to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity.”⁵³ Clearly, as in Pettie seven years earlier, the North Carolina court still—or once again—connected the right to beat with the responsibility to govern.

During the same October term, the court took up a case involving a husband’s slander of his wife, a case which hardly required the court to comment on physical abuse. Still, it took the occasion in State v. Edens to re-emphasize its position that courts should not get involved when abuse was not serious, that is if it did not put life and limb in peril or involve permanent injury, “or where it is not prompted by a malicious and wrongful spirit,” without the slightest suggestion that, as the court had earlier declared, all abuse was likely to be malicious. Instead, it reiterated the dropped curtain policy to keep private “scenes of domestic life,” the rationale being that publicizing family disputes would magnify them and make reconciliation impossible.⁵⁴

At times the Supreme Court had difficulty summarizing what the state’s court-announced policy on wife abuse was. That was either genuine confusion about judicial

⁵³ State v. Fred Jones, 95 N. C. 590, 592.

⁵⁴ State v. Edens, 1886, 95 NC 693, at 696-697.

policy or an attempt to make their predecessors appear more sympathetic towards married women than they had been. In State v. Dowell (1890), the court cited Rhodes to acknowledge that there had been a time when “courts would not go behind the domestic curtain and scrutinize too nicely every family disturbance, even though amounting to an assault.” But since Oliver (1874) and subsequent cases, it continued, “we have refused ‘the blanket of the dark’ to these outrages on female weakness and defenselessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person.”⁵⁵ In State v. Fulton (1908), a case involving a husband’s slander of his wife, the court again took note of previous rulings on chastisement. Citing Oliver and Dowell for the ruling that a husband had “no right to chastise his wife under any circumstances,” it pointed out that North Carolina courts had been “slow to reach this position.” Just a few years before Oliver, the court noted, Rhodes had held just the opposite. Now, “the Court will no longer ‘draw the veil over dealings between man and wife,’” even where there is no permanent injury.⁵⁶ Neither Dowell nor Fulton cites the more recent Jones and Edens cases and neither cites any

⁵⁵ State v. Dowell, 106 N.C. 722, at 724. The marvelous phrase “blanket of the dark” does not appear in Oliver. It’s from Shakespeare’s The Tragedy of Macbeth, Act 1, scene 5. Dowell is a rape case; a white husband, at gunpoint, attempted to force an African-American male to rape his white wife. The court began its decision expressing its horror:

Ordinarily, precedent is grateful to the judicial mind as something approved and steadfast on which it may rest with confidence, but sometimes cases arise of such exceptional enormity that, for the fair name of humanity, the judge would hope to find no counterpart in criminal annals.

⁵⁶ State v. Fulton, 149 N. C. 485, at 496-497.

case that establishes the court's refusal to cover up mild chastisement.

North Carolina courts—alone of all state courts—were clearly preoccupied, obsessively so, with the notion of privacy, using the concept to confine wives in their dangerous environments. At the same time those privacy cases began, however, another case somewhat confusingly took a different tack, protecting an abused wife. But there was an unusual twist; in the end, the case serves to highlight the judiciary's approach and to better explain its actions—and to some extent the actions of judges from other southern states, who, even without the privacy issue, were the most cold-hearted to physically abused wives.

Earp v. Earp first reached the North Carolina Supreme Court in late 1853. William Earp appealed a judge's order granting his wife alimony while her request for a divorce was going forward. The immediate issue was clear cut, for just a year earlier the legislature had determined that in divorce cases a judge could grant a wife support while her divorce petition was being considered. Before the revised act was passed, a court could not come to a wife's aid, the reasoning being that if the wife lost her case she would have been given money she was under no obligation to return.⁵⁷ And, of course, presumably she might not have had the money to make good the debt.

Chief Justice Nash was succinct. A husband's brutality might force a wife out of her home. Not to allow her alimony or to allow her husband to appeal such an award might be tantamount to "condemn[ing] her to starve," and that was now unacceptable.⁵⁸

When the Supreme Court ruled on Elizabeth Earp's divorce petition itself in 1854, of

⁵⁷ Earp v. Earp. 1853, 54 N. C. 118, at 119-120.

⁵⁸ Earp v. Earp. 1853, 120.

necessity it examined the nature of her forty-year marriage. For thirty of those years, she suffered “harsh and brutal treatment,” which “she bore... as only woman can bear.” Nash’s opinion does not detail “the brutal oppression,” although it does specify her forced seclusion. Rarely did friends visit; nor was she permitted out. Several times she fled, but servants recaptured her. According to her divorce petition, she finally escaped “after being beaten.”

For a number of reasons the North Carolina Supreme Court could quite easily have disregarded the divorce petition, with its “list of grievances running through a long series of years.” First, the court recognized that the charges of violence were not specific or particular enough. Eight years later, in 1862, Eliza Joyner was doomed by just such failure to specify “time and place.” Moreover, the court might have overlooked William Earp’s brutalities. A wife might “endure” injuries; “blows and brutality from drunkenness she might suffer.” One does not, after all, resort to the law “for every act of improper violence.”⁵⁹

But this time the court chose not to deny its protection, but rather to accept the petition as a whole, “a plain, artless, feeling statement,” which successfully stirred up “the deepest sympathies of our nature”; it allowed itself to be convinced that the law could provide relief for Elizabeth Earp’s “history of suffering.” It held the lack of specificity unimportant; after all, it did not expect married people to “keep in a diary those many causes of strife which disturb the tranquility of families.”

What damned William Earp and saved his wife, what set this case apart in North

⁵⁹ Earp. v. Earp, 242; Joyner v. Joyner, 59 N. C. 324.

Carolina, was that his brutalities were not only physical; eight years earlier he had brought a “strumpet” home. According to the petition, he had children by her, and he recognized her and the children as his family. They ate at his table. That “strumpet and his bastards” were the crushing blow: “what greater indignity could he have inflicted upon” his wife? “Woman’s nature must and will rebel against this last indignity,” a remark essentially repeated two years later by Justice Battle: a virtuous woman would feel her husband’s adultery “with a far keener anguish than would be inflicted by a blow.”⁶⁰

When Chief Justice Nash concluded that women could withstand blows but that, faced with a husband’s mistress and illegitimate children, they had to either rebel or lose their minds he was in fact saying something more than that. He (like Battle after him) was declaring simply that North Carolina judges would tolerate abusive husbands however much they wished men were not beasts, but that they would more readily protect the sexual sanctity of marriage—at least against open violation. He was articulating for wives their hierarchy of suffering and wrongdoing. Within that hierarchy he was offering his and the state’s opinion that wives *could* endure physical abuse; he meant that men were mandating that they *would have to* endure it—for the sake of society.

But that, too, had another meaning. It was not society in general, but southern society in particular which dictated quiet suffering and submission behind private domestic curtains. In fact, it is no exaggeration to say that the burden of saving southern civilization, both before and after the Civil War, fell on wives, not in the usual sense of nurturing their

⁶⁰ Earp v. Earp, 240-241; Battle in Coble v. Coble, quoted in Bynum, Unruly Women, p. 72.

husbands and raising future generations of southern men but by that very endurance which was imposed on them. Northern courts occasionally invoked the notion of privacy, but not in cases of abuse. Privacy in southern wife beating cases was not a doctrine necessary to protect the family from society's prying eyes; it was necessary to protect society from too great a knowledge of or from open acknowledgement of what truly happened in families. It was to keep a well-known and obvious truth from prominence in the public record, thereby giving some credence to denials while protecting the reputations not only of individual men, but of areas, of states, and indeed of a region and its way of life. By extension, too, there was an even larger issue. Domestic privacy, secrecy, acceptance of wife abuse served as rationale and example for violence against African-Americans, first as slaves then as free but unequal people, just as violence against African-Americans was rationale and example for the abuse of wives.

Clearly, there was no one South and no one North. As Nell Painter has noted, "Southern history demands the recognition of complexity and contradiction, starting with family life, and therefore requires the use of plurals."⁶¹ That said and duly noted, there was a certain consistency in the South regarding wife abuse and enough consistency in the North to see a significant difference—and the difference can be suggested here with reference to two northern cases, the first one useful as a comparison with State v. Hussey, that 1853 case in which the North Carolina Supreme Court reversed an assault and battery conviction because a wife had been allowed to testify about her husband's "abuse," two "violent"

⁶¹ Nell Irvin Painter, "*Three Southern Women & Freud A Non-Exceptionalist Approach to Race, Class, & Gender in the Slave South*," in Southern History Across the Color Line (Chapel Hill: University of North Carolina Press, 2002), p. 111.

blows to the head, which the court called “ordinary.”

Twenty-five years before Hussey the Maine Supreme Court had dealt with a similar case. Chief Justice Mellen began his decision in Soule’s Case just as his North Carolina counterpart would: the only issue was whether the defendant’s wife was properly admitted to testify against him. Mellen too noted the general rule against such testimony. But the Maine Supreme Court accepted the validity of the exceptions. Without a wife’s testimony about threatened or actual abuse, a husband “could play the tyrant and the brute at his pleasure, and with perfect security beat, wound, and torture her.” Like Nash, Mellen pointed out that a wife could “exhibit articles of peace against her husband” and require security against “apprehended and threatened violence.” The North Carolina court stopped there, but the Maine Supreme Court noted that it would be “a strange and unreasonable doctrine” and “nothing less than a legal inconsistency,” if a wife could go that far against her husband and, “in so doing, perhaps cause his commitment to prison, and yet not be considered a competent witness to prove the fact that the threatened and apprehended violence had been cruelly committed by him.”

The North Carolina court went on to point out that allowing a wife’s testimony would weaken or break down “the great principles which protect the sanctities of the marriage state,” an argument the Maine court had forcefully rejected:

So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace, and introduce discord, animosity, and confusion in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic, and perhaps intoxicated husband, who had done all in his power to render the

wife unhappy and destroy all mutual affection.⁶²

In North Carolina the wife's testimony led the Supreme Court to overturn the verdict in the lower court and order a new trial. In clear contrast, the Maine Supreme Court ended its decision: "We are satisfied, both from the reason of the thing and the authorities, that the witness was properly admitted; and accordingly the motion for a new trial is overruled." It is worth noting that Soule's Case was decided just four years after the Mississippi Supreme Court had ruled in Bradley v. State that husbands were "permitted to exercise the right of moderate chastisement."⁶³

A second northern case, from Iowa, was Miller v. Miller (1889). Three years earlier the North Carolina Supreme Court had yet again announced that courts should not interfere in families when the abuse was not serious. Excerpts from the Iowa decision sound a familiar note. "It is the genius of our laws, as well as of our civilization, that matters pertaining so directly and exclusively to the home... are not to become matters of public concern or inquiry."⁶⁴ In the same vein the court went on to note that to investigate the case at issue, it would have to probe into "the thousand occurrences of life... [that might] provoke an unpleasant word, .. [or] stimulate anger." "Such inquiries in public would strike at the very foundations of domestic life and happiness."⁶⁵

⁶² Soule's Case, 1828, 5 Me. 407, at 408.

⁶³ Bradley v State, 1 Miss. 156, at 157-188.

⁶⁴ Miller v. Miller, 68 Iowa 177, at 182.

⁶⁵ Miller v. Miller, at 184, 183.

But the Iowa court was not dropping a curtain to cover abuse. Miller v. Miller was about the enforcement of a contract Nancy and Robert Miller had signed agreeing to “ignore” their previous actions towards each other, “to refrain from scolding, fault-finding and anger.” In addition Nancy Miller would keep their home and family comfortable and Robert Miller was to provide for the family’s expenses and to pay his wife \$200 a year on a monthly basis as long as his wife kept to her part.⁶⁶ Nancy Miller sued, claiming her husband had failed to live up to the bargain. The court essentially begged off the question; it was too much a public invasion to investigate whether Mrs. Miller had ever found fault, been angry, or scolded. “That which should be a sealed book of family history must be opened for public inspection and inquiry.” Obviously reserving the right to intervene in cases of abuse, the court concluded that “the law, except in cases of necessity, will not justify it.”⁶⁷ Perhaps what the Iowa court had in mind had been explained five years earlier in a divorce case. The defendant husband admitted having struck his wife once with a whip. The court agreed that his wife’s conduct had been “quite aggravating, to say the least,” but added, “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.”⁶⁸

In both North and South there were, of course, exceptions to the general trend of court decisions. The Alabama Supreme Court, for example, ordered a new trial in an 1844

⁶⁶ Miller v. Miller, 178-179.

⁶⁷ Miller v. Miller, 184.

⁶⁸ Marsh v. Marsh, 64 Iowa 667, at 668.

case when the lower court refused to allow a wife's testimony. But State v. Neill had a significant and quite unusual twist: the husband accused of abuse wanted to call his wife to disprove the charge. In general terms, the court acknowledged that a wife would be allowed to testify about abuse. Having said that, it could not imagine why she should not also be allowed to disprove an assault and battery charge, downplaying the possibility that "the coercion of the husband might induce her to conceal the fact." And if it was the husband's subsequent "caresses" that had changed the wife's attitude, that would "seem to prove that the breach, if any existed, had been healed, and the State could certainly have no interest in exposing to the public gaze a matrimonial dispute, which those, most, if not solely, interested in, were willing to bury in oblivion."⁶⁹

North Carolina and its courts were not quite alone in their blatant acceptance of a husband's legally-sanctioned right to strike his wife, privacy simply being an additional judicial rationale. At mid-century and beyond, Texas law still allowed husbands to restrain and correct their wives. As late as 1873, after a grand jury had indicted a husband for aggravated assault and using a knife "with malice aforethought to murder" his wife, the presiding judge told the jury "that it is not unlawful violence of a husband to control the conduct and actions of his wife, provided he only uses such force as will restrain and control her, without doing her any serious bodily injury."⁷⁰ The jury acquitted him.

⁶⁹ State v. Neill, 6 Ala. 685, at 686. See also Tucker v. State, 71 Ala. 342, 1882, and Johnson v. State, 94 Ala. 53, 1891.

⁷⁰ Quoted in Angela Boswell, "The Social Acceptability of Nineteenth-Century Domestic Violence," in Philip D. Dillard and Randal L. Hall, eds., The Southern Albatross Race and Ethnicity in the American South (Macon, Georgia: Mercer University Press, 1999), pp. 140, 159-160.

Other southern states tolerated and covered up a high level of abuse, preserving family privacy by punishing only the most egregious cases of domestic violence. In Virginia, according to Thomas E. Buckley, both the legislature and society exalted the notion of family privacy, in the process minimizing wife abuse.⁷¹ When Ann Cowper petitioned the Virginia legislature for a divorce in 1818, she had sworn testimony about her husband's brutality and his boasts that he would kill her—as he might kill any other woman he married. But the legislature sided with her husband who, despite denying the cruelty charges, argued that since he was “a free Man and in a free Country hard would be to divorce me from my wife without my consent for mere trivials.” And, he argued, his wife's complaints reflected only “private disputes in families.”⁷² Virginia newspapers also downplayed wife abuse with the familiar argument that allowing divorce for even extreme cruelty “prevents a married couple from overlooking a great many acts in each other which they would otherwise contrive to make up.”⁷³

The social, political, and ideological context for the North Carolina Supreme Court's opinions and for the South's greater emphasis on family privacy and its insistence that marital stability was a higher priority than safety for wives marked a clear distinction

⁷¹ Laura Edwards, “Women and the Law: Domestic Discord in North Carolina After the Civil War,” in Christopher Waldrep & Donald G. Nieman, eds., Local Matters Race, Crime, and Justice in the Nineteenth-Century South (Athens: The University of Georgia Press, 2001), p. 128; Buckley, S.J., The Great Catastrophe of My Life Divorce in the Old Dominion (Chapel Hill: The University of North Carolina Press, 2002), p. 179.

⁷² Quoted in Buckley, The Great Catastrophe of My Life, pp. 184-185.

⁷³ Richmond Enquirer, 22 Jan. 1820, quoted in Buckley, The Great Catastrophe of My Life, p. 186.

between North and South. Obviously, what set the South apart when the privacy cases first appeared was slavery, its peculiar institution. But slavery might better be understood as one of two peculiar institutions. While southerners were for a while somewhat embarrassed by slavery, until they honed and then aggressively asserted their positive defenses, they, the ruling white males, that is, were never defensive about their other peculiar institution: the family. They gloried in its distinctiveness. And they enmeshed the two institutions. The one, slavery, called forth the other, the southern family, which in turn justified slavery.

It was common currency that all white men, slaveholders and non-slaveholders alike, benefited in many ways from the bondage of blacks. On a regional level, slavery made southern republicanism tick. The very existence of a massive, readily identifiable disempowered race gave all white men a sense of superiority and a common interest at the polls. The much-touted and assumed absence of impoverished white males gave southern leaders confidence in the superiority of their pure republicanism, conservative, free of radical threats from mobs of propertyless voters; their governments made white men proud. In the midst of the Civil War, Benjamin Morgan Palmer put it succinctly. The North had “confounded” republicanism with democracy. It had made “the voice of the people the voice of God... exalting the will of a numerical majority ... and creating in the despotism of the mob the vilest and most irresponsible tyranny known in the annals of mankind.” “In the South,” he continued, “the dominant race, by the force of its position towards an inferior and servile class, is rendered conservative in the highest degree. All their interests are bound up in the perpetuation of the prevailing institutions of the land; and the class, whose tendencies might be to change, has no share whatever in the administration of public

affairs.”⁷⁴ Or as theologian Robert L. Dabney argued just after the war, if poor whites had to provide the labor on southern plantations how could they “be rendered content in their political disfranchisement, when they are of the same race, colour, and class, with their unauthorized oppressors...?” The south’s solution was “happy and potent” for everyone. “African slavery... solve[d] this hard problem” and “without injustice” to slaves because they became “*parts of the families* of the ruling class.”⁷⁵ And, as Palmer wrote, it mattered not at all “whether slaves be actually owned by many or by few: it is enough that one simply belongs to the superior and ruling race, to secure consideration and respect.”⁷⁶

Slavery made white men feel good about themselves. Less talked of, but still present, were the supposed benefits of slavery to women and to family life. In part, the intellectual argument went, it was a simple case of wives benefiting from the kindness of their husbands, which flowed directly from slavery. Slavery made “the temper of the ruling caste more honourable, self-governed, reflective, courteous, and chivalrous.”⁷⁷ Slaveowners, said Thomas Dew, are “characterized by noble and elevated sentiments, by humane and virtuous

⁷⁴ Benjamin Morgan Palmer, “A Discourse before the General Assembly of South Carolina, on December 10, 1863, Appointed by the Legislature as a Day of Fasting, Humiliation, and Prayer” (Columbia, S.C., 1864), pp. 10-11. Documenting the American South. 2005. University Library, The University of North Carolina at Chapel Hill. 18 January 2006 <<http://docsouth.unc.edu/imls/palmdisc/menu.html>>. Palmer was a minister in New Orleans.

⁷⁵ Robert L. Dabney, A Defence of Virginia,[and through her, of the South] in Recent and Pending Contests against the Sectional Party (New York, 1867), pp. 298-300.

⁷⁶ Benjamin Morgan Palmer, “A Discourse before the General Assembly of South Carolina, on December 10, 1863,” pp. 10-11.

⁷⁷ Dabney, A Defence of Virginia, p. 297.

feelings.”⁷⁸ But there was a more direct effect. To slavery, Dew argued, women, like men, owed their freedom from labor. No longer “*beast[s] of burthen*,” women became “the cheerful and animating center of the family circle.” It was a heart-warming scene. As Charlestonian C. G. Memminger wrote, “the Slave Institution at the South increases the tendency to dignify the family.... Domestic relations become those which are most prized.”⁷⁹

The differences in family government sometimes determined and paradoxically sometimes were determined by attitudes towards slavery. Northerners were divided between those who opposed slavery and those who did not, and northern opponents of slavery subdivided between abolitionists and antislavery moderates. The moderates themselves often disagreed with each other, although they had in common a general belief in what can conveniently be called domestic feminism. By and large abolitionists, a substantial number of them women, radical on the subject of slavery, were radical also in their calls for reform of the family, reforms needed even more in the South than in the North. Taking

⁷⁸ The Pro-Slavery Argument; as Maintained by the most Distinguished Writers of the Southern States, Containing the Several Essays on the Subject, of Chancellor Harper, Governor Hammond, Dr. Simms, and Professor Dew (Charleston, 1852), p. 455. Dew, a professor at William and Mary College, was here responding to Thomas Jefferson’s charge that the children of slaveowners “were stamped... with odious peculiarities.”

⁷⁹ Pro-Slavery Argument, p. 339. On this point see also Elizabeth Fox-Genovese, Within the Plantation Household Black and White Women of the Old South (Chapel Hill: University of North Carolina Press, 1988), p. 198; Memminger is quoted in Theodore R. Hovet, “Modernization and the American Fall into Slavery in Uncle Tom’s Cabin,” New England Quarterly, 54:1981, p. 507. Bertram Wyatt-Brown in The Shaping of Southern Culture Honor, Grace, and War, 1760s-1890s (Chapel Hill: University of North Carolina Press, 2001) p.143, identifies that quote as coming from an 1851 lecture: Lectures Delivered before the Young Men’s Library Association, of Augusta, April 10th, 1851 (Augusta, Ga.: Printed by W.S. Jones, 1851), p. 14.

advantage of economic and social changes that had already affected families—the move away from farms with the resultant growth of urban areas and male employment outside the home, as well as more jobs for women and substantially reduced family size—they championed the rights of women to a public presence, to speak, to organize, to work, and sometimes to vote. And they championed too greater rights for women in home matters, the right to property, divorce, custody of children, and the right even to refuse their husbands’s sexual demands. Antislavery supporters were more moderate in their attacks on the South’s peculiar institution, focusing on halting its spread and encouraging its gradual end; they were more moderate too in their calls for reform of the family. Uncle Tom’s Cabin, serialized in 1851-1852 in a Free Soil newspaper and published as a book in 1852, depicted the “domestic bliss” of northern families; and the women were domestically powerful.⁸⁰ Of course, in all the ranks there were shades of opinion. But wherever one stood on the matter of family dynamics, it was apparent that change had already come in many areas of the North and that that change frightened southerners; they found common cause with northern Democrats, defending male rights, resisting change, and limiting women’s possibilities.

Northerners and southerners could agree that their families were different, even agreeing about what those differences were, but arguing fiercely about who had the better of it. But southerners tried to fix the debate, giving their families mythic qualities, and passing them off as real. The curtain which kept wife beating private protected the myth

⁸⁰ Michael D. Pierson, Free Hearts and Free Homes: Gender and American Antislavery Politics (Chapel Hill: University of North Carolina Press, 2003), pp. 71ff.

that black slavery led to harmony and bliss for white families, thus justifying both slavery and the white family dynamic. In similar fashion, there was silence about another domestic family matter; southerners, or at least South Carolinians, were careful not to publicize a feature of family life common to many: woman's field labor. Northern and foreign travelers routinely commented on it. But field labor was supposed to be black labor, slave labor and hence demeaned. Planters's wives were obviously spared. To acknowledge that yeomen's wives did field work was to bring into focus class distinctions (which it behooved southern leaders to downplay). Moreover, as Stephanie McCurry noted, women's field work "dangerously eroded the social distinctions between free women and slaves, and that cut deeply into the pride of men raised in a culture of honor." Hence, "out of respect for yeoman masters and particularly for their votes," planters helped sustain the myth of non-working white women.⁸¹

The Virginia Court of Appeals focused attention on the importance of family and southern distinctiveness in the aftermath of the Civil War when it commented on the possible destruction of "all the forms of our southern civilization" and identified the family as the one remaining "pillar... of the social fabric."⁸² Just as southerners took comfort when they compared northern and southern governments, they found solace when examining families North and South. "In the South," Daniel R. Hundley wrote in 1860, "the family is a

⁸¹ Stephanie McCurry, Masters of Small Worlds Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country (New York: Oxford University Press, 1995), pp. 78-81.

⁸² Bailey v. Bailey, 1871, 21 Gratt 43, at 49; see above for the case.

much more powerful institution than in other portions of the Republic.”⁸³

The innovations which southerners thought had distorted and corrupted northern families, and which they saw as pervasive, as though northern men had lost all power—women’s separate sphere, their influence in, perhaps dominance over, child-rearing, women’s rights, readily-available divorce—had to be resisted. “The avowed program of all able abolitionists and socialists,” wrote Virginian George Fitzhugh, was to sweep away slavery, religious institutions, private property, political government, “and, finally, family government and family relations.” People like Horace Greeley were only more timid, Fitzhugh thought, desiring the same effects but willing to proceed more gradually.⁸⁴ “The Family,” Fitzhugh concluded, “is threatened, and all men North or South who love and revere it, should be up and a doing.”⁸⁵

Robert Dabney agreed, spelling out the logical and unavoidable progression of abolitionist ideas in greater detail. Southern families would be threatened if women were not kept in their proper place. He was quite prescient: “Other consequences follow from

⁸³ Hundley, quoted in Bertram Wyatt-Brown, Southern Honor: Ethics & Behavior in the Old South (New York: Oxford University Press, 1982), p. 117.

⁸⁴ George Fitzhugh, Cannibals All or Slaves without Masters (Richmond, Va., 1857), p. 281. Documenting the American South. 1998. Academic Affairs Library, The University of North Carolina at Chapel Hill. 19 October 2005 <<http://docsouth.unc.edu/fitzhughcan/fitzcan.html>>. Similarly, the New York Herald wrote that Lincoln’s election would bring “socialism in its worst form, including the most advanced theories of women’s rights, the division of land, free love and the exaltation of the desires of the individual over the rights of the family.” 19 Sept. 1860. Quoted in Pierson, Free Hearts, p. 110.

⁸⁵ Cannibals All, p. 293.

the abolitionist dogmas. ‘All involuntary restraint is a sin against natural rights,’ therefore laws which give to husbands more power over the persons and property of wives, than to wives over husbands, are iniquitous, and should be abolished. The same decision must be made upon the exclusion of women, whether married or single, from suffrage, office, and the full franchises of men.” And he tellingly noted, highlighting southern fears in one simple sentence, “there must be an end of the wife’s obedience to her husband.”

Abolitionism led inexorably to wifely disobedience. Outside the South the changes had already begun. “Female suffrage is already introduced in one State, and will doubtless prevail as widely as abolitionism” This uprooting of God’s family ordinance represented “the destruction of society.”⁸⁶

Responding to an 1821 petition for divorce, a South Carolina legislative judicial committee commented that it was the “policy of the state to refuse granting a divorce under any circumstances.” Over two decades later Judge John Belton O’Neill could still note: “The most distressing cases, justifying divorce even on scriptural grounds, have been again and again presented to the Legislature and they have uniformly refused to annul the marriage tie. Those whom God has joined together, let not man put asunder.” Even Henry William DeSaussure, who, however reluctantly, had agreed that the state needed on occasion to intervene in family matters, feared the consequences of divorce.⁸⁷ South

⁸⁶ Dabney, A Defence of Virginia, pp. 265-266.

⁸⁷ Both the 1821 committee and O’Neill are quoted in McCurry, Masters of Small Worlds, pp. 86-87. Norma Basch, Framing American Divorce: From the Revolutionary Generation to the Victorians (Berkeley: University of California Press, 1999), p. 60. “Divorce is not permitted in South Carolina,” Life reported in 1889, “but you can shoot

Carolina took the most extreme position of any state on divorce; but its position was welcome to North Carolina Chief Justice Thomas Ruffin. In 1832 he noted that “there is in general no safe rule but this: that persons who marry agree to take each other *as they are*.”⁸⁸ Since southerners were always more reluctant to sanction divorce than others, one can easily imagine their collective horror at Jane Grey Swisshelm’s comment in her Pittsburgh newspaper that “twenty divorces for every one we now have would greatly benefit the parties most concerned, and society in general.”⁸⁹ And Swisshelm was not even among the most radical of the North’s reformers.

In Reconstructing the Household, Peter Bardaglio extended the argument: the defense of the southern family, “the very essence of their reason for being,” was one motive for secession. As one southerner noted in 1855, northerners “divide the household into separate interests; the domestic hearth is no longer a common property to the family.” It was greatly different in “the slaveholding States.” “A very different idea of [family] government prevails.” “The [hierarchical] relations of parent and child, of husband and wife, of master and slave... all go to make up the great corner-stone of the social edifice—the family.”⁹⁰

your wife when you have grown tired of her, and the jury won’t trouble you.” XIV, no. 342, 18 July, p. 32.

⁸⁸ Quoted in Victoria Bynum, “Reshaping the Bonds of Womanhood: Divorce in Reconstruction North Carolina,” in Catherine Clinton and Nina Silber, eds., Divided Houses: Gender and the Civil War (New York: Oxford University Press, 1992), p. 322.

⁸⁹ Quoted in Pierson, Free Hearts, p. 89.

⁹⁰ Peter W. Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (Chapel Hill: University of North Carolina Press, 1995), pp.

Of necessity, slavery created hierarchies. It demanded powerful masters who could legislate for, judge, and punish the African-Americans in their possession. In Chief Justice Ruffin's famous and only slightly exaggerated formulation, "the power of the master must be absolute to render the submission of the slave perfect." It made white men patriarchs, rulers of domains which stretched from field to home. Anyone in either place was a subject. "I have a large Family of my own," wrote William Byrd II in the eighteenth century. "Like one of the Patriarchs, I have my Flocks and my Herds, my Bond-men and Bond-women,... so that I live in a kind of Independence on every one but Providence," a sentiment echoed a century later by John C. Calhoun: "Every plantation is a little community, with the master at its head."⁹¹ "Each planter in fact is a Patriarch," C. G. Memminger wrote. "His position compels him to be a ruler in his household."⁹²

Whether spoken or not, the logic was simple. Patriarchy was all encompassing and self-reinforcing. As Nell Painter put it: "Patriarchal families, slavery, and evangelical

117-118. Bardaglio is quoting an essay, "The South and the Union," De Bow's Review, 19: 1855.

⁹¹ State v. Mann, 1829, 13 NC, quoted in Bynum, Unruly Women, p. 70; Byrd, quoted in Bardaglio, Reconstructing the Household, p. 25; Calhoun is quoted in Drew Gilpin Faust, Mothers of Invention Women of the Slaveholding South in the American Civil War (New York: Vintage Books, 1997 [orig. ed., 1996]), p. 32. For a treatment of Ruffin, State v. Mann and other slave cases, see also Timothy S. Huebner, The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890 (Athens: University of Georgia Press, 1999), pp. 130-159.

⁹² Memminger is quoted in Theodore R. Hovet, "Modernization and the American Fall into Slavery in Uncle Tom's Cabin," p. 507. Bertram Wyatt-Brown uses part of that quotation in The Shaping of Southern Culture Honor, Grace, and War, 1760s-1890s, p. 143. It came from an 1851 lecture: Lectures Delivered before the Young Men's Library Association, of Augusta, April 10th, 1851 (Augusta, Ga.: Printed by W.S. Jones, 1851), 14.

religion further reinforced one another's emphasis on submission and obedience in civil society, particularly concerning people in subaltern positions."⁹³ As early as 1778, a northern traveler in the South noted the connection: "Accustomed to tyrannize from their infancy," slaveowners "carry with them a disposition to treat all mankind in the same manner they have been used to treat their Negroes."⁹⁴ Men carried back to their homes the sense of power they got from their control of slaves in the fields, just as they carried with them their belief that they ruled their universe.⁹⁵ Even if men who wielded ultimate power over their slaves, which included the power to whip, perhaps to kill, and the power to rape, could turn off their habit of command at their own thresholds, they could not afford to let their wives oppose or disobey them. Any show of weakness, any suggestion that obedience was voluntary or that disobedience was tolerable was dangerous for the message it gave slaves. Subordinate wives were not to think that complaining was an option lest subordinate slaves think likewise. And that remained just as important after the Civil War and the end of slavery. To southern whites, freed African-Americans were in even greater

⁹³ Painter, "Soul Murder & Slavery: Toward a Fully Loaded Cost Accounting," in Southern History Across the Color Line, p. 33; see also Angela Boswell, "Married Women's Property Rights and the Challenge to the Patriarchal Order: Colorado County, Texas," Janet L. Coryell, et al., eds., Negotiating Boundaries of Southern Womanhood: Dealing with the Powers that Be (Columbia: University of Missouri Press, 2000), pp. 89-109.

⁹⁴ Ebenezer Hazard, quoted in Robert Olwell, Masters, Slaves, & Subjects: The Culture of Power in the South Carolina Low Country (Ithaca: Cornell University Press, 1998), p. 50.

⁹⁵ For the best most succinct statement about the impact of southern culture on men, women, and domestic violence, see Wyatt-Brown, Southern Honor: Ethics & Behavior in the Old South, pp. 282-283.

need of control. And married white women, again, were object lessons.

One of the clearest descriptions of southern patriarchy—and its direct and supposedly wondrous impact on southern wives—as well as of the contrast between North and South-- was made by George Fitzhugh in his 1854 Sociology of the South. Elizabeth Fox-Genovese captured Fitzhugh's meaning perfectly. "‘A state of dependence,’ he maintained, ‘is the only situation in which affection can exist among human beings—the only situation in which the war of competition ceases and peace, amity and good will arise.’" Fitzhugh, Fox-Genovese notes, thought proof of northern society's "dissolution" was to be found in the women's rights movement. Men, he thought, loved their wives "because they are dependent."⁹⁶ "So long as she is nervous, fickle, capricious, delicate, diffident and dependent, man will worship and adore her. Her weakness is her strength...."⁹⁷

Three years later, in Cannibals All! or, Slaves without Masters, Fitzhugh again argued that dependence was power, applying the principle to all dependents in the "family circle," wives, children, pets, and slaves. In contrast to the outside world, where might triumphed and was used to oppress, in the family, a pleasing, lovely world where "each person prefers the good of others to his own," weakness ruled. "The humble and obedient slave exercises more or less control over the most brutal and hard-hearted master." "The

⁹⁶ Fox-Genovese, Within the Plantation Household, p. 199.

⁹⁷ George Fitzhugh, Sociology for the South, or the Failure of Free Society (Richmond, Virginia, 1854), p. 214. Documenting the American South. 1998 Academic Affairs Library, The University of North Carolina at Chapel Hill. 7 January 2006 <<http://docsouth.unc.edu/fitzhughsoc/fitzhugh.html>> A northern Democratic newspaper similarly argued: "the good wife, commandeth her husband, in any equal matter, by constantly obeying him." Lockport Niagara Democrat, 14 December 1854, quoted in Pierson, Free Hearts Free Homes, p. 106.

moral and physical world is but a series of subordinations,” Fitzhugh wrote, “and the more perfect the subordination, the greater the harmony and the happiness.”⁹⁸

Of course, the quality of life for dependents in a patriarchal society was determined by the goodness of the patriarchs. As Chief Justice of North Carolina, Thomas Ruffin had done much to enhance the power of slaveowners and of husbands, presumably believing that everyone benefited from their enlightened governance. As he said in 1855: “authority in domestic life, though not necessarily, is naturally considerate, mild, easy to be entreated, and tends to an elevation in sentiment in the superior which generates a humane tenderness for those in his power, and renders him regardful alike of the duty and the dignity of his position.” Fitzhugh also described a benevolent patriarchy. White or black, a woman “is treated with kindness and humanity.”⁹⁹

It would be difficult, however, to read such gentle treatment into the decisions handed down in the so-called ‘privacy’ cases or into the remarks of Judge Glover in an 1858 South Carolina custody case: “looking to the peace and happiness of families and to the best interests of society,” the law “places the husband and father at the head of the household.” He was given “a power of control over all members of his household,” especially his wife; her “legal existence... is suspended” because of “that coercion which subjection implies.”¹⁰⁰ Nor could one find kindness and humanity in David McCord’s comments about the practice

⁹⁸ Fitzhugh, Cannibals All!, pp. 301-302.

⁹⁹ Quoted in Bardaglio, Reconstructing the Household, p. 26; Fitzhugh is quoted in Fox-Genovese, Within the Household, p. 199.

¹⁰⁰ Ex Parte Oliver Hewitt, quoted in McCurry, Masters of Small Worlds, p. 88.

of forcing seriously abused wives who had fled their husbands to return when their husbands offered to take them back; the state would simply deny their right to support. As McCord, a lawyer, put it, the state need not protect a woman who would rather “starve than submit.”¹⁰¹

South Carolina’s husbands may have been particularly empowered. “In every aspect of domestic relations,” Stephanie McCurry concluded, “from incest to rape to child custody, and in property law as well, South Carolina’s legislators and jurists privileged the power of male heads of household to an extent unparalleled in any other state.” The law, she quotes one judge as saying, was to “operate restrictively rather than enlarging the rights of married women.” But the patriarchal ideal, officially embodied in laws and court decisions, operated throughout the South and on all levels of society. Poor white males had in their wives “vulnerable targets” on whom to take out their frustrations.¹⁰²

Nor did the church serve wives better than the law, although church committees did discipline men when their abuse got out of hand. Like the law, the church required wives to submit regardless of cost. South Carolina’s Reverend James Henry Thornwell found in the Bible evidence that “the relation of master and slave stands on the same foot with the other relations of life. We find masters exhorted in the same connection with husbands, parents, magistrates; and slaves exhorted in the same connection with wives, children, and

¹⁰¹ McCord is quoted in McCurry, Masters of Small Worlds, p. 87.

¹⁰² McCurry, Masters of Small Worlds, pp. 86-87. “Vulnerable targets” is Christopher Morris’s phrase. Becoming Southern, p. 162.

subjects.”¹⁰³ Rector Aldert Smedes, founder of St. Mary’s school in Raleigh, North Carolina, expressed a modicum of sympathy but offered nothing but encouraging words about resignation. “The arrangement which consigns a woman to the authority and to the mercy of a man who has not sympathy in her holiest feelings... who may even drown his reason in the drunkard’s bowl,” and whose “rightful authority” might degenerate “into a brutal tyranny” so that “her wedded life becomes a prolonged martyrdom” is often a wife’s “severest test.”¹⁰⁴ Submission and obedience were the key elements for women—and key differences between North and South.

In his disparaging chapter on “Woman’s Rights” in Sociology for the South, Fitzhugh was unsparingly critical of the North, its “newspapers... filled with the sufferings of poor widowed needlewomen, and the murders of wives by their husbands.” Fitzhugh’s argument was standard fare. Robert L. Dabney continued that approach in his post-war Defence of Virginia. Acknowledging that some slaves had been abused, that “a few slaves have been tortured to death,” and that some families had been broken up, he went on to note that there were also cruel fathers and husbands, but that “wife-murder is doubtless more frequent in the State of New York, than slave-murder was in Virginia.” “But no one,”

¹⁰³ Quoted in David Goldfield, Still Fighting the Civil War The American South and Southern History (Baton Rouge: Louisiana State University Press, 2002), p. 90.

¹⁰⁴ Smedes, ““She Hath Done What She Could’ or the Duty and Responsibility of Woman; a Sermon Preached in the Chapel of St. Mary’s School, by the Rector, and Printed for the Pupils at Their Request” (Raleigh, North Carolina, 1851), pp. 8-9. Documenting the American South. 2001. Academic Affairs Library, The University of North Carolina at Chapel Hill. 12 February 2006 <<http://docsouth.unc.edu/nc/smedesa/menu.html>>.

he added, dreams that these things evince the unrighteousness of the family relations.”¹⁰⁵

Dabney continued by quoting a New Yorker about the easy Godless divorce available with the assistance of lawyers who advertised their services in daily papers. Then, said that New Yorker, “I turn to the records of our criminal courts, and find that every day some cruel husband beats his wife, or some unnatural parent murders his child....”¹⁰⁶

Just as many southerners argued that slavery reinforced the southern family, Fitzhugh, like many other southerners, found a connection between antislavery and the North’s failed domestic scene: “The people of our Northern States, who hold that domestic slavery is unjust and iniquitous, are consistent in their attempts to modify or abolish the marriage relation.” Marriages are made with “little formality,” and legislatures and courts grant divorces with “equal facility.”¹⁰⁷ Or as he wrote in Cannibals All!, for dealing with oppressive husbands, abolitionists proposed “the unnatural remedies of woman’s rights, limited marriages, voluntary divorces, and free love.”¹⁰⁸

It was, again, a matter of opposing sides seeing the same evidence and coming to starkly different conclusions. Despite Dabney’s assurance that no one would see the strife in northern families as evidence of “the unrighteousness of the family relations,” many reform-

¹⁰⁵ Robert L. Dabney, A Defence of Virginia, p. 237. Southern women’s fiction also used the North-South comparison as a means of defending the institution of slavery. See Elizabeth R. Varon, We Mean to be Counted: White Women & Politics in Antebellum Virginia (Chapel Hill: The University of North Carolina Press, 1998), p. 112.

¹⁰⁶ Dabney, A Defence of Virginia, p. 238.

¹⁰⁷ Fitzhugh, Sociology for the South, pp. 213, 216.

¹⁰⁸ Fitzhugh, Cannibals All!, p. 99.

minded northerners did just that; they did indeed view the wife murders, the abuse, and even the existing numbers of divorces as evidence that more change, including easier divorce, was necessary. And because they sought reform, they exposed the famailial failings and welcomed the publicity. Southerners read the evidence as proving that reform was disastrous. When the Virginia legislature defeated a married women's property act in 1849, the Richmond Whig rejoiced: "The old Common Law is good enough for us—notwithstanding Lord Mansfield's interpretation of it, that a man might correct his wife with a rod *not larger than his thumb*. It has produced the finest women in the world; and we would not have them corrupted by Red Republicanism and French morality."¹⁰⁹

Fitzhugh believed that "law, however well intended, can do little in... [woman's] behalf." Whatever problems that might cause in the North, in the South that was fine, for southern women did not need legal protections. "The men of the South take care of the women of the South, the men of slaveholding Asia guard and protect their women too. The generous sentiments of slaveholders are sufficient guarantee of the rights of woman, all the world over."¹¹⁰ Indeed, Fitzhugh wrote, continuing his geographical and historical sweep, families were corrupted by the introduction of wealth. In Italy the family had been "a pure, a holy and sacred thing" until liberty ended under Augustus. From that point on, "the family never resumed its dignity and importance," never that is, "till slavery arose in the

¹⁰⁹ 21 August 1849, quoted in Buckley, The Great Catastrophe of My Life, p. 187.

¹¹⁰ Fitzhugh, Sociology for the South, pp. 215, 216.

South.”¹¹¹

Fitzhugh did point to a dark side, laying the blame for it entirely on women.

“In truth,” he wrote,

women, like children, have but one right, and that is the right to protection. The right to protection involves the obligation to obey. A husband, a lord and master, whom she should love, honor, and obey, nature designed for every woman—for the number of males and females is the same. If she is obedient, she is in little danger of mal-treatment; if she stands upon her rights, is coarse and masculine, man loathes and despises her, and ends by abusing her.¹¹²

Fitzhugh skirted over wife abuse, trivializing it by the brevity of his comment and blaming wives for its occurrence. Fitzhugh notwithstanding, southern women desperately needed protection. Publicly witnessed, wife abuse was hardly ever publicly acknowledged or effectively dealt with. The reasons are many, but nothing was more important than the patriarchy that Fitzhugh, Ruffin, and others celebrated. Once again, Fitzhugh is an unabashed defender of the the legal powerlessness of wives:

Two-thirds of mankind, the women and children, are everywhere the subject of family government. In all countries where slavery exists, the slaves also are the subjects of this kind of government. Now slaves, wives and children have no other government; they do not come directly in contact with the institutions and rulers of the State.¹¹³

¹¹¹ Fitzhugh, Cannibals All!, p. 285.

¹¹² Quoted in Susan J. Tracy, In the Master’s Eye Representations of Women, Blacks, and Poor Whites in Antebellum Southern Literature (Amherst: University of Massachusetts Press, 1995), p. 68.

¹¹³ Sociology for the South, p. 105, quoted in Bardaglio, Reconstructing the Household, p. 27.

The link between wives and slaves was often present; as Fitzhugh put it, in an oft-cited remark: “marriage is too much like slavery not to be involved in its fate.”¹¹⁴ In the early South that connection sometimes worked in wives’s favor. Slaves provided society with a standard of how people could be treated. However badly wives fared, it was important that they not be confused with slaves. That was the point of two eighteenth-century Maryland cases. In 1707 Margaret MacNamara won an alimony settlement after charging that her husband behaved with a “tyrannical domineering carriage too severe to be used even to slaves”; a little more than twenty years later Mary Codd’s husband was ordered to provide her with a house and an annual income for forcing her “to live in a manner common to few people except slaves.”¹¹⁵

That changed. In early America, poor whites often identified and consorted with slaves. More and more, the slaveowning planters who governed the South drove a wedge between them. In one sense poor white males benefited; no matter how poor they were, they shared whiteness with the dominant white males . As conditions for slaves worsened, poor white males could more and more feel superior. And they could act on those feelings, witness the behavior—sometimes drunken—of slave patrollers who in the nineteenth-century were more and more drawn from the lower class. (“They jes’ like policemen, only

¹¹⁴ Sociology for the South, 207; see also Goldfield, Still Fighting the Civil War, p. 90, McCurry, Masters of Small Worlds, p. 219 and Cott, Public Vows, p. 63.

¹¹⁵ Macnamara’s case is summarized in Helms v. Franciscus, 1840, 2 Bland 544, at 566; Codd v. Codd, 1727, is summarized in Hewitt v. Hewitt, 1825, 1 Bland 101.

worser.”)¹¹⁶ It was different for white women. Their legal identity was increasingly merged with that of slaves. Mary Chestnut commented on the connection. “The Bible authorizes marriage and slavery,” she wrote. “Poor women!—poor slaves!”¹¹⁷ The semantic link—as dependents—was reiterated again and again by North Carolina’s Chief Justice, Thomas Ruffin. Slaves, he wrote in an 1845 case, were entitled to keep the “petty gains” they made from the sale of the “little crops” they grew with the consent of their deceased owners “upon the same principle that the savings of a wife in housekeeping, by sales of milk, butter, cheese, vegetables and so forth, are declared to be, by the husband’s consent, the property of the wife,” even though neither wife nor slave can legally have property. Ruffin believed, as Laura Edwards has written, that white women “belonged within households as wives, just as African Americans belonged within households as slaves.” Any disruption of the “natural” order of husband and wife suggested the possibility of a disruption of the

¹¹⁶ Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas (Cambridge: Harvard University Press, 2001), pp. 99-102. The quotation is from a 1937 WPA interview with W.L. Bost, a former NC slave, in Hadden, Slave Patrols, p. 71. On the violence of slave patrols see also Bill Cecil-Fronsman, Common Whites: Class and Culture in Antebellum North Carolina (Lexington: The University Press of Kentucky, 1992), p. 87. Asking a question in his concurring opinion in an 1849 case before the North Carolina Supreme Court, Justice Nash implied a great deal: “Suppose a parcel of drunken white men, say a dozen, meet a slave in the highway, in a lonely spot, and seize him, and while some hold him, others of the party proceed to beat him....” State v. Caesar, a slave, 31 N.C. 391, at 408.

¹¹⁷ Chestnut’s diary entry of March 1861 is quoted in Goldfield, Still Fighting the Civil War p. 90. For some earlier comments linking women and slaves, see Jerome Nadelhaft, “The Englishwoman’s Sexual Civil War: Feminist Attitudes towards Men, Women, and Marriage, 1650-1740,” Journal of the History of Ideas, 43: 1982, p. 567.

“natural” order of white and black.¹¹⁸

Southern wives were defined less by their whiteness than by the state of dependence they shared with African-American slaves. “Subordination of the Wife,” “Supremacy of the Husband,” and the “Authority of Masters” were some of the sermon titles of Benjamin Palmer. “Subordination on the part of the slave is absolutely necessary, not only to the existence of the institution, but to the peace of the community,” Thomas Cobb wrote in 1858.¹¹⁹ His words applied equally to wives. Opposing women’s political rights in 1842, for example, a writer in the Southern Quarterly had argued that a married woman who was independent of her husband “nurtures misery for herself and injury to the community.”¹²⁰ “The wife must be subject to the husband,” North Carolina’s Chief Justice Pearson declared in 1862, invoking the Bible, as southerners also frequently did to justify slavery. ““Thy desire shall be to thy husband, and he shall rule over thee.””¹²¹ The fiction of Nathaniel Beverley Tucker makes the same points, as Susan Tracy has shown. Women were “passive sufferers,” in Tucker’s words “born to suffer.” They might escape beatings if they learned from the beatings of blacks. “Oh Woman, Poor Woman. She is the slave of circumstances, and bound by an invisible chain she is dragged along to whatever destiny the

¹¹⁸ Waddill v. Martin, 38 N.C. 562, at 564; Johnson, Ante-Bellum North Carolina, p. 243, n69; Edwards, “Women and the Law,” p. 128.

¹¹⁹ Palmer’s sermon titles are cited in Cott, Public Vows, p. 60; Thomas R. R. Cobb, An Inquiry into the Law of Negro Slavery.... (New York: Negro University Press, 1968 [orig. ed., 1858]), p. 94.

¹²⁰ Quoted in Bardaglio, Reconstructing the Household, p. 27.

¹²¹ Joyner v Joyner, 1862, 59 N. C. 325. The quotation is from Genesis 3:16.

interested views of others may prepare for her.”¹²²

Equally relevant for women was Cobb’s comment about cruelty, which read much like a succinct condensation of North Carolina chastisement and ‘privacy’ decisions.

Writing about “what amounts to [the] cruel treatment” of a slave, Cobb noted that it was “a question which necessarily, to some extent, must be submitted to the jury.”

The general principle would be, that the master’s right to enforce obedience and subordination on the part of the slave should, as far as possible, remain intact. Whatever goes beyond this, and from mere wantonness or revenge inflicts pain and suffering, especially unusual and inhuman punishments, is cruelty, and should be punished as such.¹²³

Perhaps the most extreme statement linking slaves and wives as dependents/subjects to their masters/husbands came from William Harper, a South Carolina lawyer and judge. First defining a freeman as “master of his own time and action,” he noted that it would be “degrading” to “such a person” to “submit to a blow” since he was “the protector of himself.” But a blow was “not degrading to a slave—neither is it... to a woman.”¹²⁴ With regard to slaves, that was certainly settled legal policy, clearly enunciated in an 1849 case. If a slave killed a white man after “receiving a slight blow,” a North Carolina court noted, it was murder rather than manslaughter, “for accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to ‘dethrone reason,’ and must be

¹²² Quoted in Tracy, In the Master’s Eye, p. 77. “Passive sufferers” is Tracy’s term.

¹²³ Cobb, An Inquiry into the Law of Negro Slavery, pp. 98-99.

¹²⁴ Harper (1838) quoted in McCurry, Masters of Small Worlds, p. 219.

ascribed to a ‘wicked heart, regardless of social duty.’” “The law requires a slave to tame down his feelings to suit his lowly condition....”¹²⁵

Wives are not mentioned in State v. Caesar, but they are present by implication. Judge Pearson noted that in some circumstances, “the law *allows* of the *infliction of blows*. A master is *not indictable* for a battery upon his slave; a parent, tutor, master of an apprentice, is *not* indictable, except there be an excess of force....”¹²⁶ While Chief Justice Ruffin dissented from the majority opinion, he expressed himself more fully on the matter of subservience. “Slaves,” he wrote, “not dangerously or excessively and cruelly beaten, will not so feel the degradation and outrage of a battery by a white man....” In Ruffin’s and North Carolina’s scheme of things, his words clearly applied to husbands and wives. “The whites forever feel and assert a superiority, and exact an humble submission from the slaves; and the latter, in all they say and do, not only profess, but plainly exhibit a corresponding deep and abiding sense of legal and personal inferiority.”¹²⁷ The consequences of a change in attitude were dire, suggesting a southern world turned upside

¹²⁵ Majority opinion of Richard Pearson, State v. Caesar, a slave, 1849, 31 N.C. 391, at 400, 406.

¹²⁶ State v. Caesar, a slave, 401.

¹²⁷ State v. Caesar, a slave, 1849, 420, 421. In a startling burst of self-delusion Ruffin noted that “the great mass of Negroes” were born “with deference to the white man,” that “they have a duller sensibility to degradation.” Moreover, in direct contrast to those slavery defenders who denied that slaves were badly treated, Ruffin noted that in his forty-two years in the profession he had not “heard of half a dozen instances of killing or attempting to kill a white man by a negro in a scuffle, although the batteries on them by whites have been without number, and often without cause or excessive.” Ibid., 421, 423, 424.

down. “First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely.”¹²⁸ And that was precisely the fear white males had for their marital arrangements. No less than black slaves, white wives owed not only obedience, but uncomplaining obedience, to their masters. And, legally or not, each was subject to beatings.

Wives suffered because many of them, especially elite women, were trapped in a “culture of resignation” among men brought up to admire aggressiveness and quick to respond to real or imagined insults. Southern men of all classes were, in brief, always ready for a fight, maintaining a “violent stance toward the world” which was probably enhanced by excessive drink. Violence was endemic in southern society, both before and after the Civil War. “Whatever the origins of the fighting element in Southern culture,” Ted Ownby has written, “the presence of blacks was the most influential factor in intensifying and prolonging it. Slavery showed all Southerners the significance of physical force in human relations.”¹²⁹ An antebellum English traveler reported a southern violent crime rate five times that of the North and ten times that of the free countries of Europe. The 1850 murder

¹²⁸ Ruffin, State v. Caesar, a slave, 428.

¹²⁹ The “Culture of Resignation” is the title of the Jane E. Cashin’s introduction to her edited volume, Our Common Affairs: Texts from Women in the Old South (Baltimore: Johns Hopkins University Press, 1996); for the “violent stance” see Cecil-Francis, Common Whites, p. 18; Ted Ownby, Subduing Satan: Religion, Recreation, and Manhood in the Rural South, 1865-1920 (Chapel Hill: The University of North Carolina Press, 1990), pp. 12-16. The quotation is on p. 16.

rate was seven times the North's.¹³⁰ Some of those murders were lynchings. Even before the Civil War lynch mobs killed upwards of three hundred whites, mostly men.¹³¹

Clearly, wives understood their surroundings, understood that they were at risk. While society might intervene to protect them—as it did slaves—from excessive, malicious cruelty, there was otherwise little outside help available. Given the violence in their own lives, the southern elite had to accept the violence of lower class life, including what occurred in the home. To some extent they also thought of it as a natural part of that group's behavior; and in part they saw their non-interference as a way of insuring lower class support of their hegemonic rule. Often, however, wives refused to be passive victims; they helped themselves, sometimes by violently resisting their husbands's cruelty and sometimes by initiating prosecutions against them, as was evident from the appeals that the North Carolina Supreme Court heard.¹³²

¹³⁰ Cecil-Fronsman, Common Whites, p. 170; Goldfield points out that throughout the twentieth-century, the South remained the most violent section; its homicide rate was almost double that of the Northeast. Indeed, all eleven states of the Confederacy were in the top twenty states in homicide rate. Still Fighting the Civil War, p. 10.

¹³¹ Cashin, ed., Our Common Affairs, p. 13.

¹³² On women's violence, see Laura F. Edwards, "Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South," The Journal of Southern History, 65: 1999, pp. 733-770; for women initiating domestic violence prosecutions, see Stephanie Cole, "Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore," in Christine Daniels and Michael V. Kennedy, eds., Over the Threshold: Intimate Violence in Early America (New York: Routledge, 1999), 148-169. Cole notes that slavery was losing its hold in Baltimore and that Maryland was a border state.

Faced with strident abolitionist attacks on the pillars of their civilization, southerners both asserted the positive good of slavery (it civilized and Christianized Africans) and the resulting superiority of their domestic arrangements and sought to cover up their flaws. It was, indeed, a matter of necessity. Slavery was justified because it benefited all of society, blacks as well as whites, women as well as men, children as well as adults. Publicizing accounts of wife beatings, highlighting the misery that many wives lived in, acknowledging that some southern women resisted male dominance, spoke up, complained, and subjected their husbands to public shame by bringing them into court, was no different than parading before the public the violence of slavery, which southerners had done quite fully in their newspapers, until Theodore Weld mined them for his shocking 1839 work, American Slavery As It Is: Testimony of a Thousand Witnesses (1839). Like other southerners, judges knew where abolitionists got their damning material; they could make the same connection about wife abuse. The myth of the happy wife joined that of the happy slave, the slave who refused freedom, who greeted returning masters with joy and felt pride in their success.¹³³

Dropping or drawing a curtain between the public and families before the Civil War was functional; it preserved a myth of wives content with dependence and husbands blessedly generous and humane, all the gift of slavery and justification for slavery. It was no coincidence that the North Carolina Supreme Court first promulgated its privacy doctrine in 1852 and that Fitzhugh's Sociology of the South appeared two years later,

¹³³ On judges and abolitionists, see Ariela J. Gross, Double Character: Slavery and Mastery in the Antebellum Southern Courtroom (Princeton: Princeton University Press, 2000), p. 5; Varon, We Mean to be Counted, pp. 112, 118-119, for fictional treatments of slaves rejecting freedom.

closely following Harriet Beecher Stowe's vivid attack on southern slavery and the southern patriarchy.

Nor was it coincidence that the Rhodes's decision, denying that husbands had a right to chastise wives but announcing that the court would not get involved with "trivial" cases of abuse, came in 1868, after passage of the Thirteenth Amendment abolishing slavery and shortly before the requisite number of states approved what would be the Fourteenth Amendment prohibiting states from abridging the rights of citizens. The amendments, along with the debates over extending suffrage to African-Americans and women, chipped away at the legal category of subordinates (except for children) and made it far more difficult to argue that those subject groups were legally bound to obey husbands and former masters.

For a myriad of reasons, southern white males, already demoralized by military defeat, unable to protect and at times to provide for their wives and children, needed to reassert their domestic authority, their home rule, which had included the power to chastise, to beat their women; but they needed to exercise that power without a legal right to it.¹³⁴ Conway Whittle Sams, a Virginia lawyer, explained the matter well in 1913, although he thought his insight applied to the entire country: "Authority has already declined far enough in this country. The War of the Revolution shattered the royal authority. The Civil War destroyed the aristocratical power of the slaveholders in the South, and weakened the

¹³⁴ See Goldfield, Still Fighting the Civil War, pp. 96-97, for the sting of military defeat. Writing of the pre-Civil War period, Goldfield also notes that "southern white women were already experts in emotional concealment" (p. 94); perhaps that contributed to the sway of the family privacy doctrine.

position of the upper classes in the North and West. About all that is left,” he wrote, “is domestic authority.”¹³⁵ Family privacy was for the South, the perfect cover. But again, white wives and African-Americans were linked. White women were cast as weak, defenseless, and in need of protection in a newly hostile world; their husbands would save them from black men by punishing imagined insults with a frightening amount of violence. In the minds of southern slaveowners, home rule had always encompassed household and field, wives and slaves. With slavery’s end, the family governance doctrine resurfaced to fit a new society filled with assertive freedmen and women. A reference to wives or to blacks often had a double meaning, the treatment of one implying a carryover for the treatment of the other. The privacy decision and its consequent trivializing of wife abuse was rationale for the South to be left alone to deal with freed people; privacy in the smaller domestic circle legitimized privacy in the larger circle. How white southerners handled blacks was to be a private matter not subject to state (which included the federal government) interference. As Guy M. Bryan wrote to his friend Rutherford B. Hayes: “So far as the negro is concerned, it is a great misfortune to the country, to the interests of society at the South, and to the negro himself that he is not left to the management of the Southern people....” But Hayes knew what that meant: “The result will be that the Southern people will practically treat the constitutional amendments as nullities, and then the colored man’s fate will be worse than when he was in slavery....”¹³⁶

¹³⁵ Sams, Shall Women Vote? A Book for Men (New York, 1913), p. 306.

¹³⁶ Quoted in Charles Richard Williams, The Life of Rutherford Birchard Hayes Nineteenth President of the United States (2 vols., Columbus, Ohio: Ohio State

Wife abuse, often excruciatingly brutal, occurred throughout the country; but elsewhere the higher courts responded differently. Outside the South, judges and courts expressed their horror and often tried to extend their protection. Their actions were paternalistic--and helpful. In contrast, higher courts in the South, especially after the abolitionist crusade began in the 1830s, at times overturned the somewhat sympathetic responses of local courts and juries, who were at least sometimes interested in the welfare of the individuals in their midst. The judges of the appeals courts had other concerns. They recognized the validity of Fitzhugh's declaration that "Slavery, marriage, [and] religion, are the pillars of the social fabric."¹³⁷ Their larger goal, which emerged in comments about an individual's (usually a woman's) responsibility to suffer for the sake of society, was to uphold what remained of the patriarchy (men and their wives) and defend the honor of the region and southern civilization.

* * *

No other state courts followed North Carolina's and no other region was as intent on covering up abuse as the South, but elsewhere there were a few other cases related to the privacy issue or a variant of it. Some evidence seemingly highlighting a new judicial policy to serve old goals can be found in tort cases outside the South; wives sued their husbands directly, an action often very difficult for judges to accept, schooled as they were in the old

Archaeological and Historical Society, 1928), I, 493-494.

¹³⁷ Fitzhugh, Sociology for the South, p. 208.

common law tradition that husbands and wives were one.¹³⁸ As Tapping Reeve noted in 1816, no battery could give either husband or wife “a right of action to recover damages.”¹³⁹ Once again there are a few well-known, frequently cited cases, among them one of the earliest, Longendyke v. Longendyke, an 1863 New York case which arose out of New York’s Married Woman’s Property Act, passed in 1860 and revised somewhat in 1862. As this case demonstrates, sometimes courts not only did not make or bend law in order to protect wives, they actually refused to use the power they had or could easily have claimed.

One provision of the 1860 property act gave a wife the right to “bring and maintain an action in her own name for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole.”¹⁴⁰ Catharine Longendyke used the act to sue her husband Peter for damages for assault and battery. The referee first hearing the suit awarded her \$100.¹⁴¹ In considering the appeal, the Supreme Court was not interested in the fact of abuse, nor did it feel it necessary to comment on the legal standing of wife abuse, which had long since been rejected by New York courts. Its interest was more narrowly focused: could a wife sue her husband? Since common law denied husbands and wives the right to sue each other, the only issue was whether the rule had changed with the

¹³⁸ An early and very thorough study of these cases is Simon A. Bahr, “Intermarital Torts,” University of Newark Law Review, 4:1939, pp. 355-417; see also Carl Tobias, “Interspousal Tort Immunity in America,” Georgia Law Review, 23: 1989, pp. 359-478.

¹³⁹ Quoted in Tobias, “Interspousal Tort Immunity in America,” p. 371.

¹⁴⁰ As quoted in Schultz v. Schultz, 1882, 27 Hun 26. See also the 1889 Iowa case, Miller v. Miller, 68 Iowa 177, discussed above.

¹⁴¹ Longendyke v. Longendyke, 1863, 44 Barb. 366-367.

acts of 1860 or 1862. The court could not escape the words of the law: a wife could sue “any person” for injury to her person. So it interpreted them away, apparently with no embarrassment. Justice Hogeboom, for the court, ruled:

The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language of this section; but I think such was not the meaning and intent of the legislature....¹⁴²

That the court could only use the words “may perhaps” to describe whether a literal meaning of “any person” would include a husband indicates how strained this decision was. The court ruled not only that such a change would be contrary to common law, but that it would be contrary to the spirit of the act, which was meant only to give married women more property rights. In a sense, the court argued that the legislature could not have meant to pass such a law because it was “contrary to the... [old] law,” a truly bizarre conclusion. And it launched into a variant of the privacy issue. To interpret the law to allow the suit in question would be “destructive of that conjugal union and tranquility, which it has always been the object of the law to guard and protect.” It would “involve the husband and wife in perpetual controversy and litigation” and “sow the seeds of perpetual domestic discord and broil.” In other words, if husbands and wives were left alone, they would work out their problems. At least, they would not generate new ones. The Supreme Court threw out the judgment and ordered a new trial, leaving no room at all, however, for Catharine

¹⁴² Longendyke v. Longendyke, 368.

Longendyke.¹⁴³

The Supreme Court's decision in Longendyke was clearly serious, but nothing in it reversed New York's long-standing judicial rulings on the illegality of wife abuse. Indeed, in 1864, the year after Longendyke, New York's Court of Appeals, in Barnes v. Allen, overturned a Supreme Court decision (different members sitting) which had awarded a husband damages when a neighbor harbored his wife. A wife, the Appeals Court then ruled, was not chattel; "notwithstanding her marriage, and, for certain purposes, the merging and incorporation of her existence into that of her husband, she is still in law an individual, having separate rights, which the law will uphold and protect even against the husband." Even strangers had the right to protect her from her husband's "oppression and cruelty."¹⁴⁴

Catharine Longendyke may have been the victim of bad timing as well as of bad law. Certainly before the passage of the Married Woman's Property Act of 1860 she would have stood no chance. Unfortunately for her, however, her case was decided by the Supreme Court not only in the midst of the Civil War but less than two months after New York City was rocked by the draft riots. Though the Supreme Court deciding the case was sitting in Albany, it is not difficult to imagine its members resisting anything smacking of

¹⁴³ In the 1886 North Carolina case, State v. Edens, 95 NC 693, which involved a husband's indictment for slander of his wife, the court referred to New York where it had been decided that the property acts did not give a wife the right to sue her husband for assault or slander. It must have been a great relief to a North Carolina court to be able to cite precedent from another state for its action. Of course, the New York court did not go on to say that it would tolerate abuse.

¹⁴⁴ Barnes v. Allen, 1864, 1 Abb. Dec. 111, at 115-116.

revolutionary change in a disordered world already undergoing far too much change. Historically, under such circumstances, the family, with all its faults, always becomes, in peoples' minds, the bastion of stability. There was nothing revolutionary about the decision of the Appeals Court in Barnes, also decided during the Civil War. Barnes was simply a reaffirmation of New York courts's decades old protection of wives who fled abuse, which began with Hutcheson v. Peck in 1808.¹⁴⁵

Privacy was an issue in a few other major nineteenth-century tort cases, including Abbott v. Abbott, which the Maine Supreme Court heard in 1877. A divorced woman sued her former husband and some of his friends for having imprisoned her in an insane asylum. In addition, she maintained, they beat her. Somehow she managed to get out of the asylum; subsequently, "she was divorced" from her husband."¹⁴⁶

The issue at trial was simply expressed. Could Cynthia Abbott sustain an action of tort against her former husband? And the answer, buttressed by numerous citations from England and America, was an unqualified 'no.' "The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done." Despite changes, despite "the gradual evolution of the law going on, for the amelioration of the married woman's condition," the plaintiff's

¹⁴⁵ Hutcheson v. Peck, 5 Johns. 196. One of the judges noted: "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." Ibid., 210.

¹⁴⁶ Abbott v. Abbott, 1877, 67 Me. 305.

position was not supported by “any of the principles of the common law.” By marriage, “the being of the wife... merged in the being of the husband.” Since Cynthia Abbott would not have been able to sue her husband for damages if they were still married, she could not sue when they were divorced. The common law had not been changed, “either by legislative enactment or by the growth of the law.”

The court did not stop there. Unnecessarily for this case, it added a general comment which could easily be misunderstood. “Marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other,” in support of which the court quoted the 1874 North Carolina Oliver case: “it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”

The precedent of North Carolina notwithstanding, the Maine court was not sanctioning wife abuse. Even while borrowing important words from State v. Oliver, Maine’s Supreme Court distanced itself from North Carolina’s by the words it omitted. In Oliver, the North Carolina court ruled, “if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband,” then the curtain should be drawn.¹⁴⁷ The omission was full of meaning. Earlier, referring to but not quoting “a learned and instructive note” in a seemingly unrelated case from Massachusetts, the Maine court had clearly indicated that the law of all American states was “undoubtedly” that a husband could not strike his wife under any circumstances. Of course, it should have excepted North Carolina, where, as we have seen, even nine years after Abbott the Supreme

¹⁴⁷ State v. Oliver, 1874, 70 N. C. 61.

Court would go out of its way in a slander case, again, to drop “the curtain upon scenes of domestic life,” effectively hiding and tolerating most cases of abuse.¹⁴⁸

Other than its mistake regarding North Carolina, the Maine court had done its homework. The Massachusetts case referred to, Commonwealth v. Barry, actually about the sale of liquor, had been decided just three years earlier. And there was indeed a lengthy, learned, and instructive note which traced legal opinions about wife abuse from Sir Edward Coke’s day (and actually about his private life), through The Laws Resolutions of Womens Rights (1632), the Massachusetts Body of Liberties (1641), Blackstone, and back to Sir Matthew Hale, “a greater authority than Blackstone.” And then the Massachusetts court concluded that American courts were uniformly against “the right of the husband to use any chastisement, moderate or otherwise, toward the wife.”¹⁴⁹

And if all that were not enough to show it was not excusing abuse, the Maine Supreme Court noted that Cynthia Abbott had had other remedies. She could have turned to the criminal courts; if she had been “unlawfully restrained” she had “the privilege of the writ of *habeas corpus*.” And if she won a divorce, she had dower in his estate, and the right to alimony, in determining which, “all her needs and all her causes of complaint, including

¹⁴⁸ State v. Edens, 1886, 95 N. C. 696. The North Carolina court referred to Longendyke v. Longendyke in New York, without identifying the case.

¹⁴⁹ Commonwealth v. Barry, 2 Green’s Cr. L. Reports, 284. The note, three-and-a half double columned pages, is not part of the decision as it appears in the Massachusetts Reports. 115 Mass. 146. Quoting Lord Campbell’s Lives of the Chief Justices of England, the note indicates that the quarrels between Coke and his wife “disturbed the public peace—were discussed in the star chamber—and agitated the court of James I, as much as any question of foreign war which arose during the whole course of his reign.”

any cruelties suffered, can be considered by the court.”

These northern tort cases are unquestionably significant. By narrowly interpreting newly passed property laws, by not seizing the openings presented by the wording of some clauses, these late nineteenth-century justices displayed their reluctance to make major alterations in common law to benefit women. In doing so, they denied some abused wives a new form of help. But they did not set the clock back, and in no way did they grant husbands immunity for violence, which was the real point at issue in the privacy cases. And the judges invariably pointed out that wives had other remedies. In Bandfield v. Bandfield (1898), for example, the Michigan Supreme Court, reiterating its earlier decision that the state’s married woman’s property act had not given wives the power to sue husbands, noted that a wife could get a decree of separation or divorce, and that the Supreme Court, “clothed with the broad powers of equity can do justice to her for the wrongs of her husband,... [and] may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor.”¹⁵⁰

One might even question the value of tort suits for women who remained married to their abusers. Successful tort suits would certainly have been better than a system which punished a husband by fining him, the money going from the family to the state. And they would surely have been a psychological boost to abused wives, one more weapon for fighting back. But just as some people opposed whipping as a punishment because it would anger husbands, so too one could imagine husbands made angrier and more violent by being

¹⁵⁰ 117 Mich. 80, at 83.

forced to pay their wives for the privilege of beating them. And, as with fines, it would be money taken from other sources. For a divorced woman, however, as in the Abbott case, that would be a different story.

The most serious criticism of the narrowly construed tort decisions came from other judges, especially in a number of cases largely ignored in scholarly literature. Twenty years after Longendyke the New York Supreme Court again dealt with a wife suing her husband for assault and battery. Though its decision in Schultz v. Schultz was ultimately thrown out by the Appeals Court, Judge John Brady, for the Supreme Court, delivered a scathing attack--couched in respectful language--on Longendyke and a few other decisions, as well as on the general philosophy which placed the notion of family above that of personal protection.

It was, Brady noted, in Freethy v. Freethy (1865), a case which preceded Longendyke, and in which a wife sued her husband for slander, that a court first “ascertain[ed]” that the legislature had not actually meant to include a husband in the term “any person.” While Freethy was “a well considered case,” the “learned justice” was controlled by his “devotion to the rigorous rule of the common law” and he, like others, yielded to that “emotion and thus circumscribed the objects and purport of the acts of 1848, 1849, 1860, and 1862.”¹⁵¹ Longendyke was more of the same, but with additional comments

¹⁵¹ Schultz v. Schultz, 1882, 27 Hun. 28; the case is reported in the New York Times, 13 April 1882, p. 10. While this is a minor point (I think), I have not been able to reconcile Brady’s dates for Freethy and Longendyke. Freethy was considered by the Supreme Court in January 1865, although it had originated in the Jefferson county circuit in June 1863. Longendyke was considered by the Supreme Court in September 1863.

oppressive of married women. In fact, Brady argued, “the object” of the property acts was precisely “to invade the common law and dispel it, which they have successfully done.” So important was the point, he kept coming back to it: “The rules of the common law on this subject have been dispelled, routed, and justly so.... They are things of the past.... 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.”¹⁵²

Regarding the argument that “conjugal union and tranquility” would be destroyed if a wife sued her husband for damages for assault and battery, Brady seemed scarcely able to contain himself:

It is not regarded as discourteous to say that the ill treatment of the wife by the husband,... the violence of an assault and battery, is more destructive to conjugal union and tranquility than the declaration of a right in the wife to maintain an action against her husband....

In fact, Brady turned the argument on its head. Such suits would “promote greater harmony by enlarging the rights of married women, by affording greater protection to the

¹⁵² Schultz v. Schultz, 27 Hun. 30, 33. The court closely examined the language of the statutes of 1848, 1849, 1860, and 1862. In 1848 and 1849 the legislature provided that a married woman might take property “by gift, grant, devise or bequest” from any person but her husband and hold it to her own use, the point being that in these acts the legislature took care to exclude her husband from any person when it felt it appropriate. Perhaps more to the point the 1860 act gave married women the right to sue and be sued “on all matters having relation to her property which might be her sole and separate property, or which might thereafter come to her by descent, devise, bequest, or the gift of any person except her husband....” The words excepting her husband were omitted from the 1862 act, “showing that when the husband was to be excepted from the provision” of the law “it was so declared.” P. 32.

former, and by enforcing greater restraint upon the latter.”

And if the message were not clear enough, Brady and the New York Supreme Court (Judge Daniels concurring) drove it home with the clearest statement delivered by any court on the subject of abuse, which was “inexcusable, contemptible, detestable,” even in their opinion going back to denounce the old Saxon law, “which was as contemptible as it was barbarous.” “No husband, either by the laws of God or man in any civilized community, has the right to abuse his wife....” Any man who would abuse his wife ought to be “restrained by all the rules designed to prevent brutality.”¹⁵³

Presiding judge Noah Davis, the one dissenter, claimed to “heartily concur” in Brady’s “detestation of wife beaters,” but he applied the doctrine of stare decisis, and his words suggested a lack of conviction that the problem of abuse was serious. Like a few other judges over the course of the century, Davis shifted attention away from physical violence, leaving to the legislature or the Court of Appeals “the gallant duty” of dealing with “domestic disputes of husband and wife,” placing on the same level “unbridled tongues” and “angry blows.” For Davis, “many acts, words and things” which passed between unmarried individuals would be assaults and batteries, but they would have “no such character between husbands and wives.” One had to leave room for amicable settlements “free from the liens of litigious attorneys.”¹⁵⁴

¹⁵³ Schultz v. Schultz, 27 Hun. 33, 29.

¹⁵⁴ Schultz v. Schultz, 27 Hun. 34. In addition to the court record, see the New YorkTimes, 13 April 1882, p.10; there is also a notice of this case in the Women’s Journal, 13 May 1882.

Brady's angry words notwithstanding, his decision was quickly overturned by the Court of Appeals without a formal opinion in the New York Reporter.¹⁵⁵ But the issue in New York would not go away. In a bizarre case, it came up again in 1897. Katie Abbe sued her husband Richard to recover damages for an assault and battery. When the county court ruled against her, it also assessed her for costs. The Supreme Court, everyone concurring, felt bound by the earlier Court of Appeals action in Schultz, while voicing its agreement with Brady's overturned decision. Seemingly frustrated, Judge Hatch delivered an opinion dripping with sarcasm. While the law gave a wife the right to her earnings and the right to carry on a separate business and to sue her husband for debt, "for the purpose of being a subject for an assault and battery by the husband, she is both wife and husband, and therefore without civil remedy." But, Hatch continued,

she is not left without comfort, however, for our law has humanely said that, while she may be assaulted and battered by her husband, and civil remedy be denied, yet she shall not also be mulcted in costs for an attempt to use a remedy to which she is not entitled. Herein lies the strength of the adjudications.¹⁵⁶

The United States Supreme Court got involved in a similar case in 1910, ruling, over the dissenting opinion of justices Harlan, Holmes, and Hughes, that a married woman could

¹⁵⁵ Schultz v. Schultz, 89 N. Y. Reporter 644. According to the History of Woman Suffrage (III, 439) the Court of Appeals again argued that for a wife to sue her husband would be destructive of "the conjugal union and tranquility" which the law guards and protects. "Could satire go farther?" the editors asked.

¹⁵⁶ Abbe v. Abbe, 1897, 48 N. Y. S. pp. 25-26. There is a reference to this case, unidentified, in the Woman's Journal, 8 January 1898.

not sue her husband for assault and battery, in this particular case for \$70,000. The District of Columbia Code, much like that of New York and many other states, allowed a wife to sue on her own for the protection of her property “and for torts committed against them... as if they were unmarried.” It was “obvious” to the majority of the court that legislators had been concerned with matters of business and property, simply meaning to free a wife from the old common law requirement that her husband join her in any suits she undertook. Those who argued the code allowed a beaten wife to sue her husband for damages were trying to impose a “liberal construction” on the law. Rather such “radical and far-reaching changes” required “language so clear and plain as to be unmistakable evidence of the legislative intention.”

The Supreme Court also took up the matter of privacy. Totally disregarding state differences and the numerous hardships it was imposing on women by its decision, the court noted that wives who suffered “atrocious wrongs” had remedies at hand in divorce and alimony. And they could “resort to the criminal courts.” To allow them to sue their husbands would throw open the courts to other accusations, bringing them into “public notice,” and whether that “would be promotive of the public welfare and domestic harmony is at least a debatable question.”¹⁵⁷

In dissent, John Marshall Harlan quoted at length from the District Code, which he thought “embrace[d] such a case as the present one.” It was not the court’s role to determine whether it was sound public policy, “not within the functions of the court to ward

¹⁵⁷ Justice Day’s opinion, Thompson v. Thompson, 1910, 218 U.S. 611, at 614-618.

off the dangers feared or the evils threatened by a judicial construction that will defeat the plainly-expressed will of the legislative department.” He did not believe Congress meant to give a wife the right to sue her husband, in tort, for damages to property but not for damages to her person. And he accused the majority of reading into the act words which were simply not there, words excepting husbands. He closed his opinion by responding to the charge that the view he shared with others represented an attempt to “effect radical changes in the common law by mere construction,” replying that “on the contrary,” it was the majority which was defeating the will of the legislature “by a construction of its words that cannot be reconciled with their ordinary meaning.”¹⁵⁸

Nineteenth-century members of the judiciary often discussed the matter of privacy when considering relations between husbands and wives. Except in North Carolina, however, state judges did not make privacy itself a goal so valuable that it had to be accepted regardless of the evils it covered, the hurt it allowed husbands to cause wives. And in North Carolina, and elsewhere in the South, the courts’s concerns went beyond the individual husbands before them; their real interest was to protect the reputation of their states and their region, and the peculiar institutions which defined them. Patriarchy was at risk, and with it southern civilization itself.

The danger of generalizing about the fate of abused wives in the courts from too small a selection of cases from too few states may also be illustrated by reference to two

¹⁵⁸ Harlan’s opinion, Thomspon v. Thompson, 619-624. The case is reported in the Woman’s Journal, 15 April 1911.

more tort cases, neither one much cited by scholars. In March 1914, the Supreme Court of Errors of Connecticut decided Brown v. Brown, a case much like other tort cases: a wife sued her husband for assault and battery. Just four years after the United States Supreme Court had ruled against an abused wife in the Thompson case, the Connecticut court called attention to the importance of residence, illuminating the different treatment of beaten wives from one state to another. Some state courts “have held that statutes more or less similar to the one here in question give a married woman no right of action against her husband for a tort.” The Connecticut court decided differently; it allowed the suit, reasoning simply that if a wife could sue her husband “for a broken promise, why may she not sue him for a broken arm?” And it too, like Brady in the overturned Schultz decision, faced directly the notion of privacy and rejected the notion that “domestic tranquility” would best be served by legal inaction, by dropping a veil of secrecy over the home. “Courts are established and maintained to enforce remedies for every wrong....” Entirely rejecting the notion that privacy was an absolute value for husbands and wives, the court recognized that abuse escalated and eventually spilled out of the house. It was better for society that “personal differences” be dealt with in court “than that the parties should be left to settle them according to the law of nature.” To allow the parties to go it alone would be to leave them “to answer one assault with another... until the public peace is broken,” a conclusion which helps explain Connecticut’s liberal divorce laws and brings back to mind the comment of Connecticut legislators almost three hundred years earlier that bad marriages

were troublesome not only to husbands and wives, but to their friends.¹⁵⁹

A month after Brown, the Oklahoma Supreme Court decided Fiedler v. Fiedler, a woman's action against her former husband for shooting her with a shotgun while they were still married. It was too soon for the court to cite Brown, but it quoted at length Supreme Court Justice Harlan's dissent in Thompson.¹⁶⁰ It also quoted the state constitution's Bill of Rights, which opened the courts "to every person... for every injury to person, property, or reputation." Whether wives could sue husbands, the court noted, "has been the occasion of much profound reasoning and of an equal amount of sophistry." Courts which denied the suits were "in a great measure controlled by the common-law rule under which the entity of the wife was completely lost in the husband."¹⁶¹ The Oklahoma court rejected the notion that state legislation in Oklahoma and indeed in other states had been unclear. "Modern Legislatures, though vainly, it seems, have by plain, explicit, and unambiguous language attempted to break away from the common-law rule and to put the courts out of hearing of the still lingering echoes of barbaric days." And then, in a remarkable statement, the court tackled the matter of privacy and public policy:

The reasons for which the stronger of the more modern decisions have denied one's spouse the right to maintain an action for tort against the other during coverture have been, in the main, based upon public policy, reasoning that to

¹⁵⁹ Brown v. Brown, 1914, 89 A. 889, at 890-891; for the remark of the Connecticut legislators in 1640, see Glenda Riley, Divorce: An American Tradition (New York: Oxford University Press, 1991), p. 18.

¹⁶⁰ Fiedler v. Fiedler, 42 Okla. 124, at 129.

¹⁶¹ Fiedler v. Fiedler, 127, 125.

maintain such an action would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife, and that therefore, for public policy's sake, such actions should not be maintained; and yet those very decisions, in support of their philosophy, hold that the civil courts are open to parties seeking divorce and alimony, and that the criminal courts are open for the prosecution of either husband or wife for assault and battery, cudgelings, or for shooting each other with shotguns. We fail to comprehend wherein public policy sustains a greater injury by allowing a wife compensation for being disabled for life by the brutal assault of a man with whom she has been unfortunately linked for life than it would by allowing her to go into a criminal court and prosecute him and send him to the penitentiary for such assault. Nor are we able to perceive wherein the sensitive nerves of society are worse jarred by such a proceeding than they would be by allowing the parties to go into a divorce court and lay bare every act of their marriage relations in order to obtain alimony.¹⁶²

Two years before Brown and Fiedler the Alabama Supreme Court had recognized the broader issues involved in domestic violence cases. It was not a tort case, but a more serious one that involved an assault with intent to murder. The defense objected that the wife was not a competent witness. The court ruled not only that in personal assault cases the rule has always been that a wife could testify, but indeed that “she can be *compelled* to testify, whether she desires to do so or not.” Its argument was clear: “it is to the interest of the public that all crimes shall be punished.”

¹⁶² Fiedler v. Fiedler, 126. In the decision's concluding paragraph, the court added:

Should a woman, who has been crippled or maimed or disabled for life through the malicious, wanton, and willful assault of a brutal husband, go into court and ask for alimony for her support, there is not a court in Christendom but what would award her a more liberal alimony than if she were a strong, healthy, able woman. Now, upon what theory would such additional alimony be allowed? Unquestionably it would be on the ground of the tort she had received at the hands of her husband. We can see no difference in principle between an indirect and a direct recovery for tort.

The Alabama court's conclusion that domestic violence was a crime that the public had an interest in punishing was reminiscent of Henry William DeSaussure's judgment over a hundred years earlier that abuse was "mischievous to society."¹⁶³ Six years later, in 1815, DeSaussure commented in Threewits that, however reluctant the court might be, it would "enter into the privacy of domestic life." He was a southern judge prepared to intervene in matters of family governance. His willingness to do so in the early years of the nineteenth century, even in cases that fell far short of attempted murder, highlights the changes that were to come to the South in the years before the Civil War and continue for some time after. Their institutions challenged--"the whelming tide of social and political revolutions" was the Virginia Supreme Court's apt phrase--southerners sought first to justify slavery and to demonstrate the resultant superiority of southern families, then to resist any further loosening of marriage ties and traditional obligations, that is, wives's duty to obey, and lastly to undo the revolutionary changes introduced by emancipation.¹⁶⁴ Throughout the period, wife abuse was treated as a private matter. It was trivialized so it could be overlooked and overlooked so it could be both trivialized and privatized. Both before and after the Civil War, the courts served the southern patriarchy well.

¹⁶³ McGee v. The State, 1912, 4 Ala. App. 54, at 56; Prather v Prather, 1809, 4 S. C. Eq. 33. at 35.

¹⁶⁴ Bailey v. Bailey, 1871, 21 Gratt 59.