# "THE PUBLIC GAZE AND THE PRYING EYE:" THE SOUTH AND THE PRIVACY DOCTRINE IN NINETEENTH-CENTURY WIFE ABUSE CASES

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## I. INTRODUCTION:

### WIFE ABUSE AND THE FAMILY

Nineteenth-century American courts often dealt with wife abuse. In some respects their first and most important decision was a matter of general policy: before considering the law, judges asked whether courts should become involved at all with what many considered private matters. Early in the century, with the legacy of the colonial period still fresh, the airing of private affairs in public courts may have been less of an issue, but tension was emerging as early as 1815. The case of *Threewits v. 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."[1] Later, as families became more private and governments seemed to withdraw their attention, the notion of privacy as a positive good was pushed to the forefront, although not without criticism. The battle over the prohibition of alcohol in the second half of the nineteenth century highlighted the conflicting views. Its vocal opponents, mostly men, believed that more would be lost than gained in opening homes, even troubled homes, "to the public gaze, and the prying eye."[2] Prohibitionists on the other hand—both men and women—emphasized the dangers of secrecy and locked doors, behind which a tyrant "forges chains of oppression for his subjects."[3]

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* Professor Emeritus of History, University of Maine. I benefited greatly from Linda Kerber's close reading of an early draft of this article and from Lisa Pruitt's close reading of a later version. Also helpful were the comments of Michael Grossberg, 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 and to Columbia University and New York University for granting me access to their law libraries.

[1] Threewits v. Threewits, 4 S.C. Eq., 560, 561 (1815).

[2] 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), *in* DOCUMENTS PRINTED BY THE ORDER OF THE LEGISLATURE 1-2 (1850).

[3] REPORT OF THE EXECUTIVE COMMITTEE OF THE AMERICAN TEMPERANCE UNION 19 (1839).

In referring to "the privacy of domestic life," and more particularly to the court's grudging interference in family matters, DeSaussure raised the issues that would trouble some judges throughout the century and at times cloud their judgments—at least about the issue of wife abuse. Few judges dissented from the characterization of wife beaters as despicable beings whose behavior should not be tolerated, a view that seemed to provide the 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: are families best served by disclosure or, despite the abuse, by secrecy, which would require courts to ignore the abuse for some perceived greater good? This 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 and 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 repeated cruelty," an Illinois judge noted in 1882.[4] 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*: "[t]he endurance 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.[5] For some courts the judicial 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."[6] 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, and 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."[7] 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 of inharmonious tempers and dispositions."[8] Ruling in an 1890 case, which involved

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[4] Ward v. Ward, 103 Ill. 477, 483 (1882).

[5] 1 CAR. L. J. 378 (1831). "[T]he happiness of the married life is secured, by its indissolubility," noted a Connecticut judge in 1845, referring to the well-known English decision in Evans v. Evans, 1 Hag. Con. 35 (1790). He went on: "[n]ecessity is a powerful master in teaching the dictates it imposes." Shaw v. Shaw, 17 Conn. 189, 193 (1845).

[6] Evans v. Evans, 1 Hag. Con. at 37.

[7] Solomon v. Solomon, 28 How. Pr. 218, 220 (1863).

[8] Knight v. Knight, 31 Iowa 451, 456 (1871).

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.[9] The court concluded that while it might well be disagreeable for a woman to continue an association with such a man, "the necessity to endure . . . is one of the evils attending the marriage state."[10] 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." [11]

About matters such as these, there was considerable judicial confusion and geographic variation. The necessity to endure had not stopped some 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 rule 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."[12] 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 his wife "to the infamy of a public advertisement" so that no one could "safely supply the necessaries of life," a tactic long since rejected by courts.[13]

Still, many judges clearly held marriage to be sacred, an entity which took on such social significance that the individuals involved were not allowed the normal freedom 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."[14] Extreme statements about the positive good of marriage were common. For example, in 1847, the Alabama Supreme Court — 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 know that their marriage was "indissoluble."[15] 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 virtue."[16] Further, "[h]istorians trace the decline of public morals, in ancient Rome, to this cause, more than to any other . . ."[17]

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[9] McBride v. McBride, 9 N.Y.S. 827, 828 (1890).

[10] *Id.* at 829.

[11] *Evans*, 1 Hag. Con. 119.

[12] Fitzpatrick v. Fitzpatrick, 47 N.Y.S. 737 (1897).

[13] *Id.* at 738.

[14] Wood v. Wood, 27 N.C. 674, 682 (1845). For a discussion of Ruffin's attitudes towards women, *see* VICTORIA E. BYNUM, UNRULY WOMEN: THE POLITICS OF SOCIAL & SEXUAL CONTROL IN THE OLD SOUTH 68 (1992).

[15] Moyler v. Moyler, 11 Ala. 620, 623 (1847).

[16] *Id.* at 623.

[17] *Id.* (Judge Ormond went on to note: "it cannot be doubted that the State in its political capacity,

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"[18] and that his language to and about his wife was "rude, harsh, and indecorous."[19] But the court was not convinced he beat his wife; all that was proven was that he slapped her "in a laughing and playful mood."[20] Sympathy for wives in such positions had to give way "in 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."[21] 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.[22] In *Bailey v. Bailey*, a husband sought appeal of his wife's suit for divorce *a mensa et thoro* (from bed and board) and an award of alimony.[23] 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 to merely 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."[24] It then closed with a fulsome endorsement of marriage as social salvation:

> 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 [S]outhern 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

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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.)

18 Bryan v. Bryan, 34 Ala. 516, 518 (1859).

19 *Id.* at 519.

20 *Id.* at 518.

21 *Id.* at 520. The Alabama court noted eleven years later in 1870 that "even the beasts and the birds . . . 'pair off' by mutual consent." Goodrich v. Goodrich, 44 Ala. 670, 672-73 (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. *Id.*

22 JACK P. MADDOX, JR., THE VIRGINIA CONSERVATIVES 1867-1879 86-103 (1970).

23 Bailey v. Bailey, 21 Gratt. 43 (1871).

24 *Id.* at 46.

sanctified by religion, as one upon which alone the happiness and purity of social and domestic life must ever depend.[25]

## II. PRIVACY AND THE FAMILY

### *A. The Privacy Paradigm*

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 used it to justify inaction and to explain why, having acted, they would rather not have had to. One hundred and fifty years later, a new paradigm has emerged around these cases, and it has been applied broadly to explain the fate of battered wives in post-Civil War American courts.

First set forth 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 of domestic privacy. While abuse was not acceptable—and indeed was punishable—judges now argued that society 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."[26] Courts no longer needed "to justify a husband's acts of abuse as the lawful prerogatives of a master." Rather, as Siegel pointedly concluded, "the state granted a husband immunity to abuse his wife in order to foster the altruistic ethos of the private realm."[27]

While Siegel's lengthy article remains the most cogent and detailed explication of the idea, a litany of agreement from legal scholars, historians, political scientists, and feminists—in overlapping groups—has emerged. All trace their ideas back to Siegel.[28] The unanimity with which scholars have accepted

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[25] *Id.* at 59.

[26] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2153 (1996).

[27] *Id.* at 2169-70.

[28] 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." NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 162 (2000). Rather, they "stressed the public interest in shielding interactions between husband and wife from public view." *Id.* Similarly, Katharine T. Bartlett concluded that the law had traditionally viewed domestic violence as a private matter. Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L. Q. 495 (1999). There was a reluctance to intrude, "for fear of exposing the family to 'public curiosity and criticism.'" *Id.* Citing

Siegel's argument is testimony to the coherence of her writing and the thoroughness of her research. Reasoning both forward and backward in time, her conclusions simply made sense. Certainly one could find judicial commentary denouncing wife beating in mid-nineteenth-century America. How then could one explain the failure to put a dent in the problem? If reformers today and in the recent past have been stymied by a societal belief in family privacy, then perhaps 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.[29] In fact, however, none of these assertions is accurate. But there is a more fundamental problem with the privacy 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 available and without appearing to notice a crucial pattern: that virtually all the so-called privacy cases were Southern and from North Carolina. Siegel does refer to "these North Carolina cases," but she does not see that concentration as significant.[30] 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 during that period—is how little it 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. Well understood by

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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.'" ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 17 (2000). 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." KRISTEN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 63-64 (2002). "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." *Id.* Hence, a new justification for nonintervention. *Id.* at 62-64. A more recent work of Elizabeth Pleck is the new edition of DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (2004). The 1987 edition of the 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 that followed publication of her book, much of it indeed inspired by her book. *Id.* 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." *Id.* at xiii. By the 1870s, "virtually no American judge accepted the argument that a husband had a right to administer moderate correction of his wife." *Id.* Instead, they "retreated to rationales about privacy and domestic harmony." *Id.*

[29] Courts in many states often acted to protect abused wives. It is a complicated story that I am covering in a larger manuscript. *See, e.g.*, the New York cases cited *infra* note 350.

[30] Siegel, *supra* note 26, at 2158.

contemporaries, Siegel's linking of privacy and the practical right to abuse holds, but only when 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 an 1824 Mississippi case, *Bradley v. State*.[31] 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."[32] 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.[33] Then, it said, if Calvin Bradley had been reasonable when he chastised his wife, it "would deliberate long"[34] 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,"[35] 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.[36]

The court ventured into new territory in permitting such "moderate chastisement," no longer relying on the old rationale that husbands were responsible for their wives' behavior. Rather, it declared that 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."[37] "Family broils and dissentions 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."[38] To expose household conflict would result in "the mutual discredit and shame of all parties concerned."[39] 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."[40] Public reproach, of course, was one form of protection for abused wives. Interestingly, and almost as an aside, Calvin Bradley's conviction was affirmed.[41]

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[31] Bradley v. State, 1 Miss. 156 (1824).

[32] *Id.* at 157.

[33] *Id.*

[34] *Id.* at 158.

[35] *Id.*

[36] *Id.*.

[37] *Id.*

[38] *Id.* at 156.

[39] *Id.* at 158.

[40] *Id.*

[41] *Id.* Christopher Morris refers to the *Bradley* decision as "paternalism with a vengeance." CHRISTOPHER MORRIS, BECOMING SOUTHERN, THE EVOLUTION OF A WAY OF LIFE, WARREN COUNTY

The focus on the *Bradley* decision is somewhat misleading; its influence seems to 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.[42] 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,"[43] the court declared, although it had earlier noted that the plaintiff's conduct had, "to say the least," been "imprudent" at times.[44] The court did not mention *Bradley* or the notion of privacy. 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."[45] *Bradley's* "blind adherence . . . to revolting precedent" had "long been utterly repudiated."[46]

### *B. The Right to Abuse in North Carolina*

The privacy issue itself did not reappear for almost thirty years after *Bradley*, then surfaced 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, which displayed a greater willingness than evident in other state courts to continue the 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 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."[47]

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.[48] According to the record before a lower court judge,

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AND VICKSBURG, MISSISSIPPI 1770-1860 60 (1995).

[42] Holmes v. Holmes, 1 Miss. 474 (1831).

[43] *Id.* at 476 (emphasis added).

[44] *Id.* at 475.

[45] Harris v. State, 71 Miss. 462, 464 (1893).

[46] *Id.*

[47] GUOIN GRIFFIS JOHNSON, ANTE-BELLUM NORTH CAROLINA A SOCIAL HISTORY 242 (1937). 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 (1892), *reprinted in* THE PAPERS OF WALTER CLARK (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1948-1950). Thanks to E. Osborne Ayscue, Jr. for providing me with a copy.

[48] State v. Pendergrass, 19 N.C. 365 (1837).

Rachel Pendergrass had first tried mild correction of one of the small children in her school and 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."[49] Those lasted a few days longer.[50] The lower court judge had instructed the jurors that a teacher had the same right to chastise a child as a parent and that they needed to be "cautious" in determining whether there had been excessive punishment.[51] At the same time, however, the judge seemed to be directing a verdict, saying that if the jury believed the teacher to be responsible for the marks described—which seems to have been acknowledged—, then she was guilty. Pendergrass was convicted of assault and battery.[52]

The North Carolina 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 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.[53]

The higher court's reasoning was clear. It spoke to hierarchy, 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, slave-owners. 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.[54] 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 . . . . .[55]

Pain could be inflicted for the child's welfare. However severe the correction, if the pain that followed was only temporary and the teacher was not motivated by malice, then the punishment could not be judged an excessive attempt to "gratify his [or in the case at hand, her] own bad passions."[56] While intent seemed an important restraint, the heart of the decision indicated that the teacher's judgment could scarcely be questioned:

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 367-68.
[54] *Id.* at 365.
[55] *Id.* at 365-66.
[56] *Id.* at 367.

> 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 [sic] 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 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 . . . .[57]

Ending the higher court's opinion, Judge 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.[58]

The most important point about the North Carolina privacy cases, which began after *Pendergrass,* is that initially the North Carolina Supreme Court openly defended abuse, though not by that term. It saw the violence 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.[59] The court thus reserved for itself the right to determine what was tolerable and what was burdensome.[60] While the higher courts of states outside the South often tried hard to protect beaten wives, North Carolina's high court busied itself overturning local decisions punishing wife beaters until, that is, the lower courts learned to follow the high court's interpretation of state law. This judicial attitude is clearest in the 1862 case, *Joyner v. Joyner*, involving a husband's appeal of a court order granting his wife alimony while her divorce petition went forward.[61] The North Carolina Supreme Court reversed the order. The wife's charges were not set forth "particularly and specially," as called for by the state legislature.[62] Her allegations

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[57] *Id.* at 366-67 (emphasis in original).

[58] *Id.*at 368. JOHNSON discusses the violence of school discipline in North Carolina and calls attention to a teacher in 1848 who listed forty-seven offenses he punished with whippings of up to ten lashes. *See* JOHNSON, *supra* note 47, at 326-27.

[59] State v. Rhodes, 61 N.C. 453, 455 (1868).

[60] *Id.*

[61] Joyner v. Joyner, 59 N.C. 322. (1862).

[62] *Id.* at 323.

were not specific as to "time and place."[63] She had not detailed the circumstances that led her husband to hit her once with a horse whip and another time with a switch. More importantly, without mentioning privacy as a reason not to interfere, the court declared bluntly and positively that "there may be circumstances which will mitigate, excuse, and so far justify the husband in striking the wife" and even leaving bruises.[64] *Joyner* was not repudiated in subsequent decisions.

But the notion that domestic privacy had positive value may have swayed some judges in *Joyner*, even though it was not mentioned, for the run of North Carolina privacy cases had begun ten years earlier. In 1852, Beulah Hussey brought an indictment for assault and battery against her husband—and she testified against him.[65] The dull language of the printed case report 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.[66] 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 again intoxicated, on the day of the attack. He struck 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."[67]

Following the logic of *Pendergrass*—and, indeed, citing it—the husband's counsel "insisted" that every husband had "the same right to give to the wife moderate chastisment [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 thus not criminally responsible when there was no permanent injury or threat of it. Further, 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.[68]

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."[69] However, he added, if the violence was "inflicted without cause," the husband was guilty.[70] And so the jury found him. William Hussey appealed.[71]

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[63] *Id.* at 324.

[64] *Id.* at 325.

[65] State v. Hussey, 44 N.C. 123 (1852).

[66] *Id.*

[67] State v. William Hussey, Supreme Court Original Cases, 1800-1909, Box 246, Case #6471, North Carolina State Archives.

[68] *Hussey*, 44 N.C. at 124.

[69] *Id.* at 123.

[70] *Id.*

[71] *Id.*

On appeal, citing numerous precedents, the husband's attorneys noted that since husbands were responsible for their wives' behavior, they could legitimately exercise power over them, power even greater than that over servants and children.[72] Moreover, in general, a wife could not be a witness for or against her husband, and this wife beating case was no exception. And, in somewhat veiled form, they brought up the issue of privacy. To allow the wife to testify "not only to the *fact* of the assault and battery . . . but also as to the causes or provocations which produced it" 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.'"[73]

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 clearly if the court had found the lower court judge's declaration on the subject inaccurate it could 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?"[74] 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."[75] In the more specific case of abuse, the court cited an important English case[76] that allowed a wife's testimony, but then essentially dismissed the case as precedent because the husband in that case had been charged with committing an "atrocious felony" on his wife.[77] The court also rejected a comment in *Greenleaf on Evidence* that specifically allowed such testimony[78] and 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."[79]

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."[80] But that

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[72] *Id.* at 124.

[73] *Id.* at 125 (emphasis added).

[74] *Id.* at 126.

[75] *Id.* at 125.

[76] Lord Audley's Case, 123 Eng. Rep. 1140 (1631); 8 WIGMORE 2239.

[77] *Hussey*, 44 N.C. at 126.

[78] *Id.* ("[I]t is utterly impossible that the principle can be true . . ."). Simon Greenleaf's three-volume A TREATISE ON THE LAW OF EVIDENCE (1842-1853) was for years a standard reference. Its influence was recently discussed in an Oregon case involving punitive damages. *See* DeMendoza v. Huffman, 334 Or. 425 (2002).

[79] *Hussey*, 44 N.C. at 127.

[80] *Id.* at 126.

was not so between husband and wife. "In the nature of things it cannot apply to persons in the marriage state,"[81] which is tantamount to saying as the lower court had, and as the North Carolina Supreme Court would later do in both *Joyner* and *State v. Black*, that wife abuse was not illegal in North Carolina.[82] In effect, the court was saying that there was no such crime as wife abuse. The court went 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."[83] Interestingly, the court then added: "[i]t must be remembered that rules of law are intended to act in all classes of society." As Reva Siegel shrewdly notes when examining *Hussey*, the court's language is perhaps a warning or 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 wealthy.[84] Neither in *Hussey,* nor in any subsequent case, did the North Carolina Supreme Court ever explain how public opinion might moderate domestic abuse if homes were closed to "the gaze of the public."[85]

Ten years after *Hussey*, without considering privacy, the North Carolina Supreme Court overturned a judge's grant of temporary alimony to a wife seeking a divorce. The court in *Joyner* (1862) again declared 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."[86] The court reiterated this stand in *Black* two years later when it overturned another lower court decision convicting a husband of assaulting his wife. This time, however, the court reintroduced the matter of privacy without 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."[87] 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."[88] Again, the doctrine of *Black* is not that courts will overlook abuse because of some overriding belief in the privacy of the home, but that the law, in its wisdom, allows husbands to be violent and to utilize "a degree of force."[89]

North Carolina's judges understood that their bald declarations of the legality of abuse set the state apart from other states. Chief Justice Reade in *State v.*

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[81] *Id.*

[82] *Joyner*, 59 N.C. at 322; State v. Black, 60 N.C. 262 (1864).

[83] *Hussey*, 44 N.C. at 126.

[84] *Id.*; Siegel, *supra* note 26, at 2153.

[85] *Hussey*, 44 N.C. at 126.

[86] *Joyner*, 59 N.C. at 325.

[87] *Black*, 60 N.C. at 263.

[88] *Id.*

[89] *Id.*

*Rhodes* noted at first that there was little uniformity in how state courts looked at the matter of "correction."[90] "The subject is at sea . . . . [a]nd, probably," he wrote, "it will ever be so; for it will always be influenced by the habits, manners and condition of every community."[91] He acknowledged that North Carolina's doctrine found little favor outside of the state, except in Mississippi, but he did not note that even the Mississippi decision was over thirty years old.[92] 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,"[93] a statement that obscured North Carolina's isolation by suggesting, without any substantiation, that numerous state courts were in agreement with it.

*Rhodes* did, however, mark a change in the rationale for the court's acceptance of wife abuse. Basing its action in part 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 North Carolina Supreme Court this time suggested that abuse was not lawful. It did so without noting any change in the law itself. Ironically however, wives were better served by the earlier decisions —at least on paper. The trial judge's ruling in *Hussey* had noted flat out that while the law allowed correction, a husband was guilty of assault and battery if there had been no provocation. Now, with *Rhodes*, abuse was unlawful but tolerated.

According to the original manuscript record, 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 undecided how to find as a matter of law upon the guilt or innocence of the defendant," it asked the judge to decide.[94] There might well have been some trickery involved. The manuscript version of the jury decision notes "three licks with a medium sized switch without any provocation."[95] But in that handwritten document "medium" is crossed out, "small" written above it, and a phrase is inserted to define small as "not as large as a mans thumb-switch about the size of one of his fingers."[96] 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.[97] That change in wording might also have reflected an understanding of wife abuse custom peculiar to North Carolina. The *Raleigh Register* had noted in 1825 that a man could

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[90] State v. Rhodes, 61 N.C. 453, at 456 (1868).

[91] *Rhodes*, 61 N.C. at 456..

[92] *Bradley*, 1 Miss. at 156.

[93] *Rhodes*, 61 N.C. at 459.

[94] State v. Rhodes, Supreme Court Original Cases, 1800-1909, Box 373, Case #9368, at 1, North Carolina State Archives. The jury's indecision is not noted in the printed report.

[95] *Id.*

[96] *Id.*

[97] *Id.* The trial judge's rationale that the wife had not been permanently injured does not appear in the printed version of the case.

"chastise his wife, provided the weapon be not thicker than his little finger."[98] 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,"[99] 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."[100]

In a perverse way, the *Rhodes* opinion evoked the Declaration of Independence, with 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."[101] Only "a long train of abuses" designed to "reduce them under absolute despotism" justified drastic change[102].

A number of times the court indicated it would not intervene unless "permanent or malicious injury" was "inflicted or threatened,"[103] or where life became "intolerable"[104] for the complaining party; sometimes, though, the North Carolina Supreme Court noted, courts would not grant divorces even for "repeated violence."[105] 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,"[106] However, the court gave away its generally dismissive attitude in references to "trivial complaints,"[107] "trifles,"[108] "trifling cases,"[109] "every trifling family broil,"[110] and

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[98] *See* JOHNSON, *supra* note 47, at 242. Reference to thumbs as allowable standards for the size of weapons brings to mind the oft-used phrase, "rule of thumb." For further information, Henry Ansgar Kelly, examines the so-called "rule," as well as English Common Law, Roman Civil Law, Canon Law, and some of the North Carolina cases. *See* Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341, 341-65 (1994).

[99] *Rhodes*, 61 N.C. at 459.

[100] *Id.* at 454.

[101] THE DECLARATION OF INDEPENDENCE, *in* MAJOR PROBLEMS IN THE ERA OF THE AMERICAN REVOLUTION 169-170 (Richard D. Brown, ed., 1992).

[102] *Id.* at 170.

[103] *Rhodes*, 61 N.C. at 457.

[104] *Id.* at 455

[105] *Id.*

[106] *Id.* 61 N.C. at 457.

[107] *Id.* at 454.

[108] *Id.* at 457.

[109] *Id.* at 459.

[110] *Id.* at 458.

even "trifling violence."[111] Without saying it outright, the court was indicating that since it would not intervene, wives might as well take to heart the message 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 that 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 and its newly invoked rationale for protecting abusive husbands by mimicking the Declaration. "A decent respect to the opinions of mankind," Jefferson had written, required Congress to list its reasons for separating from England.[112] Similarly, out of "a decent respect for the opinions of others," Justice Reade and the North Carolina Supreme Court took pains to explain their actions.[113]

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."[114] 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. . . . ."[115] 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 if it was unprovoked. 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."[116] The difficult and impossible line that the North Carolina Supreme Court was trying to draw is perhaps best indicated by an incomplete crossed-out sentence that concluded the handwritten decision—"but we by no means commit ourselves to the doctrine that in this enlightened & christian [sic] age a husband has"—and there the opinion ends.[117]

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[111] *Id.*

[112] Brown, *supra* note 101, at 170.

[113] *Rhodes*, 61 N.C. at 459-60.

[114] *Id.* at 459.

[115] *Id.*

[116] *Id.* at 457. The *Rhodes* decision was essentially repeated in State v. Oliver, 70 N. C. 60 (1874). *See infra* notes 125-31 and accompanying text.

[117] State v. Rhodes, 14 Supreme Court Original Cases, 1800-1909, Box 373, Case #9368., North Carolina State Archives. The *Chicago Legal News* publicized the Rhodes decision. *See* 4 CHICAGO LEGAL NEWS at 476. The North Carolina 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

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 again muddled by references to the privacy doctrine. The case of *State v. Mabrey* in 1870 involved Ridley Mabrey, "a man of violent character," who had threatened to kill his wife with a knife he was brandishing. He was stopped by a bystander.[118] Mabrey was acquitted in a lower court. [119] Just as in *Rhodes*, the jury first hearing the case shirked its responsibility. "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 not guilty."[120] Not guilty, said the trial judge. The state solicitor appealed.[121]

Chief Justice Reade seemed truly incensed by the case, which he saw as a blatant misreading of *Rhodes*, decided just two years earlier. Though Mabrey did not actually strike his wife, Reade found his life-threatening behavior "savage," outrageous, and "not to be tolerated in a country of laws and Christianity."[122] 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."[123] "We repudiate any such construction," Reade concluded.[124]

### *C. The Privacy Principle Applied*

Four years after *Mabrey*, North Carolina's stance on wife beating was explained anew in a decision which paradoxically reaffirmed an abstract privacy defense of wife abuse while demolishing its practical application. The portion of the decision that effectively destroyed the privacy defense has often been overlooked, not only by scholars but also—more unfortunately—by a few

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paper to suggest sarcastically that North Carolina women might owe thanks to the court for reducing the standard of measurement for an allowable weapon. *Id.*

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." *See* DOROTHY THOMAS, 1 NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY 225 (Edward T. James et al. eds., 1971).

118 State v. Mabrey, 64 N.C. 592 (1870).

119 *Id.*

120 State v. Mabrey, Supreme Court Original Cases, 1800-1909, Box 382 Case #966 (1870).

121 *Mabrey*, 64 N.C. at 592.

122 *Mabrey*, 64 N.C. at 592-93.

123 *Id.*

124 *Id.* at 593.

subsequent courts.[125] 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."[126] He did, apparently stopping only when witnesses intervened. He was tried, found guilty, and fined ten dollars. He appealed.[127] On appeal, the North Carolina Supreme Court said that the lower courts had "advanced from that barbarism" which allowed a beating with a switch no larger than a thumb.[128] The *Oliver* court made clear that disciplinary spousal abuse was no longer the law in North Carolina. Indeed, the court wrote that "the husband has no right to chastise his wife under any circumstances."[129]

The Supreme Court again however fell back on the notion that it was best for public health that the court not listen to "trivial complaints," stating that "[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain . . . ."[130] What is not always noted, however, is that 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: "[i]n 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."[131] If, then, by its language the court was declaring that virtually all wife beating involved malice, then it was essentially announcing that it would not tolerate any level of abuse.

Unfortunately, North Carolina's Supreme Court backed away from such a description 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. Rather, it was a function of severity. That was the conclusion announced in *State v. Pettie*, which reached the North Carolina Supreme Court in 1879.[132] Pettie had received a two year sentence for beating his wife "with a stick larger than the middle finger."[133] "Her left arm, shoulder, and back were covered with bruises."[134] 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."[135] The argument on appeal

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125 State v. Oliver, 70 N.C. 60 (1874).
126 *Id.* at 60-61.
127 *Id.* at 61.
128 *Id.*
129 *Id.*
130 *Id*, 70 N.C. at 60-61.
131 *Id.* at 62.
132 State v. Pettie, 80 N. C. 367 (1879).
133 *Id.* .
134 *Id.*
135 *Id.*

was that the sentence violated the constitution, its length being cruel and unusual.[136]

The North Carolina 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, ruling at the time that a five year sentence in a county jail was excessive. It noted 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."[137] Privacy was not mentioned in the reported decision.

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.[138] 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."[139] Indeed, the court ruled that was true of Pettie. The severity of his actions indicated malice; for the protection of his wife and "the good order of society," he needed to be made an example of.[140]

In 1886 the court returned to the matter of domestic privacy in two cases, neither of which involved wife abuse. However, like *Pendergrass*[141] almost fifty years earlier, each case reemphasized the dangerous position of wives. 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."[142] 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 whelks upon her back"; shortly after, he hit her five more times, choked her, and threw her

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136 *Id.*

137 State v. Driver, 78 N.C. 423, 429 (1878). 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. *Id.* at 423. There had been other less serious chastisements. Too poor to have legal services, he had pleaded guilty. *Id.* at 425. In recommending a maximum of one month, the Supreme Court cited various authorities on constitutional protections, the state's Revised Code and noted 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. *Id.* at 425-30.

138 *Pettie*, 80 N.C. at 368.

139 *Id.*

140 *Id.* at 370.

141 *Pendergrass*, 19 N.C. at 365. Judge Gaston's decision in *Pendergrass* is quoted at length in *State v. Alford*, a case involving a man accused of committing a battery on the son of the woman with whom he was living. State v. Alford, 68 N.C. 322 (1873). Following the ruling of "the late Judge Gaston, as humane a Judge as ever presided in a Court," the court ruled in Alford that the defendant was acting in *loco parentis* and that since his "chastisement" of the boy was not "calculated to produce lasting injury" he had been "entitled to a verdict of not guilty." *Id.* at 323-24.

142 State v. Jones, 95 N.C. 588 (1886).

to the ground.[143] Jones testified that the beating was for correction; his daughter had stolen money and was "habitually disobedient."[144] 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.[145]

Relying on *Pendegrass*, the North Carolina 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 . . . ."[146] That would remove restraints from children and subvert or impair the "efficiency" of family government.[147] 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."[148] The evil resulting from that exposure was "irreparable, . . . far transcending that to be remedied by a public prosecution."[149] Fred Jones's beating of his daughter seemed to have been "needlessly severe," but the court would not view it as criminal[150]. Rather it belonged "to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity."[151] As in *Pettie* seven years earlier, the North Carolina court clearly still 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, involve permanent injury, or was not "prompted by a malicious and wrongful spirit,"[152] 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."[153] The presumption was "that acts of wrong committed in passion will be followed by contrition and atonement in a cooler moment, and forgiveness will blot it out of memory."[154] What was true for a blow was true for "the harsh and cruel word."[155]

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143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 590.
147 *Jones*, 95 N.C. at 590.
148 *Id.*
149 *Id.*
150 *Id.* at 593.
151 *Id.*
152 State v. Edens, 95 N.C. 693, 696 (1886).
153 *Id.*
154 *Id.*

Publicizing family disputes would serve only to magnify them and make reconciliation impossible.[156]

At times, the North Carolina Supreme Court had difficulty summarizing or explaining the state's court-announced policy on wife abuse. That might have represented genuine confusion about judicial policy, a difficulty in articulating it, or an attempt to make their predecessors appear more sympathetic towards married women than they had been. In *State v. Dowell,* a husband attempted to appeal his conviction for the assault and attempted rape of his wife.[157] The case was unique, the judges understood, because a husband "may enforce sexual connection, and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape."[158] The facts were "abhorrently simple,"[159] such that even the dissenting judge referred to "the horrible and detestable purpose of the defendant."[160] T.N. Dowell was a white man who, gun in hand, tried to force Lowery, a "colored man," to rape Dowell's white wife, "under menace of death to both parties."[161] "Fortunately," according to Judge Shepherd, "the fright and excitement rendered him incapable of consummating the outrage."[162]

The North Carolina Supreme Court upheld Dowell's conviction.[163] In his opinion, Judge Shepherd quickly took up the matter of wife abuse. He 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."[164] "But since *State v. Oliver* . . . and subsequent cases," he continued, "we have refused 'the blanket of the dark' to these outrages on female weakness and defenselessness."[165] Judge Shepherd, however, failed to note two other conclusions drawn by the *Oliver* court. One supported his argument: a husband who acted violently out of malice—and as the *Oliver* court noted, it is hard to conceive of violence that is not malicious—was guilty of wife

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155 *Id.*

156 *Id.* at 697.

157 State v. Dowell, 106 N.C. 722 (1890).

158 *Id.* at 724.

159 *Id.*

160 *Id.* at 727.

161 *Id.* at 722-23.

162 *Dowell,* 106 N.C. at 723.

163 *See id.* at 717 (Merrimon, C.J., dissenting). Merrimon argued that a husband could not rape his wife and that Lowery had not raped her and had no intent to rape her. *Id.* Dowell should have been charged with "an assault upon his wife with a deadly weapon with the intent to kill, and a like assault upon the negro." *Id.*

164 *Id.* at 724.

165 *Id.* The court began its decision in *Dowell* by expressing its horror: "[o]rdinarily, 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. *Id.* at 722. The marvelous phrase "blanket of the dark" does not appear in *Oliver.* It is from Shakespeare. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH 31 (Jane Bachman, ed.,, NTC Publishing 1994) (1623). i

abuse.[166] However, that novel conclusion was undermined by a comment that looked back to *Rhodes*. The *Oliver* court clearly indicated that it was still best for society to "draw the curtain" over family disputes and hide "trivial complaints."[167] Moreover, Shepherd completely ignored the 1879 *Pettie* case. The opinion in that case skipped backwards over *Oliver* and cited *Rhodes* as definitive. "It is the settled law of this state that the courts will not invade the domestic forum . . . even if a husband should chastise his wife, it is regarded as best not to take any cognizance thereof" unless the violence was excessive or "inflicted to gratify his own bad passion."[168]

Having partially summarized *Oliver*, Judge Shepherd added the current court's formulation of its wife abuse policy. "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."[169] If Judge Shepherd was trying to distinguish between an old approach that respected husbands' power by sealing homes from public view and a newer policy of protecting wives by refusing that "blanket of the dark," he ought simply to have noted "that a husband cannot commit even a slight assault upon his wife."[170] The confusion stems from his inclusion of "technically," which suggested a reality that was quite different. In other words, wife abuse was illegal, but still to be tolerated. And that certainly suggested a reinvigoration of the privacy doctrine.

Eighteen years later, the North Carolina Supreme Court turned back to *Rhodes*, *Oliver*, and *Edens* to explain the state's judicial stance on wife abuse. Like *Edens*, *State v. Fulton* concerned a husband's slander of his wife.[171] The trial judge had quashed the indictment, accepting the defendant's argument that it was not a crime for a husband to slander his wife. The North Carolina Supreme Court, evenly split two to two, affirmed the ruling. Judge Brown based his support of the lower court judge on the unanimous decision of "the eminent jurists" in the 1886 *Edens* case.[172] Brown, quoting *Edens*, noted that except in extreme cases one should drop "the curtain upon scenes of domestic life."[173] That had been the opinion of "a court composed of sages of the law who were as chivalrous as they were pure and learned."[174]

The two dissenters, one of whom was Chief Justice Walter Clark, a steadfast supporter of equal rights for women, read the precedents on chastisement

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166 *Oliver*, 70 N.C. at 62.

167 For a discussion of *Rhodes*, see *supra* notes 90 to 117 and accompanying text; for *Oliver*, *supra* notes 125 to 131 and accompanying text.

168 *Pettie*, 80 N.C. at 368.

169 *Dowell*, 106 N.C. at 724.

170 *Id.*

171 State v. Fulton, 149 N.C. 485 (1908).

172 *Id.* at 486.

173 *Id.*

174 *Id.*

differently. Citing *Oliver* and *Dowell* for the ruling that a husband had "no right to chastise his wife under any circumstances,"[175] Clark pointed out that North Carolina courts had been "slow to reach this position."[176] Just a few years before *Oliver*, he 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.[177]

*Edens*, the chief justice wrote, was simply wrong. It was "based upon the very reasoning" used in *Rhodes* and did not cite *Oliver* even though *Oliver* "had overruled the previous cases."[178] But Chief Justice Clark, like Judge Shepherd earlier in *Dowell*, failed to indicate that *Oliver* still called for drawing a curtain over "trivial complaints," a policy reaffirmed in *Pettie*, which Clark also ignored. Indeed, the chief justice, who had joined the court in 1889, could not refer to any case in which the court refused to cover up mild chastisement. In subsequent cases he repeatedly—and sometimes more dramatically—returned to his reading of *Oliver*, which was not shared by all members of the court.

In 1920, Chief Justice Clark wrote the court's opinion upholding, by a two to two vote, a jury's award of $10,000 in damages to a wife who sued her husband for infecting her with a venereal disease.[179] He cited many precedents, but *Oliver* was key:

> At common law neither civil nor criminal actions could be maintained by the wife against the husband, because of the alleged unity of persons of husband and wife, or rather the merger of the wife's existence into the husband's. The real reason was that by marriage the wife became the chattel of the husband (as a reminder of which to this day at a marriage some man "gives the woman away"), and therefore her personal property by the fact of marriage became his, as was the case in this state as to wives until the Constitution of 1868, though as to slaves it had ceased on their emancipation in 1865 . . . but the wife was not emancipated from the lash of the husband till nine years later, in 1874, when in *S. v. Oliver* . . . *Settle, J.*, tersely said: We have "advanced from that barbarism."[180]

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[175] *Id.* at 496. For a brief commentary on Clark's stance on women's rights see CLARK, *supra* note 47, at 53-54. *See also* Chief Justice Walter Clark, Address before the Federation of Women's Clubs (May 8, 1913) *in* DOCUMENTING THE AMERICAN SOUTH (2001), *available at* http://docsouth.unc.edu/nc/clark13/menu.html.

[176] State v. Fulton, 149 N.C. at 496.

[177] *Id.* at 496-97.

[178] *Id.* at 497.

[179] Crowell v. Crowell, 180 N.C. 516 (1920).

[180] *Id.* at 522. Chief Justice Clark continued:

> The true ground for the exemption of the husband from liability to the wife for his torts, and for his assumption of her property, as already said, was because by the marriage she became his chattel. The fanciful ground assigned for this doctrine, which was far more unjust to married women than that prevailing in other countries under the civil law or even in the countries under the rule of the Koran, is stated by some of the old writers to be the words in Genesis ii, 23, 24: "And Adam said, 'this is now bone of my bones and

In part, the two dissenting judges based their opposition to Clark's decision on their differing view of *Oliver*, or at least on their emphasis of a different aspect of that almost fifty-year-old case. The legislature, they wrote, had:

> [W]isely refused to abolish that legal unity existing between man and wife, which was deemed by it so essential in securing the blessings of the marital union, in which, not only the principles, but society and the community, are so deeply concerned. The privacy of the home is as sacred as it ever was, and it is often better "to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive," as said by Justice Settle in *S. v. Oliver* . . . and this is done from motives of public policy, in order to preserve the sanctity, as well as the peace and tranquility of the domestic circle.[181]

Chief Justice Clark remained steadfast. He returned to *Oliver* in 1923 with his most forceful statement yet:

> For centuries wives had to endure under the common law the brutalities of their husbands, because . . . to "give publicity to family troubles is not advisable," and therefore it was held in the courts of this state, till *S. v. Oliver*, . . . in 1874, nine years after the whip had been taken from the hand of the master, that the husband was still master of his wife, with the right to use the lash on her at his will, and that she could not complain to a court of justice for protection, except in cases of permanent injury; one judge saying that this was "necessary because it was the husband's duty to make her behave herself" (*S. v. Black*, . . . ), and a later decision put it on the ground that to allow the wife to ask protection of a court would be unseemly publicity, and therefore the courts must stifle the sobs of the victims, and held that their demands for justice and protection could not be heard in a court of justice. *S. v. Rhodes* . . . .[182]

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> flesh of my flesh,'" adding that a man and wife "shall be one flesh." And now, "speaking for myself and not by commandment" . . . this statement was made by Adam and not by Deity, and is untrue as a matter of fact, besides Adam was not a lawgiver, but the most culpable lawbreaker known to tall the ages . . . It must be remembered that there is not, and never has been, any statute in England or this state declaring that "husband and wife are one, and he is that one." It was an inference drawn by courts in a barbarous age, based on the wife being the chattel and therefore without any rights to property or person. It has always been disregarded by courts of equity and public opinion and the sentiment of the age, as expressed by all laws and constitutional provisions since have been against it. The anomalous instances of that conception which still survive, are due to courts are due to construing away the changes made by corrective legislation or restricting their application. Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to "love, cherish, and protect" her. We have progressed that far in civilization and justice. Never again will "the sun go back ten degrees on the dial of Ahaz." Isaiah, 38:8.

*Id.* at 522-24.

[181] *Id.* at 526.

[182] Small v. Morrison, 185 N.C. 577 (1923). A more qualified reading of *Oliver* was given in 1946 by the District Court of the United States for the District of Columbia. *See* Steele v. Steele, 65 F. Supp. 329 (1946). First, it provided a context for *Oliver*: "[o]riginally, at common law, a man had a legal right

North Carolina courts—alone among all state courts—were clearly preoccupied with the notion of privacy, using the concept to confine wives in their dangerous environments. However, at the same time those early privacy cases were being litigated, the judges took a somewhat confusingly different tack in another case where they chose to protect an abused wife. But there was an unusual twist and the case serves to better explain the judiciary's approach, 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.

The case of *Earp v. Earp* first reached the North Carolina Supreme Court in late 1853, fifteen years before *Rhodes*.[183] 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, 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 this 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.[184] And, of course, 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 unacceptable.[185]

When the Supreme Court ruled on Elizabeth Earp's divorce petition itself in 1854, out of necessity it examined the nature of her forty-year marriage.[186] For thirty of those years, she suffered "harsh and brutal treatment," which "she bore . . . as only woman can bear."[187] Nash's opinion does not detail "the brutal oppression,"[188] although it does specify her forced seclusion. Rarely did friends

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to beat his wife provided he did not do so to excess." *Id.* at 329-30. According to Blackstone, "'this power of correction began to be doubted . . . .'" *Id.* But Blackstone, the court noted:

> [W]as perhaps a little too optimistic, and even precipitous because vestiges of the original common law doctrine lingered until past the middle of the 19th Century. For example, in 1868 in *State v. Rhodes* . . . the court held that a husband was not subject to criminal prosecution for beating his wife, if he did not do so to excess. Six years later in *State v. Oliver* . . . the court stated that the old doctrine that a husband had a right to whip his wife provided that he used a switch no larger than his thumb, was no longer law. This statement was qualified, however, by the limitation that for motives of public policy, in order to preserve the sanctity of the domestic circle, the court would not listen to trivial complaints. How this course would preserve the sanctity of the domestic circle is not stated.

*Id.*

183 Earp v. Earp, 54 N.C. 118 (1853).

184 *Id.* at 119-20.

185 *Id.* at 120.

186 Earp v. Earp, 54 N.C. 239 (N.C. 1854).

187 *Id.* at 242.

188 *Id.* at 241.

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."[189]

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."[190] First, the court recognized that the charges of violence were not specific or particular enough to sustain the action.[191] Eight years later, in 1862, Eliza Joyner would be doomed by just such failure to specify the "circumstances" of the abuse.[192] Moreover, the court might have overlooked William Earp's brutalities. A wife might "endure" injuries; "blows and brutality from drunkenness she might suffer."[193] One does not, after all, resort to the law "for every act of improper violence."[194]

The *Earp* court chose not to deny its protection. It accepted the petition as a whole, "a plain, artless, feeling statement," which successfully stirred up "the deepest sympathies of our nature."[195] In short, the court allowed itself to be convinced that the law could provide relief for Elizabeth Earp's "history of suffering."[196] 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."[197]

The circumstance that damned William Earp and saved his wife and which set this case apart in North Carolina was that his brutalities were not merely physical. Eight years earlier, he had brought home a "strumpet."[198] 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?[199] "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 far keener anguish than would be inflicted by a blow."[200]

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189 *Id.* at 240-41.

190 *Id.* at 242.

191 *Earp*, 54 N.C. 239, 242.

192 *Joyner*, 59 N.C. at 324. For *Joyner*, *see supra* notes 61 to 64 and accompanying text.

193 *Earp*, 54 N.C. at 241.

194 *Id.* at 242.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*, 54 N.C. at 240-41.

199 *Id.*

200 *Id.*; *see* Coble v. Coble, 55 N.C. 392 (1856); *see also* BYNUM, *supra* note 14, at 72.

## III. PRIVACY AND THE ANTEBELLUM SOUTH

When Chief Justice Nash concluded in *Earp* 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 Justice 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 not only *could* wives endure physical abuse, but 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 that 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 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 and 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 of not only individual men, but of areas, states, and indeed of a region and its way of life. By extension, the doctrine served an even larger issue. Domestic privacy, secrecy, and the 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.

### *A. Two Northern Cases as Contrast*

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."[201] That being duly noted, there was a certain consistency in the South regarding wife abuse and enough consistency in the North to see a significant difference. The difference can be suggested here with reference to two Northern cases, the first one useful as a comparison with *State v. Hussey*. *Hussey* was the 1853 case in which the North

[201] Nell Irvin Painter, *Three Southern Women & Freud A Non-Exceptionalist Aproach to Race, Class, & Gender in the Slave South, in* NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE 111 (2002).

Carolina Supreme Court reversed an assault and battery conviction because a wife had been allowed to testify about her husband's abuse, which the court deemed "ordinary."[202]

Twenty-five years before *Hussey* the Maine Supreme Court decided 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.[203] 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."[204] Like North Carolina's Justice Nash, Mellen pointed out that a wife could "exhibit articles of the peace against her husband" and require security against "apprehended and threatened violence."[205] 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."[206]

The North Carolina court pointed out that allowing a wife's testimony would weaken or break down "the great principles which protect the sanctities of the marriage state,"[207] an argument the Maine court had anticipated and 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.[208]

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: "[w]e 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."[209] It is worth noting that *Soule's Case* was decided just four years after the Mississippi Supreme Court had ruled in *Bradley v.*

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202 *Hussey*, 44 N.C. at 125; for discussions of *Hussey*, *see supra* notes 65-84 and accompanying text.
203 Soule's Case, 5 Me. 407 (Me. 1828).
204 *Id.* at 408.
205 *Id.*
206 *Id.*
207 *Hussey*, 44 N.C. at 125.
208 *Soule's Case*, 5 Me. at 408.
209 *Id.* at 409.

*State* that husbands were "permitted to exercise the right of moderate chastisement."[210]

A second Northern case, this one from Iowa, was *Miller v. Miller* (1889).[211] 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.[212] Excerpts from the Iowa decision sound a familiar note: "[i]t is of 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."[213] 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."[214] "Such inquiries in public would strike at the very foundations of domestic life and happiness."[215]

The Iowa court, however, was not dropping a curtain to cover abuse. The case of *Miller v. Miller* involved 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."[216] 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.[217] 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 of 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."[218] 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."[219] 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."[220]

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210 *Bradley*, 1 Miss. at 158.
211 Miller v. Miller, 78 Iowa 177 (1889).
212 State v. Edens, 95 N.C. 693.
213 *Miller*, 78 Iowa at 182.
214 *Id.* at 184.
215 *Id.* at 183.
216 *Id.* at 178.
217 *Id.* at 179.
218 *Miller*, 78 Iowa at 182.
219 *Id.*
220 Marsh v. Marsh, 64 Iowa 667, 668 (1884).

In both North and South there were, of course, exceptions to the general trend of court decisions. The Alabama Supreme Court, for example, in *State v. Neill*, ordered a new trial when a lower court refused to allow a wife's testimony.[221] But that 1844 case had a significant and quite unusual twist: the husband accused of abuse wanted to call his wife to disprove the charge.[222] 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."[223] 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."[224]

### *B. The Southern Family*

North Carolina and its courts were not 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."[225] The jury acquitted him.

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 and in the process minimized wife abuse.[226] When Jane Goodwin 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 divource [sic] me from

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221 State v. Neill, 6 Ala. 685 (1844).

222 *Id.* at 686.

223 *Id.*

224 *Id.* at 686. *See also* Tucker v. State, 71 Ala. 342 (1882), Johnson v. State, 94 Ala. 53 (1891).

225 Angela Boswell, *The Social Acceptability of Nineteenth-Century Domestic Violence, in* THE SOUTHERN ALBATROSS RACE AND ETHNICITY IN THE AMERICAN SOUTH 140, 159-60 (Philip D. Dillard & Randall L. Hall eds., 1999).

226 Laura Edwards, *Women and the Law: Domestic Discord in North Carolina After the Civil War, in* LOCAL MATTERS RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 128 (Christopher Waldrep & Donald G. Nieman eds., 2001); THOMAS BUCKLEY, S.J., THE GREAT CATASTROPHE OF MY LIFE DIVORCE IN THE OLD DOMINION 179 (2002).

my wife without my consent [sic] for mere trivials."[227] And, he argued, his wife's complaints reflected only "private disputes in families."[228] 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."[229]

The social, political, and ideological context for the North Carolina Supreme Court's opinions, 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 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 the ruling white males honed and then aggressively asserted their positive defenses, they were never defensive about their other peculiar institution: the Southern family. They gloried in its distinctiveness and enmeshed the two institutions, each reinforcing and justifying the other. 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.[230] 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 and 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."[231] "In the South," he continued:

> [T]he 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

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227 BUCKLEY, *supra* note 226, at 184-85.

228 *Id.*

229 RICHMOND ENQUIRER, Jan. 22, 1820, quoted in BUCKLEY, *supra* note 226, at 186.

230 For a recent interpretation of the antebellum South, *see* Lacy Ford,, *Reconfiguring the Old South: "Solving" the Problem of Slavery, 1787-1838*, 95 J. AM. HIST. 95 (2008).

231 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" in* DOCUMENTING THE AMERICAN SOUTH 10-11 (2005), *available at*:http://docsouth.unc.edu/imls/palmdisc/menu.html. Palmer was a minister in New Orleans.

> the land; and the class, whose tendencies might be to change, has no share whatever in the administration of public affairs.[232]

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 . . . ?"[233] 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."[234] 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."[235]

### *C. Protecting Southern Families and the Reputation of Men*

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."[236] Slave-owners, said Thomas Dew, are "characterized by noble and elevated sentiments, by humane and virtuous feelings."[237] 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."[238] 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. . . [d]omestic relations become those which are most prized."[239]

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232 *Id.*

233 Robert L. Dabney, *A Defence of Virginia, [and Through Her, of the South] in* RECENT AND PENDING CONTESTS AGAINST THE SECTIONAL PARTY 298-300 (E.J. Hale 1867) (emphasis in original).

234 *Id.* (emphasis in original).

235 Palmer, *supra* note 231, at 10-11.

236 Dabney, *supra* note 233, at 297.

237 William Harper *et al.*, 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 HAMMOD, DR. SIMMS, AND PROFESSOR DEW 455 (Walker, Richards 1852). Professor Dew, one of the authors, was responding to Thomas Jefferson's charge that the children of slave-owners were "stamped by it [meaning slavery] with odious peculiarities." *Id.*

238 *Id.*

239 Theodore R. Hovet, *Modernization and the American Fall into Slavery in Uncle Tom's Cabin*, 54 NEW ENG. Q. 507 (1981); *see* BERTRAM WYATT-BROWN, THE SHAPING OF SOUTHERN CULTURE HONOR, GRACE, AND WAR 1760S-1880S 143 (2001) (stating that the Memminger quotation comes from an 1851 lecture: Lectures Delivered Before the Young Men's Library Association, April 10, 1851); *see also* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD BLACK AND WHITE WOMEN OF THE OLD SOUTH 198 (1988).

The differences in family government sometimes determined, and paradoxically were sometimes 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. Abolitionists by and large—a substantial number of them women—radical on the subject of slavery, were also radical in their calls for reform of the family, reforms needed even more in the South than in the North. Taking 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.[240] They also championed greater rights for women in home matters, the right to property, divorce, custody of children, and even the right to refuse their husbands' 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 as well 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, where the women were portrayed as domestically powerful.[241] 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 it 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. Southerners, however, tried to fix the debate, giving their families mythic qualities and passing them off as real. The curtain that kept wife beating private protected the myth 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 woman's field labor, a feature of family life common to many. Northern and foreign travelers routinely commented on it, but field labor was supposed to be black labor—slave labor—and hence demeaning. Planters' wives were obviously spared. To acknowledge that yeomen's wives did field work was to bring into focus class distinctions, which Southern leaders wanted to downplay. Moreover, as Stephanie

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240 MICHAEL D. PIERSON, FREE HEARTS AND FREE HOMES: GENDER AND AMERICAN ANTISLAVERY POLITICS 78-81 (2003).

241 *Id.* 75-78.

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."[242] Hence, "out of respect for yeoman masters and particularly for their votes," planters helped sustain the myth of non-working white women.[243]

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."[244] Just as Southerners took comfort when they compared Northern and Southern governments, they found solace when examining families in the North and South. "In the South," Daniel R. Hundley wrote in 1860, "the family is a much more powerful institution than in other portions of the Republic."[245]

The innovations that 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 and perhaps dominance over child-rearing, women's rights, and 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."[246] People like Horace Greeley were only more timid, Fitzhugh thought, desiring the same effects but willing to proceed more gradually.[247] "The Family," Fitzhugh concluded, "is threatened, and all men North or South who love and revere it, should be up and a doing."[248]

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 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

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242 STEPHANIE MCCURRY, MASTERS OF SMALL WORLDS YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY 78-81 (1995).

243 *Id.*

244 *Bailey*, 21 Gratt. at 49; *see supra* notes 23 to 25 and accompanying text.

245 BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH 117 (1982).

246 GEORGE FITZHUGH, *Cannibals All! Or Slaves Without Masters* 281 (1857), *in* DOCUMENTING THE AMERICAN SOUTH (1998), *available at* http://docsouth.unc.edu/southlit/fitzhughcan/fitzcan.html.

247 *Id.* 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." PIERSON, *supra* note 240, at 110.

248 FITZHUGH, *supra* note 246, at 293.

single, from suffrage, office, and the full franchises of men.[249]

And he tellingly noted, highlighting Southern fears in one simple sentence, "there must be an end of the wife's obedience to her husband."[250] 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."[251] This uprooting of God's family ordinance represented "the destruction of society."[252]

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'Neall could still note: "[t]he 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."[253] 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.[254] South 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*."[255] 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."[256] 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.[257] 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."[258] It was greatly different in "the slaveholding States,"

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249 Dabney, *supra* note 233, at 265-66.

250 *Id.*

251 *Id.*

252 *Id.*

253 *See* MCCURRY, *supra* note 242, at 86-87

254 *See* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 60 (1999). "Divorce is not permitted in South Carolina . . . but you can shoot your wife when you have grown tired of her, and the jury won't trouble you." *LIFE*, Jul.18, 1880, at 32.

255 Victoria Bynum, *Reshaping the Bonds of Womanhood: Divorce in Reconstruction North Carolina*, in DIVIDED HOUSES: GENDER AND THE CIVIL WAR 322 (Catherine Clinton & Nina Silber eds., 1992) (emphasis added).

256 PIERSON, *supra* note 240, at 89.

257 PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 117-18 (1995).

258 *Id.*

where "[a] very different idea of [family] government prevails."[259] "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."[260]

### *D. Wives and the 'Beneficence' of Southern Patriarchy*

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,"[261] a sentiment echoed a century later by John C. Calhoun: "[e]very plantation is a little community, with the master at its head."[262] "Each planter in fact is a Patriarch," C. G. Memminger wrote.[263] "His position compels him to be a ruler in his household."[264]

Whether spoken or not, the logic was simple. Patriarchy was all encompassing and self-reinforcing. As Nell Painter put it: "[p]atriarchal families, slavery, and evangelical religion further reinforced one another's emphasis on submission and obedience in civil society, particularly concerning people in subaltern positions."[265] As early as 1778, a Northern traveler in the South noted the connection: "[a]ccustomed to tyrannize from their infancy," slave-owners "carry with them a disposition to treat all mankind in the same manner they have been used to treat their Negroes."[266] 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

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259 *Id.*

260 *Id.*

261 *Id.* at 25.

262 DREW GILPIN FAUST, MOTHERS OF INVENTION WOMEN OF THE SLAVEHOLDING SOUTH IN THE AMERICAN CIVIL WAR 32 (1997); *see also* State v. Mann, 13 N.C. 263 (1829), BYNUM, *supra* note 14, at 70. For a treatment of Ruffin, *State v. Mann* and other slave cases, see TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS 1790-1890, 130-59 (1999).

263 Hovet, *supra* note 239, at 507. BERTRAM WYATT-BROWN uses part of that quotation in THE SHAPING OF SOUTHERN CULTURE, *supra* note 239, at 143.

264 Hovet, *supra* note 239, at 507.

265 NELL IRVIN PAINTER, *Soul Murder & Slavery: Toward a Fully Loaded Cost Accounting*, *in* SOUTHERN HISTORY ACROSS THE COLOR LINE 33 (2002); *see also* ANGELA BOSWELL, *Married Women's Property Rights and the Challenge to the Patriarchal Order: Colorado County, Texas*, *in* NEGOTIATING BOUNDARIES OF SOUTHERN WOMANHOOD: DEALING WITH THE POWERS THAT BE 89-109 (Janet L. Coryell et al. eds., 2000).

266 ROBERT OLWELL, MASTERS, SLAVES, & SUBJECTS: THE CULTURE OF POWER IN THE SOUTH CAROLINA LOW COUNTRY 50 (Cornell Univ. Press 1998).

them their belief that they ruled their universe.[267] Even if the men who wielded ultimate power over their slaves—which included the power to whip, rape, and perhaps to kill—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 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 for the South*. [268] 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.'" [269] Fitzhugh, Fox-Genovese notes, thought proof of Northern society's "dissolution" was to be found in the women's rights movement.[270] Men, he thought, loved their wives "because they are dependent."[271] "So long as she is nervous, fickle, capricious, delicate, diffident and dependent, man will worship and adore her. Her weakness is her strength . . . ."[272]

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. [273] 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.[274] "The humble and obedient slave exercises more or less control over the most brutal and hard-hearted master." "The 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."[275]

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[267] *See* WYATT-BROWN, SOUTHERN HONOR, *supra* note 245, at 282-83, for the best most succinct statement about the impact of southern culture on men, women, and domestic violence.

[268] GEORGE FITZHUGH, *Sociology for the South, or the Failure of Free Society* in DOCUMENTING THE AMERICAN SOUTH (1998), *available at* http://docsouth.unc.edu/fitzhughsoc/fitzhugh.htm.

[269] FOX-GENOVESE, *supra* note 239, at 199.

[270] *Id.*

[271] *Id.* .

[272] FITZHUGH, *supra* note 268, at 214. A Northern Democratic newspaper similarly argued: "the good wife, commandeth her husband, in any equal matter, by constantly obeying him." *See* PIERSON, *supra* note 240, at 106.

[273] FITZHUGH, *supra* note 246, at 301.

[274] *Id.* at 300.

[275] *Id.* at 301-02.

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 slave-owners 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."[276] Fitzhugh also described a benevolent patriarchy. White or black, a woman "is treated with kindness and humanity."[277]

It would be difficult, however, to read such gentle treatment into the decisions handed down in the so-called "privacy" cases or 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." [278] 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."[279] Nor could one find kindness and humanity in David McCord's comments about the practice 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."[280]

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."[281] The law, she quotes one judge as saying, was to "operate restrictively rather than enlarging the rights of married women."[282] 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.[283]

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

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276 BARDAGLIO, *supra* note 257, at 26.

277 FOX-GENOVESE, *supra* note 239, at 199.

278 MCCURRY, *supra* note 242, at 88.

279 *Id.*

280 *Id.* at 87.

281 *Id.* at 86-87.

282 *Id.* at 86-87.

283 *Id.* at 86-87. *See also* MORRIS, *supra* note 41, at 162.

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 subjects."[284] 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 women 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 degenerates into a brutal tyranny and her wedded life becomes a prolonged martyrdom" is often a wife's "severest test."[285] Submission and obedience were the key elements for Southern women and also the 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."[286] "But no one," he added, "dreams that these things evince the unrighteousness of the family relations."[287] 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 . . ."[288]

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: "[t]he 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

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[284] DAVID GOLDFIELD, STILL FIGHTING THE CIVIL WAR THE AMERICAN SOUTH AND SOUTHERN HISTORY 90 (Louisiana State Univ. Press 2002).

[285] ALDERT 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*, *in* DOCUMENTING THE AMERICAN SOUTH (2001), *available at* http://docsouth.unc.edu/nc/smedesa/menu.html.

[286] Dabney, *supra* note 233, at 237.

[287] *Id.* 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 112 (1998).

[288] Dabney, *supra* note 233, at 238.

formality" and legislatures and courts grant divorces with "equal facility."[289] 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."[290]

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-minded Northerners did just that. They indeed viewed the wife murders, 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 familial failings and welcomed the publicity. Southerners read the evidence as proof 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.[291]

Fitzhugh believed that "law, however well intended, can do little in . . . [women's] behalf."[292] 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."[293] 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.[294] From that point on, "the family never resumed its dignity and importance," never that is, "till slavery arose in the South."[295]

Fitzhugh did point to a dark side, laying the blame for it entirely on women. "In truth," he wrote:

> [W]omen, 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

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289 FITZHUGH, *supra* note 268, at 213, 216.
290 FITZHUGH, *supra* note 246, at 99.
291 BUCKLEY, *supra* note 226, at 187.
292 FITZHUGH, *supra* note 268, at 215-16.
293 *Id.*
294 FITZHUGH, *supra* note 246, at 285.
295 *Id.*

> 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.[296]

Fitzhugh skirted over wife abuse, trivializing it by the brevity of his comment and blaming wives for its occurrence. Notwithstanding Fitzhugh's dismissive treatment, Southern women desperately needed protection. Publicly witnessed, wife abuse was hardly ever acknowledged or effectively dealt with. The reasons are many, but none was more important than the patriarchy that Fitzhugh, Ruffin, and others celebrated. Once again, Fitzhugh is an unabashed defender of 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.[297]

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."[298] In the early South, that connection sometimes worked in favor of wives. 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."[299] 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."[300]

That sentiment changed over time. In early America, poor whites often identified and consorted with slaves. More and more, the slave owning planters who governed the South drove a wedge between them. In one sense poor white males benefited because no matter how poor they were, they shared whiteness with the dominant white males. As conditions for slaves worsened, poor white males could feel more and more superior and could act on those feelings. Witness the sometimes drunken behavior of slave patrollers, who in the nineteenth-century

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296 SUSAN J. TRACY, IN THE MASTER'S EYE REPRESENTATIONS OF WOMEN, BLACKS, AND POOR WHITES IN ANTEBELLUM SOUTHERN LITERATURE 68 (1995).

297 BARDAGLIO, *supra* note 257, at 27.

298 FITZHUGH, *supra* note 268, at 205. *See also* GOLDFIELD, *supra* note 284, at 90; MCCURRY, *supra* note 242, at 219; and COTT, *supra* note 28, at 63.

299 Helms v. Franciscus, 2 Bland 544, 566 (1840).

300 Hewitt v. Hewitt, 1 Bland 101 (1825).

were drawn in increasing numbers from lower class white males—"[t]hey jes' like policemen, only worser."[301]

It was different for white women. Their legal identity was increasingly merged with that of slaves. Mary Chestnut commented on the connection in her diary: "[t]he Bible authorizes marriage and slavery," she wrote. "Poor women!—poor slaves!"[302] A similar semantic link between women and slaves, both 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.[303] 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 "natural" order of white and black.[304]

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.[305] His words applied equally to wives. Opposing women's political rights in 1842, for example, a writer in the *Southern Quarterly* argued that a married woman who was independent of her husband "nurtures misery for herself and injury to the community."[306] "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: "'[t]hy desire shall be to thy husband, and he shall rule over thee.'"[307] The fiction

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[301] SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 99-102 (2001). The quotation is from a 1937 interview with W.L. Bost, a former North Carolina slave. *Id.* *See* BILL CECIL-FRONSMAN, COMMON WHITES: CLASS AND CULTURE IN ANTEBELLUM NORTH CAROLINA 87 (1992) on the violence of slave patrols. Asking a question in his concurring opinion in an 1849 case before the North Carolina Supreme Court, Justice Nash implied a great deal: "[s]uppose 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, 31 N.C. 391, 408 (1849).

[302] GOLDFIELD, *supra* note 284, at 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*, 43 J. HIST. IDEAS 567 (1982).

[303] Waddill v. Martin, 38 N.C. 562, 564 (1845); *see also*, JOHNSON, *supra* note 47, at 243.

[304] Edwards, *supra* note 226, at 128.

[305] Palmer's sermon titles are cited in COTT, *supra* note 28, at 60; THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 94 (1999).

[306] BARDAGLIO, *supra* note 257, at 27.

[307] *Joyner*, 59 N. C. at 325. The quotation is from *Genesis* 3:16.

of Nathaniel Beverley Tucker makes the same points, as Susan Tracy has shown. Women were "passive sufferers," in Tucker's words "born to suffer."[308] 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 interested views of others may prepare for her."[309]

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."[310] And that:

> 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.[311]

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."[312] A blow was "not degrading to a slave-neither is it . . . to a woman."[313] 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 ascribed to a 'wicked heart, regardless of social duty.'"[314] "The law requires a slave to tame down his feelings to suit his lowly condition . . . "[315]

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 . . . ."[316] While Chief Justice Ruffin dissented from the majority opinion, he expressed himself more fully on the matter of subservience. "Slaves," he wrote,

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308 TRACY, *supra* note 296, at 77. "Passive sufferers" is Tracy's term

309 *Id.*

310 COBB, *supra* note 305, at 98.

311 *Id.* at 98-99.

312 MCCURRY, *supra* note 242, at 219.

313 *Id.*

314 State v. Caesar, 31 N.C. 3911849)..

315 *Id.* at 400, 406.

316 *Id.* at 401.

"not dangerously or excessively and cruelly beaten, will not so feel the degradation and outrage of a battery by a white man . . . ."[317] 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."[318] The consequences of a change in attitude were dire, suggesting a Southern world turned upside 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."[319] 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. Legally or not, each was subject to beatings.

Wives suffered because many of them, especially elite women, were trapped in a "culture of resignation"[320] 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"[321] that 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."[322] 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. In 1850, the South's murder rate was seven times the North's.[323] Some of those murders were lynchings. Even before the Civil War lynch mobs killed upwards of three hundred whites, mostly men.[324]

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317 *See id.* at 420.

318 *Id.* at 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." *Id.* at 423. 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." *Id.* at 424.

319 *Id.* at 428.

320 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 (Jane Cashin, ed.,1996).

321 *See* CECIL-FRONSMAN, *supra* note 301, at 18

322 TED OWNBY, SUBDUING SATAN: RELIGION, RECREATION, AND MANHOOD IN THE RURAL SOUTH 1865-1920, 16 (1990).

323 CECIL-FRONSMAN, *supra* note 301, at 170. *See* GOLDFIELD, *supra* note 284, at 10. 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. *Id.*

324 Cashin, *supra* note 320, at 13.

Clearly, wives understood their surroundings and 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 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' cruelty and sometimes by initiating prosecutions against them, as was evident from the appeals before the North Carolina Supreme Court.[325]

### *E. Covering Up the Flaws*

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*.[326] Like other Southerners, judges knew where abolitionists got their damning material. They could imagine publicized accounts about wife abuse being similarly used. 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.[327]

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

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[325] *See* Laura F. Edwards, *Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South*, 65 J. S. HIST. 733-770 (1999). *See also*, Stephanie Cole, *Keeping the Peace: Domestic Assault and Private Prosecution in Antebellum Baltimore*, in OVER THE THRESHOLD: INTIMATE VIOLENCE IN EARLY AMERICA 148-69 (Christine Daniels & Michael V. Kennedy eds., 1999) (noting that slavery was losing its hold in Baltimore and that Maryland was a border state).

[326] New York: American Anti-Slavery Society.

[327] On judges and abolitionists see, AREILA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM, at 5 (2000). *See also* VARON, *supra* note 287, at 112, 118-19 (for fictional treatments of slaves rejecting freedom).

Court first promulgated its privacy doctrine in 1852 and that Fitzhugh's *Sociology of the South* appeared two years later, closely following Harriet Beecher Stowe's vivid attack on Southern slavery and the Southern patriarchy.[328]

Nor was it coincidence that the *Rhodes* 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—leaving only children—and made it far more difficult to argue that those subject groups were legally bound to obey husbands and former masters.

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 and beat their wives, and they needed to exercise that power even without a legal right to it.[329] In 1913, Conway Whittle Sams, a Virginia lawyer, explained the matter well, although he thought his insight applied to the whole 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 position of the upper classes in the North and West. About all that is left is domestic authority.[330]

For the South, family privacy was the perfect cover. But again, white women and blacks 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 slave-owners, 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 a private matter not subject to state or federal government interference. As Guy M. Bryan wrote to his friend Rutherford B. Hayes: "'[s]o far as the negro is concerned, it is a great

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328 UNCLE TOM'S CABIN, OR LIFE AMONG THE LOWLY (Boston. 1852).

329 See GOLDFIELD, *supra* note 284, at 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." *Id.* at 94. Perhaps that contributed to the sway of the family privacy doctrine.

330 CONWAY WHITTLE SAMS, SHALL WOMEN VOTE? A BOOK FOR MEN 309 (1913).

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.'"[331] But Hayes knew what that meant: "[t]he 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 . . . ."[332]

Wife abuse, often excruciatingly brutal, occurred throughout the country; but elsewhere the higher courts responded differently. Outside the South, courts expressed their horror and often tried to extend their protection. Their actions were paternalistic and often 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 "[s]lavery, marriage, [and] religion, are the pillars of the social fabric."[333] 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 and defend the honor of the region and Southern civilization.

## IV. TORT CASES AND PRIVACY IN THE NORTH

### *A. The Cases*

No other state courts followed North Carolina 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 doctrine. Some evidence seems to suggest that Northern judges also developed a new policy to serve the old goal of tolerating abuse but that they announced it in tort cases. Wives sued their husbands for beating them. This legal action was often very difficult for judges to accept, schooled as they were in the old common law tradition that husbands and wives were one and hence incapable of suing each other.[334] As Tapping Reeve noted in 1816, no battery could give either husband or wife "'a right of action to recover damages.'"[335] Once again, there are a few well-known and 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

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331 CHARLES RICHARD WILLIAMS, THE LIFE OF RUTHERFORD BIRICHARD HAYES: NINETEENTH PRESIDENT OF THE UNITED STATES 494 (Houghton Mifflin Company 1914).

332 *Id.* at 494.

333 FITZHUGH, *supra* note 268, at 206.

334 *See* Simon A. Bahr, *International Torts*, 4 U. NEWARK L. REV. 355 (1939) for an early and very thorough study of these cases. *See also* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359-478 (1989).

335 Tobias, *supra* note 334, at 371.

1860 and revised in 1862.[336] As this case demonstrates, even Northern courts at times 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 New York's Married Woman's Property Act—and of similar acts passed in other states—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.'"[337] Catharine Longendyke used the act to sue her husband Peter for damages resulting from an assault and battery.[338] The referee first hearing the suit awarded her $100.[339] In considering the appeal, the Supreme Court was not interested in the facts 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.[340] 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 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 without embarrassment. Justice Hogeboom, for the court, wrote: "[t]he 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 . . . . [341]

The court's use of 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.[342] 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. [343] In addition, it also 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."[344] It would "involve the husband and wife in perpetual controversy and litigation... [and] sow the seeds of perpetual domestic discord and broil."[345] In other words, if husbands and wives were left alone, they would work out their problems. Privacy would save

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336 Longendyke v. Longendyke, 44 Barb. 366 (N.Y. 1863).

337 Schultz v. Schultz, 27 Hun. 26, 27 (N.Y. 1882) *See also* Miller v. Miller, 78 Iowa 177 (1889), *supra* notes 211 to 219 and accompanying text.

338 *Longendyke*, 44 Barb. at 366.

339 *Id.* at 366-67.

340 *Id. See infra* notes 347 to 351 and accompanying text.

341 *Id.* at 368.

342 *Id.*

343 *Longendyke*, 44 Barb. 366.

344 *Id.*

345 *Id.* at 369.

marriages; exposure would likely generate new problems. The Supreme Court threw out the referee's judgment and ordered a new trial, leaving no room at all, however, for Catharine Longendyke.[346]

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.[347] A wife, the Appeals Court then ruled, was not chattel: "[n]otwithstanding 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."[348] Even strangers had the right to protect her from her husband's "oppression and cruelty."[349]

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.[350] Though the Supreme Court deciding the case was sitting in Albany, it is not difficult to imagine its members resisting anything smacking of revolutionary change in a disordered world already undergoing far too much change. Historically, when society is thought to be in turmoil, the family, with all its faults, becomes in people's minds the bastion of stability. In fact, there was nothing revolutionary about the Appeals Court's decision a year later in *Barnes*, which was also decided during the Civil War. *Barnes* was simply a reaffirmation of New York courts' decades old protection of wives who fled abuse, which began with *Hutcheson v. Peck* in 1808.[351]

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346 *Id.* at 370. *See also* State v. Edens, 95 N.C. 693 (1886). In *Edens*, which involved a husband's indictment for slander of his wife, the North Carolina 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. *Id.* It must have been a great relief to a North Carolina court to be able to cite precedent from another state for its actions. Of course, the New York court did not go on to say that it would tolerate abuse.

347 Barnes v. Allen, 1 Abb. Dec. 111 (N.Y. 1864).

348 *Id.* at 115.

349 *Id.* at 115-16.

350 PHILLIP SHAW PALUDAN, "A PEOPLE'S CONTEST": THE UNION AND THE CIVIL WAR 1861-1865 189-191 (1988).

351 Hutchenson v. Peck, 5 Johns. 196 (N.Y. Sup. Ct. 1808). One of the judges noted that "[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." *Id.* at 210. *See also, e.g.*, Bennett v. Smith, 21 Barb. 439 (N.Y. Gen. Term 1856), Smith v. Lyke, 20 Hun. 204 (N.Y. 1878).

Privacy was an issue in a few other major nineteenth-century tort cases, including *Abbott v. Abbott*, a case heard in 1877 by the Maine Supreme Court.[352] Again, in this Northern state, privacy was not invoked to excuse or cover abuse. In *Abbott*, a divorced woman sued her former husband and some of his friends for having imprisoned her in an insane asylum and beating her.[353] Somehow she managed to get out of the asylum and was subsequently divorced from her husband.[354]

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."[355] "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."[356] Despite "the gradual evolution of the law going on, for the amelioration of the married woman's condition,"[357] the plaintiff's position was not supported by any of the principles of the common law.[358] By marriage, "the being of the wife . . . merged in the being of the husband."[359] 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."[360]

The court did not stop there. Unnecessarily for this case, it added a general comment that could easily be misunderstood: "[m]arriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other." In support of this statement, 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.'"[361]

The recent precedent of North Carolina notwithstanding, the Maine court was not sanctioning wife abuse. Even while borrowing important words from *Oliver*, Maine's Supreme Court distanced itself from North Carolina by the words it omitted. In *Oliver,* the North Carolina court ruled, "[i]f no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband," then the curtain should be drawn.[362] Maine's omission was full of meaning. Referring to but not quoting "a learned and instructive note" in a seemingly

352 Abbott v. Abbott, 67 Me. 304 (1877).
353 *Id.*
354 *Id.*
355 *Id.* at 305-06.
356 *Id.* at 306.
357 *Abbott*, 67 Me. at 307.
358 *Id.* at 305.
359 *Id.* at 306.
360 *Id.* at 307.
361 *Id.*; *see also Oliver*, 70 N.C. at 61-62.
362 *Oliver*, 70 N.C. at 61-62.

unrelated case from Massachusetts, the Maine court clearly indicated that the law of all American states was "undoubtedly" that a husband could not "strike his wife, to punish her, under any circumstances . . . ."[363] Of course, the court should have excepted North Carolina, where, as we have seen, even nine years after *Abbott* the North Carolina Supreme Court would go out of its way in a slander case to again drop "the curtain upon scenes of domestic life," effectively hiding and tolerating most cases of abuse.[364]

Other than its mistake in referencing 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, the same year as *Oliver*.[365] And there was indeed a lengthy, learned, and instructive note that traced legal opinions about wife abuse from Sir Edward Coke's day—and actually about his private life—through *The Laws Resolutions of Women's Rights* in 1632, the 1641 *Massachusetts Body of Liberties*—which stated that "every married woman shall be free from bodily correction or stripes by her husband, unless it be in his own defence, upon her assault"—through Blackstone, and back to Sir Matthew Hale, "a greater authority than Blackstone."[366] The Massachusetts court then concluded: "[t]he cases in the American courts are uniform against the right of the husband to use any chastisement, moderate or otherwise, toward the wife for any reason."[367]

And if all that were not enough to show it was not excusing abuse, the Maine Supreme Court noted that Cynthia Abbott 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*."[368] And if she won a divorce, she had dower in his estate and the right to alimony. In determining the latter, "all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court."[369]

These Northern tort cases are unquestionably significant. By narrowly interpreting newly passed property laws and by not seizing the openings presented by the wording of some clauses, the late nineteenth-century justices in these cases 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

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363 *Abbott*, 67 Me. at 307.

364 *Edens*, 95 N.C. at 696.

365 Commonwealth v. Barry, 2 Green's Cr. L. Reports 284 (1874).

366 *Id.* at 288. 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." *Id.*

367 *Id.*

368 *Abbott*, 67 Me. at 307.

369 *Id.*

violence, which was the real issue in the North Carolina privacy cases. In addition, the Northern judges invariably pointed out that wives had other remedies. In 1898, in *Bandfield v. Bandfield,* for example, the Michigan Supreme Court, reiterating its year-old decision in *Wagner v. Wayne Circuit Judge* 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 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."[370]

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 that 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, furnishing 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 forced to pay their wives for the privilege of beating them. And as with fines, tort damages would be money taken from other sources within the family income. Of course, for a divorced woman—as in the *Abbott* case—the effects of a successful tort case would be different.

### *B. The Critiques*

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. In 1882, twenty years after *Longendyke*, the New York Supreme Court again dealt with a wife suing her husband for assault and battery.[371] Though its decision in *Schultz v. Schultz* was ultimately thrown out by the Appeals Court,[372] 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 that placed the notion of family above that of personal protection.

Brady noted in his opinion that it was in *Freethy v. Freethy*—a case preceding *Longendyke* 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."[373] 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

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370 Banfield v. Banfield, 117 Mich. 80, 83 (1898).

371 Schultz v. Schultz, 27 Hun. 26 (N.Y. 1882). *See also Judge Brady on Women's Rights,* N.Y. TIMES, April 13, 1882, at 10.

372 Schultz v. Schultz, 89 N.Y. 644 (1882).

373 *Schultz*, 27 Hun. at 27-28.

the objects and purport of the acts of 1848, 1849, 1860, and 1862."[374] *Longendyke* was more of the same, but with additional comments oppressive to married women. In fact, Brady argued that "the object" of the property acts was precisely "to invade the common law and dispel it, which they have successfully done."[375] So important was the point, he kept coming back to it: "[t]he 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."[376]

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: "[i]t 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 . . ."[377] 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 former, and by enforcing greater restraint upon the latter . . . ."[378] Allowing a wife to sue would "preserve peace."[379]

As if the message was not clear enough, Brady and the New York Supreme Court, with Judge Daniels concurring, drove it home with the clearest statement delivered by any court on the subject of abuse—namely that it was "inexcusable, contemptible, detestable,"[380] even going back to the old Saxon law, which they found "was as contemptible as it was barbarous."[381] "No husband, either by the laws of God or man in any civilized community, has the right to abuse his wife . . . ."[382] Any man who would abuse his wife ought to be "restrained by all the rules designed to prevent brutality."[383]

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374 *Id.* at 28.

375 *Id.* at 30.

376 *Id.* at 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. *Id.* at 32. 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 . . . " *Schultz*, 27 Hun. at 32. 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." *Id.*

377 *Id.* at 28.

378 *Id.* at 33.

379 *Id.*

380 *Schultz*, 27 Hun. at 33.

381 *Id.* at 29.

382 *Id.*

383 *Id.*

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 in the seriousness of the problem of spousal abuse.[384] Like a few other judges over the course of the century, Davis shifted attention away from physical violence, making husbands and wives seemingly equal combatants in household contests. He would leave to the legislature or the Court of Appeals "the gallant duty" of dealing with "domestic disputes of husband and wife."[385] He placed "unbridled tongues" and "angry blows" on the same level.[386] 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."[387] One had to leave room for amicable settlements "free from the liens of litigious attorneys."[388]

Brady's angry words notwithstanding, his decision was quickly overturned by the Court of Appeals without a formal opinion in the *New York Reporter*.[389] But the issue in New York would not go away. In a bizarre case in 1897, Katie Abbe sued her husband Richard to recover damages for an assault and battery.[390] When the county court ruled against her, it also assessed her for costs.[391] The Supreme Court felt bound by the earlier Court of Appeals decision in *Schultz,* while voicing its agreement with Brady's overturned decision.[392] 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."[393] But Hatch continued:

> [S]he 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.[394]

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384 *Id.*

385 *Schultz*, 27 Hun. at 34

386 *Id.*

387 *Id.*

388 *Id.; see also Judge Brady on Women's Rights, supra* note 371.

389 *Schultz*, 89 N.Y. 644. According to the HISTORY OF WOMAN SUFFRAGE, 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. 3 HISTORY OF WOMAN SUFFRAGE 1876-1885, 439 (Elizabeth Cady Stanton et al. eds., 1886).
"Could satire go farther?" the editors asked. *Id.*

390 Abbe v. Abbe, 48 N.Y.S. 25 (1897).

391 *Id.*

392 *Id.*

393 *Id.* at 25-26.

394 *Id.* at 26. There is a reference to this case, unidentified, in the WOMAN'S JOURNAL (Jan. 8 1898).

The United States Supreme Court ruled in a similar case in 1910, over the dissent of Justices Harlan, Holmes, and Hughes, that a married woman could not sue her husband for assault and battery, in this particular case for $70,000.[395] 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."[396] It was "obvious" to the majority 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.[397] Those who argued that the code allowed a beaten wife to sue her husband for damages were trying to impose a "liberal construction" on the law.[398] Rather, such "radical and far-reaching changes" required "language so clear and plain as to be unmistakable evidence of the legislative intention."[399]

The Supreme Court also took up the matter of privacy. Disregarding state differences and the numerous hardships it was imposing on women, the Court noted that wives who suffered "atrocious wrongs" had remedies at hand in divorce and alimony.[400] In addition, they could always "resort to the criminal courts."[401] 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."[402]

In his dissent, Justice Harlan quoted at length from the District Code, which he thought "embrace[d] such a case as the present one."[403] It was not the court's role to determine whether it was sound public policy and "not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department."[404] He did not believe that Congress meant to give a wife the right to sue her husband in tort for damages to her property, but not for damages to her person.[405] Justice Harlan accused the majority of reading into the act words excepting husbands that were simply not there.[406] Harlan closed his opinion by denying 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

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395 Thompson v. Thompson, 218 U.S. 611 (1910).
396 *Id.* at 616.
397 *Id.* at 617.
398 *Id.*
399 *Id.* at 618.
400 *Id.* at 617.
401 *Id.* at 619.
402 *Thompson*, 218 U.S. at 618.
403 *Id.* at 621.
404 *Id.*
405 *Id.* at 623.
406 *Id.* at 622-23.

contrary," it was the majority that was defeating the will of the legislature "by a construction of its words that cannot be reconciled with their ordinary meaning."[407]

## V. CONCLUSION: THE SOUTH, THE NORTH, AND PRIVACY

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 and the hurt it allowed husbands to cause wives. In North Carolina and elsewhere in the South, the courts' concern 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 that 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 a small selection of cases from too few states may also be illustrated by reference to two 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 the other tort cases discussed above, involving a wife suing her husband for assault and battery.[408] Just four years after the United States Supreme Court had ruled against an abused wife in *Thompson*, 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."[409] 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?"[410] It too, like Brady in the overturned *Schultz* decision, directly addressed the issue of privacy and rejected the notion that "domestic tranquility" would best be served by legal inaction and a veil of secrecy over the home.[411] Instead, it stated that "[c]ourts are established and maintained to enforce remedies for every wrong . . ."[412] Entirely rejecting the notion that privacy was absolute for husbands and wives, the court recognized that abuse escalated and eventually spilled out of the house.[413] 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."[414] To allow the parties to go it alone would be to leave them "to answer one assault with another . . . until the

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407 *Thompson*, 218 U.S. at 623-24. The case is reported in the WOMAN'S JOURNAL (Apr. 15 1911).
408 Brown v. Brown, 89 A. 889 (Conn. 1914).
409 *Id.* at 891.
410 *Id.*
411 *Id.*
412 *Id.* at 892.
413 *Id.*
414 *Id.*

public peace is broken."[415] The court's conclusion helps to explain Connecticut's liberal divorce laws and brings to mind the comment of Connecticut legislators almost three hundred years earlier that bad marriages were not only troublesome to husbands and wives, but also to their friends.[416]

A month after *Brown*, the Oklahoma Supreme Court decided *Fiedler v. Fiedler*, which involved a woman's action against her former husband for shooting her with a shotgun while they were still married.[417] It was too soon for the court to cite *Brown*, but it quoted Justice Harlan's dissent in *Thompson* at length.[418] 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."[419] Whether wives could sue husbands, the court noted, "has been the occasion of much profound reasoning and of an equal amount of sophistry."[420] Courts that 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."[421] 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."[422] 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 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

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415 *Id.*

416 See GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 18 (1991), for the remark of the Connecticut legislators in 1640.

417 Fiedler v. Fiedler, 42 Okla. 124, 140 P. 1022 (1914).

418 *Id.* at 129.

419 *Id.* at 127.

420 *Id.* at 125.

421 *Id.* at 126.

422 *Fiedler*, 42 Okla at 126. More than thirty years earlier, the Colorado Supreme Court was equally blunt:

> The courts, which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempted departure from the principles of the body of our law... for the enlargement of the rights of married women, regarding such enactments as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers...

Wells v. Caywood, 3 Colo. 487, at 491 (1877). My attention was drawn to this comment by Walter Clark's 1913 speech to North Carolina women's clubs. Clark, *supra* note 175, at 5.

> or wife for assault and battery, cudgelings, or for shooting each other with shotguns. We fail to feel the force of such philosophy. 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.[423]

Two years before *Brown* and *Fiedler* the Alabama Supreme Court had recognized the broader issues involved in domestic violence cases. *McGee v. State* was not a tort case, but a more serious criminal case that involved an assault with intent to murder.[424] The defense objected that the wife was not a competent witness. The court ruled that not only has the rule always been that a wife could testify in personal assault cases, but indeed that "she can be *compelled* to testify, whether she desires to do so or not."[425] Its argument was clear: "it is to the interest of the public that all crimes shall be punished."[426]

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 opinion over a hundred years earlier, which stated that abuse was "mischievous to society."[427] 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."[428] 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 coming to the South in the years before the Civil War and continued for some time after. Their institutions were challenged by "the whelming tide of social and political revolutions," as the Virginia Supreme Court aptly noted,[429] Southerners sought first to justify slavery and demonstrate the resultant superiority of Southern

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[423] *Fiedler*, 42 Okla. at 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.

*Id.* at 130.

[424] McGee v. State, 4 Ala. App. 54, 58 So. 1008 (Ala. Ct. App. 1912).

[425] *Id.* at 56 (emphasis added).

[426] *Id.*

[427] Prather v Prather, 4 S.C. Eq. 33, 35 (1809).

[428] *Threewits*, 4 S.C. Eq. at 561.

[429] *Bailey*, 21 Gratt. at 59.

families, secondly to resist any further loosening of marriage ties and traditional obligations, such as the duty of wives to obey, and lastly to undo the revolutionary changes introduced by emancipation. Throughout this period, wife abuse was treated as a private matter. It was trivialized and privatized so that it could be overlooked and overlooked so it could be both trivialized and privatized. In essence, both before and after the Civil War, in concealing and excusing wife beating the courts served the Southern patriarchy well.