9

THE TRANSFORMATION OF DOMESTIC LAW

HOLLY BREWER

Law has a peculiar tendency to normalize social relations that are in fact culturally distinct in different societies and eras. There is no better example of this tendency than domestic relations. Following common law norms, legal historians have largely portrayed a particular domestic order as peculiarly unchanging, indeed as private and ideally inviolate. In an abstract sense domestic order may thus seem to be outside the law. The law's very success in normalizing family relations has obscured its own agency in shaping them, rendering its own role in historical and cultural change mysterious.

In England and its colonies in the early modern period, the law – both common and statute – regulated domestic order in many and profound ways. That regulation was also the subject of intense dispute. Laws defining domestic order circumscribed many people's lives from birth through death, shaping their status and mandating appropriate behavior – for women and children; for workers, servants, and slaves; and indeed for husbands, fathers, and masters. Relationships, particularly the status of "dependent" groups, usually thought of as static throughout the colonial and early national periods of American history, and in early modern Britain too, were recreated over the course of the eighteenth century through common law justifications of a particular domestic order. These acts of creation occurred during a period of dramatic struggle over the basis of authority, not only over abstract political authority but over the rules that should govern the household and indeed over the very definitions of household and domestic. The results diminished the legal powers of lords and masters and increased those of fathers and husbands. These changes were accomplished with a legal sleight-of-hand that made the powers of husbands and fathers seem eternal within the common law and obscured the frequent conflicts between the authority of masters and those of fathers and husbands. The new legal regime was built on a fiction that the rights of kings, lords, and masters were essentially the same and that all were variations on the same patriarchal absolutism that was itself a celebration of fatherly authority. In reality the rights of

kings, lords, and masters were often in conflict with those of common men, women, and children. Consequently, the struggle over domestic space and authority was central to a larger struggle over rights and political authority.

To understand how law could normalize a particular domestic order, one must first sketch the vision of that order that emerged in the late eighteenth century. This was a moment of peculiar influence for the common law, and especially for its main expositor, Sir William Blackstone. The first professor of law at Oxford University, Blackstone is best known for the grand synthesis of the common law he completed in the 1760s. Blackstone's synthesis was profoundly influential in America no less than in England. He was cited more in American newspapers of the 1790s – that critical period of the creation of state constitutions and legal norms – than any other thinker, including Locke and Montesquieu, the sages of previous decades. At the end of the eighteenth century, Tapping Reeve, founder of the first American law school in Connecticut and author of the first American treatise on domestic law, posed neat, parallel categories of domestic order under the common law drawn straight from Blackstone: child/wife/servant appear ranged beneath father/husband/master. The head of household speaks for, orders, and controls those under his roof: they are his property and speak (if at all) only through him.[1]

Reeve claims to be portraying the common law of household relations as they existed throughout the colonial period and in England. In fact, he is largely reproducing both Blackstone's categories and his portrayal of them as unchanging. Blackstone had ordered in parallel the powers of masters over servants (first), followed by the powers of husbands over wives, parents over children, and guardians over wards (a lesser category). In each category, Blackstone set up the same order of identity and obedience, consistently denying the ability of the lesser person(s) to have legally independent judgment. Take, for example, the rule of husbands over wives: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything."[2] Blackstone even claimed that a married woman could not testify against her husband. In his eyes this act was equal to self-incrimination.

Blackstone's changes built on more than a century of common law arguments that had begun to prioritize the rights of persons and the idea of

[1] Tapping Reeve, *The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Powers of Courts of Chancery* (New Haven, 1816).

[2] William Blackstone, *Commentaries on the Laws of England* [London, 1765], facsimile ed. (Chicago, 1979), 1: 430.

consent – at least for those he held to be able to consent. His efforts harmonized earlier treatises and decisions in a fashion that made the common law more coherent, but at the expense sometimes of those persons he considered "dependent" on others. With respect to children, his logic is more persuasive. In his attempt to rationalize norms across categories, however, he ended up excluding workers and women (whom he also categorized as dependent) from obtaining many of the rights – and the ability fully to consent – that he elsewhere privileged.

Historians have allowed that during the seventeenth and eighteenth centuries some change in the legal rules of domestic hierarchy occurred with respect to servants, employees, and slaves – more in America than in England itself. Masters' powers declined, it is generally thought, along with a tendency to glorify "free labor." With regard to the remainder of the head of household's powers, however, only very minor regional variations, or "deviations" arising perhaps from social factors, such as longevity, the frontier, or the shortage of women, have been admitted. Generally, the organization of households in places like Puritan New England has been treated as good evidence for unchanging patriarchal legal power.

In fact, common law rules of domestic hierarchy were far from static. Just as masters' authority over servants, slaves, and workers was debated, so were the other aspects of domestic order. Throughout the seventeenth- and eighteenth-century Anglo-American world, the norms of domestic authority changed in response to some of the same forces that shaped contemporaneous debates about political hierarchies. Reeve and Blackstone, in other words, represent not stasis but the winning side in a fierce argument over the proper boundaries of household government and of personal identity. So-called deviations often expressed hotly contested struggles over legal norms that had everything to do with political order, not simply with domestic order.

To understand these developments we must begin by focusing on the power of masters. Reeve's triptych is neat but misleading. When we separate the authority of masters from that of husbands and fathers we can begin to measure – and to imagine – the extent of the change in the law of household government.

The fundamental change that occurred during the seventeenth and eighteenth century was that the legal powers of masters (or as the legal guides of the seventeenth century called them, Lords) were extended to men as fathers and as husbands. While this was happening, the powers of masters were changing – ameliorating in some ways, consolidating (depending in part on whom the master had power over: slave, servant, or employee) in others. Despite the revolutionary challenge to hierarchies in the broader political order, standard invocation and interpretations of the common law tended

to substantiate and increase many aspects of domestic hierarchy, including even that of employers over employees. Overall, the common law developed simple parallel categories that tended to increase the power of the patriarch. New hierarchies came into being alongside older ones.

Largely outside the common law, meanwhile, revolutionary reforms and principles undermined older assumptions about status by idealizing consent and equality. Ideally, relations between adult men would be based on contracts, freely entered. Contract challenged the principle that one was born into a status that the law would confirm. Instead, adult men would gain some influence over their status at work and more control over their wives and children. Men as fathers, that is, gained grounds to challenge men as masters, such that poor children, for example, might not be as easily removed from their fathers and forcibly apprenticed.

The heritage of the Revolution and the legislative reforms that followed in its wake proved to be more ambiguous for women and children. Their opportunities to choose their status were sharply limited: women could choose mostly at marriage, and children not at all. Also, for some adult men – and certainly for their wives and children – these norms did not apply at all. They were slaves, not "free laborers." They did not possess legally recognized marital rights or custodial powers over their children. Their master owned both. Slavery became the major continuation of older common law norms about the rights of Lords.

Once this history is unpacked, it is apparent that the domestic law of the early nineteenth century was more complex than Reeve's simple presentation suggests. Many of his categories highlighted the principle of consent. In the same breath they raised a fundamental question: whose choice? Blackstone's common law allowed choice for some, but not others.

A final preliminary. Both inside and outside the common law, we shall see, many of the principal reformers who rose to challenge the rights of Lords in the seventeenth century (who argued for the rights of men) were from Puritan or dissenting backgrounds. In both America and in England, the political and legal debates of the seventeenth century had religious dimensions. Puritans and dissenters voiced the most profound challenge to the rights of Lords and argued for the rights of husbands and parents. Migration and civil war created opportunities to put new practices in place, first in Puritan New England and then in England during the Interregnum. Many of the most important common law legal reformers, men like Sir Matthew Hale, came from dissenting backgrounds. Their arguments combined with the larger debate in democratic/republican political theory that challenged the rights of birth, of Lords, and especially of the divine right of kings. Religion, politics, and law were in many ways conjoined.

I. THE OLD COMMON LAW

In the sixteenth and seventeenth centuries, throughout Anglo-America, the family was the basic unit of society. Perhaps that has always been true. Yet, relations of power within families – and the question of who is to be considered a member of which family – have differed dramatically across time and culture. In England and in its North American colonies, the family unit was composed of a master, his servants and slaves, his wife and his children, and sometimes his children's or his servants' (and normally his slaves') families. In the earliest period, the household master's powers were defined most clearly in application to non-kin – servants. The household mistress (the master's wife) had similar powers. Thus, authority accorded primarily to rank. The powers of husbands and of fathers were much less well defined: the child of a servant usually did not belong to the servant, but, at least in a legal sense, to the master.

These basic statements reflect a profoundly hierarchical society. Within Anglo-America in the seventeenth century, however, a great debate raged over the powers of masters *qua* fathers and husbands and – more broadly – parents who questioned this hierarchy. The debate took place within a society torn apart by religious conflict. In areas where religious radicals gained control, notably early New England and later colonies like Quaker Pennsylvania, they adopted contrarian norms.

In taking seriously the mainstream rules that prevented servants and slaves from forming legal families of their own, we begin to grasp the broad picture of Anglo-American colonial life, particularly as it developed in the South, outside the dissenter colonies. To grasp it fully, we must also recognize how different the powers of fathers and husbands were from those of masters. The rights of wives, of children, and of servants were also distinct. Each step away from Reeve's normalized post-eighteenth century perspective can transform our view of authority, of liberty, and of the family, especially if we then pause to survey the panorama before us.

The Status of Servants in Anglo-America

Sixteenth- and seventeenth-century England had a well-developed principle and practice of legal servitude. Statutes made labor obligatory for many landless people. Inheritance laws that governed the transfer even of rented land privileged the oldest son and deprived others of the ability to own land themselves. Whereas small holders and tenants had held real claims on land, even if their property claim was part of a multilayered ownership, efforts to "enclose" land vacated their ancient common law use rights in favor of the "greater" claims of lords. These larger property rules and practices are

critical because most people made their living from the land. Lack of access to land meant that many people had no choice but to work for others as farm laborers or domestics. If they refused to work, they could be forced under vagrancy statutes into contracts of a year, or of many years, depending on their age.

At the dawn of its seventeenth-century colonization of the New World, England suffered from significant poverty. By some estimates, half the population was poor. Primogeniture, enclosure, and the dissolution of the older Catholic system of caring for the poor with the Reformation added up to a near crisis. Contemporary tracts and court records dwell on the problem of vagrants. The laws were harsh. There was no minimum age for forced service: by Elizabethan statute, a child of any age could be imprisoned until he or she signed a contract agreeing to labor until the age of 24 for a boy or 21 for a girl. The only questions were the poverty of the family or individual and whether anyone actually wanted their labor. The laws did not always work to the advantage of landowners: stories were told of masters forced to accept unwanted laborers. Perhaps so. Yet it is clear that the laws that denied ownership of landed property to one group and simultaneously made them the partial property of others are central to understanding the legal principles undergirding authority and domestic order in England and its colonies.

By these principles, hierarchy regularly trumped kin-family relations. Masters and mistresses often had authority over others, including others' children and others' wives and husbands. The elements of domestic hierarchy that we tend to assume went hand in hand – the powers of masters and those of husbands and fathers – were thus often in direct conflict. This was not true of all families of course. England had many tenants and smallholders who were not directly "in" the household of others and had their own separate families. Servants who "lived in" with their masters and mistresses were of course much more dependent than tenants. However, landlords often had claims over smallholders that made these men and women dependent on them in various ways. To acknowledge this dependency, which was often legally explicit and had important cultural and political consequences (such that those who were dependent on others were not allowed to vote), is to begin to understand that domestic order had a broad, multilayered legality.

Principles of dependency were eminently transportable. Consider the fate of some of the first immigrants to Virginia. Faced with a shortage of voluntary immigrants and not much money, the Virginia Company persuaded a number of London churches to participate in a benevolent enterprise. The Company argued that children who had been apprehended for the crime of "vagrancy" (not having employment) should not be apprenticed locally.

Instead the churches should pay for them to go to the New World and work there. In exchange, the Virginia Company promised that at the end of their service of seven or more years, the children would be given land, a reward unheard of in England. The churches agreed to underwrite the costs of passage. Unfortunately, the laws of England in 1618 required that the children themselves sign the labor contracts, and many refused to do so. To circumvent this restriction, the Privy Council granted a special exemption, forcing the children to go to Virginia and serve masters. Neither the laws nor the Privy Council required the consent of their parents. Of course, on some level this was really charity by the London churches; the parishioners thought they were offering the children a chance at a better life, including not only land but also training in "husbandry" (farming). Children needed such training to make a way for themselves. The very premises of the policy, however, revealed a society in which the labor of some for others in a property relation was normal, rank was central, and the integrity of poorer families unimportant.

The story also incorporates the promise of free land – symbolic of New World opportunity. One of American history's most durable myths is that land was free and abundant throughout the colonial period, undermining like nothing else the status relationships of the mother country. Though land was free at times, access was often controlled. Virginia's initial promise of land to freed servants, for example, changed after 1618. Masters thereafter received a "headright" – free land for each servant imported – a very different bargain that offered much less opportunity to the servant. While other colonies, like Maryland, continued to allow freed servants to claim land, the claims still had to be surveyed and granted through the secretary's office, a costly process. Former indentured servants were more likely to end up long-term tenants than landowners. This was especially so in the Southern colonies, where migrants were largely servants.

Long-term tenancy was of course an improvement on servitude. For whites who survived their servitude, the colonies offered better opportunities than England. Yet, servitude remained widespread. Indeed, once we include slaves – blacks and captured Indians – in the calculation, the percentage of the population in servitude was much higher in the colonies, particularly in the South, than in England. Correspondingly, the laws circumscribing servitude of all sorts became increasingly complex and rigid over the course of the colonial period. Every English colony routinely sanctioned slavery and indentured servitude as well as local apprenticeships. The laws tended to be more elaborate in the Southern colonies, with more complex slave codes and more enforcement, but the legal structures of servitude – including the legal sale of people (both white and black) and the legal capture of runaways (both white and black) – were similar throughout

British North America. White servants could complain of mistreatment to authorities (unlike slaves), but masters could punish both servants and slaves corporally – indeed could even kill them without penalty if death occurred during the course of punishment.

While the authority of the head of household was strongest over his servants, a great deal depended on the type of servant or employee and the status of that person. In the colonies, many white laborers (if born there or once freed from their initial indenture) could negotiate contracts that gave fewer privileges to their employers and did not place them firmly under a master's control. In England, in contrast, by the early eighteenth century, new restrictions were emerging that brought more forms of employment within the rubric of master/servant relationships, including many proto-industrial occupations, such as piecework and weaving. Even employees who did not live with their employers began to be seen – both at statute and common law – as governed by master/servant relations, with masters being given much greater privileges over their workers.

How was the role of head of household acquired? Status (derived from land ownership, militia or other title, financial resources, or age) played an important part. A wealth of records and studies indicate that whether an individual became a servant – or a master – depended greatly on status. Service was partly a life-cycle phenomenon, in that many servants were adolescents or adults younger than 25, saving to marry. But not all youth underwent a period of service. Indeed, many masters were youthful themselves. Although service, then, has been properly recognized as a part of the life cycle of poorer and middling people in England, it was not a "natural" institution. Rather, service was an institution designed to benefit elites.

Though widespread, most people did not enter into service for others, even as children. Some entered high-status apprenticeships controlled by guild companies or became mercantile clerks – but access to those positions was restricted. Elite families, and landowners generally, did not place their children in service to others. In seventeenth-century England, domestic servants were perhaps 20 percent of the total population. Many of these were adolescent life-cycle servants, but by no means all: in some districts 25 was the average age of domestic servants. Even when adolescents entered adulthood and finished "official" domestic service, the wage labor they entered could be poorly paid, condemning the laborer to life on the margins, unable to support a family. Especially before 1660, harsh vagrancy laws forced people into labor, or even transportation, simply because of poverty. Circumstances changed somewhat after 1660, when the poor law system began to emphasize returning people to their place of settlement, but punishment for vagrancy remained an issue.

In the British mainland colonies, the proportion of those in servitude grew even higher. Some 44 percent of the white population of 1620s Virginia were servants. However by 1700 the proportion had fallen to perhaps 10 percent (about 4 percent indentured servants from England and perhaps 6–10 percent native-born apprentices, mostly to farm labor). If slaves are included, of course, by the middle of the eighteenth century in Southern colonies like Virginia and South Carolina, more than half the total population, white and black, were domestic servants or slaves. In mid-Atlantic colonies, such as Pennsylvania and New York, and in New England, the proportion of servants and slaves in the total population was always lower – lower migration rates of indentured servants, lower binding rates for apprentices, and lower numbers of imported slaves. To be white in England's colonies was to enjoy opportunities for advancement: cheap land in some periods and places and better wage labor possibilities.

Given the ubiquity of status considerations, it is hardly surprising that the Elizabethan Statute of Artificers, which governed relations between masters and servants, operated on the basis of status. Potential masters (who met a specified property qualification) could request that any child under 21, of poor and landless parentage, be bound to them as an "apprentice" until the child reached age 24 (for boys) or 21 (for girls) If the child inherited property, the apprenticeship would be void. If a justice of the peace agreed, the child could be imprisoned until he or she agreed to the contract. These strict rules moderated over the next half-century; justices were allowed to approve the indenture themselves (without imprisoning the child). Nevertheless, forced labor remained a part of the labor code in early modern England. Poor fathers and mothers had no right to their children's labor. Statutes instead emphasized the inability of parents to care "properly" for their children. Property-less unemployed adults could also be forced to enter labor contracts at set rates. Those with minimal resources could, of course, enter contracts at their own discretion. Those of higher status never had to work at all. In the seventeenth century youth per se was no bar to power. Teenage sons of peers were routinely elected to Parliament.

During the seventeenth century the status-driven laws allowing landowning persons to obtain servants from impoverished families by imprisoning their children became slightly less severe. Proceedings had to be initiated by a justice of the peace and the unfitness of the parent shown and recorded. A matter of status had become one that gave slightly more attention to the rights of parents. Simultaneously, vagrancy statutes became less harsh and enforced less severely, especially for adult men.

If status thus shaped the composition of the labor force of the Old World, it should come as no surprise that status also helped shape that of the New. Both indentured servitude and slavery feature prominently. Perhaps

half of the white immigrants to British North America (roughly 250,000 people) arrived as indentured servants. Still, only a minority of the white population (aside from the very early years) was actually indentured or apprenticed at any given time because white servitude was a temporary condition. For African Americans, in contrast, slavery was perpetual and hereditary. Although not many more slaves arrived than servants (300,000), the permanence and heritability of slavery meant a large proportion of the population was permanently in bondage.

Some white servants traveled willingly, signing contracts with "spirits" who lured them into seeing the New World as a land of opportunity. Others did not. Kidnapping was widespread, especially in the seventeenth century. In some ports officials clearly colluded with shippers. English laws against kidnapping gained some teeth by the early eighteenth century, though the practice continued on a reduced scale through at least mid-century. Thousands, perhaps tens of thousands, traveled without contracts, for which colony laws designated terms of service that varied depending on the servant's adjudged age. Most English authorities looked on the practice relatively benevolently, seeing it as a means of managing the lower sort and of keeping the vagrant population under control. Even for those who willingly signed labor contracts, their situation on arrival in the New World was arguably worse than in the Old. Their contracts generally specified longer periods of service, with strict punishments for absconding. Though the servant was free to complain about mistreatment before a justice of the peace, the terms of the indenture gave masters relatively more power. Perhaps the most important difference from the Old World was that their contracts were transferable. In England, servant contracts were individually between master and servant and not assignable. The very nature of the "indenture," however, often between a shipmaster and the new servant, meant that it had to be assignable to the future master. This innovation made servants ever more clearly property – movable property – than had the older, more personal rules. Apart from this critical difference, master/servant relations generally followed the laws on the books for England.

Husband and Wife in Anglo-America

The laws of master and servant were both well developed and tailored to the status of the worker. Neither is true for those relating to husband and wife. In practice, this meant that the husband's powers under the common law were not nearly as strong in 1600 as they would be two centuries later.

When legal historians touch on the history of women in early modern England they often find that the common law rules they anticipate are

missing. Take, for example, Edward Britton's *The Community of the Vill*, a study of fourteenth-century Huntingdonshire:

> Whether one looks at landholding, business affairs, or the home, it is evident that the wives of Broughton were by no means wards of their husbands. The precepts of *Baron et Feme* are fascinating, and may be used by all who wish to depict all that is medieval and retrograde, but such legal theories held little sway in this village in darkest Huntingdonshire. There women were a strong social force, and the independence of married women was clearly recognized by the customary law.

Numbers of studies of women's legal status in early modern Britain have concluded in effect that the common law guidelines were purposefully ignored. Scholars refer to the "wide gap" between the theory of femme covert and practice. While confined (and indeed repressed) by some laws, in many other cases women apparently used the law for their own purposes and protections.[3]

Recent studies of seventeenth-century Virginia have drawn similar conclusions. Only some of the common law rules about femme covert applied there. Women went in and out of courts, even while married. The most consistent seventeenth-century application of femme covert dealt with the sale of property by married women without their husbands' permission. This was widely viewed as a voidable transaction (indeed women themselves sometimes invoked the rules of femme covert to avoid such deeds). Restraint on land sales provided husbands a means of control that could turn particularly harsh when a woman's husband had actually abandoned her. In two early eighteenth-century cases, the Virginia House of Burgesses attempted to ameliorate just such a situation (vetoed by the king on the advice of his Privy Council). Femme covert rules also restrained married women's capacity to make wills.

These situations apart, women in the colonies in the seventeenth and early eighteenth centuries enjoyed relative freedom from rules limiting their legal capacity, at least compared to the nineteenth century. Married women appeared in courts. They were sometimes active business partners who participated fully in building the kin networks that provided the basis for transatlantic commerce. Nor were married women completely at the mercy of their husbands. As in England, a woman who was physically mistreated by her husband could obtain an action of the peace against him (requiring that he post bond for his good behavior toward her) or seek a

[3] Edward Britton, *The Community of the Vill: A Study in the History of the Family and Village Life in Fourteenth-Century England* (Toronto: Macmillan, 1977), 33–5; Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Cambridge, MA, 1990), 206; Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998), 33–8.

"bed and board" separation (not the equivalent of divorce) that required him to provide her with alimony payments. Still, we must also be conscious of limits. The fact that in separations the husband had to provide alimony – and that he often remained in charge of the land that both had brought to the marriage – is strong evidence of assumptions and power relations underlying marriage during this period. Neither the bond he posted to keep the peace (for which the wife's estate was also potentially forfeit) nor a separation that offered only maintenance could provide complete protection for a wife.

Women's own goods belonged to them in marriage, and afterward they had legal disposition of them. Men's wills did not include their wives' personal possessions. Consider the example of Magdalen Trabue Chastain, who lived in Virginia in the early eighteenth century. She owned several pieces of jewelry that were not listed in the wills or inventories of either of her two husbands, indicating she disposed of them herself.[4] Sometimes the presence of the wife's goods was evident in joint suits, where husband and wife were both listed in the attempt to recover a debt owed to only the wife before marriage. Wives were also often administrators of their husbands' estates, with legal responsibility for paying the debts and managing the whole process. Their legal activities, in short, were extensive.

One factor that historians have explored in explaining women's legal position in the colonies is the prevalence of unbalanced sex ratios. In Virginia, men greatly outnumbered women in the early years, putting a premium on marriage. An excess of men grants women a better negotiating situation in relation to prospective husbands, and hence opportunities for greater autonomy. High death rates meant that women were often widowed, sometimes even before bearing children, which increased their chances of accumulating their own property through inheritance of entire estates, adding to their attractiveness (and chances for autonomy) to potential husbands. Historians have also pointed to the legal exigencies of the frontier to explain women's relative autonomy – to colonial judges who found common law rules unreasonable given the circumstances of settlement.

Though such factors may have had an impact on women's relative legal opportunities in the colonial period, however, they were not decisive. A shortage of women could as readily worsen their collective situation as improve it. Those who seek a rare resource often try to control it once found. Fewer women could mean individual oppression and isolation, not collective strength. But the larger problem with interpretations that dwell

[4] Joan R. Gunderson and Gwen Victor Gampel, "Married Women's Legal Status in Eighteenth-Century New York and Virginia," *Willam and Mary Quarterly*, 3rd ser., 39 (1982), 127.

on unique colonial environments is that in England, where the common law originated, where the sex ratios were balanced, and where no special circumstances obtained, women should have been worse off. They were not: instead, the English also deviated from eighteenth-century common law norms. There too, women in the sixteenth and seventeenth centuries had more freedoms and legal responsibilities than the common law supposedly allowed. Such broad similarities in practice across such different regions suggest that we have yet to understand the nature of the common law before Blackstone.

We return to this below. For the moment, we can note that the decisive issue for contemporary law books lay less in the realm of behavior than of property: how much control were wives to exercise over land, even their own dower lands, without their husband's permission?

We have talked of broad similarities across different regions. However, Puritan New England was unlike either Virginia or England, in that it gave relatively more authority to husbands over wives. Separate estates for women were less likely to be found there in the eighteenth century than elsewhere, as work by Marylynn Salmon illustrates. There too, however, the seventeenth century at least was a period of greater legal equality, as shown by such scholars as Cornelia Dayton. Divorce, for example, was acceptable in New England, particularly in Connecticut. Expectations of wifely obedience prevailed, but husbands' authority was limited to a greater extent than it would be in the nineteenth century. Unlike servants, wives were protected from battery by their husbands (except in cases of self-defense), or at least women were allowed to complain about it. Above all, there as elsewhere married women can be found in court records engaging in many kinds of legal action. Take Elizabeth Creford as an example; she frequently signed promissory notes on her family's behalf.[5]

Yet, we cannot say that in the seventeenth century married women had equal power in marriage or that women had approximately the same rights as men in general. Too many gendered disparities are observable. For example, both women and men were found guilty of sexual offenses during the seventeenth century and punished relatively equally, but in Massachusetts adultery, which was punishable by death, applied exclusively in cases of sexual relations involving a married woman. A married man who had sex with an unmarried woman committed only "fornication," a much less serious crime punishable by fine or whipping. In one famous case, a married woman and her two lovers were all executed. Women were also more much more likely than men to be accused of witchcraft in New

[5] Laurel Thatcher Ulrich, *Good Wives: Image and Reality in the Lives of Women in Northern New England, 1650–1750* (Oxford, 1980), 41.

England (by a ratio of 4 to 1), especially if they owned land in their own right.

Inequalities in marriage are particularly clear in matters of estates. Women were more likely than men to bring money and goods to their marriages, but sons were more likely than daughters to inherit land and hence a livelihood – especially in New England. Only if women had no brothers – characteristic of roughly one-quarter of families –were they likely to inherit land. About 20 percent of marriages produced no children, in which case widows often inherited the whole estate. Otherwise, widows might receive only their dower thirds (the minimum portion decreed their due) during their lives and have to share the remainder of the estate with children or other heirs. The law generally allowed women only life estates (owned during the widow's life and reabsorbed into the original estate on her death); husbands were always reluctant to allow wives unencumbered inheritance for doing so risked the estate. If widows remarried without restrictions on control of their inheritance, new husbands were likely to press their new wives to allow land sales, so that they could gradually take control of the original family estate and defraud the first marriage's children. This is one reason why so many forms of encumbrance – life estates and entails – were popular during this period. Dower thirds themselves were often life estates to prevent successor husbands from obtaining control. Wives and heirs of the original husband could sue for "waste" of the land (felling too many trees, failing to maintain a mill, or damage).

Fathers could also create encumbered estates for their daughters and their daughters' children to prevent husbands from taking control of the property. Entails are often understood to exclude female succession. This was not so. Entails often originated with daughters, so that the father could prevent a husband from controlling the land (or selling it), preserving it intact for his daughter and her progeny (a common pattern in Virginia). Entails allowed testators to designate who would get land "forever" by the rules of primogeniture, a policy that normally favored the eldest son. If there were no son, however, daughters inherited – either jointly or in severalty. Entails thus favored the male line, but over time they limited the power of the husband-patriarch and often allowed elite and middling women control over large estates. Fathers (or first husbands) might also prevent future husbands from controlling wives' estates through the creation of a jointure, common in England in the early modern period. A jointure set aside a separate estate for the wife's exclusive use, guaranteeing her income (usually rents) and a dower right on her husband's death. A jointure was a form of trust; there were many others, some overseen by common law courts and others by Chancery (or Equity) courts. Both tribunals can be found in the English colonies.

From the evidence presented, we can conclude that women in early modern Anglo-America enjoyed relatively greater authority within marriage than they would in the nineteenth century, but were still at a significant legal disadvantage. Women could not usually vote, although sometimes they could inherit that right and designate a male to vote for them (depending on borough norms). They could not hold seats in Parliament. Women were not appointed judges, generally they did not sit on juries (except in the limited role of examining women's bodies in cases of witchcraft or rape), and they could not hold most political offices. Culturally, the husband was expected to be the "Lord" of the family.

But the husband's authority over his servants was much clearer in law and in practice than his authority over his wife. Indeed, though a truism it is important to point out that wives also had authority over servants, male as well as female. As this suggests, both within and outside the household, legal disadvantage was modulated sharply by status. The impact of hierarchy in society is obvious from any analysis of women's legal identity during this period. In some districts in England, for example, women controlled which candidates stood for election to the House of Commons. Women, particularly as widows, clearly played political roles in England's colonies. Women could not only have political influence as the wives of governors – as did the wife of Virginia Governor Berkeley in the 1670s – but could also play influential political roles at court. And of course, as Queen, a woman could reign over all.

Parents and Children in Anglo-America

Parents' custodial authority was weak in early-modern Anglo-America, far weaker than it would be by the late eighteenth century. Only after 1660, as we have already seen, does one encounter something approaching legal recognition of parental, which is to say paternal, custody rights. Parents possessed disciplinary authority: they were allowed to punish their children "without breach of the peace" throughout this period. In many ways, however, childhood itself was not a defined category. Once again, status proved all important.

As we have seen from the earlier discussion of servants, status – whether in the Old World or New – was largely determined by the family into which one was born. Young children in wealthy families had authority over adult servants. In "middling sort" families, children lived with their families and performed much of the household and farm labor. In poor families, children were likely to be removed and placed in service in a wealthier family – to learn a trade if one was lucky; otherwise simply as a servant, to learn "husbandry" or "housewifery." Service was comparatively more common

for poor whites in the Southern colonies. More common, too, in the South were wealthy households whose children learned early the skills and habits of command. Thomas Jefferson acknowledged the phenomenon in order to criticize it, late in the eighteenth century.

Though custodial rights were weak, fathers might exert indirect control over their children through inheritance. In the colonies testamentary power was mediated by the availability of western lands, which meant that children were less dependent on inheritance for their livelihood than in England. Nevertheless inheritance was a source of real power, especially in New England where fathers lived to an advanced age. In Virginia, fathers had less testamentary power. In the seventeenth century, fathers often died young, and by the eighteenth century estates were often entailed, allowing fathers less choice in the disposition of their estates and hence less control. Inheritance practices in the middle colonies varied, but tended to be more similar to those in New England. There too, longer life spans meant fewer encumbrances on estates.

As a concept, custody in its modern sense of parental authority and responsibility simply did not exist, partly because the idea was not needed in a world where children could enter their own binding contracts and possessed a legal identity no different from that of adults. Children were rarely distinguished as such in legal records. They could be punished for many different crimes – especially once older than age 8 – and could form many kinds of contracts. Thus, pre-pubescent children could and did enter into marriage contracts, usually to cement family alliances or alleviate property concerns. (Children marrying younger than 12 or 14 could sue for divorce if the marriage had not been consummated.)

The category of a ward needing a guardian was an exception, for it specifically recognized minority; however, it was applied only to heirs of land and the guardian's responsibilities were limited in scope. At age fourteen a ward was empowered to choose his or her own guardian. Some guardianships ended at that point, some at age seventeen or eighteen. Some heirs and heiresses could evade guardianship if, for example, their father had made them executor of the estate. All that would happen is that the estate would remain in a holding pattern until the minor executor reached age seventeen. Advisors (usually also designated in the will) had little authority to dispose of or manage the estate without consulting the heir.

Childhood per se entailed few legal restrictions. Teenagers could be elected to Parliament in England or to the House of Burgesses in Virginia during the seventeenth century. Legally a male could hold most appointed offices at age eleven. Army and navy officers – a patronage appointment – were frequently in their early teens. In England and Virginia one qualified to sit on a jury at age fourteen (higher in New England). At least in the

early seventeenth century, one could testify at any age. In this part of the legal landscape, as elsewhere, status trumped everything else. All criminal records, for example, stated the status of the accused: virtually none stated the age. Those who held positions of political and legal authority while still teenagers – John Randolph, for example, who was appointed king's attorney for several Virginia counties at age eighteen – came from the most powerful families. Those bound into apprenticeships by the churchwardens though both parents might be alive came from the least powerful, the families of the poor.[6]

As consent became more important to the law over the course of the early modern period (growing out of broad religious and political debates), childhood would emerge as a much clearer category of law and experience. Children lost their independent legal and political identity, and parents gained the power to make decisions for them. These changes challenged old elite practices that allocated authority by birth status irrespective of age. They also reflected changing norms about the meaning of consent that grew out of broad economic and political changes.

The best way to understand changes in practice is to examine the evolution of the common law itself as recorded in legal treatises. English common law changed dramatically in many ways over the seventeenth and eighteenth centuries, particularly as it concerned the rights of persons. In the late sixteenth century, it was concerned primarily with the rights of Lords. What the early nineteenth century would consider domestic hierarchies were important mostly as they concerned masters and servants. Treatises touched lightly on husbands and wives and hardly at all on the rights of parents over children.

The focus of early modern common law – laid out in excruciating detail – was on the privileges of landowners and the constraints on those who did not own land. In practice England had moved away from strict feudalism, but the law on the books bore its deep imprint. The first volume of Sir Edward Coke's *Institutes of the Laws of England*, undoubtedly the most important attempt at a comprehensive survey of English law in the early seventeenth century, was a commentary on Sir Thomas Littleton's classic fifteenth-century text on the law of landed property and the obligations and authority of Lords and villeins. Coke's commentary had short sections on femme covert and the relationship of guardian and ward, but property was the core of the feudal law. What kinds of restraints governed the selling and inheritance of property? Who inherited under primogeniture? When could land be willed and what land was encumbered? What powers did landlords have over tenants, or Lords over villeins? When could guardians act for

[6] Holly Brewer, *By Birth or Consent: Children, Law and the Anglo-American Revolution in Authority* (Chapel Hill, 2005), 28.

wards, and over what? When could husbands sell their wives' property and on what conditions? The volume is thick with answers to questions like these. Its sections explain what it meant to hold land in different ways and the varied implications of each landholding method for the use and ownership of land. They even reveal that ownership of land often implied a limited ownership of people – those who farmed it, leased it, and dwelt on it.

Coke wrote three additional treatises to complete his *Institutes*, inspiring Blackstone's similar four-volume synthesis 150 years later. The commentary on Littleton (volume I) anticipates elements of what would come, particularly volume II, which concerns the statutory law of England. The third volume concerns crimes, particularly high crimes such as treason. The fourth deals with the jurisdiction of England's many different courts, not only those of the common law but also of some fifteen other court systems that produced precedents (with often overlapping appeals) in the early seventeenth century, notably the canon law and equity (Chancery) courts. A survey of their substance is revealing. Coke was a reformer – he had Puritan sympathies and struggled with James I over the rights of Parliament – but his *Institutes* contain little about subjects we might now think of as central to the common law, such as the rights of persons. Reading the *Institutes* introduces the reader to a very different world.

Coke's predominant concern in the *Institutes* is the reciprocal duties and obligations of Lords with regard to their villeins, servants, and tenants. His brief exposition on coverture focuses on the way that property can be held and conveyed (or not) once men and women marry. Men can convey their own property (if not entailed or encumbered) without their wives' consent, he tells us, but wives need their husbands' consent and must be separately examined by judges about their wishes. If land is not freehold, it cannot be conveyed at all. Husband and wife are considered as one in the eyes of the law only in the narrow sense that if an estate is left to husband and wife and to another person, husband and wife should receive only a half between them. After the husband's death, the wife has the right to the use during her life of a third of the property belonging to the husband before marriage (her "dower"). After the wife's death, the husband has the right to the use of all his wife's property during his life, but only if she actually bore a living child during the marriage (called his "curtesy").[7]

[7] Sir Edward Coke, *Institutes of the Laws of England* (London, 1809), Sect 36 "Dower":

> Ten[an]t in Dower is where a Man is seised of certain Lands or Tenements in Fee-simple, Fee-tail general, or as Heir in special Tail, and taketh a Wife, and dieth, the Wife after the Decease of her Husband shall be endowed of the third Part of such Lands and Tenements as were her Husband's at any Time during the Coverture, To have and to hold to the same Wife in severalty, by metes and bounds of Term of her Life, whether she hath Issue by her Husband or no, and of what Age soever the Wife be, so as she be past the Age of nine Years a the Time of the Death of her Husband.

The *Institutes* contain almost no discussion of the powers of parents. In contrast, discussions of the powers of guardians fill many pages. But guardianship is mostly a matter of property management – most orphans did not have guardians. In other words, children per se were not thought to be dependent and incapable; it was the inheritance of land that created the requirement for a guardian. Even then, most guardianships were sharply limited and ended at age 14.

Other early seventeenth-century law books present a similar picture of the law while filling a few gaps. Like Coke's *Institutes*, Dalton's *Countrey Justice* – a guide for local justices of the peace, men usually without legal training – was extremely popular not only in England during the seventeenth century but also in the North American colonies. It contained large sections on the statute of artificers (sometimes called the poor law by historians), indicating, for example, how a landowner might force another to labor for him and what remedies protected him from the laborer's early departure from the covenant. It also underlined the centrality of status to criminal penalties: a servant who killed a master could be drawn and quartered for the crime of petty treason, whereas a master killing a servant in the course of punishment would usually be excused altogether. A master who beat a servant was within his rights; a servant who beat his master could be imprisoned for a year.

Dalton's attention to criminal issues is not surprising, given that the jurisdiction of a justice of the peace would routinely encompass petty crime. But a modern eye quickly notices his relative neglect of questions relating to wives or children. The silence suggests he had no broad vision of "domestic" law. Other important guides give the same impression. Systematic study of them is even more revealing. By pursuing three of the key issues that appear in parallel in later guides, we realize just how different the law was at this juncture. First, many guides compared the powers of a master to those of a husband in matters of petty treason, in which a servant or wife who killed a master or husband was considered comparable to a subject who killed a king and punished as though guilty of high treason (drawn and quartered before execution or burned alive). However, a son who killed his father was not deemed guilty of petty treason and would not be liable for such extreme punishment. Second, the guides contain no discussion of witnesses, and

[Dower only applies when the lands in question belonged to the husband beforehand. Note also, that there are some cases when the man owns entailed land, where the wife cannot claim dower.]

Sect. 35 "Curtisia Dengleterre"; "Tenant by the Curtesy of England is where a man taketh a wife seised in Fee-simple, or in Fee-tail general, or seised as Heir in Tail especial, and hath Issue by the same wife, Male or Female born alive, albeit the Issue after dieth or liveth, yet if the Wife dies, the Husband shall hold the Land during his Life by the Law of England."

one encounters no sense that age is relevant to testimony: children could testify at any age. Wives and husbands could testify against each other or in open court generally. Last, and probably most revealing, are the entries on allowable battery. According to William Lambarde's *Eirenarcha: Or of the Office of the Justices of Peace*, battery "is not in all cases a violation and breach of the peace: for some are allowed to have privately a natural and some a civile power (or authority) over others: So that they may (in reasonable manner onely) correct and chastise them for their offences." A parent might beat a child "within age," the master a servant, the schoolmaster a scholar, the a jailer a prisoner, the lord a villein. But the husband might not beat his wife – that allowance is conspicuously absent.[8] Although another early text does allow a man to punish his wife, servant, or child "reasonably" without a breach of the peace, it also excludes children from the crime of petty treason against their parents and has no section on witnesses.[9] Generally, guides of this period prohibited husbands from physically beating wives. When they did so, they used the word "chastise," which had the primary meaning of verbal reprimand. Even this concession is debatable (writers would hedge, noting "some authors hold that," and would always append the word "moderately"). Physical beating could provide wives with the basis for separation suits in the ecclesiastical courts, which could also force husbands to provide their wives with alimony or "separate maintenance."[10]

Despite these limited protections, assault generally (of any kind) was not a serious crime and usually had to be privately prosecuted, a course open to those with money, such as masters, but not to servants and the poor. What this means is that while the common law discouraged husbands from beating their wives it did so only in a half-hearted manner. Wives found it difficult to prosecute and especially to convict husbands: rarely in this period did assaults lead to convictions, unless of an inferior assaulting a superior. Likewise, within marriage, the crime of rape did not exist, and rape itself was rarely prosecuted even outside marriage. These attitudes toward assault are important to a broader understanding of the character of the law at this juncture.

We can now see that the common law did not have a fully developed conception of domestic power except with respect to servants and that the tripartite array of master/husband/father was not in place, at least when it came to criminal matters. In civil matters, Coke has shown us that femme

[8] Lambarde, (London, 1599), 130–1.

[9] [Fitzherbert], *L'Office et Auctoritie de Justices de Peace* (London, 1583), 89a, 13a.

[10] Henry Ansgar Kelly, "Rule of Thumb and the Folklaw of the Husband's Stick," *Journal of Legal Education* 44 (1994), 341–65. On the meanings of chastize, see the OED (the third meaning is corporal punishment).

covert had limited application, relating almost solely to the selling of freehold property that had no other restraints on it, to a married woman's ability to make a will over such property, and, to a much lesser degree, to her husband's liability for her debts. Of particular importance, in this period most land was not unencumbered freehold. Any land that was entailed or had other legal restrictions on heritability was not within the husband's control. This basic point is very strange to modern readers, where almost all land is freehold. Once we acknowledge the encumbered nature of most land (in England especially, and increasingly in the colonies as well) we can recognize the limitations of even this core principle of femme covert.

The concept that husband and wife were one in the eyes of the law, so important to Blackstone, is conceived very narrowly in Coke's writings 150 years earlier. It is not treated at all in most other legal writings of the seventeenth century. One exception, an obscure text misleadingly entitled *The Lawes Resolutions of Womens Rights* (1632), does appear to show that Blackstone's broad concept of *femme covert* indeed had some currency in the early seventeenth century. But the treatise is not very reliable as a report on current law. The legal texts of this period name their sources in almost every paragraph, usually in statutes or other treatises on the common law or other laws. In contrast, this treatise has few citations to contemporary laws and none in the sections most relevant to the matter at hand. It is not cited by later treatises, nor does it appear in colonial lawyers' libraries. Also significant, the author's name appears only as the initials T.E. at a time when authors of most legal texts gave their full names, and the treatise itself appears in only one edition. By comparison, *Coke upon Littleton*, the first volume of Coke's *Institutes*, had appeared in eleven editions by 1719; Dalton's *Countrey Justice* was reprinted in comparable numbers.[11]

It is important, nevertheless, that we take this volume seriously, not because it was an accurate rendition of current law but because it is an early argument against women's rights. As such it provides useful information about the sources of the changes that would occur in women's legal status and indeed suggests something about why New England in particular had more limits on women's roles and property ownership than the southern mainland colonies. For T.E.'s arguments are fundamentally religious. Under the title "The Punishment of Adam's Sinne" he invites his readers to "returne a little to Genesis." Eve seduced her husband. Hence "In sorrow shalt thou bring forth thy children, thy desires shall bee subject to thy husband, and he shall rule over thee. See here the reason . . . that Women have no voyse

[11] Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries* (Knoxville, 1978). Despite Johnson's title, his review of legal inventories examines seventeenth-century (and earlier) treatises as well.

in Parliament, They make no Lawes, they consent to none. they abrogate none. All of them are understood either married or to bee married and their desires are subject to their husband . . . The common law here shaketh hand with Divinitie." Elsewhere T.E. proclaims that in marriage "Now Man and Woman are one," again citing only biblical authority, and he offers as example the sale of land to man and wife together, as one (like Coke). Most of the book, in fact, is best understood as a response to Coke. Revealingly, the author uses biblical citation, not legal references, to challenge the legal rules that he finds objectionable. For example, following Littleton, Coke acknowledges that heiresses can manage their own estates at age fourteen, if unmarried. T.E. recommends against this: he states that the common law is clearly wrong and urges that heiresses should be married young so as to avoid letting them control their own property.[12]

"T.E." was probably Thomas Edgar, a member of the Inns of Court. Edgar was not a prominent seventeenth-century lawyer. Educated as a Puritan in Ipswich, he is best known for his defense in 1649 of the legality of the Commonwealth in the wake of Charles I's execution, seventeen years after the publication of *The Lawes Resolutions of Womens Rights*. Edgar would later support the Restoration of Charles II, but in 1649 his views were radical, suggestive both of his religious impulses and political principles.

The Lawes Resolutions of Womens Rights was thus a religiously inspired commentary on current law with important political implications and overtones that sought to limit married women's status and strengthen their husbands' authority. Significantly, it includes sources external to the law, notably Puritan sermons about wifely obedience and the ideal marital relationship. In elaborating on the possible legal meanings of the unity of husband and wife and in emphasizing women's legal disabilities it is quite possible that T.E. influenced later thinkers. And indeed that was the goal, for the book imported into legal writing the genre of the Puritan prescriptive manual, along the lines of (and arguably influenced by) William Gouge's popular 1622 treatise on *Domesticall Duties*. Gouge's text was not a law treatise but a religious advice manual that described how the members of the household should behave, outlining the "duties" of wives, husbands, children, parents, servants, and masters, in that order, citing only the Bible. Interestingly, in Gouge's treatise we begin to see the first outlines of the late eighteenth century's familiar triptych: "for a family consisteth of these three orders,

Husbands,	Parents,	Masters,
Wives,	Children,	Servants,"

[12] T.E., *The Lawes Resolutions of Womens Rights* [London, 1632], (facs. ed. Amsterdam, 1979), 21.

Gouge attributes his analysis of the proper order of "private families" to "the Apostle."[13]

From all this we can conclude that, beginning in the early seventeenth century, common law ideas about domestic order were profoundly influenced by Puritan ideas. We can see this most clearly in how prescriptive works by such authors as T.E. and William Gouge challenged the prevailing common law norms outlined in the work of commentators such as Sir Edward Coke.

There can be little doubt that Puritan writers sought to increase husbands' powers. Debate was raging, particularly in religious circles, over the role of the household and all its members. Part of the challenge to older hierarchies posed by radical Puritanism lay in religious arguments about a different natural order to which the family was central. In this new order men as such not only had the right to exercise consent but also to remain with their own families and enjoy rights to their own wives and children, so that a husband might rule his own household and his children might no longer be taken away as servants to others. It is highly significant that in early New England the first paragraph on the first page of the first law book specifies that "no man shall be deprived of his wife or children" – along with other basic rights, such as not to be killed, arrested, or banished – "unles it be by the vertue or equity of some expresse law."[14] Here was a profound challenge to the older common law of England.

It was not only Puritan ideas that shaped the common law, however, nor was the influence always direct. Religious debates intersected with political controversies in England throughout the seventeenth century. The tracks are not easy to follow, but we can be sure that the Puritan emphasis on consent in religious matters influenced the emergence of ideas about government based on consent, which challenged the powers of Lords in that sphere, and that fathers' and husbands' claims of household rights challenged those of Lords and masters in *that* sphere.

The clearest example of this interaction is the landmark custody law of 1660, which built on Puritan precedents and which was an essential element in the settlement to which Charles II had to agree for the Restoration to proceed after the English Civil War and Interregnum. The law allowed fathers, for the first time, to designate who should get custody of their children up to the age of 21, should the father die. Before 1660, inasmuch as custody had existed, it had been concerned with the rights of guardians

[13] William Gouge, *Of Domesticall Duties* (London, 1622, facs. rpt Amsterdam, 1976), 17.
[14] *The Laws and Liberties of Massachusetts* [1648], ed. Richard S. Dunn (facs. rpt. Huntington Library, 1998), 1.

(in limited cases) and the rights of masters. A Lord, for example, would receive custody of a tenant's son up to the age of 14. Likewise one of the greatest sources of revenue for the Tudor and early Stuart kings had been the "Court of Wards," which had allowed them, essentially, to sell land use and guardianship rights on behalf of all those inheriting land held of the King in so-called knight's service – encompassing the land of all major peers – but who were too young actually to perform their service. The 1660 revision abolished the Court of Wards and allowed all men to choose a guardian for all their children.

Giving up wardship income was an important concession by Charles II and marked a major weakening of feudalism. Indeed the 1660 custody law is commonly thought of as marking the final abolition of feudal tenures in general. Advocates emerged not only from the remnants of Puritan reformers in the Rump Parliament but also from the recently reincarnated House of Lords, which had an obvious interest in such a change. The larger point is that the trade-off here – the King's surrender of important rights over his tenants and the similar surrender by Lords of rights over their tenants, which in each case increased the rights of fathers over children – was part of a larger challenge to the old feudal system. New ideas grounded on family order supplanted older ideas grounded on feudal hierarchy.

A new "domestic" or household law dealing with servants, wives, and children did not emerge all at once in the late seventeenth century. Indeed, at the end of the eighteenth century, its rules remained unfinished. The head of Cromwell's Interregnum commission on law reform, Sir Matthew Hale, who subsequently became Chief Justice under Charles II, would play a major role in reform, although initially his recommendations went unheeded and were only fully absorbed into the law by the mid-eighteenth century. Other treatise writers, notably Thomas Wood and Sir William Blackstone, would also play important roles. Their work synthesized precedents and rationalized the common law to create a coherently reformed system. The American Revolution, finally, would play a crucial role in rendering explicit the shift of norms that had been taking place, not only in the larger political order and in ideas about consent but also in the new domestic order, in the duties of servants, wives, and children.

II. REORGANIZING HOUSEHOLD AUTHORITY: THE EMERGING POWERS OF FATHERS AND HUSBANDS

By the end of the eighteenth century and the beginning of the nineteenth, Anglo-American domestic law had begun to take coherent form. As we have seen, Blackstone was key to this transition, although Blackstone built

on other treatise writers, such as Hale and Wood, and others added to (and modified) his formulations, such as Tapping Reeve and, later, Chancellor James Kent. In the wake of the Revolution, state legislatures would also contribute, as did judges (often following the new treatises) case by case.

One major change that occurred in the wake of the Revolution was that most of the new American states legalized complete divorces (all had allowed legal separations, called divorce "a mensa et thoro"). Before, only Connecticut had allowed complete divorces ("a vinculo"), although some colonies had permitted "private acts" of the legislature to authorize the divorce of a particular couple, following English practice. After the Revolution, many states began to allow divorces when one side could show that the other had broken the marriage contract by infidelity. The resulting cases, as one can imagine, make for interesting reading, but the larger point is that the rhetoric of the Revolution itself could have radical implications for marriage rules and practices.

Yet, the overall impact of the Revolution itself on domestic order – at least in the short term – was actually minimal, largely because of the continued role the common law played in America in the years immediately after the break with Britain. Partly we may credit Blackstone's particular influence, partly the very character of common law decision making itself. Instead of passing to legislators, legal authority remained in the hands of judges. Judges rationalized their decisions by appealing to what they portrayed as an unchanging, unhistorical, universal law. Blackstone's *Commentaries* provided judges with the necessary material, minimizing change over time and shrouding historical origins in invariant legal certainties.

Blackstone's representation of an unchanging common law, of course, actually hid what had been years of fundamental transformation. The reorganization he summarized and synthesized is revealed most clearly in the contrast between his *Commentaries on the Laws of England* and Coke's *Institutes*. Blackstone began the *Commentaries* with the rights of persons (volume I), moved on to the rights of things (volume II), and devoted volumes III and IV to crimes, private and public. A common law that had been primarily about property and the rights of Lords 150 years before, now devoted itself – under Blackstone's careful hand – to the rights of persons.

We have noted Blackstone's profound influence on the new United States: he was the most widely cited author in American newspapers in the 1790s (following Locke in 1770s and Montesquieu in the 1780s); he was immensely respected among the intelligentsia for his *Commentaries*, which were published in their first American edition, with a list of some 600 subscribers, in 1772; and his work would become the template and point of departure for all the major American common law treatise writers of the early nineteenth century. Given all this influence, Blackstone's

representation of domestic law to his American readers is crucial. He commences discussion of domestic law as follows:

> The Three Great Relations in Private Life are 1. That of *master and servant*; which is founded in convenience. . . . 2. That of *husband and wife*; which is founded in nature, but modified by civil society: . . . 3. That of parent and child, which is consequential to that of marriage, being its principle end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But since the parents, on whom this care is presently incumbent, may be snatched away by death or otherwise. . . . the law has therefore provided a fourth relation; 4. That of guardian and ward, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural.[15]

In succeeding chapters, Blackstone laid out these parallel household relations. What is striking are the similarities: according to the ancient common law (so Blackstone contends) the master, husband, father can beat the dependent servant, wife, child. The master, husband, father is often responsible for the dependent actions of the servant, wife, child. The master, husband, father is also responsible for the maintenance of his dependents and, in the case of the wife and child, also responsible for their debts for necessities (but no more than that). Within the parallels there are a few variations: wives cannot testify against their husbands (or vice versa) in most cases because they are considered "one" in the eyes of the law; children under age 14 generally cannot testify at all, whether against parents or not; and servants can testify. Wives can "elope" from their husbands without the law forcing their return (unlike servants and children) or penalizing them except (if they flee to another man) the loss of their alimony and of any monetary claims against their husbands. One variation is of particular importance. Blackstone clearly sees servants as the property of their masters, so that if a servant leaves to work for another he can be forced to return and the master can sue his rival for damages. Blackstone never describes wives in that fashion. He does, however, grant fathers a property interest in their children's labor, which is a direct parallel to his discussion of servants on this question and is a new common law right. Blackstone's discussion of the rights of guardians, finally, is quite brief compared with the other relations. Guardians' rights are clearly less extensive than they had been (guardians have no right of battery, for example). Nevertheless, guardians' rights are rendered comparable to those of parents. Blackstone bases those rights in children's inability to form contracts, although he allows children their established common-law exemptions – contracts for necessities and labor contracts. (Once aged 14 they can be held liable for crimes too.) Generally,

[15] Blackstone, *Commentaries*, I, 410.

he concludes, children need guardians, which in some cases they can choose if their father has not done so.

What is extraordinary about the *Commentaries* is first, just how much is new in the sections on servants, wives, and children, and second, just how much Blackstone tries to universalize principles across all three categories of relationship. Admittedly, the parallels Blackstone develops are not all his own doing: it was Hale, for example, who, late in the seventeenth century, first developed the rules barring wives and children from testifying. But Blackstone's is the grand synthesis.

Though acknowledging in specific instances that changes had occurred over time (as in the case of guardianship) Blackstone hides change. He also ignores contrary precedents. There are limits, one could argue, to how extensively Blackstone could mold the common law to fit his synthesizing imagination. Yet the limits are not clear, for his reasoning is supple. Take the expanding legal-political ideology of contract. Blackstone emphasizes that the power to contract is essential for an individual's public legal identity. Most persons, therefore, must have it. What then of the "necessary" dependencies of the domestic relations? They are founded on contract. A servant contracts with a master, a wife with a husband. But once a servant has contracted with the master, a wife with her husband, they have exhausted their capacity to contract. Their contractual act turns them into equivalents of children; like children they are dependent on the will of the master/husband/father, at least insofar as what he requires is lawful. In other words, Blackstone envelops each relation in the new ideas about contract while actually allowing those ideas only a tenuous purchase: following the statute of laborers, he still permits force to be used in the forming of labor contracts – against the laborer. Likewise, he allows that labor contracts can be for shorter (or longer) duration than the customary one year, which gives greater flexibility to those contracting. In the wife's case, meanwhile, the concept of femme covert becomes fully realized in the law by her contract, her one self-willed act held to imply an abnegation of her legal identity.

In the new United States, such commentators as St. George Tucker in Virginia, Tapping Reeve in Connecticut, James Wilson in Pennsylvania, and James Kent in New York built on Blackstone's domestic relations blueprint. They made their own modifications: Kent, for example, strengthened a father's right to property in his child, further limited the ability of children to contract (even for necessities), and allowed mothers custodial rights due to their loving care for their children. Arguably, this last change helped precipitate later key custody battles where judges in divorce cases began to grant mothers custodial authority over their children. Tapping Reeve adopted an extreme approach to wives' dependency, contending that wives

could never be held responsible for any contract and that husbands were always responsible for fulfilling their wives' obligations, even to the extent of caring for her children from a former marriage. Reeve saw husbands' powers as also incurring responsibilities.

In the case of master/servant relations in America, the authority of masters over white servants and apprentices had weakened somewhat in the colonial period, in part because the percentage of whites in such relationships in the colonies decreased. In the wake of the Revolution, however, the common law broadened the reach of masters in parallel to increasing the powers of fathers and husbands. Adult male laborers who remained in the category of dependents were now analogized to children, but a more general basis for the authority of masters was placed on the contracts of formerly independent working men. This reactionary response to the principles of the enlightenment and the American Revolution took place particularly within the common law.

The laws regulating master and servant during the seventeenth and eighteenth centuries were grounded in older norms about master and servant, which persisted into the modern period. In practice, the application of those norms expanded in range. While in the early modern period, many types of skilled or day labor had been seen as legally independent, by the early nineteenth century, hierarchical definitions of master/servant relations began to apply to them. Masters/employers were granted so many legal advantages that real freedom of contract did not exist. The trend followed Blackstone and to some extent earlier treatise writers, such as Burns' popular *Justice of the Peace* guide. Still, in the wake of the Revolution the scope of the application of these norms expanded rapidly in America through court rulings. Key court decisions in many states allowed masters, for example, to set the rules of departure and terms of labor and to limit their liability in the case of injury. These decisions were made by placing most worker issues within the older master/servant law, which had become a universal category under which most worker relations fell. Courts also restricted workers' combinations (unions) in decisions along lines formulated in 1834 by Massachusetts Judge Peter Oxenbridge Thacher, who condemned unions as conspiracies that would undermine public order comparable to the excesses of the French Revolution. Such rulings were openly anti-democratic.[16] They blunted the principles coming out of the American Revolution that had given strength to the working men's movement, fueling the impetus toward unions that challenged employers on grounds of equity and rights and contributed to the nineteenth century's ideology of "free labor." One change that did begin

[16] Christopher L. Tomlins, *Law, Labor and Ideology in the Early American Republic* (Cambridge, 1993), e.g., 193, 238, 263, 275.

to benefit working men, however, were court decisions that began to limit employers' ability to physically punish their employees.

Ideas about the equality of men – about their ability to consent to government – shaped the legal debate about the rest of the household and the pattern of authority within it. Forcing poorer children to labor for masters no longer looked so appealing to a broader electorate that included the fathers of those poorer children. As consent became more important to the law and to the ideal of society, it became more important to train future citizens, which led in the wake of the American Revolution to ambitious plans for public education in many states that were actually realized in the middle and Northern states. In the longer run these principles also led to general bans on child labor, following the principle that poor children should not be condemned to service and manual labor, but had rights to occupational opportunity and civic capacity.

These changes were part of a larger challenge to hereditary status. With the notable exception of slavery, laws determining status by birth largely disappeared in the new United States. The U.S. Constitution mandated that, on the federal level at least, political offices could not be hereditary. States passed similar laws, though in some cases – justices of the peace in Virginia, for example – formally appointive positions remained hereditary in practice as they passed from elite landowner father to eldest inheriting son, just as in the colonial period. Still, even in Virginia, laws challenged hereditary status, such as those abolishing entails and primogeniture. Apprenticeship laws that had removed poor children to work in wealthier families also became less common – for whites, at least.

White parents tended to gain custody of their children; black parents (especially those enslaved) generally did not. Free black families were often female headed, perhaps with an enslaved father, and poor. Poor free black children were often forcibly bound out, especially in the South. The children of slaves were of course owned along with their parents. Enslaved parents had no legal voice and no legal right to be married. The legal word "family" did not apply to them. This might seem obvious to scholars of antebellum slavery, but its roots lay in older norms of master/servant. Slavery was a continuation of those norms, challenged but unreformed by the Revolution, as defenders of the South's "domestic institutions" repeatedly revealed.

States offered many variations in the details of domestic authority, with the South assuming the most hierarchical stance in the powers it gave white fathers. In the wake of the Revolution, fathers in Massachusetts were allowed to bind their children into apprenticeships solely on their own authority if the child were under 14; for children between 14 and 21, both father and child had to sign. In Virginia, fathers could bind the child solely on their own authority until the child was 21. In Pennsylvania, a parent or guardian

had no power to bind the child on their own authority at any age. Even a 2-year-old had to sign too before a labor contract could be valid. (In all three states, however, Overseers of the Poor could bind children until age 21 if they determined the children were poor or illegitimate or without proper care.) These different state laws, of course, all marked a shift away from the earlier practice that held the child's consent sufficient in itself – a norm still acknowledged by Blackstone, his extensive objections to children forming contracts notwithstanding.

Across the broad spectrum of the law, children lost legal capacity – they were no longer able to manage estates, to serve in political or appointed offices or on juries, to marry without parental consent, let alone under the age of puberty, to be criminally culpable (at least if under the age of 14), to make wills, to testify in a court of law, or even to make contracts for necessaries. These changes sometimes worked to a child's advantage, as in an 1806 case in which a 13-year-old girl accused of murdering her drunken father was deemed too young to have her confession admitted as reliable evidence and was acquitted.[17] Generally these new rules emerged out of legal policies that privileged informed consent – and legal independence – in the forming of all contracts and relations of responsibility and assumed that children lacked the competence to make such decisions.

The story of women's legal rights is somewhat grim. Blackstone's grand synthesis set up a situation in which women (particularly heiresses) could be exploited more easily by their husbands, a situation that fed the women's rights movement and paved the way for some of the women's separate property acts of the mid- and late nineteenth century. Blackstone's unqualified embrace of marital unity and the reformulation of property rights that gave the husband all authority over property – even personal possessions and property the women had brought to the marriage as dower – sharply altered the multiple ownership norms and encumbrances of the older system. Blackstone's injunctions were supported by revolutionary ideals that glorified simple property ownership and jettisoned many types of property encumbrances. Bans on one particular type of encumbrance, namely entails that conveyed only life estates to heirs, did advantage women in the sense that daughters were more likely to inherit. However this reform also came at the expense of wives who were heiresses because encumbrances like entail had formerly protected a married woman's separate property. In and of itself, the abolition of entails displays the mixed character of the revolutionary legacy for women as daughters and wives.

One important technicality for understanding this transition is the role played by equity courts (Chancery). Equity courts in England had long

[17] *State v. Mary Doherty*, 2 Tenn (2 Overt), 80.

provided a separate system of justice headed by the Chancellor of England, which technically served as an appeal to the King from common law decisions. In the late eighteenth and early nineteenth centuries, equity courts coming out of the English tradition had crafted a separate body of law that (among many other things) tended to recognize the different forms of separate or encumbered estates of wives that husbands could not/should not control. In fact, these equity decisions often simply recognized what the common law, prior to Blackstone, had itself largely honored. In the early nineteenth century, as the common law ceased to allow women separate property, equity appeals (through the separate equity courts that existed in many states) built on older precedents to challenge Blackstone.

Not all states had equity courts and even those that did often limited their jurisdiction. Still, equity jurisdiction helped shape the laws that began to emerge in the 1830s and 1840s in America collectively known as the "women's separate property acts," laws that allowed women to retain control over the property that they had brought into the marriage. They were fiercely debated in many states, often in state constitutional conventions. Arguments not only focused on whether wives should be able to own separate property but also on the fundamental principle of marital unity itself, and what it meant for republican government, the virtue of citizens, and the liberties of free men. Defenders portrayed Blackstonian common law as the fundamental and eternal order of family relations, claiming that "oneness" was the core principle of happy marriage and a virtuous public order. Just like seventeenth-century reformers, they appealed to biblical descriptions of husband and wife as "one flesh." Challengers pointed to the abuses that the (new) common law norm had allowed – men who married heiresses only to squander their estates and leave them ruined and homeless. One can imagine that many men – as fathers of daughters – supported the women's separate property acts precisely as protection from such abuses.

The story of marital violence is more complicated. Most state courts held that men could not beat their wives, but their decisions varied and always found a way to repeat Blackstone's dictum that the ancient common law had allowed it. Some lawyers defending husbands in such cases actually argued that men should be allowed to beat their wives as much as they wanted, and even to kill them, on the grounds that "oneness" meant the man was beating or killing himself, which was simply suicide and not prosecutable. That argument was generally dismissed, but it remained part of mid-nineteenth-century popular and legal consciousness, and material for many jokes. In the masculine democracy of the new republic, where gender trumped rank, male "ownership" of the family arguably made abuse

of both wives and children culturally and legally acceptable.[18] Nevertheless, the rights of persons were generally becoming more important to the law, and assault a more serious crime.

Ironically, perhaps, the injustices to women sanctioned by Blackstonian common law fueled women's rights advocates. Had Blackstone not cast the common law so starkly, they would have had less to protest. And indeed, the women's movement tended to ignore equity court decisions so as to focus more sharply on the injustices of the common law. The famous Seneca Falls Declaration of Sentiments of 1848, seen by many historians as the official start of the women's rights movement, plays on the 1776 Declaration of Independence, substituting "all men and women are created equal" for the Declaration's "men" only, and replacing George III's crimes against the colonies with men's crimes against women. The list is a fair summary of Blackstone's description of a husband's powers over his wife in marriage – a tyranny, according to the authors, like that of a king granted too much power. The very definition and history of the common law, as Blackstone had portrayed it, now shaped the legal debate not only in practice, in other words but also in theory. Tradition had become a weapon for people on both sides of the struggle.

But tradition was neither as unchanging nor as exploitative as either side believed. Why? Arguments about the basis of governmental authority convulsed England during the seventeenth century. Should government be based on consent or heredity? Constitutionally, from the thirteenth-century founding of the House of Commons onward, English government had been a mixture of the two, but it had leaned more toward heredity. Both the monarchy and the House of Lords determined the next heir according to primogeniture, or birthright. Too, most of those elected to the House of Commons were prominent landowners, many the eldest sons of peers. Powerful families often controlled which candidate stood for election, and the suffrage was sharply restricted. No more than 10 percent of adult males could vote, and qualification was often hereditary, whether directly, through descent, or indirectly, based on land ownership. Only sometimes could suffrage be earned, by, for example finishing an apprenticeship and becoming a "freeman" of particular cities.

Even that was not enough for hereditarian ideologues of the mid-seventeenth century such as Sir Robert Filmer. Filmer claimed that the sole purpose of Parliament was to advise the king and that its instructions were not binding. His arguments were challenged by many mid-seventeenth-century religious and political reformers, such as John Milton – and of

[18] Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA, 2000), 103–5.

P1: JZP
9780521803052c09 CUFX175/Grossberg 978 0 521 80305 2 September 30, 2007 17:6

course by Civil War defenders of Parliament in general. Authors of political tracts in the 1680s renewed the assault, most prominently John Locke, whose arguments against Filmer greatly strengthened the contentions of those whose theory of government emphasized consent. His entire *Two Treatises of Government* (1689) was a sustained attack on birthright and birth privilege.

The problem, of course, lay in defining who should be able to consent. Hereditarians argued that all human beings were born into a state of natural dependence, and that dependence should (and did) order society. Building on earlier arguments about religious choice, Locke developed an answer that contested universal dependence by conceding the difference between children and adults. All men were by nature born equal, but while children men were dependent for a period of time and incapable of independent judgment. Dependence ended at the age children attained reason; that is, became adults. Reason then supplied the principle underlying the formation of society. In a society founded on reasoned consent, all men would be equal under the laws. Children would be dependent on their parents to make decisions for them until they could make decisions for themselves in a free and uncoerced manner. Parents should not be able to bind their children irrevocably: all contracts should be temporary. Children could not be born into servitude, even if their parent was a servant or slave to another. Likewise children could not be born owing political obedience.

Locke had a good deal to say about children, but much less about the rights of masters or husbands. What he did say indicated that even in those cases consent had to be given freely. Locke hinted that a woman, while reasonable, might, in choosing a husband, also be choosing a political representative (in that he would vote on her behalf). He also suggested, however, that women should have the right to divorce. As to servitude, Locke held that in only one case – the crime of engaging in an unjust war – could a person be forced to serve another without consent, for the captive had in effect forfeited his life to his captor. Still, the captive was to be treated with respect by his master, was required to labor only for a set term of years, and retained a primary obligation to his family.

The point that emerges here is that what we would now regard as fundamental democratic political theory – who could consent, under what circumstances, who could not, who had authority over those who could not – was being worked out in arguments over family order. In this merged arena, the idea that unjust contracts were voidable challenged tyrannical government by kings and also by husbands, fathers, and masters. To be just, consent to anything had to be meaningful – fully informed and free from coercion. Obviously such arguments would have invalidated many Elizabethan and seventeenth-century labor contracts. At the same time,

such arguments demarcated a very clear space for childhood and underlay arguments for expanded custody. Other norms of authority could also potentially be justified by comparing wives, slaves, and servants to children in their inability to make independent judgments. Thomas Wood's *Institute of the Laws of England* (1720), popular in colonial libraries, appears to follow precisely this strategy by exploring in parallel the rights of masters, husbands, and fathers.

As Wood's "prequel" to Blackstone suggests, the new synthesis of the common law under way in the eighteenth century was deeply influenced by Locke. Blackstone's crowning edifice – the *Commentaries* – cites Locke (and also Continental natural law theorists like Pufendorf) repeatedly. For years, scholars have debated the political meaning of this development: whether, crudely, the new common law synthesis should be considered conservative or radical in its implications. The debate admits no clear answer, for the *Commentaries* are an artful mixture: Blackstone upholds hereditary status and the obligations of inferiors to obey their superiors, but he also argues that slavery is immoral and should be illegal (at least in his first edition). Some sections seem to express pure Lockean contract theory, notably Blackstone's argument against the wide use of the death penalty. Others adapt contractarianism to hierarchical precepts. With respect to domestic law, for example, it can fairly be said that Blackstone made it more hierarchical and gave hierarchy broader, more universal application.

Blackstone was thus influenced by emerging contractarian ideas at the same time as he adhered to hierarchical principles and older precedents. His objective was to create clarity and consistency within the common law in a way that strengthened the legal authority of many adult men, especially with respect to their wives. His domestic law was not the work of a misogynist: by all accounts Blackstone had a close and loving relationship with his own wife. It is not clear that Blackstone gave much thought to the practical effects of the powers he attributed men as husbands and fathers. What is clear is that Blackstone sought to bring order to a disorderly, haphazard, and neglected mass of statutes and common law precedents that appeared to obey no principles. Locke supplied principles that could be useful in imagining the balanced organizational framework Blackstone desired to create, whose particular twist appealed to Blackstone's own sympathies for hierarchy. The twist increased the powers of fathers and husbands and masters, for it established that those who cannot reason, like children, cannot consent. Wives can consent, but they consent to their husbands in marriage, who thereby becomes their representative and acts for them. Servants consent initially to labor and then are bound, unless the master releases them. Blackstone cemented hierarchy into the setting of consent by interpolating an element left over from the medieval common law: the idea

of people as property. Locke had carefully avoided that idea in the case of wives and children and had hedged it even for servants – more so, at least, than did the law of his own time. Blackstone was not so shy. Here was a broad exception to the principles of "All men created equal" for it meant that the contracts were not entered into in equal terms. It would prove a powerful legal tool, at least for those who sought to maximize its potential.

CONCLUSION

Anglo-American domestic law was not a timeless category: the powers of fathers and parents were not fixed in an unchanging common law between 1600 and the early nineteenth century, but significantly strengthened. Those powers increased at the same time as the powers of Lords and masters weakened (though applied more broadly), and the underlying cause was the same in each case: the political ideas that powered the three Anglo-American Revolutions (the Civil War and Interregnum, the Glorious Revolution of 1688, and the American Revolution of 1776). The new revolutionary principle of authority based on consent grew out of religious arguments that emphasized the authority of the father/husband and the principle of meaningful consent as corollary propositions. Political debates affected the common law and legal practice to reshape the boundaries of domestic authority. In the common law one finds both accommodation of the new principles of authority and elements of reaction.

The American Revolution added force to the legal changes whose path we have observed. Particularly in the late eighteenth century, changes in legal norms were occurring virtually hand in hand with the development of democratic-republican ideas about consent. They also occurred hand in hand with the emergence of new forms of capitalist industrial organization. The ubiquity of contractualism made it easier to identify and prosecute debtors, confiscate estates for debt, streamline finance, facilitate mortgages, and generally increase both circulation of and access to capital. Freedom of contract could aid transactions by unraveling tangled lines of property ownership, simultaneously simplifying the lines of responsibility of owners for debts owed. Freedom of contract could also advance the circulation of labor, while restrictions on the ability to contract could enable employers to retain effective control of their workers. We should note that America offered more possibilities for free labor before the Revolution and that Americans in the wake of the Revolution never adopted some of the harsh restraints developed in English law. The Revolution and attachment to the principles underlying it help explain the latter, whereas opportunities for westward movement helped forestall the coercive restraint of white labor.

P1: JZP
9780521803052c09 CUFX175/Grossberg 978 0 521 80305 2 September 30, 2007 17:6

Anglo-American common law innovation reified and reorganized old and ubiquitous norms about the power of lords and masters and then preserved them within the law as a new category, "domestic law." This category (especially with regard to minor children) was intrinsic to the newer political ideas of a government based on meaningful consent. Given its construction, we should not, indeed cannot, understand domestic law as if it were a phenomenon lying outside politics. Principles of domestic authority connect intimately with principles of public authority; public debates and legal decisions shaped private relationships.