
1-1-1999

Note: English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Parental Custody

Sarah Abramowicz

Wayne State University, sabramowicz@wayne.edu

Recommended Citation

Sarah Abramowicz, *Note: English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Parental Custody*, 99 Colum. L. Rev. 1344 (1999).

Available at: <http://digitalcommons.wayne.edu/lawfrp/37>

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.

NOTE

ENGLISH CHILD CUSTODY LAW, 1660–1839: THE ORIGINS OF JUDICIAL INTERVENTION IN PATERNAL CUSTODY

Sarah Abramowicz

Many legal historians see pre-1839 English child custody law as consisting of near-absolute paternal rights. These historians believe that the weakening of fathers' rights began with the 1839 Custody of Infants Act, which created certain maternal custody rights. Other historians have noted that paternal custody was qualified even before 1839 by the Court of Chancery's application of the doctrine of parens patriae. This Note tells a different story and argues that the origin of incursions into the so-called "empire of the father" was the 1660 Tenures Abolition Act, a statute that ironically seemed designed to strengthen fathers' rights.

The Tenures Abolition Act granted fathers the right to appoint guardians to their children by will. According to Blackstone, the effect of the Act was to extend the father's empire "even after his death." But by involving courts in child custody—even as enforcers of fathers' rights—the Tenures Abolition Act created a tradition of judicial intervention that would eventually undermine those rights. This Note traces the development from 1660 to 1839 whereby court supervision of testamentary guardians led to court supervision of fathers themselves, transforming the "empire of the father" into the empire of the judge.

INTRODUCTION

The legal power of a father,—for a mother, as such, is entitled to no power, but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.¹

In his authoritative pronouncement on English law, William Blackstone describes custody of children under the age of twenty-one as "the empire of the father." Blackstone advances as evidence of this empire that a father could appoint a guardian to his children by his will, thereby continuing his power "even after his death." But just as Blackstone was formulating his version of the father's empire, the doctrine he produces

1. 1 William Blackstone, Commentaries *453.

as evidence of its absolute nature was developing into authority for judges to intervene in paternal custody even during a father's lifetime.

The father's right to appoint a guardian to his children by will originated with a 1660 statute. From 1660 to the time of Blackstone, the English Court of Chancery had built a tradition of supervising these father-appointed guardians, known as testamentary guardians. Beginning in the mid-eighteenth century period when Blackstone wrote and culminating in the decades after his death, the Court of Chancery employed an analogy between testamentary guardians and fathers to extend its jurisdiction to include the supervision of fathers themselves.

As this Note will recount, some scholars have, like Blackstone, seen paternal rights as absolute under English law until the passage of an 1839 statute that created certain maternal custody rights. Others have noted the extent to which the "empire of the father" was qualified even before 1839. But no scholar has observed the irony that the origin of incursions into this empire was the father's acquisition of the right to appoint testamentary guardians. Once the father was granted a means of extending his power through legal instrument, judicial interpretation and discretion seeped into his empire. And once judicial discretion entered, even though initially in the guise of strengthening paternal rights, the empire of child custody was no longer the father's, but that of the judge.

This Note offers a revised version of the history of English child custody law from 1660 to 1839.² Part I analyzes the accounts of this history given by both modern scholars and pre-twentieth-century activists and commentators. In simplifying the law of child custody, either to the "empire of the father" or to an issue of Chancery's jurisdiction, these accounts miss the full story of the Court of Chancery's power to intervene in paternal custody. Part II begins to tell this story, by explaining how the advent of testamentary guardianships led to considerable discretion by Chancery. Finally, Part III explains how this power extended from the regulation of such guardianships to the regulation of fathers themselves. It documents, in short, that the "empire of the father" fell, and that its fall originated, not with the 1839 statute meant to weaken paternal rights, but with the 1660 statute meant to strengthen them.

I. PREVAILING VIEWS OF THE HISTORY OF ENGLISH CHILD CUSTODY LAW

This Part critically assesses prior treatments of the pre-1839 history of judicial intervention in paternal custody. No modern scholar has focused exclusively on this history, and those who have discussed the subject in tangents to other explorations have made critical omissions. Without yet

2. The English law of child custody described here pertains only to legitimate children. A history of the entirely different set of laws that pertained to the custody of illegitimate children is beyond the scope of this Note. For a discussion of the custody laws relating to illegitimate children, and of illegitimacy generally under English law, see generally Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (1982).

revealing the full story, this Part explains what those omissions are and shows how similar gaps existed in pre-twentieth-century advocacy and scholarship.

A. *Twentieth-Century Accounts*

The history of English child custody law is only beginning to receive adequate treatment by legal scholars. The child custody legislation of 1839 has recently begun to attract interest, especially among feminists.³ The history of English child custody law prior to 1839 has yet to receive similar attention.⁴ To the extent that scholars have approached this history, they have done so from two very different, but equally limited, perspectives.

The first mode of discussing the pre-1839 history of English child custody law, the more prevalent one in recent years, has been to recount this history in order to provide background for a history of American family law. The second mode, popular until the early 1970s, has been to trace the history of *parens patriae*, the ancient English doctrine that the King, as the father of the nation, has the power to act in protection of the nation's weak and powerless, namely infants, idiots, and lunatics. Today, in both the United States and England, *parens patriae* is used in a variety of contexts, from protection of the mentally ill⁵ to the law of juvenile

3. Two recent articles discuss the passage of England's first Custody of Infants Act in 1839. See Martha J. Bailey, *England's First Custody of Infants Act*, 20 *Queen's L.J.* 391 (1995); Dorothy E. Zaborsky, *Domestic Anarchy and the Destruction of the Family: Caroline Norton and the Custody of Infants Bill*, 7 *Int'l J. Women's Stud.* 397 (1989). Several scholars who trace the emergence of women's rights in England also mention the 1839 Custody of Infants Act, discussing Caroline Norton's role in bringing about that Act as an early example of feminist activism. See Lee Holcombe, *Wives & Property* 50-57 (1983); Joan Perkin, *Women and Marriage in Nineteenth-Century England* 26-27 (1989); Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*, at 23-26, 136-37 (1989). The passage of the 1839 Custody of Infants Act is also discussed by Susan Maidment as she traces the creation of maternal custody rights in English child custody legislation from 1839 to 1973. See Susan Maidment, *Child Custody and Divorce* 107-43 (1984).

4. An excellent history of English child custody law from 1839 onward is Susan Maidment's *Child Custody and Divorce*, *supra* note 3. Taking as her starting point the 1839 Custody of Infants Act, Maidment investigates the interplay between legislation and case law as well as between the two principles that emerged out of that interplay, namely, the "welfare principle," that is, the best interests of the child test, see *id.* at 89-107, and the principle of maternal rights, see *id.* at 107-49. Although she does briefly describe the state of the law in 1839 regarding both the welfare principle, see *id.* at 93-95, and maternal rights, see *id.* at 110-13, Maidment frames her discussion of the pre-1839 history in terms of post-1839 developments.

5. In its modern British incarnation, *parens patriae* allows the state to exercise a greater control over children than parents themselves can exercise, thus justifying, for example, the enforced sterilization of a mentally disabled fourteen-year-old girl. See John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 *Oxford J. Legal Stud.* 159, 159-62, 178-87 (1994).

courts,⁶ in order to justify the state's power to intervene. Scholars exploring the scope of this doctrine have had occasion to examine its history.

Both groups of scholars emphasize particular aspects of English child custody law and omit other, equally significant aspects, thus painting a misleading picture of the law as a whole. The first group examines only one small subset of child custody cases, and it is the cases they exclude that defined the contours of the English courts' power to control paternal custody. The second group emphasizes the issue of Chancery's jurisdiction at the expense of a discussion of the development of the substantive law. This Section will discuss these accounts in turn.

1. *Historians of American Family Law*. — Michael Grossberg⁷ and Mary Ann Mason⁸ have recently published important works on the history of American family law.⁹ In the sections of their works dealing with child custody law, both Grossberg and Mason argue that under the system of English law inherited by the colonies, and followed by American courts well into the 1800s, the father had an absolute right to the custody of his children. Grossberg and Mason use this characterization of English legal history to show how nineteenth-century American law diverged from its British counterpart. Under this analysis, the American courts acted throughout the nineteenth century to replace the British system of paternal rights with a judicial discretion that focused on maternal rights and the best interests of the child.

This characterization of British law as consisting of absolute paternal rights is an incomplete one that serves more as a foil for Grossberg's and Mason's arguments about American law than as an adequate picture of the English law of child custody. Grossberg, for example, states that the English Court of Chancery, beginning in the seventeenth century, devel-

6. The doctrine of *parens patriae* became of sudden interest to American legal scholars in the years following the decision of the U.S. Supreme Court in *In re Gault*, 387 U.S. 1, 27-28 (1967) (holding that the due process clause of the Fourteenth Amendment applies to proceedings in juvenile court), which questioned the extent to which juvenile courts had formerly relied upon *parens patriae* to avoid giving due process rights to minors. *Parens patriae* was, in the years prior to *Gault*, the predominant justification of the power of the state to control children in the juvenile courts. For an early discussion of the use of *parens patriae* to justify the system of the juvenile courts, see generally George Rossman, *Parens Patriae*, 4 Or. L. Rev. 233 (1925). For articles that revisited the subject in the wake of the 1967 decision, see George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DePaul L. Rev. 895 (1976); Douglas Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 22 S.C. L. Rev. 205 (1970).

7. Michael Grossberg, *Governing the Hearth* (1985) [hereinafter Grossberg, *Governing*].

8. Mary Ann Mason, *From Father's Property to Children's Rights* (1994).

9. Another recent work is Michael Grossberg, *A Judgment for Solomon* (1996) [hereinafter Grossberg, *Judgment*], an account of an American child custody battle in 1840. Prior to Grossberg's *Governing the Hearth*, scholarly attention to the history of American child custody law was rare. See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U. L. Rev. 1038, 1038 (1979) ("The history of American family law is largely unwritten.").

oped a doctrine called *parens patriae* which allowed it to interfere in paternal rights, but does not cite any instance of the English application of this doctrine.¹⁰ He goes on to assert that “[t]he development of *parens patriae* into a means of challenging paternal custody rights went on more rapidly and fully in North America.”¹¹ Grossberg does not cite any English case to support his assertion that the challenge to paternal rights progressed more rapidly in the United States than it did in England. Nor does he cite any cases to demonstrate his next claim, that it was in the American case law that “a father’s custody power evolved from a property right to a trust tied to his responsibility as guardian.”¹² Grossberg describes the notion that fatherhood is a trust as an American innovation, one that he enlists in support of his thesis as “yet another example of the antipatriarchal ethos embedded in republican family law.”¹³ As this Note will argue, the notion that fatherhood is a trust was no American innovation, but in fact existed in England as early as the eighteenth century.¹⁴

In addition to giving short shrift to the decisions of the English Court of Chancery, Grossberg and Mason further miss an opportunity to identify the true nature of English child custody law in their discussions of decisions made by English common law courts regarding child custody.¹⁵ The focus on English common law cases is an understandable one, because the early American child custody cases, to the extent that they cited English precedents, cited those cases rather than the decisions of the Court of Chancery.¹⁶ But neither Grossberg nor Mason notes this fact. As a result, what emerges from their analysis is a skewed picture of English child custody law. When a suit regarding the custody of a child was brought at an English court of common law, usually in the form of a habeas corpus petition asking for the delivery of the child, the court could only enforce, or in certain cases refuse to enforce, existing custody rights, but could not change them.¹⁷ When Grossberg and Mason discuss

10. Grossberg, *Governing*, supra note 7, at 236.

11. *Id.* For a similar argument, see Mason, supra note 8, at 58 (citing Grossberg).

12. Grossberg, *Governing*, supra note 7, at 236.

13. *Id.* at 236–37. Mason agrees that nineteenth-century American child custody law shifted away from a notion of custody as a father’s property right toward a more child-centered standard, but places her explanatory emphasis on the emergence of a cult of motherhood. Mason, supra note 8, at 49–83.

14. See *infra* Parts II & III.

15. See Grossberg, *Governing*, supra note 7, at 237 & 381 n.7; Grossberg, *Judgment*, supra note 9, at 52–53; Mason, supra note 8, at 59.

16. This can be explained by the fact that in nineteenth-century America, in contrast to England, most child custody cases were heard by courts of common law rather than by courts of chancery. See Lewis Hochheimer, *The Law Relating to the Custody of Infants* 27–28 (Baltimore, Harold B. Scrimger 1899) (1891) (“[T]he occasions for the interposition of chancery in matters of guardianship are here comparatively rare . . .”).

17. Fathers and other legal guardians frequently sought to recover the custody of children by bringing a writ of habeas corpus in a court of common law. At first, courts were uncertain how to respond to a writ of habeas corpus brought by a child’s guardian, since the traditional purpose of the writ is to free a person from improper restraint, not to

English common law cases, they fail to mention that the reason these cases refused to alter the right of custody was that to do so was the sole prerogative of the Court of Chancery.¹⁸

The misleading nature of the account of English child custody law provided by Grossberg and Mason is exemplified by their treatment of the case of *de Manneville*. The *de Manneville* case was heard twice, first in the Court of King's Bench, a court of common law, as *Rex v. de Manneville*,¹⁹ then in the Court of Chancery, as *de Manneville v. de Manneville*.²⁰ Both Grossberg and Mason discuss only the version of *de Manneville* decided by the Court of King's Bench.²¹ *Rex v. de Manneville* was

deliver the person from one custodian to another. In the early case of *Rex v. Johnson*, the court "doubted whether they should go any further than to see [the child] was under no illegal restraint," but decided that in "the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian . . ." *Rex v. Johnson*, 93 Eng. Rep. 711, 712 (K.B. 1724). A decade later, *Rex v. Smith* overruled *Johnson* and held that, even in the case of a child, a court presented with a writ of habeas corpus could do no more than set a person at liberty. See *Rex v. Smith*, 93 Eng. Rep. 983 (K.B. 1734) (ordering a fourteen-year-old boy released from the custody of his aunt, but refusing to deliver him to his father). Then, in *Rex v. Delaval*, Lord Mansfield synthesized *Johnson* and *Smith* to set forth the rule that upon a habeas corpus petition concerning a child, the court was only required to set the child at liberty from improper restraint, but could decide, at its discretion, whether or not to deliver the child into the hands of the legal guardian. See *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763) (refusing to deliver child into father's custody).

Often third parties without legal rights to the custody of a child—usually, mothers—would bring a writ of habeas corpus asking for the child to be delivered into their custody. In these cases, the courts refused to order the child removed from the guardian with the legal right to custody, on the ground that it could not interfere with that legal right. See *Rex v. de Manneville*, 102 Eng. Rep. 1054 (K.B. 1804); see also *Ex parte Skinner*, 27 Rev. Rep. 710 (C.P. 1824) (refusing mother's petition, upon writ of habeas corpus, for the custody of her six-year-old child, who had been placed by her father at the home of his mistress); *Ex parte McClellan*, 1 Dowl. P.C. 81 (K.B. 1830) (refusing mother's petition, upon writ of habeas corpus, for the custody of her child, who was very ill and had been placed by her father at a boarding school).

18. The tendency of American legal historians to read English precedents cited by American courts as the whole of English child custody law seems to have originated with Zainaldin, *supra* note 9, who in several footnotes provides the germ of the version of English law repeated by Grossberg and Mason. See *id.* at 1053–54 n.48, 1060–61 n.77, 1063–64 n.97. Zainaldin traces the history of English cases involving a habeas corpus petition for the delivery of an infant. His theory is that Mansfield liberalized the habeas corpus tradition by allowing a judge to refuse rights to a father, but that after the French revolution, the English judiciary became more conservative, and began in cases such as *Rex v. de Manneville* to retreat from the precedent of such cases as *Delaval*, once again refusing to decide the issue of custody upon a writ of habeas corpus. Zainaldin may well be correct as far as habeas is concerned, but as a history of child custody cases in general, his account is incomplete, as it does not mention the line of cases that developed simultaneously with the developments he discusses, where the Court of Chancery extended its power to remove children from the custody of their fathers.

19. 102 Eng. Rep. 1054 (K.B. 1804).

20. 32 Eng. Rep. 762 (Ch. 1804).

21. See Grossberg, *Judgment*, *supra* note 9, at 53; Mason, *supra* note 8, at 59. Confusingly, both Grossberg and Mason not only fail to note the fact that there were two

initiated by a writ of habeas corpus filed by the mother asking for the delivery of her infant child from the hands of its father, who, she claimed, had taken the child from her by force. The court ordered the child delivered up for examination, determined that it was not in danger of any harm, and returned it to the father, on the basis that "he having the legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him."²²

Looked at in isolation, *Rex v. de Manneville* indeed seems to demonstrate, as Mason puts it, "the doctrine of a father's paramount right to his children."²³ But had Mason and Grossberg examined the subsequent decision of *de Manneville v. de Manneville*, heard in Chancery, they would have found a very different interpretation of the basis for *Rex v. de Manneville's* refusal to deny a father the custody of his child:

The Court of King's Bench, when the child was brought up by *Habeas Corpus*, declined to interfere; and I am not surprised at it; for that Court has not within it by its constitution any of that species of delegated authority, that exists in the King, as *Parens Patriae*; and resides in this Court, as representing his Majesty.²⁴

The Court of King's Bench could not alter a father's right of custody, because the authority to do so was vested only in the Court of Chancery. As this Note will discuss below,²⁵ *de Manneville v. de Manneville* in fact expanded the discretionary power of the Court of Chancery to abrogate a father's right to the custody of his child.

2. *Historians of Parens Patriae.* — Historians of *parens patriae* subsume the historical development of child custody law under a larger exploration of that doctrine. Neil Cogan,²⁶ Lawrence Custer,²⁷ and John Seymour²⁸ have traced the development of *parens patriae* into a doctrine that justifies state interference between parent and child. In doing so,

de Manneville cases, but also provide an incorrect citation for the version of *de Manneville* that they do discuss. It is clear from their discussions of the holding of the case, as well as from the fact that they both name the deciding judge as Lord Ellenborough (who decided *Rex v. de Manneville*), that both Grossberg and Mason are referring, not to the Chancery decision of *de Manneville v. de Manneville*, 32 Eng. Rep. 762 (Ch. 1804), but rather, to the King's Bench decision of *Rex v. de Manneville*, 102 Eng. Rep. 1054 (K.B. 1804). However, Grossberg names his case as "*De Manneville v. De Manneville*" and cites to "32 Eng. Reps. 762 (Ch., 1804)." Grossberg, Judgment, *supra* note 9, at 250 n.44. Meanwhile Mason, though correctly identifying the case she discusses as "*Rex v. De Manneville*," similarly provides the citation not to *Rex v. de Manneville* but to *de Manneville v. de Manneville*, "32 Eng. Rep. 762 (Ch. 1804)." Mason, *supra* note 8, at 59 & 204 n.45.

22. *Rex v. de Manneville*, 102 Eng. Rep. at 1055.

23. Mason, *supra* note 8, at 59.

24. *De Manneville v. de Manneville*, 32 Eng. Rep. at 765.

25. See *infra* Part III.C.2.

26. See Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae"*, 22 S.C. L. Rev. 147 (1970).

27. See Lawrence Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195 (1978).

28. See Seymour, *supra* note 5.

they overemphasize the relevance of *parens patriae* in early child custody cases, concluding that child custody law originated with *parens patriae*. Although Cogan, Custer, and Seymour do mention testamentary guardianships, they treat them as an incidental element of, rather than the driving force behind, the cases employing *parens patriae*.²⁹ The modern version of *parens patriae* may have emerged in the context of English child custody law, but English child custody law did not grow out of *parens patriae*. To the contrary, the *parens patriae* doctrine was relevant to child custody primarily in that it gave the Court of Chancery jurisdiction to regulate testamentary guardianships.

The history of *parens patriae* provided by Cogan, Custer, and Seymour traces its extension to justify the Court of Chancery's regulation of testamentary guardians in three early cases:³⁰ *Falkland v. Bertie* in 1696,³¹ *Eyre v. Shaftsbury* in 1722,³² and *Shaftsbury v. Shaftsbury* in 1725.³³ A careful reading of these cases reveals that, while the courts were not as meticulous in separating their analyses of jurisdictional and substantive issues as courts today, the *parens patriae* doctrine was of the former type in the child custody context. The first case to mention *parens patriae* in conjunc-

29. These authors pay varying degrees of attention to the fact that many of the early cases they cite as establishing *parens patriae* involved testamentary guardianships, but none see the testamentary guardianship itself as the origin of Chancery's jurisdiction over paternal custody rights. Custer mentions that the Tenures Abolition Act, 12 Car. 2, ch. 24 (1660), gave fathers "the right to commit [their] children to guardianship by will," Custer, *supra* note 27, at 201, and, in his discussion of *Eyre v. Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722), states that this case involved a guardian appointed by will, see Custer, *supra* note 27, at 201, but does not analyze the relevance of the testamentary guardianship to the development of *parens patriae* jurisdiction, or distinguish between cases involving testamentary guardians and cases involving fathers. Both Cogan and Seymour discuss testamentary guardianships in more detail and trace the expansion of *parens patriae* from cases regulating testamentary guardians to cases regulating fathers themselves, but describe this as an expansion of *parens patriae* rather than as an expansion of the logic of testamentary guardianship. See Cogan, *supra* note 26, at 178 (arguing that the extension of Chancery's powers over fathers was based not on the logic of guardianship, but on the court's *parens patriae* power); Seymour, *supra* note 5, at 174-76 (tracing "the expansion of the *parens patriae* jurisdiction"). Seymour indeed notes that the 1660 Act establishing testamentary guardianships "gave particular impetus to the development of Chancery's jurisdiction over infants," *id.* at 172, and that the Court of Chancery's "assertion of jurisdiction over a testamentary guardian paved the way for judicial control over a father's exercise of his powers," *id.* at 175. But while Seymour recognizes that the step from regulating testamentary guardianships to regulating fathers was a large one—"[i]t was one thing for the Court to take action to fill the gap when the natural parent was dead, it was quite another for it to override the views of a father"—he simply notes that "[t]his step was taken in the eighteenth century," without explaining how or why. *Id.* at 175. To do so is the project of this Note.

30. See Cogan, *supra* note 26, at 166-77; Custer, *supra* note 27, at 201-05; Seymour, *supra* note 5, at 167-69.

31. 23 Eng. Rep. 814 (Ch. 1696).

32. 24 Eng. Rep. 659 (Ch. 1722).

33. 25 Eng. Rep. 121 (Ch. 1725).

tion with infants was *Falkland*.³⁴ In response to the infant petitioner's argument that the court should overlook as overly harsh the clause in her uncle's will conditioning her inheritance on marriage to a certain man, the *Falkland* court, though ruling against her, agreed with her proposition that the Court of Chancery could interfere on behalf of infants. In support of this proposition, it summoned up the doctrine of *parens patriae*, and in doing so described the doctrine as it had never been described before. Not only did *Falkland* rename "*parens patriae*" as "*pater patriae*,"³⁵ but it also advanced the novel idea that this doctrine extended to infants, that the portion of *parens patriae* relating to infants had formerly been exercised by the Court of Wards, and that upon the abolition of the Court of Wards in 1660, the jurisdiction over infants reverted to the Court of Chancery.³⁶

Falkland's statement on *parens patriae* was simply dictum. This dictum was subsequently, as Seymour describes it, "adopted as a correct statement of the law"³⁷ by a petitioner in *Eyre*, who relied upon the Court of Chancery's *parens patriae* jurisdiction over infants in asking it to intervene in a testamentary guardianship.³⁸ When the case returned to the

34. See Cogan, *supra* note 26, at 166; see also Custer, *supra* note 27, at 201.

35. See Cogan, *supra* note 26, at 166. The post-*Falkland* case law uses the two terms interchangeably.

36. The court stated:

In this court there were several things that belonged to the King as *pater patriae*, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, &c., afterwards such of them as were of profit and advantage to the King, were removed to the Court of Wards by the statute; but upon the dissolution of that court, came back again to the Chancery

Falkland, 23 Eng. Rep. at 818. As Custer observes, "The Lord Chancellor cited no authority for these statements . . . if he had any case authority he did not mention it." Custer, *supra* note 27, at 202.

37. Seymour, *supra* note 5, at 167; see also Custer, *supra* note 27, at 204 ("Thereafter . . . *Eyre v. Shaftsbury* became the precedent for upholding the crown's and consequently the equity court's protective authority over minors.").

Both Custer and Seymour overstate the importance of *parens patriae* to the decision in *Eyre*. While the petitioner in *Eyre* referred to the Court of Chancery's *parens patriae* power in arguing that the court had jurisdiction to interfere in a testamentary guardianship, see *Eyre*, 24 Eng. Rep. at 659, discussed *infra* at note 38, and the court implicitly accepted this argument by deciding that it could so interfere, the *Eyre* court itself did not mention *parens patriae*. But Custer and Seymour claim that the *Eyre* court itself referred to *parens patriae* as a basis for its decision. See Custer, *supra* note 27, at 202-04; Seymour, *supra* note 5, at 167, 169. The confusion stems from the fact that an account of the Court of Chancery's reconsideration of *Eyre* in the later case of *Shaftsbury v. Shaftsbury*—which did make direct mention of *parens patriae*—is appended to the report of *Eyre*, see 24 Eng. Rep. 661-66 (a separately published (and differently authored) report of *Shaftsbury* itself appears at 25 Eng. Rep. 121). The passages that Custer and Seymour attribute to *Eyre* as relying on *parens patriae* are in fact from the 1725 reconsideration of *Eyre* in *Shaftsbury*, as described by the reporter of *Eyre*.

38. See *Eyre*, 24 Eng. Rep. at 659. *Eyre* involved a mother who disputed the legitimacy of her child's testamentary guardian (on the technical ground that since the guardianship had been appointed to three, it became defunct upon the death of any one of those three), and in the alternative asked the court to prevent that guardian from removing the

Court of Chancery three years later in *Shaftsbury v. Shaftsbury*, the court itself referred to *parens patriae* as a justification for its authority over testamentary guardianships, thereby reaffirming the Court of Chancery's jurisdiction to care for the nation's infants in its role as *parens patriae*.³⁹ As the historians of *parens patriae* demonstrate, in the years following *Shaftsbury*, the Court of Chancery continued to refer to its *parens patriae* power in cases involving the regulation of testamentary guardians,⁴⁰ and again in cases extending this regulation to fathers.⁴¹

By reading the history of child custody law through the lens of *parens patriae*, historians take one aspect of the child custody legal regime for the whole. They therefore downplay the importance not only of the actual context in which cases involving child custody disputes emerged—the regulation of testamentary guardianships⁴²—but also the guiding notion by which the courts intervened in these disputes, that is, the notion that guardianship is a trust.⁴³ The opening statement of the decision in *Eyre* demonstrates both the centrality to the court's decision of the notion

child from her home and from interfering in her management of his education, arguing that "it was in the discretion of the Court" to do so. *Id.* The Court of Chancery ruled against the mother's argument that the guardianship was invalid, but agreed that it had the power to regulate testamentary guardianships, which it did in this case by deciding that the guardian could remove the child during the daytime and manage his education, but must return him to his mother every night. See *id.* at 660.

39. See *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121, 121–22 (Ch. 1725); see also the version of *Shaftsbury* reported at 24 Eng. Rep. 659, 664 (citing *Falkland* as authority for the proposition that "the care of all infants is lodged in the King as *pater patriae*, and by the King this care is delegated to his Court of Chancery").

Shaftsbury also supported its use of *parens patriae* in the context of infants by citing the 1603 precedent of *Beverley's Case*, 76 Eng. Rep. 1118 (K.B. 1603). Custer demonstrates that this use of precedent is based upon a printer's error. *Beverley's Case* concerned an attempt to avoid a debt on the grounds of mental incompetence. In upholding its jurisdiction to act in protection of the petitioner, the *Beverley* court referred to its power, delegated by the Crown, to act in protection of "idiots and lunatics." In the 1658 reprint of *Beverley* in Coke's Reports, the printer mistakenly changed "idiot" to "infant." See Custer, *supra* note 27, at 203–05. Custer describes the use of *Beverley's Case* by *Shaftsbury* (which Custer mistakenly cites as *Eyre*, see *supra* note 37) as evidence that the Lord Chancellor deciding *Shaftsbury* "knew he was treading on dangerous precedential ground" in extending *parens patriae* to encompass the protection of infants. *Id.* at 204.

With *Shaftsbury*, as Custer puts it, "[t]he *parens patriae* power was thereafter entrenched." *Id.* at 205.

40. See, e.g., *Smith v. Smith*, 26 Eng. Rep. 977 (Ch. 1745) (cited by Cogan, *supra* note 26, at 177–78).

41. See, e.g., *Wellesley v. Beaufort*, 38 Eng. Rep. 236, 243 (Ch. 1827) (cited by Cogan, *supra* note 26, at 179–81; Custer, *supra* note 27, at 207; Seymour, *supra* note 5, at 175–76); *de Manneville v. de Manneville*, 32 Eng. Rep. 762, 767 (Ch. 1804) (cited by Cogan, *supra* note 26, at 180; Custer, *supra* note 27, at 206; Seymour, *supra* note 5, at 172).

42. See *supra* note 29.

43. Seymour mentions the theory, raised in the eighteenth century, that Chancery's jurisdiction over guardianship originated in, and was modelled on, the law of trusts, and follows the eighteenth-century scholars in dismissing this theory. See Seymour, *supra* note 5, at 166–67. For a discussion of the eighteenth-century dismissal of the trust theory of guardianship, see *infra* Part I.B.2.

that guardianship is a trust and the connection between this notion and the newly established testamentary guardianships:

The father by the statute has a right to dispose of the guardianship of his child until twenty-one, and having done so here, it will be binding, unless some misbehaviour be shown in the guardian, in which case it being a matter of trust, this court has a superintendency over it.⁴⁴

The issue in *Eyre* was the court's power to regulate and enforce the new testamentary guardianships created by the 1660 statute. The mode in which *Eyre* approached its regulation of these testamentary guardianships was to treat them as trusts. The court had power vis-à-vis the guardian because the guardian was a trustee, and as such invited judicial intervention whenever he failed to properly execute his trust.⁴⁵

Thus, the necessary element of judicial intervention in testamentary guardianships was not *parens patriae*, but the idea of guardianship as a trust. The *parens patriae* argument served only to explain why the Court of Chancery, as opposed to another court, should have the jurisdiction over guardianships.⁴⁶ Even before *Falkland* advanced the *parens patriae* theory, courts had undertaken the regulation of testamentary guardianships, and had done so on the theory that guardianship is a trust. In 1668, in *Bedell v. Constable*,⁴⁷ the Court of Common Pleas heard a dispute involving the appointment of a testamentary guardian.⁴⁸ Throughout its

44. *Eyre*, 24 Eng. Rep. at 660 (citation omitted). Forty years later, William Blackstone would describe the regulation of guardianships in much the same terms:

[T]he lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay sometimes will proceed to the removal of him, and appoint another in his stead.

1 Blackstone, *supra* note 1, at *463.

45. Similarly, the Court of Chancery had held a year earlier, in *Beaufort v. Berty*, that guardians appointed by will under the Tenures Abolition Act were trustees, and as such subject to the control of the Court of Chancery. See *Beaufort v. Berty*, 24 Eng. Rep. 579, 579 (Ch. 1721).

46. A useful demonstration of the relationship between the Court of Chancery's *parens patriae* powers—which helped to justify its jurisdiction over guardianships—and the notion of guardianship as a trust—which justified its use of discretion in regulating and enforcing those guardianships—is provided by the argument of the petitioner in *Eyre*:

It was . . . urged, that this was a matter of trust, for every guardianship was a trust; that the Crown, as *parens patriae*, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing, as to take away an infant under thirteen years of age, from so careful a mother

Eyre, 24 Eng. Rep. at 659 (citations omitted).

47. 124 Eng. Rep. 1026 (C.P. 1668).

48. The case involved a dispute between the person who would ordinarily be the guardian in socage, see *infra* Part II.A, and the guardian appointed by the father, where the father had devised the "custody and tuition of his heir" but did not specifically dispose of his property. *Id.* at 1026. Since the land and the custody of the heir traditionally fell to the same person, the court needed to determine whether "the land follows the custody," by

decision, *Bedell* referred to the notion that guardianship is a trust.⁴⁹ The difference between *Bedell* and *Shaftsbury* was that whereas *Bedell* was heard in the Court of Common Pleas, *Shaftsbury* claimed the regulation of guardianships as the special prerogative of the Court of Chancery, and justified this jurisdictional grant by referring to the Court of Chancery's power of *parens patriae*.⁵⁰ In the child custody cases that ensued, some decisions reiterated Chancery's special role as *parens patriae*,⁵¹ and others disputed that this role encompassed a jurisdiction over infants.⁵² But whenever the Court of Chancery's ability to interfere with a guardian's rights was put into question, it rested its power to remove a guardian who mismanaged the care of a ward on the basis that a guardian was but a trustee, and as such subject to judicial supervision.⁵³

B. Earlier Accounts

That the histories of English child custody law provided by twentieth-century scholars emphasize certain aspects of that history at the expense of others should perhaps not be surprising, because, as this Section will now show, similar distortions were present in earlier tellings of the same story. Consistent with the American historians' belief that English child custody law afforded absolute paternal rights was a nineteenth-century

which both would go to the testamentary guardian, or "the custody follows the land," by which both would go to the guardian in socage. *Id.* at 1026. The court manifested its discomfort with the new testamentary guardianship by ruling for the guardian in socage on the ground that the appointment of the testamentary guardian was void because the father had not named any specific age at which the guardianship was to terminate. See *id.* at 1030.

49. See, e.g., *id.* at 1028 ("And a more near or tenderer trust cannot be, than the custody and education of a mans [sic] child and heir, and the preservation of his estate."). *Bedell* was one of the first printed cases to interpret the Tenures Abolition Act, 12 Car. 2, ch. 24 (1660), and seemed repeatedly troubled by the unprecedented nature of the situations created by the Act. *Bedell* referred to both the guardianship in socage and the testamentary guardianship as a trust, and primarily used the notion of "trust" to reject the idea that a guardianship could be lightly conferred or transferred, complaining that in making the trust of guardianship subject to change by the father's will, the new statute allowed outcomes "contrary to the ancient and excellent policy of the law." *Bedell*, 124 Eng. Rep. at 1029.

50. See *supra* note 39 and accompanying text.

51. See *Butler v. Freeman*, 27 Eng. Rep. 204, 204 (Ch. 1756).

52. See *Ex parte Whitfield*, 26 Eng. Rep. 592, 592-93 (Ch. 1742).

53. See *Beaufort v. Berty*, 24 Eng. Rep. 579, 579 (Ch. 1721) ("Guardians [appointed by will under the Tenures Abolition Act] were but trustees . . . and as the Court would interpose, where the estate of a man was devised in trust, so would it a fortiori concern itself, on the custody of a child's being devised to a guardian . . ."); *Eyre v. Shaftsbury*, 24 Eng. Rep. 659, 660 (Ch. 1722); *Morgan v. Dillon*, 88 Eng. Rep. 361, 365-66 (Ch. 1724) (removing testamentary guardian for breach of trust); *Goodall v. Harris*, 24 Eng. Rep. 862, 862-63 (Ch. 1729) (removing testamentary guardian for breach of trust); see also *Wellesley v. Wellesley*, 4 Eng. Rep. 1078, 1081 (H.L. 1828) (upholding the Court of Chancery's power to remove a father for breach of trust by reasoning, "why is the conduct of the father not to be considered a trust, as well as the conduct of a person appointed as guardian?").

effort that mischaracterized that law in an effort to obtain rights for mothers. And consistent with the *parens patriae* scholars' emphasis on that doctrine was a debate in the late eighteenth century about the source of the Court of Chancery's jurisdiction over fathers.

1. *Maternal Rights Advocacy and the Myth of Absolute Paternal Rights.* — The crystallization into accepted truth of Blackstone's notion that English fathers had absolute rights to the custody of their children began in nineteenth-century England with the advent of agitation for maternal rights. As marital dissolution became increasingly common at the beginning of the nineteenth century,⁵⁴ more and more cases emerged in which mothers competed with fathers for the custody of their children. The view that fathers had absolute rights to the custody of their children grew out of these cases: first, in the jurisprudence itself, which repeatedly rejected maternal rights as a sufficient basis for the removal of children from their fathers, and second, in the treatment of these cases in the influential writings of Caroline Norton, whose crusade for the creation of maternal custody rights resulted in the passage of the 1839 Custody of Infants Act.

a. *The Lack of Maternal Rights Before 1839.* — Prior to 1804, the Court of Chancery regularly granted mothers' requests to restrain fathers from interfering with the custody of their children.⁵⁵ The basis of these decisions was never that the mother had a right to the custody of her child superseding the right of the father, but rather that the father had lost his

54. See Lawrence Stone, *Road to Divorce* 141–48, 158–59, 184–86, 325–26 (1995). In most cases, marital dissolution was effected either de facto or by a privately arranged separation agreement, rather than through a legally sanctioned separation or divorce. See *id.* This was because, prior to the Divorce Act of 1857, 20 & 21 Vict., ch. 85, separation and divorce were very difficult to obtain under English law. A legal separation could be obtained from the ecclesiastical courts, but only on the grounds of adultery or cruelty, and the costs of filing such a suit were high. In cases where the wife had committed adultery, a full divorce could be obtained by an Act of Parliament; this was even more costly. See Stone, *supra*, at 141. In the early 1800s, changing attitudes about the acceptability of divorce ushered in an era of agitation for legal reforms that would make divorces easier to obtain. See *id.* at 353–67.

For an account of the effect on women's rights of the 1857 Divorce Act, and of the role of women in bringing about the passage of that Act as well as subsequent legislation reforming the laws of marriage and divorce, see Shanley, *supra* note 3; see also Holcombe, *supra* note 3. As both Shanley and Holcombe recount, Caroline Norton played an important role in bringing about the passage of the 1857 Divorce Act. See Holcombe, *supra* note 3, at 50–58; Shanley, *supra* note 3, at 22–48; see also Caroline Norton, *English Laws for Women in the Nineteenth Century* (Hyperion Press 1981) (1854) [hereinafter Norton, *English Laws*] (providing Norton's own description of her agitation on behalf of divorce reform).

55. See *Giffard v. Giffard*, unreported case cited in *Blisset's Case*, 98 Eng. Rep. 899, 900 (K.B. 1774) (granting custody to a mother, where the father was a Catholic and bankrupt); see also *Creuze v. Hunter*, 30 Eug. Rep. 113 (Ch. 1790) (preventing a bankrupt father from interfering with the mother's arrangements for the custody and education of their children); *Skinner v. Warner*, 21 Eng. Rep. 473 (Ch. 1792) (ordering a bankrupt father not to remove his children from the schools at which their mother had placed them).

own rights to custody.⁵⁶ In the *de Manneville v. de Manneville* case of 1804,⁵⁷ and in cases that followed,⁵⁸ mothers who sought the custody of their children began to argue for this custody on the novel basis that maternal rights superseded paternal rights. It was when custody became an issue of competing maternal and paternal rights that judges ruled in favor of fathers, holding that paternal custody rights are superior to maternal ones. But they never denied the superiority of judicial power to that of fathers.

The absence of maternal custody rights was famously articulated by Blackstone in 1765: “[A] mother, as such, is entitled to no power, but only to reverence and respect.”⁵⁹ Even in Blackstone’s time, however, the weakness of maternal rights was less extreme than his famous quote implies. Most legal scholars of the seventeenth, eighteenth, and nineteenth centuries, Blackstone included, agreed that a mother had the right to her child when no other guardian existed to supersede her.⁶⁰ It was only relative to other guardians—including the father and the father’s appointed guardian—that the mother had no enforceable custody rights.

In *de Manneville*, a mother petitioning for the custody of her infant daughter advanced the argument that “children of such a tender age . . . cannot without great danger be separated from the mother.”⁶¹ The Lord Chancellor hearing *de Manneville* refused even to consider the theory that children belong with their mothers—“I do not mean to decide, whether I am at liberty to pay attention to the affidavit of the wife”⁶²—preferring instead to proceed as if the mother’s argument did not exist: “[T]he Court will do what is for the benefit of the infant, without regard to the

56. See *Giffard*, cited in 98 Eng. Rep. at 900:

[T]he paternal authority as to its civil force was founded in nature, and the care presumed which he would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child’s person, or if he would educate it in a manner forbidden by the laws of the State, the public right of the community to superintend the education of its members, and disallow what for its own security and welfare it should see good to disallow, went beyond the right and authority of the father

57. 32 Eng. Rep. 762 (Ch. 1804). This important case will be discussed in more detail *infra* Part III.C.2.

58. See cases discussed *infra* at notes 67–73 and accompanying text.

59. 1 Blackstone, *supra* note 1, at *453.

60. For a description of the “guardianship by nurture,” by which both the mother and the father, in the absence of any other species of guardianship, had the right to the custody of their children under the age of fourteen, see Peregrine Bingham, *The Law of Infancy and Coverture* 140–41 (London, J. Butterworth & Son 1816); 1 Blackstone, *supra* note 1, at *461; Edward Coke, *The First Part of the Institutes of the Laws of England: A Commentary upon Littleton* 88b (London, W. Clarke 17th ed. 1817) (1628); John Fonblanque, *A Treatise of Equity* 240 note h (London, J. & W.T. Clarke, 1820) (1794); Francis Hargrave, *Notes to Coke’s Commentary upon Littleton* 88b n.13 (London, W. Clarke 1817) (1787).

61. *De Manneville*, 32 Eng. Rep. at 763.

62. *Id.* at 765.

prayer.”⁶³ As this Note will discuss below,⁶⁴ *de Manneville* in fact reaffirmed and extended the power of the Court of Chancery to interfere with fathers’ custody over their children, and even to remove children from their fathers altogether. At the same time, however, *de Manneville* emphasized that in deciding whether to abrogate paternal custody rights, the court did not need to consult the mother’s rights or desires, but only its own discretion. In this instance, the court’s discretion led it to order, on the one hand, that the father be restrained from removing the child out of England,⁶⁵ and on the other hand, that the child not be delivered to the custody of the mother, since the mother had separated from her husband without obtaining a legal separation or divorce, and to place the child with her would be to condone this illegal arrangement.⁶⁶

As mothers in subsequent years made claims to their children on the basis of custody rights, the Court of Chancery held repeatedly that mothers have no right of custody against fathers.⁶⁷ Although in each of these cases the father had behaved in a manner that might, in itself, jus-

63. *Id.*

64. See *infra* Part III.B.2.

65. See *de Manneville*, 32 Eng. Rep. at 768.

66. See *id.* at 765–66 (“This is an application by a married woman, living in a state of actual, unauthorized, separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law.”). Martha Bailey argues that “it was the sanctity of marriage, not the sacred rights of fathers, that underlay the [*de Manneville*] decision.” See Bailey, *supra* note 3, at 398. As she goes on to observe, Lord Eldon, the Lord Chancellor deciding *de Manneville*, would in later cases “involving dead mothers and ‘immoral’ fathers . . . show his willingness to override fathers’ rights when separation was not in issue.” *Id.* The cases involving “dead mothers and ‘immoral’ fathers” to which Bailey refers were *Shelley v. Westbrooke*, 37 Eng. Rep. 850 (Ch. 1817) and *Wellesley v. Beaufort*, 38 Eng. Rep. 236 (Ch. 1827), see *id.* at 398 n.20, which are discussed *infra* at Part III.C.2.

67. See *Ball v. Ball*, 57 Eng. Rep. 703 (V.C. 1827) (rejecting a mother’s petition for the custody of, or access to, her child, submitted on the grounds of her husband’s cruelty); see also *Gallini v. Gallini*, unreported case cited in *Ball*, 57 Eng. Rep. at 704 (refusing a mother’s petition to remove children from their Catholic father); *Smith v. Smith*, cited in *Ball*, 57 Eng. Rep. at 704 (rejecting a claim that right to children under the age of seven is vested in the mother); unreported case of *Mrs. Greenhill*, referred to in *Rex v. Greenhill*, 111 Eng. Rep. 922, 923 (K.B. 1836), and discussed in more detail in Caroline Norton, *The Separation of Mother and Child by the Law of “Custody of Infants,” Considered 54–73* (London, Roake & Varty 1838) [hereinafter Norton, *Separation*]. In the case of *Mrs. Greenhill*, the Court of Chancery dismissed a mother’s petition complaining that her husband had deprived her of access to her children, on the ground that a mother did not “as a matter of right” have a claim “even [to] see her children,” let alone to her children’s custody. See Norton, *Separation*, *supra*, at 61. Norton’s report of the *Greenhill* case is probably an accurate one, as it was prepared with the help of Sergeant Talfourd, see *id.* at 33, who was the lawyer for Mr. *Greenhill* in the original case, see Bailey, *supra* note 3, at 409. Talfourd was inspired by *Mrs. Greenhill*’s case to take up the cause of maternal custody rights, and it was he who presented to Parliament Norton’s *Custody of Infants* Bill. See *id.*

tify removal of his children—adultery,⁶⁸ irreligion,⁶⁹ cruelty⁷⁰—the mothers lost when they attempted to obtain the children on the ground that they had a right to do so. In *Ball*, the court even refused to order that a father allow his wife access to her children, holding that the court did not have the power to interfere in a father's rights unless the father himself lost these rights by his own misbehavior.⁷¹ In 1836, *Rex v. Greenhill*⁷² articulated the reasoning behind this repeated rejection of mothers' claims to custody rights: "[A]ny doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes."⁷³ Although willing to remove children from fathers, the courts were reluctant to do so where this might encourage mothers to think that they had a right to their children's custody. Where a claim to custody was cast as a dispute between mother and father, the rule was clear: The father's rights dominated. But the judicial process stood above both.

b. *Caroline Norton and the 1839 Custody of Infants Act*. — It was Caroline Norton who brought the lack of maternal custody rights to the attention of the English public. In doing so, she created the misperception that under English law prior to 1839, fathers had absolute rights to the custody of their children. Norton entered the world of child custody law when she separated from her husband and he refused to allow her access

68. Compare *Ball*, 57 Eng. Rep. at 703 (refusing to abrogate father's rights on grounds of adultery), with *Wellesley v. Beaufort*, 38 Eng. Rep. 236 (Ch. 1827) (abrogating a father's custody rights in part due to his adultery), discussed *infra* Part III.B.2. It seems that the determining factor in the difference in outcome between *Ball* and *Wellesley* was that in *Wellesley*, the mother was dead, and therefore not in any danger of asserting her maternal rights, whereas in *Ball*, the mother was alive.

69. Compare *Gallini*, cited in 57 Eng. Rep. at 704 (refusing to abrogate a father's rights on religious grounds), with *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817) (abrogating paternal rights on religious grounds), discussed *infra* Part III.B.2.

70. Compare *Smith*, cited in 57 Eng. Rep. at 704 (refusing to abrogate paternal rights on grounds of cruelty toward mother, where maternal rights claimed by mother), with *Mytton v. Holyoake* (Ch. 1830), unreported case cited in William Macpherson, *A Treatise on the Law Relating to Infants* 110 (Philadelphia, John S. Littell 1843) (abrogating paternal rights on grounds of cruelty toward mother and general profligacy, and placing children with mother, where petition brought by a third party).

71. See *Ball*, 57 Eng. Rep. at 704 ("Some conduct, on the part of the father, with reference to the management and education of the child, must be shown to warrant interference with his legal right").

72. 111 Eng. Rep. 922 (K.B. 1836) (rejecting a mother's petition of habeas corpus to have her children removed from the custody of their adulterous father).

73. *Id.* at 927. *Rex v. Greenhill* was not decided in the Court of Chancery, but rather, in the Court of the King's Bench, and, as the lawyers for both sides admitted, "[t]he power of separating children from the father on account of immorality in him, lies in the Court of Chancery . . ." *Id.* at 926. The *Greenhill* court, noting that the mother had already petitioned the Court of Chancery and lost her case, decided not to base its ruling on the fact of its limited powers, but rested instead on the "more general grounds" that in the case of a dispute between a mother and a father, "the proper custody . . . undoubtedly is the custody of the father." *Id.* at 927–28.

to their three children.⁷⁴ Told by a legal advisor that she had no legal recourse, Norton, in disbelief, read through the law books herself and discovered that mothers in her position had been repeatedly turned away by the courts. Rather than attempt to struggle against years of anti-maternal precedent, Norton decided to appeal directly to Parliament, and drafted the bill that eventually became the Custody of Infants Act.⁷⁵ Passed in 1839, the Custody of Infants Act gave the Court of Chancery the power to grant a mother the custody of her children under the age of seven and access to her older children, provided that the mother had not committed adultery.⁷⁶ It also opened up a new era of child custody law by ushering in a tradition of Parliamentary legislation on the subject.⁷⁷

Norton argued for the passage of her proposed bill in two pamphlets that she distributed to members of Parliament.⁷⁸ These pamphlets revolutionized the public perception of child custody law by reframing it as an issue of mothers' and fathers' competing rights. Noting that whenever a mother claimed custody against a father, the legal decisions that resulted made "no reference to the mother's claim," but instead focused exclusively on the rights of the father,⁷⁹ Norton sets out to tell the formerly untold aspect of child custody law, that is, the plight of the mothers whose rights had been refused. Thus Norton transforms *de Manneville v.*

74. See Norton, *English Laws*, supra note 54, at 41–53 for Norton's autobiographical account of her brutal treatment at the hands of her husband, and his refusal to permit her access to her children. See also the biography of Norton by Jane Perkins, *The Life of the Honourable Mrs. Norton* (1909).

75. Thus Norton decided, as she put it, to fight her situation with her pen, "looking to it to extricate me, as the soldier trusts to his sword to cut his way through." Perkins, supra note 74, at 130 (quoting Norton); see also Norton, *English Laws*, supra note 54, at 49, 52; Caroline Norton, *A Plain Letter to the Lord Chancellor on the Infant Custody Bill 71* (London, James Ridgeway 1839) [hereinafter Norton, *Plain Letter*] (published under the pen-name "Pearce Stevenson, Esq."). For recent articles on Norton's role in the passage of the Custody of Infants Act, see supra note 3.

76. See *Custody of Infants Act*, 2 & 3 Vict., ch. 54 (1839). This Act was extended to all courts by the *Judicature Act*, 36 & 37 Vict., ch. 66 § 25(10) (1873).

77. The *Custody of Infants Act*, 1873, 36 & 37 Vict., ch. 12, raised the age under which children could be awarded to the mother to 16, see id. § 1, removed adultery as a bar to maternal custody, see id. § 1, and allowed the Court of Chancery to uphold a separation deed if it determined such deed to be "for the benefit of the infant," id. § 2. The *Guardianship of Infants Act*, 1886, 49 & 50 Vict., ch. 27, allowed the court to consider both "the conduct of the parents" and the "welfare of the infant" in making a custody determination, id. § 5, and the *Guardianship of Infants Act*, 1925, 15 & 16 Geo. 5, ch. 45, placed the mother and the father on equal footing with regard to child custody, see id. § 2, and required that courts "shall regard the welfare of the infant as the first and paramount consideration" in making a child custody determination, id. § 1. For an overview and analysis of English child custody legislation from 1839 to 1925, see Maidment, supra note 3, at 89–149.

78. See Norton, *Plain Letter*, supra note 75; Norton, *Separation*, supra note 67.

79. Norton, *Separation*, supra note 67, at 36.

de Manneville,⁸⁰ *Ball v. Ball*,⁸¹ and *Rex v. Greenhill*⁸² into "Case of Mrs. de Manneville,"⁸³ "Case of Mrs. Ball,"⁸⁴ and "Case of Mrs. Greenhill,"⁸⁵ retelling each dispute over child custody from the point of view of the mother. She details the pain every mother feels at losing the custody of her child,⁸⁶ and expounds on the dangerous nature of a law that in many instances forced a mother to choose between suffering at the hands of an abusive husband and losing access to her children.⁸⁷

As she recasts legal history from a mother's perspective, Norton remedies one imbalance in legal discussions of child custody, but at the same time creates an imbalance of a different sort by giving the misleading impression that fathers had absolute rights to the custody of their children. Although Norton does mention that the Court of Chancery had upon several occasions interfered with fathers' rights, she does not describe these instances in any detail.⁸⁸ More importantly, Norton presents the cases she does describe, involving mothers' and fathers' competing rights, as if these cases refused custody to mothers on the basis that fathers' custody rights were absolute. This is exemplified by her treatment of *de Manneville*.⁸⁹ Here Norton mentions the court order forbidding the father from taking the child out of the jurisdiction,⁹⁰ but does not view this as an abrogation of paternal rights. Norton focuses instead on the court's refusal to grant custody to the mother, spinning the facts of the case to make the decision stand for the proposition "that 'the father's right' extends to the hour of a child's birth, and that he may tear it from the breast of its mother, in the act of affording it the nourishment which supports its life."⁹¹ With its rhetoric of brutal fathers and victimized

80. 32 Eng. Rep. 762 (Ch. 1804).

81. 57 Eng. Rep. 703 (V.C. 1827).

82. 111 Eng. Rep. 922 (K.B. 1836).

83. Norton, Separation, supra note 67, at 33.

84. Id. at 49.

85. Id. at 54.

86. Norton describes in great detail "the effect on a woman's heart" of "suddenly snapping the tenderest of ties." Id. at 16.

87. Norton frequently casts the effect on a mother of losing her children as torture, asking, for example, "what degree of bodily agony, or bodily fear, can compare with the inch-by-inch torture of this unnatural separation?" Id. Her argument is that this torture can be inflicted at the will of the husbands who wish to use "the custody of their children as a means and instrument in their hands . . . the forfeiture of which can be held *in terrorem* over [the wife] to prevent her resisting any violence or any insult." Thus, the law of child custody allows husbands "to rack the heart instead of the body." Norton, Plain Letter, supra note 75, at 46.

88. See, e.g., Norton, Separation, supra note 67, at 6; Norton, English Laws, supra note 54, at 22.

89. See Norton, Separation, supra note 67, at 33-37. For a discussion of *de Manneville*, see supra text accompanying notes 19-25; infra Part III.A.2.

90. See Norton, Separation, supra note 67, at 36.

91. Id. at 37.

mothers, Norton's *de Manneville* suggests that judges are impotent to break in against the all-powerful rights of fathers.⁹²

Norton's agitation on behalf of the Custody of Infants bill did more than change the future of child custody law. It also changed the way in which the future would read the custody law of the past. Members of Parliament debating Norton's proposal often disagreed about the advisability of passing it into law, complaining, for instance, that the law would allow wives to leave their husbands with impunity,⁹³ that women should learn to obey their husbands,⁹⁴ and that a custody law would encourage litigation⁹⁵ and cause couples to bring their private disputes into the public arena.⁹⁶ But they accepted Norton's view of legal history, not only believing her version but also reading it into the record to be recorded for all posterity: "[W]hat was the state of the law with respect to the subject to which this bill applied? By the law of England, as it now stood, the father had an absolute right to the custody of his children."⁹⁷

2. *Early Scholarship on Chancery's Jurisdiction.* — In the decades before Norton's crusade created the impression of absolute paternal rights, a crisis arose in legal scholarship over the power of the Court of Chancery to abrogate the rights of fathers to the custody of their children. The Court of Chancery had for years been regulating testamentary guardians, and had in 1756 quietly extended this regulation to include fathers themselves,⁹⁸ when a legal scholar caused a furor by labeling Chancery's jurisdiction over guardianship a "usurpation" of power.

The attack on the Court of Chancery's jurisdiction to interfere in guardianship came in 1787 from Francis Hargrave, in his annotations to one of the classic works of legal scholarship, Coke's *Commentary upon Lit-*

92. In addition to her rhetorical flourishes, Norton employs a selective and somewhat sly use of citation. To support her reading of *de Manneville* as upholding absolute paternal rights, Norton refrains from citing the court's language on its power to supersede a father's custody rights: "[T]he Court has jurisdiction . . . to control the right of the father . . . to the person of the child." *De Manneville v. de Manneville*, 32 Eng. Rep. 762, 767 (Ch. 1804). Instead, she cites, without distinguishing it as such, the claim of the father's lawyers that "*the law is clear that the custody of the child, of whatever age, belongs to the father,*" thereby leading her readers to assume that this was the holding of the case itself. See Norton, *Separation*, supra note 67, at 36; *de Manneville*, 32 Eng. Rep. at 764 (argument of father's counsel).

93. See, e.g., 40 Parl. Deb. (3d ser.) 1115 (1838) ("The great tie which prevents the separation of married persons is their common children. A wife was, in general, glad to have that excuse for submitting to the temper of a capricious husband."); see also 43 Parl. Deb. (3d ser.) 146 (1838) ("[T]he present state of the law favored reconciliation between husband and wife . . .").

94. See, e.g., 40 Parl. Deb. 1116; see also 43 Parl. Deb. 144 ("A woman's strength lay in her submissiveness . . .").

95. See 40 Parl. Deb. 1118 ("The Bill . . . opened a scene of misery for families, which was interminable, and an extent of litigation which was perfectly frightful . . .").

96. See, e.g., 42 Parl. Deb. (3d ser.) 1050-54 (1838).

97. *Id.* at 486.

98. See *infra* Part III.

tleton.⁹⁹ In annotating Coke's note 88b, on guardianship,¹⁰⁰ Hargrave updated Coke's text by including the new jurisprudence by which the Court of Chancery regulated guardians.¹⁰¹ But when the moment came to explain the basis for this jurisdiction, Hargrave was stymied: "How this jurisdiction was acquired by [the Lord Chancellor] is not easy to state. The usual manner of accounting for it appears to us quite unsatisfactory."¹⁰² Hargrave set forth the two major theories that had been advanced as the basis for this jurisdiction, and rejected each in turn: first, the theory that the Court of Chancery controlled guardianships because its power as *parens patriae* to protect idiots and lunatics extended to infants as well, and although the portion of the *parens patriae* jurisdiction relating to infants had been diverted to the Court of Wards in 1540, it reverted to Chancery upon the abolition of that court in 1660,¹⁰³ and second, that guardianship was a trust, and as such subject to Chancery's jurisdiction.¹⁰⁴

Hargrave rejected the first theory by noting that whereas the Court of Chancery had been specifically delegated the power to protect idiots and lunatics as *parens patriae*, no such delegation of authority existed with

99. See Hargrave, *supra* note 60. Coke's *Commentary upon Littleton*, also known as *The First Part of the Institutes of the Laws of England*, is itself a 1628 translation and annotation of Thomas Littleton's 1481 *Of Tenures*. See Coke, *supra* note 60; Thomas Littleton, *Of Tenures* (Edward Coke trans., London, W. Clarke 17th ed. 1817) (1481).

100. Note 88b of Coke's *Commentary upon Littleton* annotates Chapter 5, Section 123 of Littleton's *Of Tenures*, on guardianship in socage, a type of guardianship based on the medieval system of land tenures, discussed *infra* at notes 123–126 and accompanying text. At the end of note 88b, Coke provides a general overview of the types of guardianship then extant under English law. See Coke, *supra* note 60, at 88b.

Since the analysis of guardianship provided by Littleton and Coke was based on the medieval system of land tenures, it became largely outdated when that system was abolished by the Tenures Abolition Act in 1660. See discussion *infra* at Parts IIA and IIB.

101. See Hargrave, *supra* note 60, at 88b. Hargrave casts his discussion in terms of the Court of Chancery's power to *appoint* guardians rather than its power to *regulate* existing guardians. See *id.* at 88b n.16 (discussing "guardian by appointment of the lord chancellor"). In the years following the establishment of testamentary guardianships, the Court of Chancery would occasionally appoint guardians where none had been devised by testament. These cases usually came before the Court of Chancery in connection with the administration of an inheritance to an infant heir. See, e.g., *Doctor Davis's Case*, 24 Eng. Rep. 577 (Ch. 1721) (committing the custody of an infant heiress to a guardian). The Court of Chancery could also appoint a guardian upon request. See *Ex parte Watkins*, 28 Eng. Rep. 301 (Ch. 1752). But the power to appoint new guardians was primarily an aspect of the power to supervise, and if necessary replace, existing guardians. And indeed, two of the four cases that Hargrave cites involve the regulation of an existing testamentary guardianship, rather than the appointment of a guardian where none existed. See Hargrave, *supra* note 60, at 88b n.16 (citing *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121 (Ch. 1725) and *Teynham v. Lennard*, 2 Eng. Rep. 204 (H.L. 1724), both of which involved testamentary guardians).

102. Hargrave, *supra* note 60, at 88b.

103. See *id.* (citing *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121 (Ch. 1725)). As discussed *supra* at note 36, this theory was first advanced in *Falkland v. Bertie*, 23 Eng. Rep. 814, 818 (Ch. 1696).

104. See Hargrave, *supra* note 60, at 88b n.16.

respect to infants; that the Court of Chancery's exercise of a *parens patriae* jurisdiction over infants prior to the establishment of a Court of Wards "remains to be proved; or at least we, after a diligent search, do not find any authority in print";¹⁰⁵ and that the Court of Chancery had itself explicitly rejected the notion that its power over guardianship was at all related to its power over idiots and lunatics.¹⁰⁶ He then dismissed the trust theory as "an overstrained refinement," on the basis that "in the *technical* sense in which our lawyers use the word . . . trusts are invariably applied to *property*, especially *real estates*, and not to the *person*."¹⁰⁷ Hargrave ultimately concluded that the jurisdiction of Chancery was based upon a "usurpation" of power of recent origin, but a necessary one, and one which had become, through precedent, unquestionable.¹⁰⁸

The result of Hargrave's questioning of the basis of Chancery's jurisdiction to interfere in guardianships was that the Court of Chancery itself began to doubt the basis of its own jurisdiction. Hargrave was an attorney in *Powel v. Cleaver*¹⁰⁹ in 1789, and attempted to raise the issue of Chancery's jurisdiction to control guardianship and, more specifically, fathers.¹¹⁰ The court responded by refusing to hear any arguments on the subject of its jurisdiction to regulate guardianships.¹¹¹ Similarly, in *Creuze v. Hunter*¹¹² in 1790, where the Court of Chancery again interfered with a father's custody rights, the Lord Chancellor responded to the questioning of its jurisdiction by the father's counsel by declaring that "if the House of Lords thought differently, they might control his judgment; but he certainly would not allow the child to be sacrificed to the views of the father."¹¹³

The Court of Chancery's doubt about its jurisdiction over guardianships was allayed in 1793, when John Fonblanque published a rebuttal of

105. *Id.*

106. See *id.* (citing *Ex parte Whitfield*, 26 Eng. Rep. 592, 592 (Ch. 1742) (distinguishing Chancery's jurisdiction over guardianship from its jurisdiction over "ideots and lunatics")).

107. *Id.*

108. *Id.* Hargrave explained:

However, we must not be understood by these remarks to controvert the *present* legality of the jurisdiction thus exercised in Chancery over infants; our intent being simply to shew, that such jurisdiction is not, *as far as yet appears*, of *ancient date*; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for.

Id.

109. 29 Eng. Rep. 274 (Ch. 1789). For a discussion of *Powel*, see *infra* Part III.C.1.

110. See *id.* at 276.

111. Toward the end of his career as Lord Chancellor, Lord Eldon described the behind-the-scenes arguments of *Powel*, where he had assisted as counsel. According to Eldon, Lord Thurlow "would not allow us to argue the question of jurisdiction; and perhaps he was right." *Wellesley v. Beaufort*, 38 Eng. Rep. 236, 244 (Ch. 1827).

112. 30 Eng. Rep. 113 (Ch. 1790).

113. *Id.* at 113.

Hargrave's attack on the jurisdiction.¹¹⁴ Fonblanque agreed with Hargrave in rejecting the trusteeship theory of jurisdiction, although for a slightly different reason, namely, that the Court of Exchequer could oversee trusts but not guardianship.¹¹⁵ But Fonblanque instead came up with a new version of the argument Hargrave had rejected regarding Chancery's power of *parens patriae*. Fonblanque's explanation for the lack of any specific delegation of the power of *parens patriae* relating to infants was that this power had always existed, for the simple reason that it was a necessary element of a civilized state.¹¹⁶

In the cases that followed, the Court of Chancery repeatedly cited Fonblanque's *parens patriae* justification for its power over fathers and guardians. However, it often, in the very same breath, expressed doubts about whether *parens patriae* was indeed the source of this power.¹¹⁷ The important thing, according to the Court of Chancery, was not the origins of its jurisdiction, but the necessity that it exist,¹¹⁸ and the fact that the Court of Chancery had for over a century exercised it.¹¹⁹ As this Note will now show, it had started to do so in the cases of testamentary guardianship. And the manner in which it had done so, in contrast to the views of Hargrave and Fonblanque, was by treating guardianship as a trust.

II. THE SOURCE OF JUDICIAL POWER: THE REGULATION OF TESTAMENTARY GUARDIANS

Judicial discretion over child custody neither developed in 1839 nor always existed in the form of *parens patriae*. This Part describes the history of the law of testamentary guardians, which served as the original basis for judicial discretion in child custody. Although judicial power was originally limited to cases in which a guardian was appointed for an infant, Part III will explain how this power expanded to allow second-guessing of fathers themselves. The birth of testamentary guardians law came in 1660, but an understanding of the change that year wrought requires an

114. See Fonblanque, *supra* note 60.

115. See *id.* at 231.

116. See *id.* at 228–29. Fonblanque reasoned:

That in every civilized state, such a superintendence and protective power does somewhere exist, will scarcely be controverted. That if not found to exist elsewhere, it may be presumed to vest in the crown, will not, I think, be denied. Assuming, therefore, that the general superintendence of infants did originally vest in the crown, I shall conclude, that *eâ ratione*, it is now exercised in the Court of Chancery as a branch of its general jurisdiction.

Id. at 229.

117. See *de Manneville v. de Manneville*, 32 Eng. Rep. 762, 767 (Ch. 1804); see also *Wellesley v. Beaufort*, 38 Eng. Rep. 236, 243 (Ch. 1827) (discussing the notion of *parens patriae* as one theory among many about the basis of its jurisdiction over guardianship).

118. See *Wellesley*, 38 Eng. Rep. at 243 (“[N]otwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found to be absolutely necessary that such a jurisdiction should exist.”).

119. See *id.* (“[T]hat this jurisdiction belongs to the Court [of Chancery] and to the individual who sits in it . . . I take . . . to have been long settled by judicial practice.”).

acquaintance with the complex regime that existed before. This Part thus begins by describing that regime, and then introduces the watershed statute and the case law that, in interpreting the statute, gave remarkable powers to the Court of Chancery.

A. *Child Custody Law Before 1660*

Prior to the Tenures Abolition Act, English child custody law was for the most part a by-product of the laws of inheritance and land ownership. The laws regarding the custody of children who did not stand to inherit a landed estate were minimal and rarely invoked. Guardianship of such children, known as guardianship by nurture, fell to both the father and mother, and lasted until the children reached the age of fourteen.¹²⁰ It was regarding those children who did stand to inherit estates that the law of child custody was complex and well-developed. This Section will describe the three types of guardianship by which the custody of infant heirs could be controlled: the guardianship by nature, the guardianship in chivalry, and the guardianship in socage.

A father had the supreme right to the guardianship of his infant heirs. The father's guardianship was known as the guardianship by nature, and lasted until the heir reached the age of twenty-one.¹²¹ When the father of an infant heir died, the guardianship¹²² of that heir was determined by the medieval system of land division known as tenures.¹²³ Under the tenures system, the landed classes did not own their estates, but in fact held them as tenants of the Crown and of the few select lords

120. Littleton, writing in 1481, does not discuss the issue of guardianship in regard to children who were not to inherit an estate. Coke, in 1628, mentions the existence of a guardianship "*per cause de nurture*," but does not explain what this guardianship consists of, or to whom it belongs. See Coke, *supra* note 60, at 88b. But later writers explain that the guardianship by nurture to which Coke refers belonged to both the father and the mother, and lasted until the infant reached the age of fourteen. See Hargrave, *supra* note 60, at 88b n.13; see also Bingham, *supra* note 60, at 159; John David Chambers, *A Practical Treatise on the Jurisdiction of the High Court of Chancery over the Persons and Property of Infants* 63 (1842); Macpherson, *supra* note 70, at 59-67.

121. See Littleton, *supra* note 99, at § 114 ("[N]one shall be in ward of his bodie to any lord living his father . . ."); see also Coke, *supra* note 60, at 88b; Hargrave, *supra* note 60, at 88b n.12.

122. The guardianship of an infant by one who was not his parent was also referred to as a "wardship"; the infant was the guardian's "ward." See, e.g., 1 Blackstone, *supra* note 1, at *459.

123. For general overviews of the medieval system of land tenures, see 2 Blackstone, *supra* note 1, at *58-*79; Coke, *supra* note 60; Littleton, *supra* note 99. For a modern history of the system of tenures and its decline, see Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 *Clev. St. L. Rev.* 221 (1995) (arguing that the abolition of feudal land law came about as the result of the English Revolution in the seventeenth century, rather than as the result of incremental change). According to Reid, the notion of trusts, and the jurisdiction of the Court of Chancery to oversee trusts, developed as an attempt to thwart the feudal system of land ownership, and began to acquire widespread legal significance when the Tenures Abolition Act abolished the feudal system of land law.

to whom the Crown had originally conveyed its land.¹²⁴ Of the several types of medieval land tenure, the two most common, the tenure in chivalry (also known as the tenure by knight-service)¹²⁵ and the tenure in socage,¹²⁶ had as their corollaries two types of guardianships of infants, the guardianship in chivalry¹²⁷ and the guardianship in socage.¹²⁸

The most prestigious estates were held as tenures in chivalry.¹²⁹ When a tenant in chivalry died leaving an heir under the age of maturity, the guardianship of that heir fell to the lord of the estate,¹³⁰ regardless of whether the heir's mother was still alive.¹³¹ The guardian in chivalry could control both the lands and the person of the ward¹³² until the infant reached the age of twenty-one, if male, and sixteen, if female.¹³³ This control included the right to arrange the ward's marriage,¹³⁴ which, since the ward stood to inherit a considerable estate, was of significant value. The guardian in chivalry could marry the ward to his own offspring,¹³⁵ arrange a marriage in exchange for money,¹³⁶ or sell the wardship itself, which was considered a form of chattel.¹³⁷

124. See 2 Blackstone, *supra* note 1, at *59–*60.

125. See *id.* at *62 (“The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law French, *chivalry*, or *service de chivaler*.”).

126. See *id.* at *79. After the abolition of the tenure in chivalry by the Tenures Abolition Act, all land held in chivalry reverted to tenures in socage. Tenures Abolition Act, 12 Car. 2, ch. 24, § 1.

127. See 2 Blackstone, *supra* note 1, at *67.

128. See *id.* at *87.

129. See *id.* at *62. For a general overview of the guardianship in chivalry, see Macpherson, *supra* note 70, at 2–18.

130. See Littleton, *supra* note 99, § 103.

131. See Coke, *supra* note 60, at 84b (“[T]he mother shall not barre the lord by knight's service of his wardship of the bodie.”).

132. See *id.* at 76a (“[T]he lord [in chivalry] hath the wardship of the body and the land.”); see also 2 Blackstone, *supra* note 1, at *67; Custer, *supra* note 27, at 199.

133. See Littleton, *supra* note 99, § 103.

134. See 2 Blackstone, *supra* note 1, at *70–*71; Littleton, *supra* note 99, § 110. By the Statute of Merton, 20 Hen. 3, ch. 6 (1236), the ward was granted the right to refuse a marriage considered one of “disparagement,” i.e., to a person considered of lower dignity or rank, such as a lunatic or idiot, a person with certain physical impediments, a widow, or the son or daughter of a convicted felon or a tradesman. See Coke, *supra* note 60, at 80a–80b; Littleton, *supra* note 99, § 107.

135. For a discussion of guardians who married their wards to their own children, see Joel Hurstfield, *The Queen's Wards* 142–44 (1973).

136. See 2 Blackstone, *supra* note 1, at *71; Littleton, *supra* note 99, § 110. Even when a marriage was not one of disparagement, a ward could refuse the marriage arranged by the guardian in chivalry, but was then responsible to the guardian for the value of such marriage. See *id.* § 110.

137. See Coke, *supra* note 60, at 85a; Hargrave, *supra* note 60, at 88b n.11 (“[G]uardianship in chivalry, being deemed more an *interest* for the *profit* of the *guardian* than a *trust* for the *benefit* of the *ward*, was saleable and transferable, like the ordinary subjects of property, to the best bidder.”); Littleton, *supra* note 99, § 116. Hurstfield relates that the guardianship of a ward “would be sold, sometimes to his mother, more often to a complete stranger.” Hurstfield, *supra* note 135, at 18.

Before 1660, the most important reform to the guardianship in chivalry occurred in 1540, when Henry VIII passed a statute establishing the Court of Wards and Liveries.¹³⁸ In the years leading up to 1540, Henry VIII had uncovered several long-forgotten tenures in chivalry possessed by the Crown. Accompanying—and motivating the discovery of—these newfound tenures in chivalry was a number of guardianships in chivalry that now devolved to the Crown. The Court of Wards was created to administer these royal guardianships.¹³⁹

The tenure in socage involved lower-ranking estates than the tenure in chivalry,¹⁴⁰ and entailed a less powerful form of guardianship.¹⁴¹ When a tenant in socage died and left an heir under the age of fourteen, the guardianship of that heir devolved to the nearest of kin who could not inherit the estate. This guardian was the guardian in socage. Guardians in socage could control the person of the ward and manage the ward's estates until the infant reached the age of fourteen.¹⁴² But the guardian in socage could act only for the infant's benefit, and was liable, when the infant came of age, for any financial losses incurred through the management of the guardian, including loss of income through a disadvantageous marriage.¹⁴³ The guardianship in socage was not a form of property but instead a trust held for the infant's benefit, and as such was not transferable.¹⁴⁴

138. See 32 Hen. 8, ch. 46 (1540).

139. The Court of Wards controlled these guardianships for the benefit of the Crown, selling marriages and guardianships in order to increase the Crown's revenues. The Crown's management of its wards was heavily resented by the landed classes, and was one of the perceived abuses of power that led to the overthrow of the monarchy in 1642. For a history of the establishment of the Court of Wards and its role in the overthrow, see Hurstfield, *supra* note 135, at 7–17, 329–30; Reid, *supra* note 123, at 236–42.

140. See 2 Blackstone, *supra* note 1, at *78–*79.

141. For general overviews of the guardianship in socage, see Bingham, *supra* note 60, at 156; Chambers, *supra* note 120, at 59–63; Macpherson, *supra* note 70, at 19–43.

142. See 2 Blackstone, *supra* note 1, at *88; Littleton, *supra* note 99, § 123; see also Bingham, *supra* note 60, at 156.

143. See Littleton, *supra* note 99, § 123.

144. See Hargrave, *supra* note 60, at 88b n.13 (“Being wholly for the infant's benefit, and not in any respect for the guardian's profit, [the guardianship in socage] is not a subject either of alienation forfeiture or succession, as wardship in chivalry was.”); see also *Bedell v. Constable*, 124 Eng. Rep. 1026 (C.P. 1668) (holding that a testamentary guardianship, like the guardianship in socage, is a trust, and as such not transferable); *id.* at 1028 (“A guardian in socage [sic] cannot transfer his custody, because it is a personal trust.”).

It is important to note that although the word “trust” appears in Hargrave's 1787 annotations to Coke's *Commentary upon Littleton* in reference to the distinction between the guardianships in chivalry and in socage, *supra* note 60, neither Coke nor Littleton referred to guardianship in socage as a “trust.” This can be explained by Charles Reid's theory that the notion of trusts did not come into widespread use until the abolition of feudal tenures by the 1660 Tenures Abolition Act. See Reid, *supra* note 123, at 280–90.

B. *The Tenures Abolition Act*

The Tenures Abolition Act¹⁴⁵ abolished the tenures in chivalry¹⁴⁶ and all that accompanied them,¹⁴⁷ including the guardianships in chivalry¹⁴⁸ and the Court of Wards that had managed that portion of those guardianships that had devolved to the Crown.¹⁴⁹ To fill the gap left by the abolition of guardianships in chivalry, the Act gave fathers the right to appoint guardians to their infant heirs, either to take over custody during the father's lifetime or to succeed him in custody after his death.¹⁵⁰ The father was free to appoint these guardianships to any person he chose as long as he or she held property¹⁵¹ and was not Catholic.¹⁵² The resulting guardianship was meant to be equivalent to that held by the father himself.¹⁵³ It lasted until the infant reached the age of twenty-

145. Tenures Abolition Act, 12 Car. 2, ch. 24 (1660).

146. See id. § 1. All tenures became tenures in socage.

147. The Tenures Abolition Act pertained not only to guardianship, but to the entire system of land law of which guardianship was a part. It is often discussed in the context of land law and, more generally, as signaling the end of feudalism. Blackstone considered the Act a revolutionary watershed in the laws of England: "A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches." 2 Blackstone, *supra* note 1, at *77. Reid, *supra* note 123, makes a similar argument.

148. See Tenures Abolition Act § 1.

149. See id. § 3 (repealing 32 Hen. 8, ch. 46 (1540)).

150. The statute stated:

[W]here any person hath or shall have any child or children under the age of twenty one years and not married at the time of his death . . . it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father or at that time in ventre sa mere, or whether such father be within the age of twenty one years or of full age by his deed executed in his life time, or by his last will and testament in writing in the presence of two or more credible witnesses in such manner and from time to time as he shall respectively think fit to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty one years or any lesser time. . . . [S]uch disposition of the custody of such child or children . . . shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise

Id. § 8.

151. See id. (requiring that the guardianship be granted to "persons . . . in possession or remainder").

152. See id. (prohibiting the father from appointing the guardianship to any "popish recusants," i.e., Catholics).

153. From the start, judges interpreting the Tenures Abolition Act read the Act as intending to put testamentary guardians in the same position as fathers themselves. See *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121, 124 (Ch. 1725) ("The Testamentary Guardian is *in Loco Parentis* . . ."); see also the version of *Shaftsbury* reported at 24 Eng. Rep. 659, 666 ("[A]s the father was the head of the family, so the statute puts [the testamentary guardian] *in loco patris*."). However, prior to the Tenures Abolition Act, the extent of the father's own rights, being a matter of common law rather than statute, had never been

one,¹⁵⁴ and it superseded all other guardianships, including the guardianship by nurture of the child's own mother.¹⁵⁵

The result was a revolution in the law of guardianship. Although theoretically, the old guardianships in socage still existed, these fell into disuse, in part because their underlying premise—that a guardian who stood to inherit an infant's lands would harm his or her own kin—came to be seen as a barbaric remnant of ancient times.¹⁵⁶ Thereafter, when a custody dispute arose concerning an infant whose father had died without appointing a guardian,¹⁵⁷ or whose testamentary guardian had become incapacitated,¹⁵⁸ the Court of Chancery would itself appoint a guardian whose legal status was akin to that of a testamentary guardian.¹⁵⁹ The difference between the new father- or court-appointed guardianship and the guardianships in chivalry and in socage was vast. Guardianship was no longer an automatic function of the laws of inheritance, but was instead a matter of choice. Although at first this choice fell

quite so clearly delineated. Littleton, writing in 1481, and Coke, writing in 1628, had determined that the father, as guardian by nature, had the right of custody of his infant heirs under the age of twenty-one. See *supra* note 120 and accompanying text. Coke had also mentioned a species of guardianship called guardianship by nurture, but had not specified what this guardianship consisted of. See *supra* note 120 and accompanying text. Thus, the Tenures Abolition Act, by giving testamentary guardians rights equivalent to those of fathers and specifying what those rights were, had the further effect of delineating the previously undefined boundaries of fathers' own rights.

154. See Tenures Abolition Act § 8 (allowing father to “dispose of the custody and tuition of [his] child or children for and during such time as he or they shall respectively remain under the age of twenty one years or any lesser time”).

155. See *id.* (“[S]uch disposition of the custody of such child or children . . . shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise . . .”). Courts interpreted this language to mean that testamentary guardians superseded all others, even the infant's mother. See, e.g., the version of *Shaftsbury v. Shaftsbury* reported at 24 Eng. Rep. 659, 663 (Ch. 1725) (“The right of a testamentary guardian takes place of [a mother, because] by the express words of the act of parliament the guardian by will takes place of all other guardians . . .”).

156. See *Mr. Justice Dormer's Case*, 24 Eng. Rep. 723, 724 (Ch. 1724) (rejecting, in the absence of a testamentary guardian, “the maxim, that the next of kin to whom the land cannot descend is to be guardian in socage,” as “not grounded upon reason, but [having] prevailed in barbarous times before the nation was civilized”).

157. See, e.g., *Ex parte Watkins*, 28 Eng. Rep. 301 (Ch. 1752) (appointing guardian where there is “no testamentary guardian so as to be valid” and “neither father nor mother”).

158. See, e.g., *Morgan v. Dillon*, 88 Eng. Rep. 361 (Ch. 1724) (appointing a guardian to replace the testamentary guardian, the infants' mother, on the ground that she became incapacitated to hold the testamentary guardianship upon remarriage), *rev'd sub nom. Dillon v. Mount-Cashell*, 2 Eng. Rep. 207 (H.L. 1727) (reinstating the mother as testamentary guardian on the ground that remarriage did not incapacitate her).

159. The court-appointed guardian was a proxy for the testamentary guardian, who in turn was a proxy for the father himself, “who is the root out of which all guardians spring.” *Morgan*, 88 Eng. Rep. at 365. See also *Mr. Justice Dormer's Case*, 24 Eng. Rep. at 724 (“[W]here a man dies intestate, the law should dispose of the guardianship of his children in the same manner as the intestate would be supposed to do, had he lived to make will.”).

only to fathers, the idea of discretion in guardian selection eventually would become the touchstone of child custody decisionmaking.

C. *The Regulation of Testamentary Guardianships by the Court of Chancery*

The regulation of the testamentary guardians appointed under the 1660 statute¹⁶⁰ fell to the Court of Chancery, which until 1873 administered the law of equity.¹⁶¹ The substantive basis for Chancery's authority over testamentary guardianships was that guardianship was a trust, and as such subject to the Court of Chancery's power to oversee all trusts.¹⁶² To carry out the trusteeship, the guardian was entitled to the custody and control of the person and property of the ward,¹⁶³ and could petition the Court of Chancery to enforce these rights against the ward¹⁶⁴ or against

160. This Section will discuss both cases involving testamentary guardians and cases involving guardians appointed by the Court of Chancery in the absence of a testamentary appointment. Throughout this Section, the generic term "guardian" will be used to refer to both father- and court-appointed guardians, and the infants under the care of such guardians will be referred to interchangeably as "wards" or "wards of court."

161. The Judicature Act of 1873, 36 & 37 Vict., ch. 66, merged the law of equity with the common law. Before 1873, the English judicial system was divided into two separate branches, common law and equity. The law of equity originally emerged as an alternative to the more rigid common law. In cases where the common law did not provide a redress of grievances, a petition could be made to the law of equity. The law of equity was administered by the Court of Chancery. In response to a petition, in earlier times made directly to the Crown or to Parliament, and later made to the Court of Chancery, the Lord Chancellor of the Court of Chancery could use the royal power to make orders based on his sense of fairness where he felt that justice did not prevail under the common law.

Judicial interference in issues of child custody occurred primarily through the Court of Chancery, and it was the Court of Chancery that first asserted a power to interfere between father and child. Chancery was less accessible to the public than the common law courts, as it was more centralized and met less frequently than did the courts of common law, and Chancery cases were generally more expensive to litigate than were cases at common law. Therefore a large segment of the population was not, at first, affected by the legal developments discussed in this Note. It was only when the courts of common law and equity were merged by the Judicature Act of 1873 that the developments of the Court of Chancery in child custody law became applicable to the public at large. The Judicature Act specifically legislated that "[i]n questions relating to the custody and education of infants the Rules of Equity shall prevail." Judicature Act § 25(10). For a discussion of the distinctions between the common law courts and the Court of Chancery, and of the impact this had on the practice of child custody law, see A. H. Manchester, *A Modern Legal History of England and Wales 1750-1950*, at 148, 360-401 (1980).

162. See *Beaufort v. Berty*, 24 Eng. Rep. 579, 580 (Ch. 1721) (holding that the jurisdiction of the Court of Chancery to regulate testamentary guardianship "was grounded upon the general power and jurisdiction which it had over all trusts, and guardianship was most plainly a trust"); see also *Eyre v. Sbaftsbury*, 24 Eng. Rep. 659, 660 (Ch. 1722) (finding that guardianship "being a matter of trust, this court has superintendency over it").

163. See *Eyre*, 24 Eng. Rep. at 661 (upholding a testamentary guardian's right to control the daily activities of his ward on the basis that he "will well execute such trust, which it will be impossible for him to do, without being allowed to place and choose the governor, gentleman, &c., to attend upon and take care of this young nobleman").

164. See *Tremain's Case*, 93 Eng. Rep. 452 (Ch. 1719) (sending a messenger to escort a ward to the school his guardian had chosen for him, and upon ward's subsequent

third parties,¹⁶⁵ including the ward's mother.¹⁶⁶ In turn, the ward or third parties could petition the Court of Chancery to enforce the testamentary guardian's duties toward his ward.¹⁶⁷ Just as the court could employ its equitable powers to control a trustee who had breached his fiduciary duties by mismanaging an estate, so too could it use those powers to control a guardian who had mismanaged an infant.¹⁶⁸

The management of an estate can be evaluated in terms of financial value, but evaluating the management of a child is a much less definite enterprise. As a result, the court had a wide discretion in determining what the duties of a testamentary guardian were, and how they should be fulfilled. Furthermore, because the care of an infant was a much more sacred trust than the care of land,¹⁶⁹ the court had broad discretion in determining how it should carry out its supervisory role over guardianships. The court decided early on, in the case of *Beaufort v. Berty*,¹⁷⁰ that it could best oversee guardians by acting, not only to punish a breach of guardian's duty once it had occurred, but also to prevent such a breach of duty from occurring in the first place, because "[a] *preventing justice* was to be preferred to [a] *punishing justice*."¹⁷¹ The following subsections will

departure from the school, sending a second messenger both to carry the ward back to school and to keep him there).

165. See *Foster v. Denny*, 22 Eng. Rep. 925 (Ch. 1677) (ordering an uncle to deliver an infant of seven years to the child's mother, whom the father had appointed guardian).

166. See *Eyre*, 24 Eng. Rep. at 659 (ordering a mother to surrender her child to the testamentary guardian).

167. See *Beaufort*, 24 Eng. Rep. at 579 (agreeing to investigate the propriety of the educational arrangements made for an infant by his testamentary guardians, upon a petition by the infant's mother); see also *Vernon's Case* (Ch. 1723), unreported case cited in *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121, 122 (Ch. 1725) (ordering infant removed from guardian's home and sent to school, upon petition by third party on infant's behalf claiming that infant was improperly conversant with guardian's daughter).

168. The *Beaufort* court stated:

[S]uppose one should devise lands to trustees to sell for such a price as they should think fit, for payment of debts, there could be no doubt but that this court, at the desire of any single creditor, might and would interpose, and order the estate not to be sold as the trustees should see fit, but for the best price before the master; and as the Court would interpose, where the estate of a man was devised in trust, so would it *a fortiori* concern itself, on the custody of a child's being devised to a guardian, who was but a person *intrusted* in that case.

24 Eng. Rep. at 579.

169. See *Bedell v. Constable*, 124 Eng. Rep. 1026, 1028 (C.P. 1668) ("[A] more near or tenderer trust cannot be, than the custody and education of a mans [sic] child and heir."); see also *Beaufort*, 24 Eng. Rep. at 579 ("[N]othing could be of greater concern than the education of infants.").

170. 24 Eng. Rep. 579 (Ch. 1721).

171. *Beaufort*, 24 Eng. Rep. at 579. The court continued:

[H]is *Lordship* observed . . . that he ought rather to prevent the mischief and misbehaviour of guardians, than to punish it when done. That if any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians . . . , or if the guardians chose to make use of methods that might

delineate the full extent of Chancery's activism, an activism that made regulation of fathers just another small step for the court. The first subsection explores the areas of a child's life into which Chancery felt free to venture, and the two subsections following explain the factors that weighed in Chancery's decisionmaking and the tools the court used to effect its decisions.

1. *The Areas of Chancery's Involvement.* — a. *Marriage.* — The Court of Chancery considered the control over an infant's marriage an especially important aspect of testamentary guardianship.¹⁷² The testamentary guardian's control over the marriage of his or her ward derived from the Tenures Abolition Act's granting the guardian the right to bring an action called a "ravishment of ward" against anyone who married the ward without permission,¹⁷³ and was further strengthened by Hardwicke's Marriage Act of 1753,¹⁷⁴ under which a marriage obtained without the consent of an infant's parent or guardian was held to be void.

A guardian who feared that a ward was in danger of contracting a marriage without consent could apply to the court to help prevent the marriage. The court would then issue an injunction, lasting until the infant reached the age of twenty-one, ordering the offending party to refrain from contracting a marriage with the ward¹⁷⁵ and even, in some cases, to refrain from any further communications with the ward.¹⁷⁶ In the absence of a specific injunction on the subject of marriage, a person who married an infant ward without the guardian's consent, or helped to arrange such a marriage, was subject, not only to the action of ravishment of ward brought by the guardian, but also, at the court's discretion, to a writ of contempt of court. The contempt of court could be enforced by

turn to the prejudice of the infant, the court would interpose and order the contrary.

Id. at 579–80.

172. In an early case, the court noted that "a court of equity entertains no greater jealousy of, nor shews more resentment against any thing, than . . . the matter of marrying infants without the proper consent of guardians." *Shaftsbury v. Shaftsbury* (Ch. 1725), as reported at *Eyre v. Shaftsbury*, 24 Eng. Rep. 659, 662 (Ch. 1722).

173. The Tenures Abolition Act does not mention marriage *per se*, but grants the guardian a more general power to "maintaine an action of ravishment of ward or trespassed against any person or persons which shall wrongfully take away or detain" the ward. Tenures Abolition Act, 12 Car. 2, ch. 24, § 8. But in practice, the action for "ravishment of ward" was used frequently in cases where a person had married the ward without the guardian's permission. The "ravishment of ward" originated in feudal times as a remedy available to guardians whose wards had been married without their consent. See Hurstfield, *supra* note 135, at 143; Theodore Plucknett, *A Concise History of Common Law* 535 (5th ed. 1956).

174. 26 Geo. 2, ch. 33. For a discussion of the passage and early application of Hardwicke's Marriage Act, see Stone, *supra* note 54, at 121–37.

175. See *Smith v. Smith*, 26 Eng. Rep. 977 (Ch. 1745) (forbidding a young man from marrying a ward without the permission of the court).

176. See *Beard v. Travers*, 28 Eng. Rep. 485 (Ch. 1749) (forbidding a young man and his parents from marrying, having access to, or writing letters to a ward, and forbidding the ward likewise from writing letters to the man and his parents).

imprisonment or sequestration of property.¹⁷⁷ Eventually, the court extended the punishment of contempt of court for marrying or arranging the marriage of a ward without the guardian's permission even to those who did not know that the infant was the ward of a testamentary guardian.¹⁷⁸

In addition to enforcing the guardian's right to control a ward's marriage, the Court of Chancery superintended the guardian's exercise of this right. The court exercised this supervision in both a preventive and a punitive manner.¹⁷⁹ In cases where an infant had not yet married, but a petition on the subject of the infant's guardianship had been brought before the court, the court might order a guardian to refrain from marrying the infant without the court's consent,¹⁸⁰ and would subject the guardian to contempt of court for disobeying this injunction.¹⁸¹ The court often supplemented this injunction by requiring a security deposit from the guardian to ensure compliance.¹⁸²

Once such an injunction had been issued, the court had control over all aspects of an infant's marriage. A guardian who desired to arrange marriage for a ward was required to contact an officer of the court known as the Master, who would help the guardian to negotiate the marriage contract. If the Master approved of the arrangement, he would submit a report to the Lord Chancellor, who had the power to approve or refuse

177. Thus, in *Shaftsbury v. Shaftsbury*, the Court of Chancery issued a writ of contempt of court against an infant's mother who had arranged her son's marriage without his guardian's consent. See *Shaftsbury v. Shaftsbury*, 25 Eng. Rep. 121, 24 Eng. Rep. 659 (Ch. 1725) (ordering a sequestration of the mother's property). The court justified its action by emphasizing that "the marriage of a ward without consent of the guardian, is a ravishment of ward, and aggravated in this respect, that after such ravishment by marriage, the ward cannot be restored to such condition as he was in before." *Shaftsbury*, 24 Eng. Rep. at 661. Thus, punishment was necessary to deter others from similarly acting against a guardian's wishes. See *id.* at 663 ("In all these cases the reason of inflicting punishment is for example's sake, and to deter others from the like offence of ravishment of wards.")

178. See *Mr. Herbert's Case*, 24 Eng. Rep. 992, 993 (Ch. 1731) (holding that marrying a guardian's ward is a contempt of court, though the parties concerned had no notice that she was a ward, because "where the marriage of an infant is encouraged without the concurrence of his real guardians or relations, the consequences of such marriage ought to be at the peril of all those that are instrumental therein").

179. See *Shaftsbury*, 24 Eng. Rep. at 662 ("[A]s this Court punishes the instruments where such marriage is had without the consent of the guardian, so if there be only an apprehension, that the infant will be married unequally, either by the guardian, or by his neglect, a court of equity will interpose.")

180. See *Foster v. Denny*, 22 Eng. Rep. 925 (Ch. 1677) (ordering testamentary guardian not to marry ward without consent of court).

181. See *Doctor Davis's Case*, 24 Eng. Rep. 577 (Ch. 1721) (amending order prohibiting a guardian from allowing his ward to marry without the court's consent so that the guardian would not be subject to contempt of court should the ward marry without his knowledge or consent); see also *Long v. Elways*, 25 Eng. Rep. 378 (Ch. 1729) (holding that where a guardian was ordered not to marry his ward without the court's consent, upon the marriage of the ward without any such consent, the guardian can avoid contempt of court only by showing that he was not privy to the marriage).

182. See *Foster*, 22 Eng. Rep. at 925.

the petition.¹⁸³ Where a guardian had not been under a specific injunction to consult the court before marrying his ward, the court would nevertheless respond to a marriage of a ward with an order of contempt where it felt that the guardian's actions constituted a breach of duty.¹⁸⁴

b. *Education.* — The Tenures Abolition Act gave the testamentary guardian the right to control the "tuition" of the ward.¹⁸⁵ Several cases involving disputes over the choice of school for a ward illustrate the extensive nature of the court's interaction with the testamentary guardianship. A guardian might petition the Court of Chancery to enforce his or her right to control a ward's schooling by ordering the ward to obey the guardian's orders to attend a particular school,¹⁸⁶ or a ward or a third party might petition the court to dispute a guardian's choice of school.¹⁸⁷ In both instances, the court would order its Master to look into the school chosen by the guardians, and to evaluate whether it was appropriate for the infant. The father's expressly stated wishes regarding the child's education would also be consulted.¹⁸⁸ The court would then order the infant and the guardian into court to discuss the situation, taking on the paternalistic role of questioning the guardian's choice of school in some cases,¹⁸⁹ and scolding an infant for unreasonableness in others.¹⁹⁰ Fi-

183. See *Gordon v. Irwin*, 2 Eng. Rep. 241 (Ch. 1781) (reaffirming decision by Court of Chancery rejecting a petition by guardians for permission to marry their ward, where the guardians had arranged the marriage with the help of the Master of the Court of Chancery, and the Master had submitted to the Lord Chancellor a report approving the marriage). For an example of the extent to which the Lord Chancellor could become involved in the minute details of a ward's marriage settlement, and in doing so act upon his own opinion of what was in the ward's best interests, see *Bathurst v. Murray*, 32 Eng. Rep. 279, 280 (Ch. 1801) (insisting that the marriage settlement of a female ward give a portion of her income to her husband, on the ground that "there cannot be much expectation of happiness, where the husband has nothing, and the wife has the whole controul over the property").

184. See *Goodall v. Harris*, 24 Eng. Rep. 862 (Ch. 1729) (ordering imprisonment of guardian who breached his duty to his ward by marrying her to his own son, even though the guardian had not been specifically ordered to consult the court before arranging the ward's marriage).

185. Tenures Abolition Act, 12 Car. 2, ch. 24, § 8.

186. See *Tremain's Case*, 93 Eng. Rep. 452 (Ch. 1719); see also *Hall v. Hall*, 26 Eng. Rep. 1213 (Ch. 1749) (citing *Tremain's Case*).

187. See *Beaufort v. Berty*, 24 Eng. Rep. 579 (Ch. 1721).

188. See *Anonymous*, 28 Eng. Rep. 38 (Ch. 1750) (considering parol evidence of the father's intent "[a]s to the particular method of education").

189. See *Eyre v. Shaftsbury*, 24 Eng. Rep. 659, 661 (Ch. 1722) (questioning the guardian's decision to send the infant to a "public school" (i.e., boarding school) on the ground that "sending the infant to a public school . . . may be thought likely to instil into him notions of slavery").

190. See *Hall*, 26 Eng. Rep. at 1213 (telling the infant that he had "no reasonable grounds of complaint" against his school, and refusing to "indulge him in being put to a private tutor, or going to another school," because "his guardian was the proper judge at what school to place him, and where he had sent him, was a school of very great reputation"). Often, the choice was between two equally good schools. In these cases, the court would enforce the guardian's original choice, basing its decision, not on a finding

nally, the court would make an order about where the infant was to attend school.¹⁹¹ In most cases, the court specified that its order as to schooling was not final, and that the infant and guardians could reapply to the court after a period of time if the school did not work out.¹⁹²

c. *Religion*. — A particularly contentious aspect of the testamentary guardianship was the infant's religious upbringing. Under the Tenures Abolition Act, a father was forbidden to devise the guardianship of his children to a "popish recusant," i.e., a Catholic.¹⁹³ But debates nevertheless arose, concerning Catholicism, Judaism, and other religions that deviated from the Protestant Church of England, such as Presbyterianism. The court's official position in these cases was that the father's wishes as to religion were paramount, but in practice it tended to intervene in favor of those who wanted to raise a child in the religion of the Church of England.

The court's opportunity to promote the Church of England arose both when there was a dispute among guardians as to how to raise a

that a particular school was best for the infant, but on the reasoning that it would be "dangerous" to allow a young scholar to change schools at whim, as he should learn to submit to the authority of his schoolmaster. Anonymous, 28 Eng. Rep. 240, 240 (Ch. 1751) (consulting a young woman over the age of sixteen about where she wished to reside, and distinguishing the case at hand from a situation involving a "scholar," in which instance it "would be very dangerous" to take his wishes into account, because "a scholar might then apply to change his school as not liking it").

191. In the case of a recalcitrant ward, the court might send an officer of the court to escort the infant there. See *Tremain's Case*, 93 Eng. Rep. at 452 (ordering an infant, who went to Oxford, contrary to the orders of his guardian, to attend Cambridge instead); id. ("[T]he court sent a messenger, to carry him from Oxford to Cambridge. And upon his returning to Oxford there went another, tam to carry him to Cambridge, quam to keep him there.").

192. See *Beaufort*, 24 Eng. Rep. at 580 (suspending a past order that an infant transfer from the Westminster school to Eton upon a petition arguing that the infant "was recovered in his health, and had made a considerable progress in the school, and that a new method of instructing him might retard his learning," but warning infant "that while he behaved himself well and regularly at Westminster (which it was not doubted but he would do) he should stay there; but if otherwise, the Court would remove him to Eton"); see also *Storke v. Storke*, 24 Eng. Rep. 965, 966 (Ch. 1730) (following an order that the Master inquire whether the school at which the wards were placed was "a good and proper school for their education" by "giving liberty to all parties to apply to the court as there should be occasion").

193. See *supra* note 152. For an example of how the court dealt with a situation where the father had appointed a guardian whom others suspected of being a Catholic, see *Shaftsbury v. Hannam*, 23 Eng. Rep. 177, 177 (Ch. 1677), where the court threatened to remove a child from a testamentary guardian who was suspected of being a papist but denied the same, unless she "receive the Sacrament according to the Rites of the Church of England, before the End of the next Term, and produce a legal Certificate thereof." The issue of religion was further complicated by several statutes which limited the rights of Catholics and Jews to practice and teach their religions. Under 1 Jam., ch. 4 (1603), it was illegal for anyone to educate a child as a Catholic, or to send a child overseas for the purpose of receiving a Catholic education. Under 11 & 12 Will. 3, ch. 4 (1700), it was illegal for a Catholic parent to punish his or her child for converting to Protestantism, and 1 Anne, ch. 30 (1702) extended this law to Jewish parents.

child¹⁹⁴ and when there was a dispute about whom the father had appointed as guardian.¹⁹⁵ In such instances, the court did its utmost to place infants in the situation most likely to ensure a Protestant upbringing. It could supplement its power to influence religious upbringing by issuing orders that no Catholics be allowed to visit or otherwise communicate with an infant.¹⁹⁶ These orders could even limit a child's interaction with his or her mother.¹⁹⁷

194. Thus, in *Storke*, a Presbyterian father had devised the guardianship of his three daughters to his three Presbyterian brothers and to one clergyman in the Church of England without specifying in his will in which religion the children should be brought up. The clergyman took hold of the two youngest children and installed them in a boarding school where they would be brought up in the Church of England, and petitioned the court to order that the eldest daughter be placed there as well, "praying, that the court would give directions for the education of the three infant daughters in the way and principles of the church of England." 24 Eng. Rep. at 965. The three brothers counter-petitioned that the two daughters be delivered to them, offering proof that their brother had intended his daughters to be raised as Presbyterians. The court noted that it could not prohibit the education of children as Presbyterians, as the statutory laws on religious education pertained only to Catholicism. But it managed to mandate that the children be brought up within the English church by prohibiting the introduction of parol evidence on the subject of religion, with the result that the two younger children were ordered to remain at the school chosen by the clergyman. See *id.* That the court's use of the parol evidence rule in *Storke* was an excuse to achieve a desired result is evident in light of the fact that it regularly allowed parol evidence on other subjects, such as the father's wishes regarding his children's education. See *supra* note 188.

195. Chancery's bias can be seen by comparing two similar cases with different results. In *Teynham v. Lennard*, 2 Eng. Rep. 204 (H.L. 1724), a father died while his child was still unborn, and did not appoint a testamentary guardian by written will. The care of the child fell to his mother, a Catholic. Six years into the child's life, his relatives petitioned to have him removed from his mother, on the ground that the father had made a deathbed declaration asking his own father, a Protestant, to ensure that the unborn child be brought up a Protestant. When the issue came to court, the court ruled that the deathbed declaration, although not in writing and not heard by any but the grandfather, constituted a valid appointment of a testamentary guardian, and ordered the child delivered over to the grandfather.

On the other hand, in the case of *Villareal v. Mellish*, 36 Eng. Rep. 719 (Ch. 1737), where a Jewish father had similarly failed to devise the guardianship of his children, but an informal agreement had been reached that they should reside with their Jewish grandfather, upon the mother's remarriage to a Christian and conversion to Christianity, the court found that the devise of guardianship to the grandfather was not valid. Here, the court professed not to decide on the basis of religion alone, but on the right of guardianship in conjunction with religion: "Much has been said on the point of religion; holds the true state of the question to be, whether this court shall not take the infants out of the lands of a person who has no right of guardianship, and put them into the hands of the person who has the right, and is of the religion of this country?" *Id.* at 722. The court then stated that, when in doubt, it preferred to decide on the basis "that the Christian religion is part of the law of the land." *Id.*

196. See *Blake v. Leigh*, 27 Eng. Rep. 207, 207 (Ch. 1756) (ordering "no person, not professing the Protestant religion, to have access to" the infant).

197. See *id.* (allowing an exception, upon petition by the infant's mother, to the court's earlier injunction prohibiting Catholics from having access to the infant, but limiting her interaction with her child to six visits a year in the presence of his guardian,

d. *Location*. — Whenever a case arose in which it seemed that a guardian might remove a child from the Court of Chancery's jurisdiction, that is, from England, the Court of Chancery used its power over testamentary guardians to prevent such an outcome. Guardians were required to petition the court for permission before removing an infant ward from the country.¹⁹⁸ Where a visit out of the country was allowed, the court often demanded a security deposit to ensure the infant's return to England.¹⁹⁹ But often the court would deny the request to remove an infant ward from its jurisdiction, even for a short visit.²⁰⁰ It was even less likely to permit a child to be brought out of the country for a longer period of time.²⁰¹

e. *Parental Access*. — The Court of Chancery often acted upon the principle that testamentary guardians should instill in their wards a respectful attitude toward their parents.²⁰² In the case of a guardian who cared for the child of a living parent, the court could require that the parent be allowed access to the child.²⁰³ The court had a wide discretion in regulating parental access, and its decisions ranged from ordering that a child be returned to his mother's home every night,²⁰⁴ to ordering that a mother be allowed access as often as she wished,²⁰⁵ to requiring that a mother be permitted six visits a year, under supervision.²⁰⁶

2. *The Basis of Chancery's Decisions*. — The Court of Chancery enjoyed a wide discretion in determining how the testamentary guardianships should be managed. The basis for its decisions was usually whatever

and forbidding her from sending her son any letters which had not first been perused by the guardian).

198. See *Campbell v. Mackay*, 40 Eng. Rep. 552 (Ch. 1837).

199. See *Jeffrys v. Vanteswarstwarth*, 27 Eng. Rep. 588 (Ch. 1740) (ordering a security deposit to insure infants' return from visit overseas).

200. See *Mountstuart v. Mountstuart*, 31 Eng. Rep. 1095 (Cb. 1801) (refusing a guardian's petition to take his ward to Scotland during the vacation).

201. In *Campbell*, 40 Eng. Rep. at 554, the testamentary guardian, the children's mother, backed up her request to raise her children abroad with medical testimony to the effect that the children needed to be raised in a warmer climate. The court disputed the findings of the mother's medical experts, concluding that the children would be just as well off in the mild and dry air of the South of England. Citing "the well-established rule of the Court . . . against permitting an infant ward . . . to be taken out of the jurisdiction," the court explained that to remain in England was always in the best interests of an English child, as "scarcely anything can be more injurious to the future prospects of English children . . . than a permanent residence abroad," because such an infant, "accustomed to habits and manners which are not those of their own country . . . must be becoming, from day to day, less and less adapted to the position which, it is to be wished, they should hereafter occupy in their native land." *Id.* at 553.

202. "[I]mplanting in the hearts of the children filial and dutiful feelings towards the parent" was considered "the best and most important duty imposed upon the guardian by the deceased parent." *Ex parte Ilchester*, 32 Eng. Rep. 142, 154 (Ch. 1803).

203. See *Eyre v. Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722); see also *Blake v. Leigh*, 27 Eng. Rep. 207 (Ch. 1756); *Morgan v. Dillon*, 88 Eng. Rep. 361 (Cb. 1724).

204. See *Eyre*, 24 Eng. Rep. at 661.

205. See *Morgan*, 88 Eng. Rep. at 366.

206. See *Blake*, 27 Eng. Rep. at 207.

the court determined to be “for the benefit of the infant.”²⁰⁷ This standard usually assumed that it was in a child’s best interests to acquire as much rank and fortune as possible.²⁰⁸ Where “the benefit of the infant” was not measurable in terms of fortune or rank, the court’s discretion was unbounded. Sometimes, in the case of an older female ward, the judge might question the infant herself about where and how she preferred to be raised.²⁰⁹ But for the most part, the court could and did make decisions on whatever basis it felt “proper.”²¹⁰ The decisions made in these cases tended to be those that favored the ward’s inculcation into the customs and religion of England, requiring that the ward live in England,²¹¹ study at an English school,²¹² and learn to practice the official English religion.²¹³

The other standard occasionally advanced by the court as the basis of its decisions in regulating testamentary guardianships was that it acted,

207. *Morgan*, 88 Eng. Rep. at 361, 365 (“[Since] a testamentary guardian is under the control and inspection of a Court of Equity, as superintendant of all guardianships . . . this Court . . . may compel him to do any . . . act which may be thought necessary for the benefit of the infant.”); see also *Jeffrys v. Vanteswarstwarth*, 27 Eng. Rep. 588, 588 (Ch. 1740) (ordering the “Method of Inquiry, as is always done where the Interest of Infants is concerned, namely, to refer it to a Master to examine whether it is for their Benefit or not”). The “benefit of the infant” standard was occasionally phrased in the negative, so that the court would act to prevent the guardian from acting “to the prejudice of the infant.” *Beaufort v. Berty*, 24 Eng. Rep. 579, 580 (Ch. 1721); see also *Smith v. Smith*, 26 Eng. Rep. 977, 978 (Ch. 1745) (“This jurisdiction is exercised by way of punishment, sometimes on such as have done any act to the prejudice of infants; and likewise more usefully exercised to restrain persons from doing any thing to disparage infants, where the act has not yet been completed.”).

208. See, e.g., *Smith*, 26 Eng. Rep. at 978 (considering “fortune” and “rank”); *Gordon v. Irwin*, 29 Eng. Rep. 241 (Ch. 1781) (refusing permission to marry where the proposed husband did not have an independent fortune). Where a guardian married his nine-year-old ward, heir to a significant fortune, to his own son, an apprentice to a peruke-maker, the distance in station between the ward and her spouse was so extreme that the disadvantageous nature of the marriage was not even a subject of debate. See *Goodall v. Harris*, 24 Eng. Rep. 862, 863 (Ch. 1729) (finding a breach of duty where a guardian married the ward to one “who was worth nothing”). Where the spouses were equal in “family and quality,” but not in “portion and fortune,” the court was more hesitant to condemn a marriage, since “portion and fortune . . . is not the material ingredient in the happiness of the married life,” *Smith*, 26 Eng. Rep. at 978, but often did so nonetheless. Explaining its preference for marriages where the spouses were equal in both rank and wealth, the court reasoned that to secure a ward a fortune equal to his or her own was to act “by way of analogy to the care and prudence of the natural parent,” since “parents always take care that such provision shall be made . . . as will enable infants to live in the world suitable to that rank to which their birth intitles them.” *Id.*

209. See *Storke v. Storke*, 24 Eng. Rep. 965 (Ch. 1730) (sending for the eldest of three wards to be brought into court, and asking her where she preferred to be placed, and upon her stating that she desired to stay where she was, allowing her to continue there).

210. See *id.* at 966.

211. See *supra* Part II.C.1.d.

212. See *supra* Part II.C.1.b.

213. See *supra* Part II.C.1.c.

not in the interests of the child, but in the interests of the general public. This standard applied where a child stood to become a peer of the realm, that is, a member of the House of Lords.²¹⁴ In these cases, the court proclaimed that its interest in the child's welfare was especially strong, explaining that "the public was interested" where the child was to become one of England's leaders.²¹⁵ The application of this "public interest" standard, however, led to an outcome identical to that obtained by the application of the "benefit of the infant" standard. In the public interest cases, just as in the benefit of the infant cases, the court inevitably found that a ward should be brought up in a "proper"²¹⁶ manner.

3. *The Exercise of Chancery's Authority.* — The Court of Chancery employed a wide variety of mechanisms to enforce its control over testamentary guardianships. Although the court later began to claim that its control over testamentary guardians was exercised primarily through its power to dispense the ward's property,²¹⁷ and thus to determine how much was to be spent for the infant's education and maintenance,²¹⁸ usually the mechanisms of the court's control did not involve the ward's property. It could, and frequently did, issue a contempt of court against guardians and third parties who disobeyed its orders. This writ of contempt could be followed with an order that the offending parties be held prisoners at the Fleet until the court decided to release them, or it could, alternatively, lead to a sequestration of the offending party's property. Both of these methods were primarily intended to force the offender to comply with the court's order, or to reach a settlement by which the offender would pay for any damage done,²¹⁹ but could also serve as punish-

214. See *Beaufort v. Berty*, 24 Eng. Rep. 579 (Ch. 1721); see also *Eyre v. Shaftsbury* 24 Eng. Rep. 659 (Ch. 1722).

215. See *Beaufort*, 24 Eng. Rep. at 579 ("[N]othing could be of greater concern than the education of infants, and more especially of this noble lord, in whom the publick was interested, and from whom his prince and country might justly have expectations."); *Eyre*, 24 Eng. Rep. at 662 ("[T]he present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested . . .").

216. *Eyre*, 24 Eng. Rep. at 662.

217. See *Wellesley v. Beaufort*, 38 Eng. Rep. 236, 243 (Ch. 1827) (reasoning that if most cases regulating testamentary guardians have involved children with property, this is "not, however, from any want of jurisdiction" in the absence of property; but rather, because "this Court has not the means of acting, except where it has property to act upon").

218. The general rule was that a guardian could spend only the income from an infant's estate, and not the capital. See *Anstis v. Gandy*, 2 Eng. Rep. 212, 216 (Ch. 1735). Where a guardian felt it necessary to spend part of the capital as well, he or she could petition the Court of Chancery for permission to do so. See, e.g., *Anstis*, 2 Eng. Rep. at 215 (refusing guardian's petition for an exception from "the general rule whereby guardians are restrained from exceeding in expences the income of the infant's fortune"); *Ex parte Petre*, 32 Eng. Rep. 163 (Ch. 1802) (regulating the amount of money to be taken from the wards' inheritance for the purpose of maintenance and education).

219. See, e.g., *Bathurst v. Murray*, 32 Eng. Rep. 279, 280 (Ch. 1802) (holding husband of ward in prison until satisfactory marriage settlement reached).

ment.²²⁰ In aggravated instances, the court could also order an information against a guardian or third party, and subject him or her to criminal penalties.²²¹ And where a guardian had irremediably breached his or her trust to care for a ward, or become incompetent to carry out the guardianship, the court could remove him or her altogether, and, if no other guardian remained, appoint another guardian in his or her stead.²²²

III. THE REGULATION OF FATHERS

In the second half of the eighteenth century, the Court of Chancery employed an analogy between testamentary guardians and fathers to extend its jurisdiction to include the supervision of fathers themselves. The development, however, occurred gradually, with no case reaching more than a step or two beyond the last. This Part will trace that development. It shows how the legitimacy of judicial regulation of fathers began in dicta and then emerged as the law in a subset of cases in which a father was found to have waived his rights. The Note will then describe how the court extended its regulation beyond this subset, first to fathers who breached financial duties to their children, a comparatively objective inquiry, and then to fathers who in the view of the court breached their more general paternal duties.

A. *Early Dicta Concerning Interference with Paternal Rights*

Even the earliest cases regulating testamentary guardianships had included dicta stating that the Court of Chancery could regulate fathers as well as guardians. In the important early case of *Beaufort v. Berty*, the Lord Chancellor stated that he “would and had interposed, even in the case of a father,”²²³ citing *Kiffin v. Kiffin*, where the court had prevented a father from taking the profits of his son’s estate.²²⁴ Similarly, *Morgan v. Dillon*²²⁵ justified its intervention in a testamentary guardianship by citing

220. See *Eyre*, 24 Eng. Rep. at 663.

221. See *Goodall v. Harris*, 24 Eng. Rep. 862, 863 (Ch. 1729).

222. See *id.* at 862 (removing testamentary guardian for breach of duty, and remanding wards to custody of other guardian); see also *Morgan v. Dillon*, 88 Eng. Rep. 361 (Ch. 1724) (removing testamentary guardian for breach of trust, and appointing another in her stead, upon her remarriage), *rev’d sub nom. Dillon v. Mount-Cashell*, 2 Eng. Rep. 207 (H.L. 1727) (reversing on the grounds that the guardian’s remarriage did not constitute a breach of trust); *Roach v. Garvan*, 27 Eng. Rep. 954, 956 (Ch. 1748) (“The court sometimes, though rarely, removes a testamentary guardian”); *Smith v. Bate*, 21 Eng. Rep. 416 (Ch. 1784) (removing testamentary guardian for bankruptcy, and appointing another person in his stead). But see *Foster v. Denny*, 22 Eng. Rep. 925 (Ch. 1677) (holding that the court cannot remove a testamentary guardian); *Ingham v. Bickerdike*, 56 Eng. Rep. 1096, 1096 (Ch. 1822) (“[T]he Court will not make an order to remove a testamentary guardian; but a proper case being made, the Court will . . . appoint some other person to superintend the maintenance and education of the infant.”).

223. 24 Eng. Rep. 579, 579–80 (Ch. 1721).

224. Unreported case, cited in *Beaufort*, 24 Eng. Rep. at 580.

225. 88 Eng. Rep. 361, 365 (Ch. 1724).

Roberts v. Roberts, another case in which a father was prevented from taking the profits from his child's estates.²²⁶ The reasoning in *Morgan* was that since "the father . . . is the root out of which all other guardians spring," if a father could be "removed," as had happened in *Roberts*, "then certainly a derivative guardian may be removed, for he can have no greater privilege or immunity than a primitive and original guardian from whom he derived."²²⁷ But, in fact, the regulation of guardians in *Beaufort* and *Morgan* went far beyond any regulation that had ever been imposed upon a father. Whereas *Kiffen* and *Roberts* concerned only the management of a child's property, *Beaufort*, *Morgan*, and the cases that followed concerned the management of the child himself.

The analogy between fathers and testamentary guardians made in *Beaufort* and *Morgan*, serving as it did to justify the new regulation of testamentary guardianships that these cases helped to initiate, was soon forgotten. Until 1756, in *Butler v. Freeman*,²²⁸ no court again mentioned its power to regulate fathers themselves. *Butler* involved a living father who had allowed a third party to take on the guardianship of his child. The child had been seduced away from the guardian, and in response to a petition by both guardian and father for a contempt of court for marrying a ward without leave, the seducer had argued that the Court of Chancery could not enforce a guardian's rights where a father was alive, since this would be tantamount to interfering in fatherhood. The Court of Chancery responded by reversing the original analogy between fatherhood and testamentary guardianship set forth in *Beaufort* and *Morgan*. These cases had reasoned that fathers had been removed, therefore so too could guardians; but *Butler* reasoned that if testamentary guardians were subject to regulation by the Court of Chancery, as they had been for half a century, then so too were fathers: "It is admitted, the Court has interfered where there has been a testamentary guardian. I see no difference between the cases. A testamentary guardian, by statute, has all the remedies at law which a father has."²²⁹

Although *Butler* did not itself interfere with a father's control of his child, since the father in *Butler* had voluntarily relinquished this control, the logic set forth in its dictum provided powerful ammunition for future cases to regulate fathers against their wishes. Fatherhood soon came to be seen in the same light as testamentary guardianship, that is, as a trust, where a father's rights stemmed from the fulfillment of certain duties. Upon a breach of these duties, a father lost his paternal rights.

226. 145 Eng. Rep. 399 (Exch. 1657) (prohibiting an infant's father from felling timber on her property).

227. *Morgan*, 88 Eng. Rep. at 365.

228. 27 Eng. Rep. 204 (Ch. 1756).

229. *Id.* at 205.

B. *Judicial Intervention in Fatherhood: The Waiver of Rights Justification*

The first cases to justify termination of paternal rights involved situations in which the father was seen to have waived or even sold his rights over his children, usually in exchange for a bequest of property either to his children or to himself. In the pre-*Butler* case of *Ex parte Hopkins*,²³⁰ the court rejected a claim that a father could waive his paternal rights by accepting a legacy to his children. In *Hopkins*, a testator had left a legacy to the three daughters of a living father, and had appointed his executor to care for the girls and administer the legacy. The Lord Chancellor rejected the executor's claim of guardianship, stating that "it cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian."²³¹

Two days after *Butler* was decided, however, a case similar to *Hopkins*, *Blake v. Leigh*,²³² had very different results. In *Blake*, a grandfather left his legacy to his grandson, whose father was still alive, and appointed a guardian to care for the child. In response to the father's petition for guardianship, the *Blake* court at first reiterated the ruling in *Hopkins*, holding that "[t]he grandfather had no power to appoint guardians of his grandson, it being a right vested in the father."²³³ But it went on to state that a father could give up his vested right in his child by allowing the grandfather to appoint a guardian in exchange for the legacy to the child: "[A]ny one can give his estate on what conditions he pleases; and the father has in this case submitted to the will."²³⁴ By accepting the legacy for his child, and agreeing to allow a guardian appointed to oversee the child's education, the father "had waived his parental right," and this waiver was irrevocable: "[H]ere is no ground to alter what was done with the consent of all parties."²³⁵ Fatherhood was no longer an immutable status, but a contractual bundle of rights and duties.

After *Blake*, the court again upheld an express waiver of paternal rights in exchange for a legacy in *Colston v. Morris*.²³⁶ Then, in *Lyons v.*

230. 24 Eng. Rep. 1009 (Ch. 1732).

231. *Id.* at 1009. That the court felt constrained to award guardianship to the father rather than to the wealthy benefactors, but preferred a different outcome, is evident in the fact that despite its holding reaffirming the father's guardianship, the court refused to deliver the children over to their father on the technical ground that in order to obtain his children he must pursue a proper legal remedy, i.e., a writ of habeas corpus, and even forbade the father from attempting to obtain them through forceful means. See *id.* at 1010.

232. 27 Eng. Rep. 207 (Ch. 1756).

233. *Id.* at 207.

234. *Id.*

235. *Id.*

236. 37 Eng. Rep. 849 (Ch. 1820) (enforcing as binding a condition attached to a legacy by which the father, in accepting the legacy, agreed not to interfere in his daughter's education, and rejecting the father's claim that such a condition was *in terrorem* and void).

Blenkin,²³⁷ the court went further, finding an implied waiver of paternal rights, even in the absence of any agreement concerning guardianship, in the fact that the father had accepted a legacy for his children. The father in *Lyons* had for a time permitted his children to reside with their aunt, which was the preference of the children's wealthy grandmother, who then died and bequeathed to the children a large fortune. Upon the aunt's marriage, the father decided to ask that the children return to live with him. The court refused on the grounds that, by consenting for a time to allow the children to receive benefits paid for out of their grandmother's legacy, the father had implicitly relinquished his rights to them. The *Lyons* court cast the exchange of a father's rights for a legacy as a sort of sale: "[T]he testatrix, by the benefits she has given these children out of her property, has purchased the power of educating them in the way and under the controul and guardianship which she has pointed out, and the parent has consented to."²³⁸

C. *Judicial Intervention in Fatherhood: The Breach of Duties Justification*

1. *Breach of Duty on Financial Grounds.* — It was in 1789, with *Powel v. Cleaver*,²³⁹ that the Court of Chancery first extended *Blake* to find an abrogation of paternal rights in the absence of even an implied agreement to relinquish those rights. In *Powel*, the court found that a father had failed in his paternal duties, and therefore forfeited his paternal rights, when he refused to let others control his child in exchange for a legacy. *Powel* involved a father who rejected a legacy for his children when he realized that it was granted upon the condition that his rights of guardianship be terminated.²⁴⁰ The court refused the father permission to interfere with the education of his children as arranged by the executor, on the grounds that the children had certain "expectations" that the legacy had created, and must be educated in accordance with those expectations. Hesitant to admit the extent to which it thereby abrogated a father's rights to his child, the *Powel* court finessed the issue by refusing to articulate the basis for its jurisdiction to do so. Citing *Blake* as precedent,

237. 37 Eng. Rep. 842 (Ch. 1821).

238. *Id.* at 847.

239. 29 Eng. Rep. 274 (Ch. 1789).

240. *Powel*, like *Blake*, involved a will with an express clause that conditioned a legacy to infants upon their father's acquiescence in a transfer of guardianship. The father in *Powel* at first allowed his children to accept the legacy. Three years later, however, the father petitioned the court to assert his rights of guardianship, claiming that he had not at first understood the condition on which the legacy had been granted, and now that he did, would rather relinquish the legacy than give up his rights of guardianship. See *id.* at 277. The executors' lawyers, on the other hand, claimed that Mr. Powel had understood from the start the condition on which the legacy had been granted, and having acquiesced in it, could not change his mind. It was to avoid resting the case upon this factual dispute that the executors' lawyers decided to make the novel argument that "[i]t is material also to consider whether a parent can insist upon his full right of guardianship, where by so insisting on that right against the condition of a legacy to them, such a legacy may be forfeited." *Id.* at 277.

the court declared: "It is no where laid down that the guardianship of a child can be wantonly be disposed of by a third person. The wisdom would be not to raise points on such a question, as the Court will take care that the child shall be properly educated for his expectations."²⁴¹

The effect of *Powel* was immense. Despite its reluctance to admit the revolutionary basis of its decision, *Powel* was widely considered to have established the principle that where a father refused to allow his child a wealthier lifestyle than the one he himself could provide, then he failed to pay "due attention to the interests of the child,"²⁴² and thereby lost his paternal rights. This principle was used in a series of cases removing children from their fathers on the grounds of bankruptcy. In *Creuze v. Hunter*, the court ordered a father "restrained from interfering with the management of his child" where the father was bankrupt and the child was heir to a significant estate, on the ground that it "would not allow the child to be sacrificed to the views of the father."²⁴³ Similar orders against bankrupt fathers were made shortly thereafter in *Giffard v. Giffard*²⁴⁴ and *Ex parte Warner*,²⁴⁵ and later in *Ex parte Mountfort*.²⁴⁶

But *Powel* also initiated a new model of interference in fatherhood, one that extended beyond cases involving money alone. *Powel* removed children from their father on the basis that in refusing a legacy for them, he was no longer acting as a father should. As later explained in *de Manneville v. de Manneville*,²⁴⁷ *Powel* therefore stood for the larger proposition that wherever a father had breached his duty to his child, he thereby lost his paternal rights. The court's explanation is so sweeping that it is worth quoting in full:

[T]he Law imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others would fail in particular instances; and if an instance occurred, in which the father was unable, or unwilling, to execute that duty, and, farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of them-

241. *Id.* at 279.

242. *De Manneville v. de Manneville*, 32 Eng. Rep. 762, 767 (Ch. 1804) (explaining *Powel* and other cases).

243. 30 Eng. Rep. 113 (Ch. 1790) (restraining an insolvent father from interfering in his son's education or taking him abroad, where the son was under the management of guardians arranged by his mother).

244. See *Giffard v. Giffard*, an unreported case cited as "a late . . . cause . . . before the Lord Chancellor" in the 1790 report of *Blisset's Case*, 98 Eng. Rep. 899, 900 (K.B. 1784) (removing child from bankrupt father).

245. 29 Eng. Rep. 799 (Ch. 1792) (citing *Powel* and *Creuze* as precedent, and ordering a bankrupt father, who had also exhibited cruel behavior toward the mother, restrained from removing his three children from the schools at which their mother had placed them and taking them into his own custody).

246. 33 Eng. Rep. 822 (Ch. 1809) (appointing a guardian to supersede an insolvent father).

247. 32 Eng. Rep. 762 (Ch. 1804).

selves; and have not the benefit of that care, which is presumed to be generally effectual. In [*Powel*] there was a struggle between the feelings of the father and a due attention to the interests of the child . . . [The Lord Chancellor] took upon him the jurisdiction on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate, deliberation the parent owed to the true interests of the child; and [therefore] separated the person of the child from the father.²⁴⁸

Once *Powel* had extended *Blake* to allow abrogation of paternal rights where a father refused a legacy to his sons, the court could, in effect, stand in the father's place, and judge what was best for his child. If the court's opinion differed from that of the father, then the father had breached his duties toward his child and lost his rights to fatherhood.

2. *Breach of Duty on Non-Financial Grounds.* — In 1804, with *de Manneville*,²⁴⁹ the Court of Chancery for the first time found a breach of paternal duties on a basis other than a purely financial one. In the cases that had come before, the court's discretion to interfere in fatherhood had been exercised in a predictable manner: Children were better off with wealthier guardians. In these cases, "better" was measured by the objective standard of wealth. But *de Manneville*, and the cases that followed it, allowed the court to regulate fatherhood on the basis of a newly unbounded interpretation of "the interests of the child."²⁵⁰

De Manneville involved a French father and a British mother who had literally snatched a child back and forth. The mother petitioned the Court of Chancery to force the father to deliver the child to her. The

248. *Id.* at 767.

249. In *de Manneville*, the court refused the mother's petition for the custody of her child, but agreed to restrain the father from removing the child out of the country. Before petitioning the Court of Chancery to intervene on behalf of her child, the mother in *de Manneville* had attempted to achieve the same result by filing a writ of habeas corpus in a court of common law. See *Rex v. de Manneville*, 102 Eng. Rep. 1054 (K.B. 1804) (refusing to deliver child to custody of the mother, or to restrain the father in any way, on the ground that the father has the legal right to custody). As the Lord Chancellor in *de Manneville* stated in reference to this earlier petition,

The Court of King's Bench, when the child was brought up by *Habeas Corpus*, declined to interfere; and I am not surprised at it; for that Court has not within it by its constitution any of that species of delegated authority, that exists in the King, as *Parens Patriae*; and resides in this Court, as representing his Majesty.

32 Eng. Rep. at 765. The difference between the two *de Manneville* cases illustrates the principle articulated in *Rex v. Smith*, 93 Eng. Rep. 983 (K.B. 1734), that upon a writ of habeas corpus, a court of common law cannot make any decision altering the right of guardianship itself. Even in *Rex v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763), often cited as evidence of the extent to which an English court of common law would interfere with a father's custody rights, the court did not make any decision regarding the abrogation of those rights, but merely refused to enforce them, holding that the court could, at its discretion, refuse to order a child returned to the father. For a discussion of how the different procedural postures of the two *de Manneville* cases has confused scholars, see *supra* notes 18–25 and accompanying text.

250. *De Manneville*, 32 Eng. Rep. at 767.

court refused to deliver the child to the mother, on the ground that to do so would be to sanction her illegal separation from her husband.²⁵¹ But it decided that once the case had been brought before it, it could make any decision which would be in the child's best interests: "[T]he petition being presented on the part of an infant, the Court will do what is for the benefit of the infant, without regard to the prayer."²⁵² Reading *Powel*, *Warner*, and *Creuze* as support for the principle that where a father was "unwilling, or unable, to execute that duty . . . [which he] owed to the true interests of the child," the Court of Chancery could "control the right of the father . . . to the person of the child,"²⁵³ the *de Manneville* court took matters into its own hands, attending not only to the possibility of the infant's being removed from the country, but "also to the way, in which the child should be brought up," in order to determine "what is fit to be done with the person of the child."²⁵⁴ After considering all aspects of the situations of the child, mother, and father, the court ruled that the child would remain with the father, but the father was to be prohibited from removing his child out of England.²⁵⁵ Less important than the actual decision was the freedom the court felt in coming to this decision. At the same time that the court noted its right to interfere on the child's behalf, it admitted that it was not presented with any clear indication of how it should proceed to do so: "In the situation of this child it is extremely difficult not to interpose; and it is also extremely difficult to say, how the Court is to interpose."²⁵⁶ The court's discretion was unbounded by any objective measurement.

The Court of Chancery repeatedly found a breach of trust sufficient to abrogate paternal rights, in cases not involving financial grounds, from 1804 to 1839.²⁵⁷ The most pronounced instance of judicial discretion to interfere in fatherhood was the case of *Wellesley v. Beaufort*.²⁵⁸ As Mr. Wel-

251. See *id.* at 765–66.

252. *Id.* at 765.

253. *Id.* at 767.

254. *Id.* at 766.

255. See *id.* at 767–68.

256. *Id.* at 767.

257. One well-known instance of judicial interference in paternal rights on non-financial grounds involved the poet Percy Bysshe Shelley, who after the death of his abandoned wife tried to obtain custody of his children. He was refused on the basis both of his "immoral conduct," i.e. adultery, and of his atheistic principles, which he had avowed in written tracts and refused to recant, both of which the court considered "inconsistent with the duties of persons in such relations of life," i.e., fathers. *Shelley v. Westbrook*, 37 Eng. Rep. 850, 851 (Ch. 1817). *Shelley* created the rule that the moral education of children is of greater importance than their financial interests. Responding to Shelley's assertion that the removal of his children from his custody would in fact adversely affect their financial interests, the court replied that "to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance." *Id.* at 852; see also *Whitfield v. Hales*, 33 Eng. Rep. 186 (Ch. 1806) (removing children from a father's custody and appointing a guardian in his stead, on grounds of ill treatment).

258. 38 Eng. Rep. 236 (Ch. 1827).

lesley fought for the custody of his children, first in the Court of Chancery, then in the House of Lords, and finally when he was sentenced to imprisonment for removing one of his children from her appointed guardian,²⁵⁹ his case generated an extended debate on the subject of judicial interference in paternal rights.²⁶⁰ In the course of this debate, the Court of Chancery, and then the House of Lords, reviewed the case law regulating testamentary guardianship, and explicitly reaffirmed the applicability of the principles developed in those cases to fatherhood itself. It came to the conclusion that fatherhood is, like testamentary guardianship, a trust, and as such subject to judicial regulation.

What shocked the public about *Wellesley* was that here, unlike in previous cases, the Court of Chancery removed custody from a father who was both wealthy and extremely attentive to his children. Mr. Wellesley had always been involved in his children's upbringing, selecting servants to care for them, overseeing their schoolwork on a regular basis, and instructing them regularly on how to behave.²⁶¹ His road to losing custody of his children began when he entered into an adulterous affair with a married woman. Upon discovering the affair, Wellesley's wife initiated proceedings in an ecclesiastical court for a legal separation, but died soon thereafter. Upon Mrs. Wellesley's death, her relatives initiated a suit in the Court of Chancery to remove the children from the custody of their father, on the basis that his immoral behavior had poisoned his wife and would eventually destroy his children as well. When the Court of Chancery granted the petition on the basis that Mr. Wellesley lived a profligate life overseas, Mr. Wellesley responded by purchasing a house in London of which he thought the court would approve as well-suited for raising his

259. See *Mr. Long Wellesley's Case*, 39 Eng. Rep. 538 (Ch. 1831) (ordering the imprisonment of Mr. Wellesley for disobeying a court order not to interfere with the custody of his children).

260. The *Wellesley* controversy generated two pamphlets and several periodical articles debating the subject of judicial interference in paternal rights. See James Ram, *Observations on the Natural Right of a Father to the Custody of His Children, and to Direct Their Education; His Forfeiture of this Right; and the Jurisdiction of the Court of Chancery to Control It* (London, A. Maxwell 1828) (approving of the exercise of Chancery's jurisdiction over fathers as a necessary element of a civilized state); *Observations upon the Power Exercised by the Court of Chancery, of Depriving a Father of the Custody of his Children* 1, 48 (London, John Miller 1828) (describing the decision in *Wellesley* as "one of the most important ever pronounced," and attacking the Court of Chancery's assertion of its right to deprive a father of the custody of his children as an "extraordinary and fearful jurisdiction" which "comes home to the heart of every Father attached to his children"). The anonymous pamphlet argued that the first case to extend the regulation of testamentary guardians was *Powel* in 1789, and questioned the logic of this extension: "[T]he power to take a child from his parent seems to be of very questionable policy, and, at all events, is of very recent origin, if it be the fact, that it cannot be carried farther back than the year 1789." *Id.* at 48; see also *Abstract of Authorities Relating to the Wellesley Case*, 1 *Law Mag.* 309, 309-18 (1829) (refraining from coming down pro or con, but instead reviewing the cases in which the Court of Chancery's jurisdiction to remove fathers originated).

261. See *Wellesley*, 38 Eng. Rep. at 241.

children, and submitting his plans to educate and care for them. But the court nevertheless persisted in its refusal to grant him custody, on the ground of not only his immoral conduct in committing adultery, but also the general "tenor and bent of his mind."²⁶²

In refusing to grant custody to Mr. Wellesley, the court admitted that separating a father from his children is an action "of the most serious and important nature," and that the judge who makes such an order must exercise "the utmost anxiety to be right."²⁶³ To justify the power of the Court of Chancery to take such a drastic step, the *Wellesley* court reviewed the entire history of the Court of Chancery's interference in guardianship. Referring obliquely to the Tenures Abolition Act, the court noted that it had been over a century since the Court of Chancery had, in *Beaufort v. Berty*, established its authority to regulate the testamentary guardianships created under that act.²⁶⁴ It then cited a string of cases that had extended this regulation to fatherhood: *Powel v. Cleaver*, *Creuze v. Hunter*, and *de Manneville v. de Manneville*.²⁶⁵ The *Wellesley* court thereby concluded that interference by the Court of Chancery in paternal rights was "long settled by judicial practice" to be "the law of the land."²⁶⁶

Citing as precedent the cases regulating testamentary guardianship and the cases that extended this to the regulation of fatherhood, the *Wellesley* court read these cases as not only permitting the Court of Chancery to interfere in fatherhood, but in fact imposing upon the court a duty to do so. The Lord Chancellor proclaimed: "I cannot now retire from the discharge of this duty—I dare not violate the principles which grow out of the practice of the Court. My duty is to apply those principles honestly; to look diligently to all the circumstances of the case, and . . . to determine

262. *Id.* at 251. Among the examples cited by the court as evidence of Mr. Wellesley's unacceptable principles is the fact that he frequently swore, and encouraged his children to swear. The court describes an incident in which, while vacationing in France, Mr. Wellesley invited street children to come to the window to teach his children to swear in French, and encouraged his own children to teach the others to swear in English. See *id.* at 249.

263. *Id.* at 243.

264. See *id.* at 236, citing *Beaufort v. Berty*, 24 Eng. Rep. 579 (Ch. 1721). The *Wellesley* court wrote:

The law makes the father the guardian of his children by nature and by nurture. An act of Parliament has given the father the power of appointing a testamentary guardian for them: one should think that the guardian so appointed must have all the authority that Parliament could give him; and his authority is, perhaps, as strong as any authority that any law could give. But it is above a century ago, since, in the case of *Duke of Beaufort v. Berty*, the Lord Chancellor of that day, Lord Macclesfield, determined, that the statute-guardian was subject to all the jurisdiction of this Court.

Wellesley, 38 Eng. Rep. at 244–45 (citations omitted).

265. *Id.* at 244 (citing *Powel v. Cleaver*, 29 Eng. Rep. 274 (Cb. 1789); *Creuze v. Hunter*, 30 Eng. Rep. 113 (Ch. 1790); and *de Manneville v. de Manneville*, 32 Eng. Rep. 762 (Ch. 1804)).

266. *Wellesley*, 38 Eng. Rep. at 243.

manfully, and manfully to declare what my opinion is."²⁶⁷ A father was burdened with "the duty of a parent," and this duty included providing his children with "a moral and religious education," considered "the foundation of all that is valuable."²⁶⁸ And the Court of Chancery had "the imperious duty" to ensure that the father fulfill his.²⁶⁹

Upon appeal, the House of Lords affirmed *Wellesley*, and in doing so affirmed that fatherhood is subject to the regulation of the Court of Chancery because it is a trust.²⁷⁰ The decision opens by setting forth the rule that the father's right to his children is premised on his duty to act as trustee in their guardianship, and if he fails in that duty he loses his rights.²⁷¹ The House of Lords justified the Court of Chancery's jurisdiction to regulate the trust of fatherhood by referring to the power of Chancery to regulate the trust of testamentary guardianship.²⁷²

Asking "why is the conduct of the father not to be considered as a trust, as well as the conduct of a person appointed as guardian?" the House of Lords concluded that if the Court of Chancery could regulate testamentary guardianships, then so too could it regulate fatherhood, which the law "has always considered . . . as a trust."²⁷³ It explained, "a father is entrusted with the care of the children; . . . he is entrusted with it for this reason, because, it is to be supposed, his natural affection would make him the most proper person to discharge that trust."²⁷⁴

267. *Id.* at 244.

268. *Id.* at 247.

269. *Id.* at 247.

270. See *Wellesley v. Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828).

271. The House of Lords stated:

The opposition [to Chancery's decision] is founded on the right of the father to have the care and custody of his children. That right is not disputed by the order; but the question is, whether the father having that right, is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt.

Id. at 1080.

272. The House of Lords reasoned as follows:

If a guardian is appointed under the statute, which enables the father to appoint a guardian, the counsel at the bar have not disputed that is a trust; it is a delegated trust; a trust, which the law has enabled the father, when he ceases to live, to give to others for the benefit of his children; but if the father abuses that trust, if he appoints improper persons to be the guardians of his children, is it doubted, that a court of justice can interfere . . . ?

Id.

273. *Id.* at 1081, 1084.

274. *Id.* at 1084-85. The court—in both the Chancery case and the appeal—emphasized its power to remove fathers by quoting with disdain Mr. Wellesley's own opinion that "a man and his children ought to be allowed to go to the devil their own way, if he pleases." *Id.* at 1083. Both versions of *Wellesley* emphatically rejected this assertion of fathers' rights.

While the House of Lords' decision in *Wellesley* reaffirmed the trust rationale for regulating fatherhood, the Lords themselves did not entirely understand the origins of the Court of Chancery's power. Indeed, in a revealing statement, the House of Lords rested its holding largely on tradition:

If it were necessary to go back into times long past, to examine the grounds on which every law is administered in this country, before it could be considered as legally administered, we should be involved in very great difficulties. But what has been the practice for a great number of years, has been held, not in this country alone, but in all countries, to be a ground for supposing that it was rightly done, on this supposition, that if it had been wrongly done, it would not have been permitted to be continued.²⁷⁵

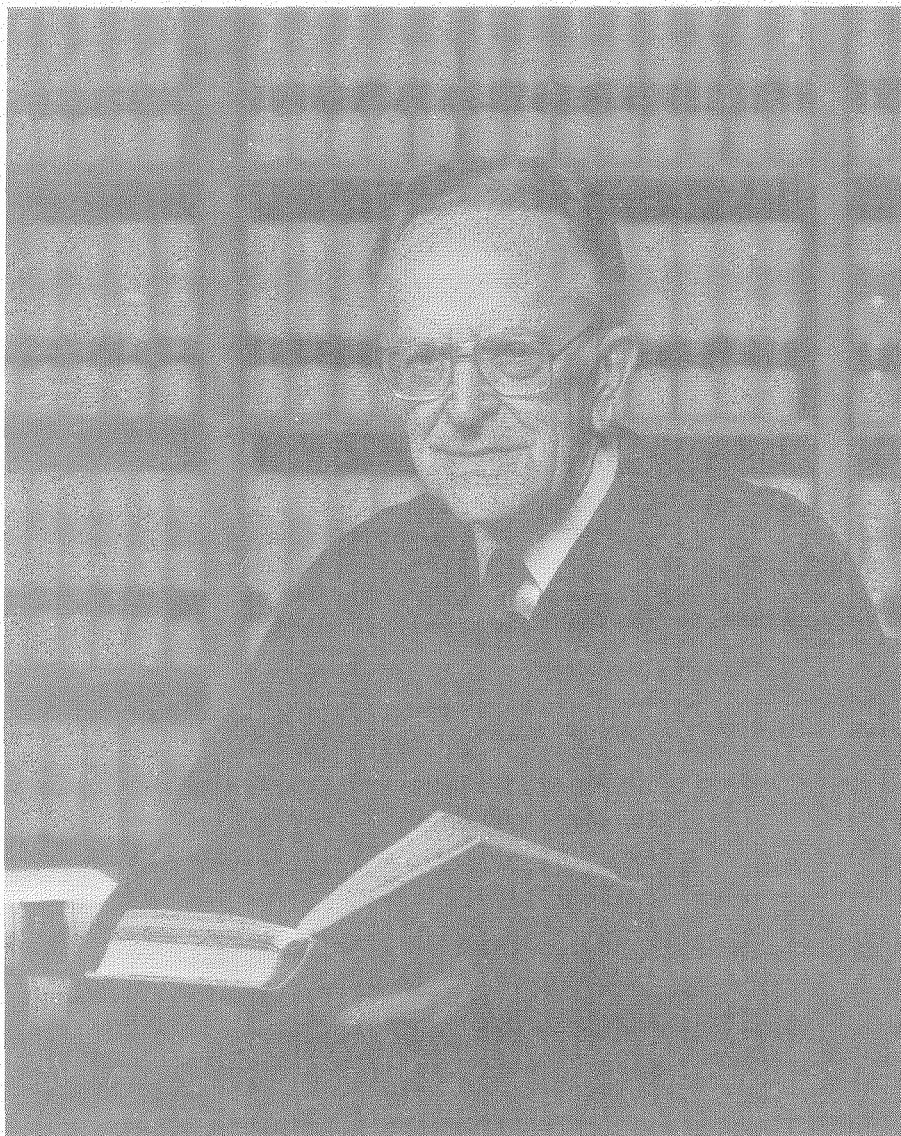
The House of Lords' conclusion that "if it had been wrongly done, it would not have been permitted to be continued" is incorrect, for as this Note has shown, the Court of Chancery's power to control fatherhood arose from a statute that was originally intended to increase paternal rights.

CONCLUSION

In 1839, Parliament passed the Custody of Infants Act, which allowed judges, in certain situations, to override fathers' custody rights by awarding custody or visitation rights to mothers. Those who fought for the passage of that Act treated it as the first English statute to arm judges against the previously inviolable "empire of the father," and historians ever since have believed this to be the case. As this Note has shown, however, a regime of judicial intervention in paternal custody was already in place by 1839, and this regime originated with another statute, the 1660 Tenures Abolition Act.

If historians have overlooked the importance of the Tenures Abolition Act in empowering English judges to remove children from their fathers, this is perhaps because it was actually designed to strengthen fathers' rights. The Tenures Abolition Act allowed fathers to appoint guardians to their children by will. When, in the early 1700s, the Court of Chancery took on itself the task of supervising testamentary guardians, it did so in order to ensure that after a father died, his children would be brought up as he would have wanted them to be. But the supervision of testamentary guardianships by the Court of Chancery opened up a tradition of judicial involvement in child custody that eventually would be turned against fathers themselves.

275. *Id.* at 1083.



Photograph by Joseph D. Lavenburg, National Geographic Society
Collection, The Supreme Court Historical Society

JUSTICE HARRY A. BLACKMUN

