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Mrs. Packard on Dependency*

Hendrik Hartog

INTRODUCTION

Elizabeth Ware Packard was born in western Massachusetts in 1816, the child of a Calvinist minister. At the age of nineteen she spent a few weeks in the Worcester State Asylum.¹ In 1839, she married Theophilus Packard, thirteen years her senior, like her father a Presbyterian minister, and her father's close friend. For the better part of two decades Theophilus and Elizabeth lived together in apparent harmony in western Massachusetts. In the mid 1850s, they moved with their children first to Ohio, then to Iowa, before settling in 1858 in the town of Manteno in Kankakee County, Illinois.²

Meanwhile, Mrs. Packard found herself more and more attracted to "enlightened" and "modern" religious movements, including perfectionism and spiritualism. These enthusiasms in no way distinguished her from many of her contemporaries, who regarded these optimistic and empirical religious faiths as emblematic of the discovery of modern religious truth.³ But to the more conservative members of Reverend Packard's church, who held firm to the Calvinist bedrock of human depravity and ignorance, her

* An early version of this paper was prepared for a conference on property and rhetoric held at Northwestern University in June 1986. Earlier and later versions were presented to faculty colloquia at Indiana University School of Law (Bloomington), the University of Chicago Law School, and UCLA Law School, to the annual meeting of the Wisconsin Psychiatric Association, and to the University of Wisconsin Summer Legal History Program. I would also like to acknowledge the financial support of the research committee of the University of Wisconsin Law School and my dependence on readings of various drafts by Elizabeth Clark, William Forbath, Nancy Hartog, Warren Lehman, Martha Minow, William Novak, Vicki Schultz, and Lucie White.

1. The reasons for her stay in the asylum would later become a matter of controversy. According to various doctors and asylum superintendents who reviewed her case, the stay demonstrated a congenital mental defect. According to her, she went to the asylum as a result of a brief and inconsequential bout of "mental exhaustion." See Andrew McFarland, "Case History," *American Journal of Insanity* 20 (1863): 89-94; Myra Samuels Himmelhoch, with Arthur H. Schaffer, "Elizabeth Packard: Nineteenth-Century Crusader for the Rights of Mental Patients," *Journal of American Studies* 13 (1979): 343.

2. By 1860, there were six living children.

3. She also vocally supported the major reform movements of the time: anti-slavery and, more ambiguously, the early women's movement. According to her husband's "diary," her enthusiasms—her insanity—were the reasons that the family had to move from Massachusetts to Ohio and, later, from Iowa to Illinois. See Theophilus Packard, "Diary," Walter E. Packard Papers, Bancroft Library, University of California. For an introduction to American spiritualism, see, R. Laurence Moore, *In Search of White Crows: Spiritualism, Parapsychology, and American Culture* (New York, 1977), 7-19. For an English parallel to Mrs. Packard, see Judith Walkowitz's study of Georgina Weldon, "Science and the Seance: Transgressions of Gender in Late Victorian London," *Representations* 22 (Spring 1988): 3-28.

beliefs were literal evidence of insanity. When, in the fall of 1859, Mrs. Packard began to explain those beliefs in presentations before an adult Sunday School class in the church, parishioners began to pressure her husband to have her committed into the state insane asylum.

According to one of Mrs. Packard's later accounts of the critical events of her life, Mr. Packard at first resisted the demands of the church members. When she had first come to ask his permission to present her views to the Bible class, he had told her she had better go, and that he would "take care of the babe during the intermission, so you can be free to go." She read him all the papers she was preparing for the class, and she always secured his consent before trying to read them to the class. "Up to this point, Mr. Packard acted the man, and the Christian, in his treatment of me."⁴

Then came "the fatal crisis" which would determine the course of the rest of her life. One afternoon a church deacon visited Mr. Packard and spent two hours closeted with him in his study. After the deacon had left, Mr. Packard called his wife over to talk to him. According to Mrs. Packard's later recollection, she

went into his extended arms, and sat upon his lap, and encircled his neck with my arm,⁵ when he remarked in a very mild tone of voice:

"Now, wife, hadn't you better give up these Bible-class discussions? Deacon Smith thinks you had better, and so do some others, and I think you had better too."

"Husband, I should be very glad to get rid of the responsibility if I can do so honorably, but I do not like to yield a natural right to the dictation of bigotry and intolerance, as Deacon Smith demands; but I am willing to say to the class that as Deacon Smith, and Mr. Packard, and others, have expressed a wish that I withdraw my discussions from the class, I do so, at their request, not from any desire to shrink from investigation on my part, but for the sake of peace, as they view it."

"No, wife, that won't do—you must resign yourself."

"Won't that be resigning, and that too on a truthful basis?"

"No, you must tell them it is your choice to give them up."

4. Mrs. Packard would always insist that her presentations were prepared at the unsolicited invitation of the Sunday School teacher, Deacon Dole. Dole had asked her to join the class as a way of stimulating interest in Bible study, even though he knew of her deviant views. The class, which had had only six members, grew to forty-six as a result of the "free and open discussion" Deacon Dole encouraged. But other members of the church called a meeting in which it was determined that the class had become "a dangerous influence, involving the exposure of the creed to the charge of fallibility." Dole was replaced by Deacon Smith, who would stop Mrs. Packard from reading her papers, despite her husband's renewed permission. See Elizabeth Parsons Ware Packard, *Modern Persecution, or Insane Asylums Unveiled, as Demonstrated by the Report of the Investigating Committee of the Legislature of Illinois*, vol. 1 (Hartford, 1875), 1-36.

5. Much of this should not be taken as literal truth. At other times Mrs. Packard wrote about their prior relationship as if it had always been cold and formal. And, as we shall see, one should always keep in mind both her gothic and romantic sensibility as well as her strategic sense of what kinds of stories would most appeal to legislators.

"But, dear, it is not my choice!"

"But you can make it so, under the circumstances."

"Yes, I can make it so, by stating the truth; but I can't by telling a lie."

"Well, you must do it!"

"O husband! how can you yield to such an evil influence? Only think! Here you have pledged before God and man that you will be my protector, until death part us, and now you are tempted to become my persecutor! Do be a man, and go to the class, in defiance of Deacon Smith, and say to the class:

"My wife has just as good a right to her opinions as you have to yours, and I shall protect her in that right. You need not believe her opinions unless you choose; but she has a right to defend her honest opinions as well as yourselves. I shall not suffer her to be molested in this right.

"Then you will be a man—a protector of your wife—and you will deserve honor, and you will have it. But if you become my persecutor and go against me, as Deacon Smith desires, you will deserve dishonor, and you will surely get it. Don't fall into this fatal snare, which the evil one has surely laid for you."

He construed my earnestness into anger, and thrust me from him, determining to risk this result at all hazards.⁶

And soon thereafter her husband evidently began to make plans to have her committed. In Illinois at this time it was possible for a husband to commit his wife into the state asylum almost unilaterally, without judicial or other public review, so long as one doctor agreed and the asylum superintendent was willing to accept her.⁷

Mrs. Packard was committed in the summer of 1860 and then spent the next three years in the Jacksonville Asylum, presided over by Dr. Andrew McFarland. Her relationship with McFarland was tempestuous. He, she claimed, knew she was sane, but depended on men like her husband for his business.⁸ He, she claimed, regarded her as insane, because she would not reconfirm her subservience to her husband.⁹ He, she claimed, wanted to keep her in the asylum, because he had sexual designs on her.¹⁰

But, there was another side to her recollections of life in the asylum. She admitted that she was at least momentarily smitten by McFarland.¹¹

6. *Ibid.*, 36-38.

7. "Married women and infants who, in the judgement of the medical superintendent are evidently insane or distracted, may be entered or detained in the hospital at the request of the husband, of the women, or parent, or guardian of the infants, without the evidence of insanity or distraction required in other cases." *General Laws of the State of Illinois, Passed by the Seventeenth General Assembly* (Springfield, 1851), 98. See the discussion of this statute in Mark E. Neely, Jr. and R. Gerald McMurtry, *The Insanity File: The Case of Mary Todd Lincoln* (Carbondale, 1986).

8. Packard, *Modern Persecution, or Insane Asylums Unveiled*, 83, 99-100.

9. *Ibid.*, 99, 164, 191-194.

10. *Ibid.*, 97.

11. *Ibid.*, 368-373, 381. Her love letters to McFarland were later used by him in a (largely unsuccessful) effort to discredit her before the Illinois legislature. See "Report of the Investigating

At various times she wrote of the asylum as a refuge from her husband's authority.¹² And when, in the end, the asylum's trustees ordered her to leave, she fought unsuccessfully to stay so long as the trustees insisted that she must return to the custody of her husband.¹³

In the fall of 1863 she came home to Manteno. Mr. Packard promptly locked his wife in the third floor of their house and made plans to recommit her. She managed to slip a note through the grates of her barred window to a passing stranger, who passed the note to one of her friends. This friend then brought a writ of habeas corpus in her name. Her husband defended by insisting that he was not holding his wife against her will, since she had no will worth mentioning, since she was crazy, having rejected his Calvinism. And there followed a marvelous trial on the question of whether rejection of Calvinism could be evidence of insanity.¹⁴ Mrs. Packard won that trial,¹⁵ but two days before the case went to the jury, with her victory apparent,¹⁶ her husband packed up all their belongings and their children and moved back to western Massachusetts. Leaving her a legal victor, but also an isolated married woman, without support or resources.

Yet the story does not end with her victimization. To the contrary. Mrs. Packard wrote up the story of her incarceration (as she called it) in innumerable pamphlets and books, which she had printed and then took door to door in Chicago and elsewhere.¹⁷ There was unquestionably a large and receptive audience for her story and for the polemical calls for legal reform which always accompanied it. She was one of the first women to address a number of state legislatures, including the Illinois legislature. By the late 1860s, she had managed to convince a number of legislatures to pass laws—usually called personal liberty or later Packard laws—requiring a jury trial prior to any involuntary commitments into asylums in Iowa, Illinois, and Massachusetts.¹⁸ She became the bane of

Committee," *Journal of the Assembly*, January 4, 1869. Himmelhoch with Schaffer, "Elizabeth Packard," 362.

12. See Packard, *Modern Persecution, or Insane Asylums Unveiled*, 383.

13. *Ibid.*, 386-393.

14. E.P.W. Packard, *Modern Persecution, or Married Women's Liabilities, as Demonstrated by the Actions of the Illinois Legislature*, vol. 2 (Hartford, 1875), 9-21; Packard, *Marital Power Exemplified in Mrs. Packard's Trial, and Self-Defence from the Charge of Insanity; of Three Years' Imprisonment for Religious Belief, by the Arbitrary Will of a Husband, with an Appeal to the Government to so Change the Laws as to Afford Legal Protection to Married Women* (Hartford, 1866), 13-41. Note, it is not clear whether the trial's participants regarded the issue as being whether her rejection of Calvinism per se was evidence of insanity or whether it was rejection (by a wife) of (her husband's) Calvinism which would constitute evidence of insanity. For various reasons that should become apparent below, I incline to the second characterization of the issue.

15. Why did she win? Perhaps, in part, because Kankakee County was in no respect a homogeneous Calvinist community. It was very diverse ethnically and religiously, with a substantial French-Canadian Catholic population. See C. Brettell, "From Catholics to Presbyterians: French-Canadian Immigrants in Central Illinois," *American Presbyterian* 63 (Fall 1985): 285.

16. In his diary, Mr. Packard characterized the trial as mob justice.

17. Packard, *Modern Persecution, or Married Women's Liabilities*, 84-90.

18. See Himmelhoch with Schaffer, "Elizabeth Packard."

asylum superintendents, who regarded the attention legislators showered on her as a measure of their alienation from the society.¹⁹ She was also a strong proponent of reformed marriage laws. She drafted a variety of women's rights reform bills (custody laws and married women's property laws, but never suffrage, which she opposed), some of which were passed into law, all of which received respectful hearings from state legislatures.²⁰

By 1869 Mrs. Packard had regained the custody of her children. Her husband went bankrupt in his last years, while she came to make a good living selling her writings. And when last seen in the early 1880s (she would live until 1896), she was living happily and with her children in a very nice house in Chicago. It was probably an exaggeration when a Boston paper's obituary noted that of American women of her time perhaps only Harriet Beecher Stowe "exerted a wider influence in the interest of humanity."²¹ But even today Mrs. Packard is not an entirely unknown figure. She has figured peripherally in the histories of psychiatric institutionalization of Gerald Grob, Ellen Dwyer, and others. Critics of psychiatric institutionalization like Thomas Szasz and Phyllis Chessler claim her as a precursor.²²

As an incipient biographer, I want to insist (gratefully and happily) that she has been unjustly ignored by previous historians—legal, medical, and religious. In part, my insistence is founded on Mrs. Packard's distinctive and peculiar voice, a voice which I have come to admire. But in the greater part, my insistence arises from Mrs. Packard's status as a "site" through which ran many of the most important highways of American cultural history. Histories of libertarianism, of religious pluralism, of institutionalization and social control, of women's rights, and of family law would all be enriched if attention were paid to Mrs. Packard's perspective and to the events of her life.

My own interest in her began when I came across the trial record of her case while working my way through family law trial records. The case is enormous fun, made up of the craziest of nineteenth-century psy-

19. John Hughes of the University of Texas has shared with me excerpts from Isaac Ray's lecture notes, in which Ray, the most famous forensic psychiatrist in nineteenth-century America, rails against Packard's influence on public policy. See also, Isaac Ray, "Confinement of the Insane," *American Law Review* 3 (January 1869): 193-217.

20. By the early 1880s she had begun to have second thoughts about her opposition to woman suffrage. See E.P.W. Packard, *The "Woman Hating Party" in the Idaho Legislature, Exposed!* (Boise, 1881).

21. *Boston Evening Transcript*, July 28, 1897. See also *Chicago Tribune*, July 28, 1897.

22. See Himmelhoch with Schaffer, "Elizabeth Packard"; John C. Burnham, "Elizabeth Packard," *Notable American Women, 1607-1960*, 3 (Cambridge, MA, 1971): 1-2; Gerald N. Grob, *Mental Institutions in America. Social Policy to 1875* (New York, 1973); Norman Dain, *Concepts of Insanity in the United States, 1789-1865* (New Brunswick, 1964); E. Dwyer, "The Weaker Vessel: The Law versus Social Realities in the Commitment of Women to Nineteenth-Century Asylums," in K. Weisberg, *Women and the Law*, vol. 1 (Cambridge, MA, 1983), 85-106; Phyllis Chessler, *Women and Madness* (New York, 1972); and Thomas S. Szasz, *Law, Liberty, and Psychiatry* (New York, 1963).

chiatric judgments and practices.²³ But it was her voice—the commentary she provided to the case—which really caught my eye. At the time I found the case I was just beginning to think about the ways Americans have shaped their demands and claims on the society in terms of legal rights—their rights consciousness. The multiple ways in which Mrs. Packard worked to clarify her status both as a married woman without rights and, at the same time, as a rights bearer with inherent natural rights that her husband had violated, raised for me interesting issues about the ways Americans have constructed diverse visions of their places within the legal order.

Mrs. Packard on rights is, however, too much for one paper. My goal here is to focus attention on one central feature of her thought—her ongoing attempt to make the events of her life into a paradigm of the illegitimate but legal dependency imposed on married women by the common law. This constitution of dependency—which I have drawn primarily from her two volume magnum opus, *Modern Persecution*—was marked by two striking features. On the one hand, Mrs. Packard insisted that her situation—indeed her identity—was constituted by the law, that she became the property of her husband, in fact, because of rights granted him by law. On the other hand, she also distinguished the bad dependency produced by her husband's legal empowerment from the good and natural dependency and care that was the right of the married woman and that ought to be (but too often wasn't) guaranteed by legal action.

In focusing on this aspect of her thought, I am not trying to reveal a distinctive female perspective on dependency and the law of marriage.²⁴ Nor do I think her writings can give us a systematic clarification of the confused intersections of dependency and legal rights in liberal legal

23. One of the doctors who examined her, a Dr. Brown, pretended to be a door-to-door salesman. He later read a statement to the court summarizing his reasons for regarding her as insane:

1. That she claimed to be in advance of the age of thirty or forty years.
2. That she disliked to be called insane.
3. That she pronounced me a copperhead, and did not prove the fact.
4. An incoherency of thought. That she failed to illuminate me and fill me with light.
5. Her aversion to the doctrine of the total depravity of man.
6. Her claim to perfection or nearer perfection in action and conduct.
7. Her aversion to being called insane.
8. Her feelings towards her husband.
9. Her belief that to call her insane and abuse her, was blasphemy against the Holy Ghost.
10. Her explanation of this idea.
11. Incoherency of thought and ideas.
12. Her extreme aversion to the doctrine of the total depravity of mankind, and in the same conversation, saying her husband was a specimen of man's total depravity.
13. The general history of the case.
14. Her viewing the subject of religion from the osteric standpoint of Christian exegetical analysis, and agglutinating the polysynthetic ectoblasts of homogeneous asceticism.

Packard, *Modern Persecution, or Married Women's Liabilities*, 33-34. One is reminded of the list (derived from a Borges story) that begins Foucault's *The Order of Things* (New York, 1970), xv. But it is should also be noted that this witness evidently was hooted from the stand.

24. See Martha Minow, "Forming Underneath Everything that Grows: Toward a History of Family Law," *Wisconsin Law Review* (no. 4, 1985): 819-98.

thought. My focus is on the strategic quality of her various arguments. Why did male legislators for the most part accept her characterization of her legal situation? What made her vision persuasive enough to justify legislative relief? I should emphasize that I am not ready to answer these questions directly in this tentative and preliminary study. Instead, I believe that I can show some of the ways in which her distinctive vision touched currents in nineteenth-century American legal culture. Most of all, I believe that an explication of Mrs. Packard's writings on dependency will help us make sense of the ways persons did and did not view themselves as property in nineteenth-century America.

THE DISCOVERY OF DEPENDENCY

Let me start with an extended passage from *Modern Persecution* that lays out the themes I want to develop in the rest of this paper.

The trial on Mrs. Packard's writ of habeas corpus ended on a Monday, with the jury declaring her to be sane and therefore entitled to the writ. On the previous Sunday, however, Mr. Packard "fled" to Massachusetts, taking with him "their" children and "their" belongings. All she had left was a letter inviting her to come join him and her trunk still packed from the asylum, which she had fortuitously removed from the house on Saturday.

When she asked her lawyer what relief was now available to her, he told her she had none, that she was a nonentity as a married woman, that her husband was her only protector and divorce her only protection from him.²⁵

"[O]n the principle of common law, whatever is yours is his—your property is his—your earnings are his—your children are his—and you are his. Whatever you hold in common with him, in his own name, you have no more right to than any other woman, while your husband lives . . . [W]hile he lives, you have not a right even to the hat on your head."

She protested that she had bought and paid for the hat with her own money. She had supposed that she "was his partner, in law, as . . . in society." But her lawyer soon convinced her of her "grand mistake":

"There is no such thing as a partnership relation in the marriage

25. Although Mrs. Packard described this scene as if it represented her first discovery of her absolute legal dependency on her husband, other passages indicate that her husband had long insisted both on his absolute legal authority and on her legal incompetence. See, in particular, her description of her negotiations with him about the possibility of her taking a trip to visit friends and relatives in Batavia, New York. Her husband claimed not to be opposed to her traveling without him, but would adamantly not entrust her with any money. As a result, she could not go. Packard, *Modern Persecution, or Married Women's Liabilities*, 39-41. He was always a "monomaniac" on the question of women's rights. *Ibid.*, 163-165.

union. The man and wife become one, but that one is the man! for the rights of the married woman are all 'suspended during coverture,' while all the rights of the married man remain established and protected by law, just as they were before marriage."

Mrs. Packard then asked whether married women could be protected by law and government, just as men were protected in their rights.

"No. For married woman is a slave! and we cannot protect slaves, except through their masters."

"Slave!" said Mrs. Packard, "Why, I have always been an abolitionist, and I never before knew that I was a slave. I supposed I was the partner and companion of my husband. I never suspected or thought I was his slave!"

If, she reflected, slavery was married women's true status, why not set them free, just as men "have emancipated the negro slave?"

"'Tis true, it ought to be done," her counsel replied, but men generally "protect" their wives, as public sentiment and her social position both demand she should be. Few, in fact, realized that their wives were slaves in the eyes of the law.

Having "discovered" that her property rights, her rights of conscience and opinion, and rights to personal liberty were all at the mercy of her "legal usurper," she next asked about her relations with her children:

"Can I not have children protected to me while I am a married woman?"

"No!" replied the lawyer, "the children are all the husband's after the 'tender age.' You can have no legal right to your children without you getting a divorce, and then the Judge will give you children and alimony."

"Then your laws do protect children to the single woman, while they do not protect them to the married woman?"

"Yes, the laws do respect the right of maternity in the single woman, but in the married woman this right, like all her other rights, is ignored by this suspension of rights during coverture."

But, if the married woman refused to get a divorce (which Mrs. Packard regarded as simply substituting one evil for another), what protections were there for the married woman?

"*The law of manliness,*" declared her lawyer, "*is the only law the married woman has to depend upon for protection under the common law.*"

"This," she later wrote, "I at once recognized as an all-sufficient refuge in most cases; for doubtless this law is based upon the almost universal fact that man will defend his own wife even before he

would himself. Therefore, laws for the wife's protection seem almost to ignore this principle of manhood.

"Yet, in such cases as my own, that is—exceptional cases—where the higher law is not a sufficient guarantee for the protection of the wife, there seems to be a necessity for the lower law of human enactments to enforce the dictates of the higher law. In such cases, and in these alone, there does seem to be a necessity for some laws to ensure the safety of the married woman."²⁶

* * *

Four themes emerge from this dialogue, each of which will be considered in the rest of this paper. First, and most obviously, is the "absolute" legal power of the husband to determine the wife's conditions of life. Second is Mrs. Packard's curious and repeated invocation of the "right" to be a married woman. Third is the law itself, which grants power to husbands and rights to the unmarried mother (but not to the married woman). And finally, there is "manliness."

I. HUSBAND'S RIGHTS

What Mrs. Packard described as the "nonentity" principle, a principle lawyers would recognize as the concept of coverture, is surely the most familiar theme in her discourse on dependency, and I should not need to spend long unpacking its features. Like legal historians, as well as feminists and other legal reformers, her description of the power her husband held over her person and property took as legal fact a characterization of the law of husband-wife relations drawn from Blackstone's *Commentaries*.²⁷ Labelling the legal situation of the white married woman as equivalent to that of the Black chattel slave was an argumentative tactic that had been used by numbers of male and female law reformers since the 1830s.²⁸ She may have applied the label in a particularly dramatic fashion. But many others had done it earlier.

26. Packard, *Modern Persecution, or Married Women's Liabilities*, 67-72 (emphasis in original). At the end of this dialogue, she had, she said, finally learned the truth of her husband's much-repeated declaration, "For twenty years I have given you a home to live in—and also allowed you the privilege of taking care of my own children in it—and to me alone are you indebted for these privileges—as by law you have no legal right to my home, my property, or my children while I live." She has also learned that she must "become her own protector." *Ibid.*

27. William Blackstone, *Commentaries on the Laws of England* (1765-69), vol. 1, chapters 15 and 16. This characterization has been attacked by many—most notably by Mary Beard in *Woman as Force in History* (New York, 1946).

28. See, for example, Timothy Walker, *Introduction to American Law* (Cincinnati, 1833), 221-232. In nineteenth-century reform rhetoric, slavery existed "wherever human institutions and human practices violated the imperatives of God's government." Lawrence J. Friedman, *Gregarious Saints* (Cambridge, 1982), 27. See, for a particularly sensitive exploration of the use of the metaphor of the slave in feminist rhetoric, Elizabeth Clark, "Matrimonial Bonds: Slavery, Contract, and the Law of Divorce in Nineteenth-Century America," *Institute for Legal Studies, University of Wisconsin-Madison, Working Papers*, 1:10 (June 1987).

Was her characterization of family law in terms of the slavlike nonentity principle exaggerated? When I first discovered her work I had assumed that it was. It is now generally conceded that Blackstone provides a misleading picture of domestic relations law, as men and women experienced it and as judges interpreted it, for the eighteenth century, let alone the nineteenth century. Common law rules were moderated by local practices and customs and by judicial discretion. And there always existed the alternative of equity jurisdiction.²⁹ More importantly, recent studies have delineated the important ways in which nineteenth-century appellate courts and state legislatures had begun to refashion family law in ways that arguably led to more egalitarian domestic relations. Indeed, the persuasiveness of Mrs. Packard's horror stories might have been closely connected to their identification with an already rejected past. Legislators could quickly and unambiguously decry the power of husbands to commit their wives because legal reforms—notably in the area of custody law and in the married women's property acts—had already destroyed the foundations of traditional coverture.³⁰

I am not yet prepared to give an alternative interpretation of nineteenth-century domestic relations law. But the reading I have done in a variety of odd corners of domestic relations legal doctrine—custody law, criminal conversation cases, seduction cases, and habeas corpus case law—convinces me that the legal structure of domestic relations throughout nineteenth-century America remained one in which the patriarchal symbols of coverture were of central (although contested) significance. Mrs. Packard's nonentity principle remained a plausible characterization of the legal position of married women before the law. The leading treatise on the law of married women in 1870 still insisted on the legal materiality of the Pauline notion of husband and wife becoming "one flesh." Likewise, an 1874 summary of the legal position of women before the law, while acknowledging the statutory and doctrinal changes of the past few years, denied that those changes constituted a reconceptualization of husband-wife relations.³¹

This latter work, in fact, construes the law in ways strikingly like Mrs.

29. See Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, 1986).

30. Michael Grossberg, *Governing the Hearth* (Chapel Hill, 1985), is the essential starting place. See also Richard Chused, "Married Women's Property Law: 1800-1850," *Georgetown Law Journal* 71 (June 1983): 1359-1425; Minow, "Forming Underneath Everything that Grows;" Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of 'Emancipation,'" *Institute for Legal Studies, University of Wisconsin-Madison, Working Papers*, 2:4 (April 1987); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, 1982).

31. Joel P. Bishop, *Commentaries on the Law of Married Women under the Statutes of the Several States, and at Common Law and in Equity* (Philadelphia, 1871); see, however, the acid review of Bishop's treatise, "Married Women," *American Law Review* 6 (October 1871): 57-73; John Proffatt, *Woman Before the Law* (New York, 1874).

Packard's rendition of her lawyer's version. According to the author, John Proffatt, the notion that by a marriage a woman lost her separate legal existence could not "be abandoned in law—it is too salutary to be discarded." Because of the "legal oneness" that characterized marriage, the husband necessarily had "the sole right of control and government." A mother, wrote Proffatt following Blackstone, was merely her husband's agent "in the government and disposition of the family, . . . entitled to no power but only reverence and respect." Although the law provided a variety of remedies for wives against their husbands' "ill usage," still, "The law impliedly consented to the personal chastisement or restraint of the wife by the husband." The law will always, "insist on the duty of the wife submitting to the direction and judgment of the husband. He is responsible for her maintenance and that of the family, and consequently must be permitted to decide what is right and expedient."³²

What was family law in the middle and late nineteenth century? To legal historians, the answer is often determined by their visualization of a trajectory of legal change—by what family law was becoming. Yet it may be that that trajectory can only be known retrospectively, looking backwards with twentieth-century eyes and understandings.³³ A variety of modifications of coverture rules had certainly occurred by the 1860s. To reformers of the time, however, those modifications were minor and relatively inconsequential, leaving intact the structure of coverture. Even in areas where change had been relatively substantial, changed rules and rights overlaid but did not obliterate and replace older visions of marital rights.³⁴

Consider, for example, custody law. In Michael Grossberg's valuable recent account, the nineteenth-century history of child custody involved the transfer by appellate court judges of patriarchal power from fathers (husbands) to themselves (the judges) and to a legal system that customarily delegated custody to mothers.³⁵ Grossberg sharply criticizes earlier accounts that characterized custody history as a smooth transfer of property rights from fathers to mothers, noting the ways the judges' "best interests of the child" standard gave mothers only a delegated and partial authority, nothing like the property right in their children which had earlier belonged to fathers.³⁶ But, like those earlier accounts, Grossberg's story is

32. *Ibid.*, 53, 100-1, 65, 66-7.

33. For some reflections on how to "read" legal change, see Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (no. 4, 1985): 899-935.

34. See Chused, "Married Women's Property Law." It is not without significance that a late nineteenth century casebook, Jeremiah Smith's, *Cases on the Law of Persons* (Boston, 1899), takes the rules of coverture (and a lawyer's version of the nonentity principle) as still the starting point for a discussion of the law of husband and wife and of custody law.

35. Grossberg, *Governing the Hearth*, 234-86; Michael Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America," *Feminist Studies* 9 (1983): 235-60.

36. In particular, that in Zainaldin, "Emergence of a Modern American Family Law: Child

about the loss of male rights relative to the (prior absolute lack of) authority of women and about the emergence of a legal presumption that women would get (even if they had no automatic legal right to) custody of their children. Even in Grossberg's account, the main contours of a modern, mother-centered custody law were in place by the time of the Civil War.

What then of Mrs. Packard's repeated statements that she had no legal authority over her children and no legal right to custody over them (absent divorce)? Was her belief that courts would not grant her legal custody over her children wrong? Do we know more about her legal rights than she did? Let me suggest two reasons for giving credence to her statements. Then let me add an alternative reason why she might have been wrong, why, even without change in the law, she might well have been able to mount a winning claim to the custody of her children.³⁷

In the first place, the doctrinal declaration that the child "belonged" to the father remained good law in most jurisdictions (and certainly in Illinois) through the end of the nineteenth century. Fathers had "paramount" rights in their children, but, in particular circumstances, where a man had abused his domestic authority, courts would sometimes exercise discretionary authority (under the police power) and delegate custody and possession of the child to another. Or, in the ordinary case of a child being cared for by a mother separated from her husband, courts often decided that the child was not subject to improper or illegal restraint and denied the father's writ of habeas corpus demanding that the body of the child be delivered to him. The exercise of such discretionary authority did not call into question fathers' fundamental rights, however. Indeed, almost every published decision in favor of a mother's custody took pains to emphasize that fathers' rights remained the foundation of custody law. Absent statutory change, mothers did not have the right to take out a writ of habeas corpus to recover their children. And, as Grossberg notes, legislatures were rarely willing to impose a statutory transfer (or equalization) of custody rights from fathers to mothers.³⁸

One might ask, however, wouldn't Mrs. Packard be exactly the sort of woman entitled to the solicitude of paternalistic judges? The effect of her 1864 habeas corpus trial was a legal decision that her husband had misused his legal authority. She, by contrast, was blameless and, according to all the witnesses in the trial, had always been a good wife and mother.

Still, Mrs. Packard assumed that in spite of her husband's known ill-

Custody, Adoption, and the Courts, 1796-1851," *Northwestern University Law Review* 73 (1979): 1038-1089

37. She gained custody of her own children after sponsoring a statute in the Massachusetts legislature abrogating fathers' exclusive rights and granting mothers an equal right to custody. She then brought suit there under the new statute, but, before the case went to trial, her husband gave up the struggle and gave her the children. Packard, *Modern Persecution, or Married Women's Liabilities*.

38. See Hendrik Hartog, "Custody and Coverture: The Barry Case and American Family Law," (paper given to the annual meeting of the Organization of American Historians, March 1988).

conduct she could not get custody of her children. Again, we can only speculate. But it is altogether possible that she was right, and that her readers knew she was right. Consider the classic case of a mother asking for judicial protection for her continuing custodial care of her children (or, more often, defending against her husband's demand that she deliver the children to him). Typically, she had returned to her father's house in the wake of whatever events caused the separation from her husband.³⁹ Sometimes she would have gone to stay with a brother or other relative, or perhaps with a local minister. Never would she be, as Mrs. Packard clearly was, a woman separated entirely from the protection of men. The idea of a woman alone with legal custody over her children, without the support of a paternal male, would, we might imagine, have been almost unimaginable (at least to the middle-class male imagination). Certainly, it would be unlikely that such a mother would meet the court's discretionary standard of providing for the "best interests of the child."⁴⁰

There remains, however, an alternative scenario to be drawn out of Mrs. Packard's narrative, one that would suggest that she was wrong, that she might have won custody of her children under existing law.⁴¹ The legal issue at the heart of the custody cases of mid-nineteenth century America was almost always the legality of the wife's separation from her husband. If the husband had behaved badly enough, then that would justify the exercise of judicial discretion in interfering with his vested rights in his children. Just as cruelty to animals would justify intervention by public officials, so marital abuse or misbehavior would justify transferring custody away from the husband-father. If he had behaved badly enough, then the separated and solitary wife was not living in an immoral and sinful state, and, therefore, she could be a proper recipient of limited custodial authority. Mr. Packard's behavior in wrongfully committing his wife was so egregious that a court would likely have seen it as justifying a legal separation. And once a legal separation were ordered, it is plausible to imagine that custody rights would have followed.

Yet that alternative scenario remains premised on the ordinarily paramount rights of fathers, regarded as a logical consequence of the principles of coverture. The exceptional case of a husband whose behavior could justify an order of a legal separation would never put general assumptions into question. Indeed, nineteenth-century judges often used the distinctive facts of the custody cases before them as occasions to expostulate on the ordinary duties of wives to submit before the legitimate power of their

39. Typically, it would be the husband who would have initiated the suit in habeas corpus for the custody of his children, and the writ would be directed against her father. See *People v. Mercein*, 8 Paige N.Y. Ch. 45 (1839). The history of the case is described in Hartog, "Custody and Coverture." See also Michael Grossberg, "Drawing Lines: the d'Hauteville Case and the Creation of a Feminine Sphere in Nineteenth-Century American Law" (unpublished manuscript, 1988).

40. This point was first raised in conversations with Diana Majury and Martha Fineman.

41. Her situation was, after all, useable as an instigator of legislative reform.

husbands.⁴² The fact that husbands' rights could be limited or even undone through misuse did not contradict the vested status of those rights. Thus, even if Mrs. Packard were wrong in her claim that the common law denied her custody of her children, her mistake does not undercut the plausibility of her larger vision of marital power and rights.

Mrs. Packard knew that her story exemplified real and widely held concerns about an ongoing structure of domestic relations law. The abusive and authoritarian husband reducing his family to servility was a staple of nineteenth-century fiction and journalism.⁴³ Mrs. Packard's story, however, went further and reached a deeper republican obsession with the misuse of public power. The heart of her polemic was not the petty tyrannies her husband showered on her—his unwillingness to let her have any money, his repeated insistence that she had no right to the obedience of her children. It was not even his callousness in abandoning her after the trial. It was rather, as should be obvious, his ability to use the state insane asylum as a way of confirming his authority over her person and her beliefs. It was here that she demonstrated the outrageous ongoing legal power of a husband to control the body and the beliefs of his spouse.

For Mrs. Packard, the problem of the asylum was only secondarily connected to the ill-treatment of those considered mentally ill. She was not really a nineteenth-century Thomas Szasz, R.D. Laing, or Phyllis Chessler. Although she detailed Dr. McFarland's callousness to her and to other patients (male and female), these complaints seem relatively unfelt and have a formulaic quality. By contrast, the heart of the evil of the asylum rested for her on McFarland's corrupting and corrupted relationship with men like her husband.

The elements of her indictment of McFarland began with his (supposed) drafting of the law allowing a husband to commit his wife unilaterally, so long as one doctor agreed that she was insane and so long as the asylum superintendent (McFarland) was willing to receive her. They continued with McFarland's willingness in fact to admit her, even though he knew that she was sane. McFarland insisted throughout her confinement (and evidently believed) that a wife's sanity could be defined in terms of her willingness to accept the intellectual authority of her husband, and he refused to declare a wife cured until she recanted her previous resistance. In the end, when he and the trustees of the asylum decided that whether sane or insane Mrs. Packard was too much of a nuisance to keep, he refused to release her into her own custody. From the asylum she had to be returned to her husband's control.⁴⁴

42. See, for example, the long opinion of Chancellor Walworth in *People v. Mercein*, 8 Paige N.Y. Ch. 45 (1839).

43. See Mary Kelley, *Private Woman, Public Stage* (New York, 1984).

44. Packard, *Modern Persecution, or Insane Asylums Unveiled*, 144-49, 191-94, 383-90; Packard, *Modern Persecution, or Married Women's Liabilities*, 186-89, 272-90.

According to Mrs. Packard, public institutions like the Jacksonville Asylum existed as joint conspiracies of husbands like hers and superintendents like McFarland. The husbands would provide business for the asylums. The superintendents would use their publicly delegated authority and their public institutions to reinforce the embattled authority of patriarchal husbands.⁴⁵

Domestic relations law was both cause and confirmation of this corrupted relationship. For Mrs. Packard, as for other women's rights advocates, the central meaning of that law was that married women did not possess legal rights. Mr. Packard had legal rights; because he did, she had none. He could rely on the legal power of state offices and agencies to secure him in his holdings. She was dependent at best on the discretion of male decisionmakers.

And yet, although without substantive legal rights, married women like Mrs. Packard did have recourse to a body of constitutional aspirations (sometimes called rights) that served as a critique and a delegitimation of ostensibly vested rights. She had, we might say, the constitutional right to demand of the legislature that it stop authorizing her husband in his exercise of corrupted and immoral power. In the wake of the Civil War, in the wake of Emancipation—a great divesting of vested rights—she had the precedent she needed. She, like others, could find the words to claim the attention of male legislators, to draw them into the project of divesting husbands' vested legal rights.⁴⁶

II. THE RIGHT TO BE A MARRIED WOMAN

If Mrs. Packard's "nonentity" principle should be almost entirely familiar to students of nineteenth-century family law and history, her notion of a "right to be a married woman" may seem mysterious and paradoxical.⁴⁷ Unlike feminists like Elizabeth Cady Stanton, who rejected entirely the vision of dependency that underlay women's traditional legal roles, Mrs. Packard asked for legal confirmation of some version of a distinctively female dependent status.⁴⁸ Yet, at the same time, she claimed the "right" to governmental intervention and protection from those with the legal right to be her protectors. And she envisioned married women's

45. She detailed the stories of other women in E.P.W. Packard, *The Great Drama; or the Millennial Harbinger*, 4 vols. (Chicago, 1892).

46. See Hendrik Hartog, "The Constitution of Aspiration and 'The Rights that Belong to us All,'" *Journal of American History* 74 (December 1987): 1013-34; Ellen Carol DuBois, "Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1876," *Journal of American History* 74 (December 1987): 836-62; Clark, "Matrimonial Bonds."

47. But see some suggestive comments in Minow, "Forming Underneath Everything that Grows."

48. See DuBois, "Outgrowing the Compact of the Fathers," and Clark, "Matrimonial Bonds," for discussions of Stanton.

rights as part of a separate sphere over which those women ought to have general—if not absolute—authority.

Should we think of the proposed right as a legalization of notions of separate spheres and domestic feminism dominant in middle-class nineteenth century America?⁴⁹ Like the proponents of domestic feminism, Mrs. Packard insisted on her competence and authority within a domain from which men were largely excluded. Like them, she granted to men authority and responsibility over political life. But unlike ideologists of domestic feminism like Catherine Beecher, Mrs. Packard saw herself as operating within a public and political realm. The very idea of a “legalization” of domestic feminism seems, at least at first blush, inconsistent with the concept of a separate sphere. Domestic feminists always insisted—at least rhetorically—on the private nature of their domain, on its moral and therefore anti-legal basis. Mrs. Packard, by contrast, argued that public recognition of the right to be a married woman would depend on the legal destruction of conceptions of marriage as a private sphere protected from state intervention.⁵⁰

What then was Mrs. Packard’s “right to be a married woman?” In part she used the phrase as a way of referring to the variety of forms of respect that should have been owed her, but that had been denied by McFarland and Packard. In part, she thought of the right as a guarantee of protection and care. The phrase represented a utopian aspiration. Mrs. Packard knew, as she put it, “that no law protects me, so long as I claim the right to be a married woman.”⁵¹ Recognition of the right could only occur if the society rejected the nonentity principle and if legislators exercised their manly natures and divested her husband of his wrongful (but legal) rights. Yet, like all utopian aspirations, its terms rested on the values of the times in which it was formulated.

In truth, I don’t think that one can draw from Mrs. Packard’s writings a unitary and coherent statement of the terms of the right. She referred to it constantly, in numbers of contexts. It was, for Mrs. Packard, a protean term encompassing all that should be in her life as a married woman and rejecting all that was wrong with it. It represented all of the aspirations that women were taught to invest into a marriage. Recognition of the right would give to married women the same rights that men had quixotically granted to unmarried women, in particular custody rights over chil-

49. Nancy F. Cott, *The Bonds of Womanhood* (New Haven, 1977); Kathryn Sklar, *Catherine Beecher: A Study in American Domesticity* (New Haven, 1973); Kelley, *Private Woman, Public Stage*.

50. All of this suggests the need for a rethinking of domestic feminism and its relationship with its supposed opponent, political feminism.

51. E.P.W. Packard, *Great Disclosure of Spiritual Wickedness!! in High Places. with an Appeal to the Government to Protect the Inalienable Rights of Married Women* (Written under the inspection of Dr. M’Farland, superintendent of insane asylum Jacksonville, Illinois.) Fourth edition (Boston, 1865; New York, 1974), 152.

dren, yet withheld from their beloved legal partners. It incorporated the gap between married women's high social status and their low legal identity. It was as well a strategic tool that allowed her to appeal to male legislators for relief and change, using a rhetoric that flattered them and did not challenge their paternalistic male authority.

Consider two texts in which the formulation of the "right" played a central role: her plea for married women's "emancipation," before the Connecticut legislature in 1866 and her response in 1869 to the rhetorical question, "Why don't I get a divorce?"⁵² She began her speech to the legislature by flattering her audience as "intelligent, manly gentlemen, whose God-like natures predispose and capacitate you to view this subject from this most favorable standpoint." It was an honor, she declared, for "us natural women, to live in Connecticut, where the manliness of our protectors not only allows us the high privilege of fulfilling the duties of our heaven appointed sphere, but also proposes to protect us in this sphere, so long as our good conduct deserves such protection." Indeed, she was satisfied "that woman's cause could not be in better or safer hands, were she allowed to be her own protector."

She then made an extended and familiar analogy between slavery and the present legal structure of marriage. The best evidence for this slavish relationship was, she declared, the rising number of divorces. Divorce was a moral wrong,⁵³ but also the only form of legal relief made available to the mistreated wife.⁵⁴

So, what should the legislature do about this situation? All that women wanted was the "right to be protected by our man government." A woman had a right to be

protected as a woman, as a companion of her husband, as one who has rights, as a woman equally dear and sacred to her, as man has rights, as a man equally dear and sacred to himself. Our rights are not man's rights, neither are man's rights woman's rights. Both are different, yet both are inalienable, and both equally sacred.⁵⁵

A husband, she conceded, was the head of the "marriage firm," which meant that he could control the family finances (although he should be open to her influence in this regard), and it was his responsibility to pro-

52. Packard, *Modern Persecution, or Married Women's Liabilities*, 393-406, 111-16. She made similar, although not identical, responses to the question, "Why don't I get a divorce?" in *Great Disclosure of Spiritual Wickedness*, published in 1864, and in *Marital Power Revealed*, published in 1865.

53. "Our divorce laws are destroying the very structure of civilized society. Yes, the monogamic principle of Christianity and civilization is being rapidly supplanted by the polygamic principle of barbarism." Packard, *Modern Persecution, or Married Women's Liabilities*, 396.

54. "Does not the radical cause for these divorces lie in the nonentity principle of the wife? that is—in your holding her legally, as a slave, with no power of resistance to this 'one man power,' and no protection from its abuse, except the law of divorce?" *Ibid.*

55. *Ibid.*

vide a suitable home for his dependents. "It seems to be the appointment of God, that man should bear the toil, and woman bear the children." But within the walls of the family home, "made secure to her by the Government, she should be the legally constituted mistress, in this, her heaven-appointed sphere. And here too she should be the legally appointed head of her own special department—viz—rearing the children."

A good husband would provide "the natural protective power which the mother seeks as her own right by nature." But, "should any degree of depravity tempt him to betray this most manly of all trusts, . . . let the Government enforce it as an obligation." He may be the "head" of the wife in the limited sense that he is obligated to protection and love. But a legitimate government, "whose chief intent and purpose is, to protect the weak against the usurpation of the strong, should not allow the husband to rule over the wife in any other sense than that of protection."⁵⁶

The question, "why not get a divorce?," she had asked herself repeatedly ever since the end of the 1864 trial. The answer she gave in 1869 repeated much of the moral critique of divorce made in her 1866 speech to the Connecticut legislature, but also posed the question in more personal terms. Mrs. Packard did not want to be a divorced woman; she wanted to be a married woman and have a husband to protect her. She was a Unionist, not a secessionist. She assumed that divorce from her husband necessarily meant divorce from her children. She wanted "protection in my own home, instead of a divorce from it."

And again, I have done nothing to deserve this exclusion from the rights and privileges of my own dear home; but on the contrary, my untiring fidelity to the best interests of my family for twenty-one years of healthful, constant service, having never been sick during this time so as to require a doctor's bill to be paid for me or my six children, and having done all the housework, sewing, nursing, and so forth, for my entire family for twenty-one years, with no hired help, except for only nine months, during all this long period of constant toil and labor. I say, this self-sacrificing devotion to the best interests of my family and home, deserve and claim a right to be protected in it, at least, so long as my good conduct continues, instead of being divorced from it, against my own will or consent.⁵⁷

Her only "crime" had been her espousal of views that her husband regarded as "contaminating" and that led him to try to separate her from

56. She urged them therefore to pass a bill announcing:

"Any woman entering the marriage relation, shall retain the same legal existence which she possessed before marriage, and shall receive the same legal protection of her rights as a woman, which her husband does as a man. Should the husband's power over the wife become an oppressive power, by any unjust usurpation of her natural rights, she shall have the same right to appeal to the Government for redress and protection that the husband has." *Ibid.*, 406.

57. *Ibid.*, 114

her home. To divorce him would be to help him in his project and would deny precisely what she hoped to affirm: that is, her right as a married woman to the protection of government. "In short, we desire to live under such laws as will oblige our husbands to treat us with decent respect, . . . and then will they be made to feel a decent regard for us as their companions and partners, whom the laws protect from their abuse."⁵⁸

III. THE FORCE OF LAW

The right to be a married woman was thus both a gendered vision of roles and rights and, at the same time, a radical invocation of the power of law to compel change in a husband. Men could be made good (or at least better) by the exercise of public authority. If married women had the legal right to protection—the freedom—that Mrs. Packard considered their legitimate due, they could fulfill their duties to society as mothers and educators.

Mrs. Packard did not believe that all women suffered as she had, or that all married women were enslaved in the absence of legal change. Coverture alone did not make husbands into tyrants. But she did believe, in a way that we might find odd and curious, that she and others were constituted by the law. She believed in the obligatory quality of legal rules. And she "knew" that her behavior and the behavior of those around her were determined by the formal commands of a legal sovereign.

To illustrate her vision of the force of law, consider the story she told about the trip from Kankakee City to Jacksonville when she was committed in 1860. A crowd of her supporters had dispersed when they had learned that her husband and the sheriff had the legal right to have her committed. The sheriff's deputies carried her on to the train going to Jacksonville.⁵⁹ So, now she, her husband, and one of her husband's deacons were sitting in the train going south. Mrs. Packard was crying, but also calculating what to do next:

Shall I murmur and complain at what I cannot help, and when I know it will do no good? or, must I silently submit to this inevitable fate, and trust to the future developments of providence to unravel this great mystery? Yes, I must submit. I must not complain, while at the same time, I have a right to use all suitable means for a restoration to my family and duties.⁶⁰

She stopped crying and decided to follow advice given by friends: that she should be sure to tell everyone she saw that she was being taken to the asylum—on the chance someone could rescue her. She turned to talk to a

58. *Ibid.*, 116.

59. See below, at footnotes 71-73, for further discussion of how she was put on to the train.

60. Packard, *Modern Persecution, or Insane Asylums Unveiled*, 65-73.

young lady. Explained her situation. The young lady burst into tears. Mrs. Packard consoled her, telling her it would come out all right in the end. The young woman then went back and got another lady. From this latter woman, Mrs. Packard learned that she had the sympathy of all the passengers, many of whom had volunteered in her defense. (Mr. Packard had been listening to all this and saw that the tide was turning against him. He asked her if his success was not evidence that the Lord was on his side. She said it was too soon to tell.)

At noon the train stopped in a small town and all the passengers got off to dine at the depot. There she sat next to the general freight agent of the railroad, with whom she had "a free and easy conversation" in which she avowed her spiritual principles and other notions abhorrent to her husband. The freight agent agreed with her. And everyone else listened intently to their conversation, in particular a young waitress.

Mrs. Packard then retired to the sitting room and suddenly (?) remembered her instructions to tell everyone where she was going. The thought of doing so had "flitted" through her mind at the table, "but the habitual practice I had acquired of shielding, instead of exposing my husband, led me to resist this suggestion of self defense and wise counsel." But now she went back to see if she could find the gentleman with whom she had lunched.

She saw the waitress who had listened in and explained her situation. The waitress took her to the landlady who offered to hide her. Mrs. Packard refused. Why? "My husband has the law on his side, and you cannot protect me."

Mr. Packard then appeared and asked her to come with him to the parlor, which she did, "quietly taking his arm and bowing to my would-be-protector."

The journey continued, and, "Now my last hope died within me, and as the gloomy walls of my prison could be but indistinctly defined by the gray twilight of a summer evening, I held on to my husband's arm, as he guided my footsteps up the massive stone steps, into my dreary prison."⁶¹

A good story like this has, of course, multiple meanings. In part, she was telling about a past self she had overcome. Much of her narrative of life in the asylum described her learning to cheat and lie and struggle to protect her personal identity—to resist.⁶² And the story is also about what it means to be womanly and about the lengths she went to remain a proper dependent wife. But mostly the story is about the force of law, about its obligatory quality, about its psychologically coercive capacity, about the ways in which law established her identity as a person.

61. Ibid.

62. The asylum narrative tells an ongoing story about the efforts of the asylum staff to keep her from getting paper and about the ways she learned to secrete paper—to sew it into the linings of her clothes, for example.

The latter is a theme Mrs. Packard returned to often. While she devoted much space to delineating "pre-legal" rights drawn from Christianity, from constitutionalism, and from various natural rights doctrines, while she prided herself on her intense individualism, still her legal status as a wife and mother remained central to her sense of self. The content of that status was determined by the commands of the state, by, in particular, the rules of coverture. And under that body of positive rules, her husband, as she well knew, and loved to remind her audience, had full power over her property and person, and she was powerless to resist. Only the legislature, she would write at interminable length, had the power to protect her, by changing the rules governing her relationship with her husband. (Here we have someone who believed precisely what generations of legal sociologists have told us no one believes.)

Indeed, she is a little like a law professor in the pleasure she took in letting others in on the bad news. There was, for example, a wonderful moment shortly after her trial when the mayor of Chicago gave her an interview and, after hearing her story, offered her the protection of the city against her husband, precisely, one would have thought, what she wanted from him. But no, ever the pedagogue, she rejected the mayor's offer, after leading him through a Socratic (in the law school sense) dialogue, whose only point was to prove that he had no power as the laws stood to protect her if her husband chose to reimpose himself on her.⁶³

IV. MANLINESS

Yet what Mrs. Packard also wanted from men like the mayor was exactly what he offered: that is, a demonstration of manliness, a quality she defined primarily as a willingness to defend and protect the dependent and vulnerable (*her!*). Law might empower men to oppress their wives, but manliness constrained them, which is why her situation, she knew, was not the norm. In some ways her endless talk of manliness suggested the marginality of law, its irrelevance where people do not shape their conduct to it. One is reminded of Oliver Wendell Holmes' famous contrast between the "bad man" of the law, who plans his conduct in terms of the sanctions and constraints of the law, who does what the law allows him to do (as both McFarland and her husband had done), and the "good man," who refuses to let his life be organized by law.⁶⁴ But manliness was also the quality that characterized those legislators who were willing to change the laws constitutive of married life.

The concept of manliness, as she used it, was quite complex. It was shaped by a notion of reciprocity between men and women. She knew that

63. Packard, *Modern Persecution, or Married Women's Liabilities*, 88-91.

64. Oliver Wendell Holmes, Jr., "The Path of the Law," *Collected Legal Papers* (Boston, 1921), 167.

men also were dependent on women, and she constantly emphasized the many ways in which she had protected her husband over the years of their marriage.⁶⁵ And along with manliness, there was a concept of womanliness—or true womanhood—which she liked to argue demanded equal recognition by the state and protection from unmanly men like her husband (and Dr. McFarland). Manliness was not a crude vision of caretaking, on the order of our ordinary vision of how we treat pets. Manliness obviously included respect for the personal and private opinions of a wife, and it also meant respect for the distinctive sphere of authority over which women were expected to rule.

Still, at bottom, manliness was a virtue connected to a willingness to care for and protect dependent and needy married women. The unmanliness of McFarland, for example, derived in part from his lack of respect for the personal identity and autonomy of a married woman. In one of several dialogues she later reconstructed, her statement that no husband “should require the subjection of his wife’s conscience to his will, when it opposes what she regards as God’s will,” was countered by McFarland’s insistence that such “principles would be subversive of all family government; for, the government of the family is vested entirely in the husband, the wife has no right to her identity; she must live, move and have her being in him alone.”⁶⁶ Yet it strikes me that her critique of him was focused less on his lack of respect for her moral autonomy and more on his

65. My favorite example of Mrs. Packard’s sense of his dependence on her is her rendition in *Great Disclosures of Spiritual Wickedness!!* of a dream she had while in the asylum:

She was attending the anniversary meeting of some national benevolent institution with her husband. Her husband was to speak and was on the platform. She noticed that he was acting peculiarly, so peculiarly, in fact, that bystanders attempted to interfere.

It was time for him to speak, which he chose to do on a high pulpit. But, instead of going directly up, he wandered around the stage. “No one could control him, not even the Moderator.”

She decided it was time for her to interfere. She joined arms with him and said she would help him. He calmed down.

All seemed to be all right, but then he whispered in her ear, “I am going to wash my face!” Suddenly he was stripped of all clothing except his shirt. Evidently, he planned to wash himself in the baptismal bowl. She felt embarrassed (“extreme mortification”) that she had let him wear an old, worn out shirt which she “had laid by for sickness.” But then her embarrassment was replaced by “a stronger fear, that he might disgracefully expose his own person.”

Her worst fear was realized. As he rushed for the stairs, “I, instinctively, together with the other true women of the house, covered our faces, or turned our backs, in disgust, from the horrid spectacle of seeing him ascend those high, steep stairs, pantless!” The men in the assembly “uttered one general shout of merriment.”

She beckoned to a gentleman, who shared the pulpit with her husband, and whispered in his ear that her husband was crazy. And then she woke up. Packard, *Great Disclosure*, 90-2.

66. To which she responded:

I admit that the recognition of her identity will endanger the overthrow of a family despotism, because the marital power will then be so limited as to compel a respectful regard to the inalienable rights of the wife; for, on this principle, the husband must have the power to ignore all her rights, or he cannot be ‘lord over all’ in his family!

I claim that every family established on such a basis ought to be overthrown, as well as all other despotisms; and it is this principle which is at the present day sending devastation throughout the whole social fabric of society.

Despotism cannot live on freedom’s soil. (Packard, *Modern Persecution, or Married Women’s Liabilities*, 362.)

unwillingness to be her “protector.” Instead of protecting her from her husband, he made her sanity contingent on a willingness to accept the authority of her husband. Instead of denying the “corrupted” authority of her cruel husband, he insisted that she had no freedom to leave the asylum until her husband was willing to have her released.⁶⁷

Yet there were moments when Mrs. Packard did recognize Dr. McFarland as a “manly” protector: most particularly in his reluctant willingness to allow her to write in the asylum. At times she referred to the asylum as a refuge. And in all her writings one feels that it was her husband’s actions rather than her experiences in the asylum that mobilized her critical energy.

Manliness was a characteristic both of individual men and of male—that is to say, public—institutions. As a set of principles of individual right conduct, manliness described a felt duty to protect those who needed care, who were dependent and needed protection. Its status as a virtue rested on the reality of legal inequality between the sexes. The manliness of true men was demonstrated by their respect for and protection of the autonomy of women, in spite of their legal right to subject and ignore them.

As a principle of legislative action, as an institutional characteristic, manliness described the impulse to institute those changes that would protect the autonomy of married women and that would undo women’s enforced legal dependency on potentially unmanly men. On the one hand, manliness was the distinctive virtue of enlightened nineteenth-century men who lived within a domestic regime of coverture. Manliness was what made the legal nonentity principle bearable and, indeed, made it irrelevant for most marriages. On the other hand, it was also manliness that led legislators to listen sympathetically to Mrs. Packard’s tale of horror and that led them to propose married women’s property acts, revised custody laws, and personal liberty laws, all of which would serve to undo the husband’s traditional custodial authority. Legal change, from this perspective, was both necessary, because of the existence of men like McFarland and her husband, yet also marginal, affecting only the deviant. True men did not need the law and would not be changed by legal reforms.⁶⁸

67. Packard, *Modern Persecution, or Married Women’s Liabilities*, 361-63; Packard, *Modern Persecution, or Insane Asylums Unveiled*, 83, 99-100, 162-63.

68. I imagine she meant everything she said. But it is important to note how strategically effective such a line of argument would be in lobbying legislators. They could view reformed marriage laws as necessary and good, as helping to solve a “problem” in society, and still avoid thinking about the reforms in terms of their own relationships with their own wives. Both as legislators and as husbands, they could feel confirmed in their manliness.

CONCLUSION

In tension with Mrs. Packard's discourse on dependency was her strong sense of herself as an emancipated moral agent. Often, she described herself as an unusually successful and capable businesswoman.⁶⁹ More importantly, she gloried in her spirit of rebellion. "God grant," she wrote, "that the time may never wear away in me this spirit of resistance to such oppression."⁷⁰

She became remarkably skilled at the tools of what today we would call civil disobedience. When the sheriff and his deputies took her to the train depot for the long journey to the asylum, she refused, as she told her husband, "to help myself into an asylum . . . I shall make no resistance to your brute force claims upon my personal liberty—I shall simply remain a passive victim, helpless in your power." Thus, she would reveal to the crowd assembled at the station her husband's nature as her persecutor.⁷¹

Later, in the asylum, Mrs. Packard repeatedly refused to cooperate with McFarland's attendants when they engaged in activities she regarded as unjust. When she had to leave the asylum, again against her will, she made the attendants carry her out. She always refused to participate actively in her own oppression.⁷²

Yet even in her defiance, she was always caught up in the contradictions between her moral identity as an emancipated being and her legal and social (and moral) identity as a respectable married woman. When her husband's men tried to carry her on to the train in Kankakee City to go to the asylum, they faced "the difficulty of knowing how to take hold" of her "in a modest and gentlemanly manner." She, however, solved this problem by demonstrating how two of them could make a "saddle seat" with their four hands, so that she could sit "erect and easily upon it."⁷³ And, by the time she left the asylum, she had made her attendants expert at saddle seats. Her resistance was always formal. Rather than endanger her status as a married woman, she would always cooperate in the actions of her powerful oppressors.⁷⁴

For Mrs. Packard, there was a complex relationship between her dependency on men and her autonomy as a moral individual and a rights holder. The relationship was not just one in which the presence of the one

69. See, for example, Packard, *Modern Persecution, or Married Women's Liabilities*, 81-88 (where she makes herself sound a little like Professor Harold Hill in *The Music Man*).

70. Packard, *Modern Persecution, or Insane Asylums Unveiled*, 361.

71. *Ibid.*, 55-59.

72. *Ibid.*, 389.

73. The "saddle seat," she later noted, was "an indispensable appendage to the enforcement of the 'nonentity' principle of the common law, in cases where intelligence claims the recognition of an identity!"

74. I think I am right in this conclusion. However, it is also true that the experience of being committed, an experience she regarded as a horrifying loss of respectability and public status, also freed her to say things—to bear witness—in ways entirely unavailable to other married women.

necessarily meant the absence of the other.⁷⁶ Because the common law of coverture—the legal structure of patriarchy—was constitutive of her personhood, her moral autonomy depended on manliness, on protective men and male institutions.

Like many other reformers, she had to speak to what was best, as she understood it, in the men who were her intended audience.⁷⁶ They offered her only protection against the abuses of marital power committed by her husband. For them, she constructed a legal vision that should have mobilized their protective impulses in a campaign to destroy her husband's private vested rights. In Mrs. Packard's intensely gendered vision of the world, granting her the right to be protected as a married woman would have reconstructed a legitimate marital relation. The right would have destroyed illegitimate private power and would have given her legal recognition of her moral identity.

All of this might suggest passivity and subservience, but again, the details of Mrs. Packard's life belie that suggestion.

75. For Elizabeth Cady Stanton, by contrast, as for most liberal thinkers, dependence stands as the antithesis of moral freedom. See, of course, her late essay, "The Solitude of the Self," in *Elizabeth Cady Stanton/Susan B. Anthony: Correspondence, Writings, Speeches*, ed. Ellen Carol DuBois (New York, 1981), 246-54.

76. I am grateful to Robert Goldstein of UCLA Law School, for raising this point in conversation.

