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KNOWING CHILDREN/CHILDREN KNOWING: NINETEENTH-CENTURY BRITISH
CHILD LAW AND LITERATURE

by

DONNA PAPARELLA

A dissertation submitted to the Graduate Faculty in English in partial fulfillment of the
requirements for the degree of Doctor of English, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in English to satisfy the dissertation requirement for the degree of Doctor of Philosophy.

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Abstract

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Adviser: Professor Talia Schaffer

Why are nineteenth-century literary narratives filled with children's accounts of bad parents, dead parents, absent parents, and surrogate parents? What are the origins of our current preoccupation with children as evidenced, for example, in Ian McEwan's new novel, *The Children Act*; New York State's recent amendments to the name and role of "Attorney for the Child"; and today's vehement debates over parenting styles? The mid-nineteenth century was a period of intense preoccupation with "the child": it engendered family law; it generated an explosion of representations of children in art and literature; and it witnessed the beginnings of the scientific study of childhood. *Knowing Children/Children Knowing: Nineteenth-Century British Child Law and Literature* pursues the relatively uncharted relation between nineteenth-century Anglo-American child law reform and Victorian literary representations of childhood and childhood consciousness, arguing that this relation is the origin of our present concerns. Examining issues of childhood and personhood, freedom, and choice, and using primary literary, legal, and historical sources, I argue that novelists and autobiographers used changes in the law as a creative opportunity, engaging legal debates about children in their plots, in their forms, and in their portrayals of childhood. These narratives, when read in their historical context, mark a

change in the understanding and representation of childhood that anticipate contemporary thinking about child welfare. Correlatively, these historical roots give us a lens through which to see and understand formal literary invention.

This project begins to fill a gap in the disciplinary intersection of Victorian family law and literature. In a 2007 *Victorian Literature and Culture* review of law and literature criticism, Simon Petch proclaimed that “Victorian Studies seems to have gained very little from the Law and Literature movement,” because of the movement’s narrow focus on a handful of texts. Much law and literature criticism has two main issues: it is oftentimes ahistorical and, as Petch points out, it treats “literature” as “culture.” For example, Kieran Dolin’s work is based on his assumption that law, like literature, is a fiction. Ian Ward, writing “as a member of the legal academy,” notes that the “‘law and literature’ movement has been nurtured in the main, from within this academy,” and challenges literary scholars to take up this relationship. Although there has been work on divorce law in the nineteenth century and much work done on “the child” by literary critics, these two are rarely considered together: custody law is most often viewed as a by-product of divorce reform and understood primarily as an expansion of a wife’s rights developed by Victorian suffragism. Likewise, in this context, literary representations of the child are often treated as part of the marriage and/or divorce plot or of “the woman question.” I present an alternative history, arguing that literary treatments of the child are primary and generative: the child is not secondary to these other plots but offers us another plot entirely. Child-centric literature participates in new ways of thinking about and structuring families and new ways of organizing narrative form. Maintaining the differences between legal and literary discourses, I read a reciprocal relationship between law and literature concerning children: child-centric literature is both influenced by child law and influences child law. As the law recognized that

children have a voice and that childhood interests exist, literature gave expression to the child's voice and interests.

The history of custody law shows us that there is a rhetoric of personhood that developed with specific applications to childhood, which has to do both with the child as such, as well as with the symbolic nature of the child as a figure of fundamental human being-ness. At the same time that the law acknowledged childhood subjectivity, it also considered children as dependents and in need of protection. In response, the court became *parens patriae*—literally, “parent of the nation”—displacing biological parents. By the early twentieth century the conception of the child changed from that of an object of possession to (paradoxically) that of an object in need of guardianship who is also a subject: as a result, children's lives became regulated by the state more than by their parents. The literary works I am examining have a stake in making adults understand the child's perspective and, in doing so, invite the reader to use this as the key to understanding one's own development. Childhood became necessary; it needed to be protected and managed because it was essential in formulating personhood in both real and symbolic ways. As such, childhood is a crucial component of modern identity itself.

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1. The Empire of the Child: British Court Intervention in Nineteenth-Century Custody Law

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. (William Blackstone, *Commentaries on the Laws of England*, 1765)

The first education is the most important and this first education belongs incontestably to women; if the Author of nature had wanted it to belong to men, He would have given them milk with which to nurse the children . . . The laws—always so occupied with property and so little with persons, because their object is peace not virtue—do not give enough authority to mothers. However their status is more certain than that of fathers; their duties are more painful; their cares are more important for the good order of the family; generally they are more attached to the children. . . . Fathers' ambition, avarice, tyranny, and false foresight, their negligence, their harsh insensitivity are a hundred times more disastrous for children than is the blind tenderness of mothers. (Jean-Jacques Rousseau, *Emile*, 1762)

The next century will be the century of the child, just as this century has been the women's century. When the child gets his rights, morality will be perfected. (Amelia Barr, *The Lion's Whelp*, 1901)

Why are nineteenth-century literary narratives filled with children's accounts of bad parents, dead parents, absent parents, and surrogate parents? What are the origins of our current preoccupation with children as evidenced, for example, in Ian McEwan's recent novel, *The Children Act*; New York State's recent amendments to the name and role of "Attorney for the Child"; and our current vehement debates over parenting styles? The mid-nineteenth century was a period of intense preoccupation with "the child": it engendered family law; it generated an explosion of representations of children in art and literature; and it witnessed the beginnings of the scientific study of childhood. From Philippe Ariès on, there has been extensive consideration of the child in almost all disciplines. What has remained relatively uncharted, however, is the relation between nineteenth-century child law reform and Victorian literary representations of

childhood and childhood consciousness. While critics of Victorian literature have produced much work on divorce law in the nineteenth century and much work on “the child,” they often treat child custody law as a derivative of divorce law reforms and/or the feminist movement. In this context, they often are concerned with the literary figure of the child only insofar as it is part of the marriage plot. I present here an alternative history, arguing that literary treatments of the child are primary and generative: the child is not secondary to the marriage plot but offers another plot entirely. Writers of literature found creative opportunities in changes in child custody and welfare laws and they engage legal debates about children in their plots, in their forms, and in their representations of childhood. Child-centric literature, like child law, participates in new ways of thinking about and structuring families and, focusing on the child offers writers new ways of organizing narrative form.

Children are born on the borderlands of humanity. In the context of conceptualizing children, law and literature have a special connection: both endeavor to construct children as subjects, as “persons”—and in doing so, reveal the paradox of such a project.¹ Thus, what is at stake is not only defining “child,” but defining “person” as well, which entails navigating the relationship between what Barbara Johnson calls “a lyric ‘person’—emotive, subjective, individual—and a legal ‘person’—rational, rights bearing, institutional” (*Persons and Things* 189). Historian Anna Davin describes “childhood” as mutable: the “properties” of childhood, she claims, “are multiple and elusive; its limits elastic. There is no absolute definition of childhood, whether subjective or official, because it is always lived and defined in cultural and economic contexts” (qtd. in Fletcher, *Childhood in Question* 15). A historically contextualized inquiry into

¹ Children, because they are children, are always (at least partially) dependent. Annette Ruth Appell rightly claims, “the personhood of the child of child-centered jurisprudence exists only within the boundaries of dependency vis-à-vis parent, state, and school” (29).

the origins of child custody laws in relation to literature necessitates investigating the questions arising from the attempt to differentiate between personhood and objecthood as well as between the real and represented child.

In *Persons and Things*, Barbara Johnson notes, “The question of what counts as a ‘person,’ which often seems intuitively obvious, has had some interesting legal moments over the years” (5). A “person” is not just an assemblage of moving body parts, but a unique subjectivity—a consciousness that can be recognized by another. Moreover, a “person” also has a particular relationship to language, which is the means to express that consciousness. Working through Emile Benveniste’s linguistic consideration of the relationship between personhood and personal pronouns, Johnson concludes that “the notion of ‘person’ has something to do with presence at the scene of speech and seems to inhere in the notion of *address*. ‘I’ and ‘you’ are persons because they can either address or be addressed, while ‘he’ can only be talked *about*. A person who neither addresses nor is addressed is functioning as a thing in the same way that being an object of discussion rather than a subject of discussion transforms everything into a thing” (6). This is particularly challenging and confusing when the person in question is a child because children have limited access to language. They require representation. Etymologically, “*infans*” means unable to speak. As Jane Eyre famously declared, “Children can feel, but they cannot analyse their feelings; and if the analysis is partially effected in thought, they know not how to express the result of the process in words” (Brontë 19). This characterization of both childhood subjectivity and of the problem with its recognition became part of the emerging discourse of child development. At the end of the nineteenth century, James Sully, one of the founders of child studies, similarly stated, “Language is that which most obviously marks off human from animal intelligence” (133), but “the first imitation of words does not show that the

little mind has seized their full and precise meaning. A clear and exact apprehension of meaning comes but slowly, and only as the result of many hard thought-processes, comparisons and discriminations” (161). In describing the difference between “persons” and “things,” Johnson reveals the “animation” behind personhood to be the production of language itself. Establishing personhood requires establishing voice. Yet, in the case of the child, someone else needs to do the speaking. Children need to be spoken for. Thus, establishing personhood, in this context, can look much like the literary figure of personification. That is, in order to recognize children as people, we are forced to project, to assume linguistic capacity, and to assume and project animation. What the history of British nineteenth-century custody law shows us is that there is such a legal rhetoric of personhood that develops with specific applications to childhood, which has to do both with the child as such, as well as with the symbolic nature of the child as a figure of fundamental human being-ness.

Legislating Life: When Is a Child a Child?

The legal recognition of individual life, like childhood itself, occupies a paradoxical status and reveals the concepts of “personhood” and “thingness” to be on a continuum. William Blackstone’s late eighteenth-century recounting of British common law, *Commentaries on the Laws of England*, devotes an entire volume to the “Rights of Persons” and the “absolute rights of the individual” as conferred or bestowed by God. In it, we find a kind of ambiguity in defining when “life” becomes “legal person.” In Blackstone’s definition of human life as protected under law, “Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb” (125).²

² It is worth noting that contemporary “pro-life” groups turn to the language of William Blackstone to back their claims.

An unborn infant, still inside the mother's body, only "begins in contemplation of law" without having full legal rights. In this conception, the infant is not a full-fledged person. Blackstone makes this clear when he differentiates between ancient law, which considered the willful death of an unborn child as "homicide" and the contemporaneous view, which considers the death of an unborn child not to be a murder, but rather "a very heinous misdemeanor" (125). However, this conceptualization is not sustained since the unborn had discrete legal protections with regard to land: "An infant . . . in the mother's womb . . . is capable of providing a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterward by such limitation, *as if it were then actually born*" (126, my emphasis). Here, the unborn child is not understood to be a person, but deemed eligible to be imagined and treated as such—"as if" it were a person—in order to maintain lines of inheritance.

The relationship between child and property is one that appears in various permutations as the British court system struggled to define childhood, and to delineate childhood rights. Though an unborn child had legal rights to own property, a child born of wedlock became property. Until nineteenth-century custody laws, once a child was born within a marriage, a child was converted from a potential person to a "thing," which belonged to its father through the law of coverture. "By marriage," Blackstone states, "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: . . . a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence"

(430).³ Under the law of coverture a woman relinquished upon marriage not only her property, future earnings, and body, but also all rights of custody or access to her future children (Wright, *De Manneville* 247). Like the mother's body, the child's body is subsumed by the father's body, with "suspended" "legal existence" and without discrete personhood. But by the end of nineteenth century, British law began to construct the child as an individual distinct from its father, as well as its mother, and, as such, entitled to legal protection. As we shall see, children began to transition from being legal property to legal persons with the 1839 Custody of Infants Act. Interestingly, it was not the category of "person" that was expanded in order to include children. Rather, children were seen in new ways, in ways that classified them as such. Beginning to be recognized as individuals, they begged to be known. Correlatively, they were understood to be perceiving something unique about the world. Thus, it became crucial not just to know children, but also to know what they know. These nineteenth-century developments engendered the child-centric zeitgeist that we take for granted today. When and how did the "empire of the father" become the "empire of the child?"

Pre-History

Child custody law came into being with the 1839 Custody of Infants Act, which for the first time, gave married mothers a legal avenue through which to petition for access to her children. Indeed, this radical act marked a cultural shift; however, it was also connected with and supported by a growing trend of court intrusion into the family and the construction of the child as a public figure. Prior to the 1839 act, there was a history of court intervention with regard to

³ An unmarried woman, however, or feme sole, had all the legal rights to property, custody, and earnings as a man (Wright, "De Manneville" 248). Likewise, children born out of wedlock belonged to their mothers: "such a child was supposedly *fillius nulli*, the child of no (known) father" (Shanley 132).

the custody of children that began in the mid-seventeenth century when children and families were subject to feudal land practices. Until the mid-seventeenth century, legal guardianship of children was dependent upon their particular situation of inheritance and property ownership: the law was different for those children who would receive an inheritance of land ownership and those who would not. Those children not subject to future property ownership retained both mother and father as guardians “by nurture” until they were fourteen. Those who would inherit property were wards of their fathers: Custody law “was for the most part a by-product of the [medieval] laws of inheritance and land ownership. . . . The father’s guardianship was known as the guardianship by nature and lasted until the heir reached the age of twenty-one” (Abramowicz, “English Child Custody” 1366). But after the father’s death, the guardianship—or wardship as it was also known—of infant heirs were subject to feudal system of land division known as tenures: landed classes did not own land directly but held them as “tenants of the Crown” (Abramowicz, “English Child Custody” 1366). Infant heirs who were heirs to “tenures in chivalry” became wards of the lord of the estate. Thus, in essence, they were the king’s wards.

This relationship between king and infant heirs changed in the mid-seventeenth century with the 1646 Abolition of Military Tenures Act (and the later 1660 Tenures Abolition Act which upheld the 1646 statute). The act granted guardianship powers over underage child heirs and their estates to the father; it “abolished the Court of Wards and Liveries, eradicated feudal tenures of wardship and marriage, and provided that a father could, by will, appoint a guardian for his children with respect to his entire estate. This statute moved guardianship decisions out of the hands of judges and the common law rules of succession for all types of estates and into the hands of fathers whose appointees would supersede mothers for all rights” (Wright, “De Manneville” 270). Under this statute, a father had the right to appoint a posthumous guardian for

his child—even if the child’s mother were still alive.⁴ Moreover, a father could even appoint a guardian if he so desired during his lifetime.⁵

While this could be viewed—and has often been viewed—as a stabilizing and promoting of the family—albeit a patriarchal one—over the state and promoting the private sphere over the public, legal scholar Sarah Abramowicz tells a different and convincing story about the gradual infiltration of courts into the paternal custodial domain prior to 1839, and one that makes sense when viewed in the context of later legal history.⁶ The legal history concerning the guardianship of children is complicated and oftentimes contradictory. Abramowicz argues that it is precisely “the history of the law of testamentary guardians” that served “as the original basis for judicial discretion in child custody” (“English Child Custody” 1365). Thus, a “statute that was originally intended to increase paternal rights” actually increased the court’s rights (“English Child Custody” 1391). Guardianship of a child—though disentangled from medieval land ownership rules—was still enmeshed in family property rights and as such still subject to the state. That the father could will his children to a guardian of his choice after his death fostered the confusion regarding the legal status of a child (as “person” or “thing”), and thus confusion over the criteria with which to determine custody. The guardianship was a legal trust and therefore the child was both a kind of property as well as a beneficiary of that property since the guardian was entitled to take revenues from the estate during the time of the guardianship: “Custody of an heir was

⁴ It was possible for a father to appoint a mother as guardian after his death.

⁵ See Abramowicz. Paradoxically, while a father was alive he could appoint anyone as guardian to his children *except* their mother: “He could willfully mistreat his children and be removed as custodian, but the courts would not enforce a willful contract in which he divested himself of his paternal rights even if he had acknowledged that the children would be better off under his wife’s care” (Wright, “De Manneville” 257).

⁶ Danaya C. Wright, while primarily focusing on custody law in the nineteenth century, and in particular the pivotal De Manneville case of 1804, aligns with Abramowicz when she discusses custody law prior to 1800.

valuable because it entailed selling the heir in marriage and effectively selling the heir's estate" (Wright, "De Manneville" 274). The guardianship itself held its own monetary value and became a form of property, a trust that could be sold or willed. Thus, there was no practical distinction between the custody of the child and the custody of the estate: "It is easy to see how custody of a child looked suspiciously like a property right. It could be bought and sold, it followed the property, and it brought income to its possessor through exercise of both wardship and marriage rights" (Wright, "De Manneville" 274).

This history becomes even more complicated by the expanding British Court system and the rise of the Court of Chancery, which ostensibly exercised equity jurisdiction that fell outside of common law. The history of the Chancery Court's distinction from the common law courts and its scope of jurisdiction reveal that distinction to be nebulous, but the Court gradually became understood as one that had the power to right wrongs (Maitland and Montague 121). Custody cases were brought to the Court of Chancery since they entertained conflicts concerning land law: "Previously to the passing of the act 2 & 3 Vict. C. 54, the rule was, that the Court of Chancery would only interfere in the case of infants where they were possessed of or entitled to property" (Forsyth 15). In addition, the Court of Chancery entertained civil rights and had power beyond that of the common law courts: "when a suit regarding the custody of a child was brought at an English court of common law . . . the court could only enforce, or in certain case refuse to enforce, existing custody rights, but could not change them" (Abramowicz, "English Child Custody" 1348). However, unlike the court of common law, the Chancery Court could—and at times did—change custody rights.

One historical narrative is that the legitimization of the father by the court introduced the legal intervention in child custody, which ultimately led to his displacement and supplantation by

the court. As Wright describes it, “The power struggle between the state and the father to define and regulate his own family affected the family structures that could be created” (“De Manneville” 256). The striking result was that the father-child relationship itself became understood as a kind of guardianship (a trust) and thus, that relationship became subject to the court’s discretion. Importantly, the Chancery Court was even able to separate father and child. This kind of judicial agency transformed the private sphere of the family into a public one.

After the Abolition of Tenures Act that gave the court the power of discretion over the father-child relationship, a new legal language—a kind of undefined conceptualization of the “interests of the child”—began to develop (Abramowicz, “English Child Custody”). Early cases reveal that the Court prioritized economic “interests” and found that guardianship should rest upon those who could provide a legacy for children, even if that meant terminating the father’s guardianship. In other cases, the (also undefined) “true interests” of child prevailed, which appeared to have expanded beyond financial means and into the realm of morals, religion, and education. Rather than revoke guardianship based upon breach of paternal duty, as was the typical way to frame such a decision, in one such case, for example, the court began to define duty in positive terms, claiming that it is the duty of father to provide the child with “the foundation of all that is valuable” (Abramowicz, “English Child Custody” 1390). Moreover, the court invested itself with child-rearing responsibilities: not only could the courts regulate parent-child relations, but also it became their “duty to do so” (Abramowicz, “English Child Custody” 1389).⁷ The development of any kind of an “interests” principle was not a smooth and linear

⁷ Whether it was routine or exceptional that the courts actually decided against fathers in practice is under debate. For example, see the discussion of Danaya C. Wright, Eileen Spring, and Michael Grossberg (“Forum”). But the debate over the degree of frequency judges exercised these powers does not negate the importance of the new guardianship laws governing paternal relationships, under which the courts could and did at least in some cases decide against fathers. What may be as important as the outcomes of the judicial decisions, were that the courts took on the responsibility for deciding custodial relationships. And

progression, and the court struggled with its application, both in the sense of when to apply it, how to apply it, and what it means. The changing of the term “interests,” its lack of definition, and its further modification into “true interests” reveals just how tenuous and historically relative such an idea is. However, out of seventeenth-century British law, a legal child-centered philosophy began to emerge—one that prefigured contemporary “best interests” standard and one that by the end of the nineteenth century developed into a platform for children’s “welfare.”

Thus, there is a historical beginning of the particular relationship between court and child that is distinct from child’s familial relations—one that seemingly prioritized child and childhood. Paternal parenting became understood as a practice that was called into question and subject to law, its scrutiny heightened with the rise of legislation regarding divorce. No longer did a father have inalienable rights to his children; his rights were contingent upon the performance of his duties and obligations. The King was understood as *parens patriae*, literally “parent to the nation.”⁸ Likewise, in the sense that it regulated relationships and governed individual lives, the courts became parents to the nation’s infants. Thus, children became, along with all people, direct subjects of the nation. Through this disengaging of the child from familial ties and parental authority, the land-owning child became a kind of pre-liberal subject.

Born (to Be) Free

because of this, the concept of child custody was forever changed from one that was already naturally determined into one that could be called into question and arbitrated by a third party. Not surprisingly then, eighteenth- and nineteenth-century history reveals a trend in legal cases challenging fathers’ custodial rights to their children.

⁸ This concept originated in common law but was then taken up in Chancery Court, first in 1722, in *Eyre v. Shaftsbury*. Some argue that the concept of *parens patriae* paved the way for English child custody law; others argue that it was used to give jurisdiction over infants to the Court of Chancery (Abramowicz, “English Child Custody” 1351, 1352).

The legal narrative that made children subjects of the nation was supported by a theoretical discourse generated by John Locke and Jean-Jacques Rousseau. Both Locke and Rousseau are understood historically as giving rise to modern ideologies of childhood and are integral to the development of the rhetoric of children's interests.⁹ Additionally, both have influenced British and American law, literature, and nineteenth-century child studies.¹⁰ Locke's *Some Thoughts Concerning Education* was first published in 1693, expanded upon through 1705, and based on series of letters dispensing parenting advice to his friend Edward Clark (xxv). When viewed through of the lens of the history of custody law, Locke's advice to his friend seems to be working within a similar paradigm of parenting as the legal discourse: both distinguish the child as an individual separate from the parent and limit the power the parent has over the child; both establish a realm of expertise in childrearing separate and over that which a parent has; both promote the concept of the child's "interests."

The Court's changing ideas of "interests" from finances to issues like morality, education can be understood in the context of changing ideas of childhood consciousness. What Locke examines—and figures explicitly—is the mind of the child, and the mind of the child in relation to concepts of liberty and justice. Like the new custody rulings of the Court of Chancery, which explicitly diverge from common law history, Locke bases his expertise on childhood through direct experience and observation rather than historical precedent. Locke is famously remembered for promoting the idea of children's minds as *tabulae rasae*, as though a child's mind is a simple receptor. However, when we turn to Locke's pedagogical ideas we find a complex, respectful and prioritizing treatment of the child's mind—and an argument that

⁹ See for example, Brewer, Fletcher, Shuttleworth, and Pattison.

¹⁰ See James Sully on Rousseau and Locke, for example.

parenting the mind requires cultivating an incipient rationality as opposed to furnishing a barren void. The child's mind may not originate with content but it has capacity.¹¹

In *Education*, Locke importantly distinguishes between the care of the mind and the care of the child's body. The first sentence reads: "A sound mind in a sound body is a short but full description of a happy state in this world." While he is concerned with the child's physical care, he prioritizes the child's mental care: "I imagine the minds of children as easily turned this or that way as water itself; and though this be the principle part, and our main care should be about the inside, yet the clay cottage is not to be neglected" (10). Locke advises that "children are to be treated as rational creatures" (35), since children have the capacity for reason: "they understand [reasoning] as early as they do language; and if I misobserve not, they love to be treated as rational creatures sooner than is imagined" (58). In his prescription for parenting, he institutes the language of individual freedom based on the child's incipient mental acuity: "We must look upon our children, when grown up, to be like ourselves. . . . We would be thought rational creatures, and have our freedom" (31). Treat children based not upon the reason they have, but the reason they will eventually attain. In this formulation of child rearing, parental "duties" change: parents become cultivators of a child's mind. Education is figured as essential sustenance.¹² The treatment and care of children's bodies is subordinate—but also relevant—to

¹¹ Anthony Fletcher remarks that the publication of Locke's *Education* "was a signal moment in the development of the positive ideology of childhood" (6). He argues that Locke constructed the child as "an individual bundle of attributes and potentialities" (7), essential characteristics in the construction of personhood.

¹² It is important to note that Locke prescribed a special reading program for children. In *Be Merry and Wise: Origins of Children's Book Publishing in England, 1650-1850*, Brian Alderson and Felix de Marez Oyens credit Locke's *Education* with the birth of a modern childhood literary movement: "the book was to be deeply influential . . . and this is nowhere more obvious than in his paragraphs (§141-§151) on reading. Like the best of twentieth-century specialists he fancied that 'Learning might be made a Play and Recreation to Children' and that they might be 'cozen'd into a Knowledge of the Letters' by games. When eventually they can read, 'some easy pleasant Book' like *Aesop's Fables* or *Reynard the Fox* should be put into their hands" (5).

children's mental conditions: Locke prohibits forms of physical punishment, claiming that physical punishments are psychologically damaging, especially when executed by parents themselves. In this way, he begins to conceptualize one basis for child cruelty—and the child's need for protection from parents.

Through his parenting advice, Locke begins to undo a presupposed proprietary relationship of parent to child in a way consistent with changes in British custody law. He argues that paternal "power" over children "so little belongs to the Father by any peculiar right of Nature, but only as he is Guardian of his Children, that when he quits his care of them, he loses power over them, which goes along with their Nourishment and Education, to which it is inseparably annexed" (qtd. in Brewer 92). Sixty years later, Blackstone similarly distinguishes between British law and ancient Roman law with regard to the basis of parental authority: while Romans had right to absolute life and death of child, British parental authority is contingent upon the fulfillment of "their duty," which includes the child's "maintenance," "protection," and "education" (435-440). Locke defines childhood as a special concrete time in individual development that was inherently good as opposed to evil, and he describes the difference between the fundamental nature of the child and his or her actions (54). To presume goodness supposes an ethical capacity (even if primitive or limited), and he instructs parents to be exemplars and act justly to the child. On parental authority, Locke writes, "I imagine everyone will judge it reasonable that their children *when little* should look upon their parents as their lords, their absolute governors. . . . Fear and awe ought to give you the first power over their minds, and love and friendship in riper years to hold it" (31). Parents do not have a perpetual and inalienable right to a child's love, but must earn it over time.

In *Education*, Locke develops a pedagogy that both recognizes childhood as special with

needs such as play and “recreation” and also one that recognizes children as future citizens, who should be treated in a “liberal way so that they “may take pleasure and pique themselves in being in being *kind, liberal* and *civil* to others” (80, 81). In Locke’s formulation, the family should function as a civil society in order to teach children how to be good citizens. The recognition of a child’s equality with the other family members is essential if not fully realized. In the *Second Treatise* on parental authority, Locke states:

Children, I confess, are not born in this full state of *equality*, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal. (Sect. 55)

What does it mean for children to be “equal” or “free” in constitution but not in practice? Legal scholar Holly Brewer argues that through Locke, “consent” becomes the cornerstone of human rights. Through the question of inheritance of slavery Locke constructs a somewhat problematic distinction between freedom and consent. With regard to the children of slaves, he claims: “For since a Father hath not, in himself, a Power over the Life or Liberty of his Child; no act of his can possibly forfeit it: So that the Children, whatever may have happened to the Fathers, are Free-Men. . . . [T]he Absolute Conqueror . . . can have no Power over them, but by their own consent” (qtd. in Brewer 93). Power requires consent; consent requires reason—which children may have, may not have, or may yet to have. Sarah Abramowicz argues that children essentially

unfree because they were unable to contract, to legally consent (268). While it could be construed that a woman “voluntarily” relinquished her rights to her husband, a child did not have sufficient reason and age to contract away rights to begin with.

However, with *Education*, Locke constructs a pedagogical program to teach a child how and why to consent or not. Locke’s creation of expertise in children’s private education, his reconfiguration of the family, took the child out of the private sphere and into public life. The issue of consent and family creation when taken to extreme suggests an implicit argument that families be created voluntarily. Likewise, in the court system, when the legal custody of a child was in question, parental authority over that child was severed and the child was instead the direct subject of the court—but because the child was still a child and could not legally function as an adult—the power that was vested in the child as person and subject was in essence transferred to the court. Bringing the child into the public sphere opened many doors for others to rethink or begin to think about children and child-related issues child such as children’s literature, child rearing, child study, and child welfare and reform.¹³

Rousseau’s Preface to *Emile*, written in 1762 almost a century after Locke’s *Education* (though Rousseau barely acknowledges it), authoritatively declares, “Childhood is unknown” (33). “Starting from the false idea one has of it,” he continues, “the farther one goes, the more one loses one’s way. . . . The wisest men . . . are always seeking the man in the child without thinking of what he is before being a man” (34). Rousseau devotes his “study” to childhood, and *Emile* had a major impact on child rearing and childhood education. That it is Rousseau’s *fictional*

¹³ Fletcher states that in America, “Locke was the standard authority on child rearing in the second half of the eighteenth century and many copied from him without crediting the source. As in England, parents often quoted him in correspondence” (7). This new idea of experts and expertise further infringes upon the parent-child relationship; one way we can see this idea taken up is in the nineteenth century’s development of the genre of parenting manuals.

account of childrearing and development that has been taken up by so many and for so long demonstrates the kind of child-centric historical movement happening.¹⁴

While Locke in many ways points to the similarities between the child and the adult and advocates education as preparation for adulthood, Rousseau distinguishes childhood as a discrete state, and one that should be cultivated. He focuses on the differences of the state of childhood and the need to protect that special state of “nurture”¹⁵ before age of reason sets in: “Nature would have them children before they are men. Childhood has its own ways of seeing, thinking, and feeling” (qtd. in Shuttleworth 5). Considering the child, Rousseau states, “Our true study is that of the human condition” (42). The child is understood as a kind of pure representation of human nature in general. In *The Social Contract*, Rousseau, like Locke, claims that “man was born free.” However, he differs from Locke in his understanding of government as corrupt and his views on childhood education. Both Locke and Rousseau believe that the family is a social institution, but as such, Rousseau, unlike Locke, believes it to be corrupt (like all social institutions). Instead, Rousseau supposes a natural law, which assumes a kind of innate system of ethics that is endowed to human beings by God. Rousseau explains: “We are born with the use of our senses, and from our birth we are affected in various ways by the objects surrounding us.” As “we become more capable of using our senses” to perceive our surrounding,” we become “more enlightened; but constrained by our habits [what we are taught to think], they are more or less corrupted by our opinions. Before this corruption they are what I call in us *nature*” (39).

Rousseau, unlike Locke, who prescribes an educational program, including specific reading lists for children, eschews early formal education. He believes the education of a child

¹⁴ Fictionality is important: I will be arguing later that literature, as much as science, makes its own claims of understanding childhood, and is used as a source of knowledge.

¹⁵ The “age of nurture” refers to the age of a child before the “age of reason.” (This so-called “age of nurture” has had various definitions at different times.)

should resist socialization, and instead should encourage an unmediated, direct encounter with the world. He advocates for the child to have a tutor, whom he figures as a facilitator of the child's experiences as opposed to a transcriber of socially sanctioned systems and beliefs. Indeed, this emphasis on natural experience precludes reading books. "*Robinson Crusoe*," Rousseau writes,

will be the first [book] that my Emile will read. For a long time it will compose his whole library. *Robinson Crusoe* on his island, alone, deprived of the assistance of his kind and the instruments of all the arts, providing nevertheless for his sustenance, for his preservation, and even for procuring for himself a kind of well-being . . . This state, I agree, is not that of social man; very likely it is not going to be that of Emile. But it is on the basis of this very state that he ought to appraise all the others. (184-185)

Interestingly, it is this education in self-reliance, Rousseau argues, that ultimately benefits a democratic society: "Natural man is entirely for himself. He is numerical unity, the absolute whole, which is relative only to itself or its kind. Civil man is only a fractional unity dependent on the denominator; his value is determined by his relation to the whole, which is the social body" (39). Refusing the social is reforming the social, and the child is a figure for this hope and potentiality. As Ala Alryyes notes, Rousseau's "emphasis on children as national raw material, as it were, and the celebration of the irrationality of the child as 'natural' is a striking departure from Locke's view" (72).

While Rousseau is constructing a system of education, and contributing to an understanding of childhood he is also constructing the child as a symbol of the autonomous man

and citizen, what Alryyes calls “the national child” (72). The “child became a symbol of the new citizen. The “citizen was to be a child of nature and a child of the state” (Alryyes, *Original Subjects* 74). Contextualizing her discussion of Rousseau within the origins of the French revolution, Alryyes claims, “Children also come to express the new *beginning* that is a centerpiece of the ideology of nationalist movements” (74). “Childhood itself became a symbol of purity and sincerity: not only did the nation have to teach its new lessons to its children, the children became an ideal image of the new citizen” (Alryyes 76).¹⁶ This ideology became important to Victorian child law reform movements and we will see similar arguments being developed in nineteenth-century England, which participated in various legal transformations, including parental authority becoming replaced by state authority, an equating of the state of the child with the state of the nation, and child-rearing becoming an increasingly public enterprise. “By revising the nature of ties between the child and his parents, and reversing the order of family and society,” Alryyes claims, “Rousseau created the national child who does not naturally belong to his family” (76). This is only partially true, however, when considering the recognition and representation of the child’s relationship to its mother.

Rousseau addresses *Emile* to his mother. Important to the developing legal arguments concerning custody is Rousseau’s recognition of the young child’s natural need for its mother and, which we will later see, is also the basis of Caroline Norton’s argument. Notwithstanding Rousseau’s paradoxical treatment of women (and, at times, his downright misogyny), *Emile* engages the rhetoric of a mother’s love and a child’s right to it, which also emerges in the context of custody law in the idea of the mother-child attachment. While a parent might not have

¹⁶ Alryyes notes that “Robespierre makes the point unequivocally: ‘The country has the right to raise its children; it should not entrust this to the pride of families or the prejudices of particular individuals. . . .’” (75).

a natural right to child, a child has a natural right to its parents, particularly its mother. The mother was figured as somehow outside the public social structure and the mother-child relationship was left as a private emotional bond. A mother's care of her child was placed in the realm of the child's "natural," that is to say, innate needs. Eighteenth-century case law begins to reveal this kind of thinking. For example, in a custody case brought by a mother, after the death of the father, whose will instructed custody of his children to their paternal grandfather, the Court overturned the father's wishes and ruled "the *children have a natural right* to the care of their mother" (Wright, "De Manneville" 281, my emphasis).

For Rousseau, "mother" is "Mother Nature," and he argues for the child's natural need for what a mothers can provide—emotional nourishment—over reason. Rousseau's fixation with a mother's breastfeeding as natural and therefore necessary (in opposition to the upper class's unnatural regular use of wet nurses) as well as with the length of breastfeeding (he declares: "All children are weaned too soon" [69]) reveal the societal fascination with the treatment of the child as a correlate to the state of society: "But let mothers deign to nurse their children, morals will reform themselves, nature's sentiment will be awakened in every heart, the state will be repopled . . . Thus from the correction of this single abuse would soon result a general reform; nature would soon have reclaimed all its rights. Let women once again become mothers, men will soon become fathers and husbands again" (46). Indeed, some legal scholars like Mary Ann Mason, describes the history of nineteenth-century custody reform as a progression from fathers' rights to mothers' love.¹⁷

¹⁷ Mason writes about nineteenth century American law; however, the trajectory of American custody law and British are not only very similar, but American law was, to a large degree, derived from British custody law (citation for this similarity and derivation?).

Caroline Norton and the Case of *De Manneville v. De Manneville*

By the nineteenth century, questions concerning children's need for their mothers, along with the contemplation of mothers' legal rights to their children, grew as more mothers petitioned the Courts for custody. Caroline Norton is widely credited for the passing of the 1839 Custody of Infants Act with her influential tract *The Separation of Mother and Child* (1837) and her *Plain Letter* (1839).¹⁸ Norton's very public and scandalous personal story of divorce and lack of access to her children is particularly harrowing. Norton personified the very figure of victimized wife and suffering mother. Born Caroline Sheridan, to an upper middle class Whig family, she married George Norton, a Tory, had three children, and became a published writer of poetry and fiction. Due to financial constraints, temperamental and political difference, by all accounts, theirs was a tumultuous and physically violent marriage. Apparently, George misrepresented his wealth to her; she had no dowry, and after George lost his short-lived seat in Parliament after its dissolution, their family lived primarily off of Caroline's literary earnings, which were not sufficient to sustain them. In 1830, Caroline turned to her old Whig friend, Lord Melbourne, who was then Home Secretary (and also friends with the young Queen Victoria), for help, who appointed George as a justice of a magistrate's court. In 1836, George Norton commenced an unsuccessful lawsuit Lord Melbourne for "criminal conversation"—essentially accusing him of adultery with Caroline. If George had prevailed he would have not only obtained a financial reward, but would have had the necessary prerequisite for obtaining a parliamentary divorce from Caroline.¹⁹ But before he did this, George absconded from the country with their

¹⁸ See Shanley, Wright, Abramowicz, Nelson.

¹⁹ This biographical information is from Shanley, Poovey, and Huddleston.

three sons, the youngest of whom was two at the time.²⁰ Though not found guilty of adultery and not divorced, Caroline assumed she had no legal redress to access her children, or they to her.

With the help of Sgt. Talfourd, Norton commenced a campaign to change the law. Though she is hailed in many of the annals of nineteenth-century “feminism,” Norton did not (at least publicly) advance an argument about the equality of women and men/husbands and wives; because of this, some have called her anti-feminist.²¹ For example, in an 1855 letter to the Queen, Norton promoted mothers’ legal rights, while abjuring equality between the sexes. In quite a Rousseauian manner, she claims, “The natural position of woman is inferiority to man. Amen! That is a thing of God’s appointing, not of man’s devising. I believe it sincerely, as part of my religion. I never pretended to the wild and ridiculous doctrine of equality” (qtd. in Huddleston 1). Abramowicz claims that Norton, along with others campaigning for custody reform, ignored or misunderstood the court’s role in child custody and in essence rewrote legal history by eliding the changes already happening in the law: she claims that Norton overlooked the court’s intervention in child custody determination, and took instead, as her starting point, the legal assumption of the absolute paternal right to children. Thus, according to Abramowicz, by not taking up the previous inroads into paternal custody, Norton assumed—and thus reinforced—the unequivocal rights of the father to the child. However, there are practical reasons for approaching child custody in this way: in many instances, the court still decided in favor of paternal custody

²⁰ In 1842, Norton’s youngest son died in a riding accident before she was ever able to see him again; thereafter, George allowed her access to their two living children.

²¹ Norton’s accusers in this regard include legal scholars Abramowicz, Maidment and Wright. Mary Lyndon Shanley notes: “Such passages have led critics to denigrate Norton’s contribution to the women’s rights movement, saying she would simply have exchanged dependence on a husband for dependence on the state. But as Mary Poovey has argued, the very act of making a public appeal was a radical challenge to the laws that held that a married woman could claim no legal personality independent of her husband’s. Norton transformed herself “from the silent sufferer of private wrongs into an articulate spokesperson in the public sphere” (27).

and this bias informed popular understanding. Moreover, Norton's rhetorical strategy was emotionally compelling to her audience. That is to say, by starting with the assumption of absolute paternal rights, Norton created judicial urgency for both the victimized mother and suffering child (in its best "interests"), and in doing so, demanded more clarity in the legal language and practice.

An early nineteenth-century case, upon which Norton's argument partially depends, illustrates just how difficult it was to disentangle husband's rights from father's rights, and to incorporate new concerns with children's interests in custody cases. The 1804 case of *De Manneville v. De Manneville*²² became a touchstone for future legal arguments. It was a particularly important case because the legal judgment performed two opposite actions: it acknowledged children's welfare, yet it also reinstated paternal rights through the institution of marriage. Furthermore, it was misconstrued and the misinterpreted judgment was applied to custody cases thereafter, setting back the trend of judicial involvement in matters of child custody. The husband in this case was a poor French emigrant and the wife a wealthy English woman. A settlement upon their marriage allowed the wife to retain her own income and, and a covenant prevented the husband from compelling the wife to live in any country other than England—yet after their marriage he threatened to do just that, and, after they had a child, "he had in like manner threatened to carry the child away (*Separation* 34). Under this threat, the wife fled with her eleven-month old nursing infant to live under the protection of her mother. Failing at one attempt to abduct the infant, the husband tried again, this time with success: "on the night of the 10th of April, her husband found means, *by force and stratagem*, to get into the house

²² This case was actually tried twice, first under habeas corpus in the court of common law (*Rex v. De Manneville*), in which the mother failed, and then afterward in the Chancery Court, which is what I am discussing here.

where she was; seized the child, *then at the breast*, and carried it away almost naked in an open carriage in inclement weather” (*Separation* 34-35).

After the mother’s application to the Court of King’s Bench for a writ of *habeas corpus* failed, she petitioned Chancery for possession of her infant daughter. The judicial ruling revealed the inherent legal problems with disentangling the child’s interests from the parents’ marriage, which, as we shall later see, become even more confused with the creation of the Divorce Court in 1858. Lord Chancellor Eldon did begin by acknowledging the child’s interests: “It has been truly observed,” he stated, “that the court will do what is for the benefit of the infant, without regard to the prayer” (*De Manneville* 59). But, in fact, under the law, the marriage contract (under which the wife’s body and the child’s body belonged to husband) superseded the consideration of the child:

I must consider the wife at present as living under circumstances, under which the law will not permit her to live. A very material consideration then arises, whether the child is to be removed to the custody of the mother, not living with the father, according to the obligation of the marriage contract; which I am bound to consider subsisting, until I am told by better authority than affidavits, that it ought no longer to subsist. 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. (*De Manneville* 60)

Though the wife accused the husband of “cruelty and ill usage,” Eldon would not take parental fitness into account, since that fell under the jurisdiction of the Ecclesiastical Court in a case of legal separation.²³ Thus, Eldon concludes:

Any relief as to the wife arises only out of the covenant. But there is no jurisdiction here to relieve her from ill usage. . . . In this case the Defendant was ill-advised as to the mode of taking away the child. A man has a right to the custody of the person of his wife; in general also to that of his child; but he must not pursue a legal object by illegal means. . . . But I can look to all these circumstances only as relating to the simple consideration, what is fit to be done with the person of the child. (*De Manneville* 60-61)

Even though Eldon claimed to consider “the person of the child,” under coverture law, children still functioned as property; thus, a wife could not petition for custody—or bring any legal suit against her husband while she was still married.

Therefore, Eldon ruled only on the covenant in the marriage settlement but, while he sidestepped an explicit custody ruling, he acknowledged that the child would benefit from free access to both parents:

It is clear, the father must be restrained from taking the child out of the country. I must either give the child to the father; when I know what he proposes to do, if it remains with him; or to the mother; to which upon some principles there is great objection: or I must take some middle course; and I shall take care, that the

²³ A wife could petition for legal separation through the Ecclesiastical Court, although only a husband could obtain the ecclesiastical annulment requisite to attain a parliamentary divorce. Separation and divorce were founded upon marital fault. I discuss this in more detail in the next chapter.

intercourse of both father and mother with the child, as far as is consistent with its happiness, shall be unrestrained. (*De Manneville* 65)²⁴

In spite of the Court's findings, the case "would be cited by later courts as primary precedent for the proposition that the royal courts did not have the authority to interfere with the father's natural, near-absolute rights to custody of children, that mothers did not have any custodial rights, and that acts constituting forfeiture of paternal rights must be so severe as to threaten child with harm to life or limb. Thus much of its value lies not in its holding but in what other courts claimed it held" (Wright, "De Manneville" 262).

The irony here is that even though a wife could not challenge her husband's right to their children, any other third party still could. Wright notes: "In the thirty-five years from 1804 to 1839, twelve cases adjudicated the question of paternal forfeiture and parental rights. Seven were brought by mothers, five by other relations. Six of the mother-petitioners lost; all five of the third party petitioners won. The only mother who won custody was unopposed because the father was in prison"; all referred to or cited *De Manneville*, not in terms of its dismissal on grounds of coverture but that "the father's rights negated possibility of mother's. . . . Not one case mentioned that Mrs. *De Manneville's* suit was dismissed on coverture grounds, that mothers' rights had not been litigated, and that fathers' rights had been routinely limited by both the law and equity courts" (Wright 285). Wright argues that "After *De Manneville*, the legal relationship of the parent and child would be mediated through the legal relationship of the husband and wife [i.e., the marriage]" so that in this context a "meaningful best interests standard" could not be

²⁴ By upholding the covenant, the father's actions toward the child were constrained, but legal custody of the child remained with him. The possibility of spousal and child abuse was not addressed and we can see how such a ruling may have encouraged the mother to return to living with the father.

constructed (257). Wright and Abramowicz both note that after *De Manneville*, there was a new vigorous commitment to, and forceful application of, the notion of absolute paternal rights when it came to family affairs temporarily hindering the eighteenth-century trend in the court's interference in such matters.²⁵ In spite of this trend however, the history of custody cases brought to court also reveals an opposing trend: more and more mothers were actually petitioning for custody and finding attorneys to represent them. As Wright and Abramowicz assert, Norton did describe the court's findings incorrectly by inflating the Court's commitment to fathers. But rather than report the law, Norton used the dramatic facts of the case in order to harness public sentiment. Figuring the Court as complicit with the callous brute of the father, Norton established her tenets by appealing to emotion as well as a kind of commonsensical morality: the separation of mother and child is traumatic; the child needs its mother; the mother-child relationship is natural and necessary; natural law trumps man-made law; and the Court needs to be proactively selective in its application of coverture.

The most compelling part of Norton's case for custody reform is not the suffering of the mother, but the cruelty to and suffering of the child through the loss of its mother. This is important because it was the conceptualization of the suffering child that was used to further custody reform and to bring about child protection agencies and child welfare laws later in the century. Norton repeatedly claims that denying a child its mother "*is an injury*" (*Separation* 12), asking "what can be more false and unnatural than the position of children, who, with two parents living, are given over to hired care, or the custody of strangers, *knowing that they HAVE a mother*, whom they are neither taught to love, nor permitted to see?" (*Separation* 13). "The

²⁵ I am examining the trend in custody matters that were brought to court. There were private and informal decisions made between divorcing spouses that allowed mothers to retain custody of their children. For example, see Wright in "De Manneville" (254, 255).

circumstances under which the [De Manneville] child was taken,” Norton asserts, “were most gross, and such as would seem the act of a savage rather than one educated in a civilized country. The child itself was only a few months old; unweaned, and utterly dependant on the mother; but because, as Lord Ellenborough observed [in the first trial], ‘there was no pretence it had been injured by want of nurture;’ that is, because the father, after cruelly taking it from the breast of its mother, supplied it with another nurse” (*Separation* 37).²⁶ Astonishingly, the Court did not differentiate between a wet nurse and a mother. Norton establishes that the mother is essential; the child has physical and psychic maternal needs that cannot be fulfilled by a surrogate:

The daily tenderness, the watchful care, the thousand offices of love, which infancy requires, cannot be supplied by *any* father, however vigilant or affectionate. The occupations of his life alone prevent his fulfilling the petty cares which surround the cradle. He is compelled to find *other* care for them, to replace that of which he has deprived them; he is compelled either to leave them to hired female servants, or to deliver them over to some female relative. And it is in this very point that Nature speaks for the *mother*. It pronounces the protection of the father insufficient, – it pronounces the estrangement of the mother *dangerous and unnatural*, and as such must be immediately supplied by female guidance of some sort or other. . . . The question evidently is not whether they shall be taken from the *mother* to be given to the *father*; the question is whether they shall be taken from the *mother* to be given to A STRANGER. (*Separation* 13-4)

²⁶ This was part of the habeas corpus case, *Rex v. De Manneville*.

Norton asks, “There are other laws besides those made by men—what says the holier law, the law of nature?” (*Separation* 9). In this construction of nature and natural rights, Norton challenges previous popular and legal assumptions about the father’s “natural” right to his children through property and inheritance by juxtaposing this relationship with that of the mother and child, who are attached through emotional and biological necessity. Paternal preference, she argues, severs this vital and incontestable bond between mother and child: “It is a law *against nature*, and such a law is not to be borne” (*Separation* 28).

Throughout *Separation*, Norton builds a rhetoric of injury, suffering, and psychological and emotional cruelty that arises from this unnatural “separation of mother and child.” Interestingly, this kind of rhetoric was being used at the time to castigate mothers who deserted their children, and Norton used that popular sentiment as support for her argument. A mother who abandons her child, Norton claims, is “stigmatized” by society “as a monster”: “Because *a mother’s love is believed to be the strongest tie of nature, and HER CARE TO BE ESSENTIAL TO THE WELL BEING OF HER INFANT CHILDREN*” (14, 15). Quoting John Philpot Curran, the Irish lawyer and political orator, on such a case of maternal desertion, she calls the loss of a mother to a child “*the orphanage which springs not from the grave, which falls not from the hand of Providence or the stroke of death, but comes before its time*”²⁷ and asks “if it be indeed so unnatural in the mother to *leave* them, is it natural in the father to tear them from her?” (15). She puts the impetus on the Court to rethink these relationships through her conceptualization of the “Natural” in the context of child welfare. And, she makes an important distinction between parents (mothers and fathers) and spouses (husbands and wives). Norton argues that the Court cannot:

²⁷ *Massy v. Headfort* (Criminal Conversation), for Plaintiff, July 27, 1804.

excuse its non-interference on the plea of the FATHER'S natural right, when it *does* directly interfere with the natural right of the MOTHER, and forces her children from her very breast. Either the right admitted, is NATURAL or ARTIFICIAL; if ARTIFICIAL, the law has the same power to adjudge the custody of infants, that it would have in case of any other artificial right; if NATURAL, the law has no power to order children from their mother, since by nature the rights of both parents are co-equal. (*Separation 27*)

If parental rights are “natural,” then they are outside the bounds of law. If parental rights are artificial, and legally constructed, then the Court already has the authority to adjudicate them and must do so. Though men and women may not be equal, mothers and fathers are equal by Nature, and thus should be by law.²⁸ Importantly, this conceptualization begins to construct a familial domain (separate from the spousal one) that prioritizes the child. Furthermore, this argument and this rhetoric became part of the legal language and public discourse that developed throughout the century.

The Early Custody Acts

First proposed by Sergeant Talford in 1837,²⁹ the Custody of Infant's Act of 1839 is often understood by scholars as one that extends the rights of the mother—and it does. However, it focuses—linguistically and practically—on the infant and the relationship of the court to the infant. The language reads:

²⁸ Norton also ironically critiques the difference in the law concerning “bastard” children and “legitimate” children.

²⁹ See Maidment 114.

That after the passing this Act it shall be lawful for the Lord Chancellor . . . upon hearing the Petition of the Mother of any Infant or Infants being in the sole Custody of the Father thereof or of any Person by his Authority, or Infants being in the sole Custody or Control of the Father thereof or of any Person by his Authority, or of any Guardian after the Death of the Father, if he shall see fit, to make Order for the Access of the Petitioner to such Infant or Infants, at such Times and subject to such Regulations as he shall deem convenient and just; and if such Infant or Infants shall be within the Age of Seven Years, to make Order that such Infant or Infants shall be delivered to, and remain in the Custody of the Petitioner until attaining such Age, subject to Regulations as he shall deem convenient and just.³⁰

The law specifically defines age of child who may be in need of being in the custody of its mother as seven years and younger, a concept now taken up as the “tender years” doctrine, which dominated twentieth-century custody decisions.³¹ The law gives full discretion to the Lord Chancellor over the child with the vague criteria being “convenient and just.” While some argue that it does not address “interests” of child,³² the law, remarkably, does not address either paternal or maternal “rights,” thereby paving the way for future acts to add in language concerning “best interests” and “welfare,” which does indeed happen.

The act also includes specific language regarding parental behavior. One argument against granting mothers custody rights was that if mothers were assured of their continued

³⁰ 2 & 3 Vict. C. 54

³¹ The 1837 Act that was revised cited the end of the age of infancy as twelve (Maidment 114).

³² See Wright, for example.

relationship with their children, marriage would be undermined, as they would be more likely seek divorce. Thus, along with the right to petition for custody, limitations and regulations upon mother's behavior were also established in order to enforce custody and mediate custody through relationship of husband and wife and the ecclesiastical court that regulated divorce: "no Order shall be made by virtue of this Act whereby any Mother against whom Adultery shall be established, by Judgment in an Action for Criminal Conversion at the Suit of her Husband, or by the Sentence of an Ecclesiastical Court, shall have the Custody of any Infant or Access to any Infant, anything herein contained to the contrary notwithstanding." What many feminist arguments overlook is that a standard of morality was also applied to fathers, albeit not as rigorously: the court did have the authority interrogate their morality and, in doing so, could find grounds to terminate custody.³³ Though not typical, in 1817, Percy Bysshe Shelley, famously lost custody of his first two children to their maternal grandparents after his first wife's death because of his publicly pronounced atheism. As with the case history after the Abolition of Tenures Act, over time both the "morality" of mother as well as father became applicable as a standard of "true interests" when the court engaged petitions of guardianship. "Standards" of morality with regard to parents in terms of custody supports some recognition—if limited understanding—of the interests, needs, and welfare of children. And, a legal application of the principles of justice and injustice was applied to children regarding their guardianship and living conditions. Although all terms regarding children's interests were relative, undefined, and left to

³³ There was a somewhat complicated understanding of the law concerning "morality" in circumstances of an adulterous father with regard to custody of his children. It seems that for the most part, an adulterous father could retain custody of his children so long as *the children were not brought into contact with the father's mistress*. However, this was not understood as unproblematic or even morally acceptable. See Forsyth's discussion of this (25, 28-30, 66-71), and in particular his account of the debate in the House of Lords on July, 18, 1839, concerning one such case (69).

individual interpretation, the 1839 act was a fundamental turning point in the history of British family law.

The first reform of the 1839 Act came over forty years later in 1873. What was not formally articulated in custody law in the years between these acts became articulated in other areas. The mid-nineteenth century was engrossed with “the child” in all sorts of ways and disciplines, so much so that this time period has been referred to as the “cult of child” and, there were cross-disciplinary influences in understanding and representing childhood. Sally Shuttleworth’s exhaustive study on the interconnections of literature, science, medicine, and psychiatry with child development shows us this. In *The Mind of the Child*, Shuttleworth argues that literature about children helped bring about the discipline of child science and literary representations of children were used as case studies. Surely then, the representation of the inner workings of the child’s mind, and the child’s voice as expressed in literature in novels such as *Jane Eyre* (1847) and *David Copperfield* (1850) also helped influence and shape the law. And literature written about the child, in its representation of childhood interiority, also helped solidify the notion that the child was a person.³⁴ Furthermore, the mid-nineteenth century did not just produce literary representations of children, but also gave rise to books and periodicals for children. Thus, literature itself was attempting an unmediated relationship with its child reader, much like the Court was creating a direct relationship with its child subject.

The Custody of Infants Act of 1873 did not give mothers and fathers equal legal status,

³⁴ Truth and fiction did not have a naïve, uncomplicated relationship in the nineteenth century, but did perhaps share a less worried one than they have now: legal treatises turned to fiction to ground their arguments. Caroline Norton begins *English Laws For Women* (1854) by quoting *Bleak House*: “It won’t do to have TRUTH and JUSTICE on our side; We must have LAW and LAWYERS,” stating “I take those words as my text” (1). Norton wrote the majority of her most acclaimed fiction during these years between the first two Custody Acts. In her narrative poem, “Woman Free” written under the pseudonym, Ellis Ethelmer, the suffragist and child rights advocate, Elizabeth Wolstenholme Elmy quotes abundantly from George Eliot’s and George Sand’s novels among others.

but it significantly changed the 1839 act by extending the age of a child of which a mother could petition for access and custody from seven to sixteen years old, at which time the child could then choose his or her own guardian.³⁵ Before the age of sixteen, the Court could also regulate the father's access and custody "as the said judge shall deem proper" (qtd. in Hall 155). Thus, the act helped to redefine and extend the period of time a child is in direct relation with the Court and in need of its protection as well as introduce the concept of individual choice. The act also allowed adulterous mothers who had been previously denied custodial rights to petition for custody: "By distinguishing between the mother's offense and the possible needs of the child, this provision reflected increasing acceptance of the notion that the correct criterion for custody decisions was the interest of the child, not the absolute right (or the fault) of either parent" (Shanley 139). The language of the section of the statute concerning separation agreements between parents explicitly supports this notion, providing "that no Court shall enforce any such agreement, if the Court shall be of opinion that it will not be for the benefit of the infant" (qtd. in Hall 155).³⁶ Thus, for the first time in legal history, one formally articulated criterion for the determination of custody became the "benefit of the infant." An article in the *Spectator* just after the passing of the bill reports that the "discretion" given to the Court "applies precisely the needed remedy" (533), revealing the perception of the need for judiciary intervention on behalf

³⁵ Complicating child custody even further was the passing of The Matrimonial Causes Act of 1857 and the resulting Court of Divorce and Matrimonial Causes, established in 1858. The Divorce Court was given authority to adjudicate custody, not under the custody and guardianship laws, but rather, under section 35 of the Matrimonial Causes Act 1857: "on any petition for dissolving a marriage . . . the Court may . . . make such provision in the final decree, as it may deem just and proper with respect to custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or proceeding, and may . . . direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." I discuss this Act in further detail, along with the relationship between the Divorce and Chancery Courts, in Chapter 3.

³⁶ Until this provision, separation agreements between parents that gave mothers custody were found invalid.

of children as a counter for poor parental judgment to be already part of the public discourse.³⁷

Child Welfare

In 1886, the government introduced The Guardianship of Infants Act making the first consideration of the courts in awarding custody the “welfare of the infant.” The 1886 Guardianship of Infants Act was another important legal turning point because it explicitly made the child its first priority in adjudicating custody and, it introduced the language of “welfare,” which influenced the many child laws that followed it. The two years between the 1884 bill to the 1886 act reveal the legal struggle and the resulting separation between parental claims and children’s interests. In 1884, suffragist and writer proto-feminist writer Elizabeth Wolstenholme Elmy, along with parliament member James Bryce, introduced a new reform bill to Parliament (Shanley 144). Early arguments for child custody reform built upon the arguments and social reforms for women, emphasizing the issue of equal rights for mothers and, in doing so, invoked for some parliament members the connection between children and property. Indeed, Bryce stated that “the Bill might be regarded as a corollary to the Married Women’s Property Act” (Shanley 142). Clause 2 of the original Guardianship of Infants Act sought to establish the legal equal rights of both the mother and father to their children (Maidment 127). Essentially, the mother of her child had never been considered to be the child’s legal parent. The previous custody acts allowed mothers to only petition for *access* to her children—but not *guardianship* of them—after the marriage ended. The presumed guardian of the children, both during the marriage and after the marriage, was the father. The new proposed act would take as its premise

³⁷ The Judicature Act of 1873 combined both equity and common law courts into one system (Maitland and Montague 165).

that a mother had equal guardianship with the father over their children during their marriage.³⁸

Thus, if the marriage ended, both parents would be presumed as guardians of their children from the outset of any dispute.

The discussion concerning a mother's equal right to guardianship generated further inquiries into the mother's role in childrearing. Some argued à la Norton that a mother is equal but distinct—and even superior to a father—by virtue of her “natural” relationship to her child. This position was supported by nineteenth-century science: for example, the medical doctor, Frances Hoggan, in her well known treatise, *The Position of the Mother in the Family in its Legal and Scientific Aspects*, produced a scientific argument for the necessity of the mother: “In general, in the vertebrate kingdom, the mother is the undisputed guardian, the devoted nurse, and the courageous defender of the young, and the father is either wholly indifferent, more or less helpful to the mother, or the protector of the whole community, inclusive of his offspring; but such a thing as ownership of the young by the father is unknown amongst the higher Vertebrata, and the mother is the parent whose duties and rights predominate throughout the whole animal world” (15). Elmy uses both a biological and an equal rights argument: in her narrative poem “Woman Free,” Elmy quotes Hoggan, stating “mother reigns supreme” in the “primary physical necessities of the infant”; however, it is “equally clear” that the child is entitled to the “moral and social order, the love, tender nurture, educating of moral and intellectual of both parents” (page number). The argument in “Woman Free” wavers between women's and children's rights, and seems to yield to the rights of the child: though the topic is ostensibly “woman,” we find that one argument that runs through the verse is about “mother-love” by which “alone the infant oft preserved” (xv: 8). In *The Custody and Guardianship of Children, the Infants' Bill* (1884), Elmy

³⁸ So, used in this way, the term would mean legal control during marriage and both mother and father would be presumed to have equal rights to access as well as control if the marriage ended.

states, “As the law by death or misfortune of either parent is a real and irreparable calamity to the child, so does the recognition by any system of law, or of social ethics, of one parent and the exclusion of the other or even the subordination of the other, involve a fraud upon or a denial of the most just and natural claims of the child”; she goes so far as to argue that “deliberate and persistent neglect of parental duties by either parent justly involves the forfeiture of parental right” (3-4). Again, the argument for the mother’s rights yields to the argument for the child’s interests. Elmy acknowledges, in both a legal and a “natural” context, the rights of the child, the duty of parents, and the supersession of the child's rights over those of the parents. These writings crystallize the questions that the government was grappling with for two years before it rewrote and passed this bill.

In the end, the British government rejected the concept of presumed equal guardianship and introduced the concept of “welfare,” reinforcing the principle of best interests. The Court was unwilling to fully recognize the mother as a legal subject, although it started to recognize the child as such. While it did recognize the feelings of both parents, this act is known even more for further enlarging the role of the court in making custody decisions: “according to section 5, in exercising discretion on a mother’s application for custody, the first consideration was the welfare of the infant; the second was the conduct of both parents, not merely the kind of misconduct that would previously have forfeited the father’s rights, and when considering the whole of their conduct the parents were not to be treated in an unequal manner; the third was the wishes of both parent, so that the father’s wishes would not override the mother’s” (Maidment 130). Though the government formally rejected the concept of equal parental rights, Maidment points out that the act could be interpreted in such a way as to afford the court the ability to make

determinations that would resemble joint custody, but this was virtually unheard of.³⁹ Thus, due to the growing judiciary discretion over child custody, children became in a sense legally “divorced” from their parents: as wards of the Court, they were metaphorically “orphaned.”

Persons and Things

This legal history is part of the story of how a child became constructed as more of a “person,” and less of a “thing.” It also reveals just how tenuous and undefined the child’s legal status is. Legal scholar and philosopher Ronald Dworkin argues that the point at which a child has “interests” is the point at which a child is vested with “personhood” (18). Thus, we can look at the rhetoric of “interests” as the rhetoric of “personhood.” Dworkin understands the question of when “interests” develop as a moral, not biological one (22). Who makes that moral decision and how is it made? Part of the problem with a Court determining the legal custody of a child in accordance with the child’s “interests” is the oppositional impulses of “protection” and “equality” in terms of personhood.⁴⁰ Dworkin claims: “Protecting people . . . too weak to protect themselves is one of government’s most central and inescapable duties” (31). A child is literally, physically “weak.” But what about a child’s mind? Children could be compared to Dworkin’s account of the demented, who “cannot possibly know what is in their own best interests as well as trained specialists, like doctors can” (223). If this is the legal view of children, do children have a right

³⁹ There was such a case in the late nineteenth century in which the court divided the children’s time equally between parents, which I discuss in detail in Chapter Three in relation to Henry James’s *What Maisie Knew*.

⁴⁰ Another strand of this argument takes into account the nineteenth-century child protection laws, which I address in Chapter Four.

to autonomy? Protecting the weak or mentally incompetent is different than granting those entities legal equality and individual freedom.⁴¹

Autonomy is based upon “competence,” which Dworkin describes as “the ability to act out of genuine preference or character or conviction or a sense of self”: “Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent—but in any case, distinctive—personality” (225, 224). Indeed, the British nineteenth-century court system at times did recognize a child’s “competence” and “autonomy” in this very sense. The child’s own voice entered into legal (as well as literary) history: “even before 1839 in practice children as young as seven were sometimes called to judges’ benches in the Chancery Court to testify as to where and with whom they desired to reside—and a child’s choice was at times confirmed in the court’s decision.⁴² Affirming a child’s choice in his or her guardianship acknowledges childhood consciousness: children can know; children are worth knowing.

⁴¹ An interesting custody case in 1863 reveals some of the complicated relations among the Common Law and Chancery Courts, the unregulated discretion of judges, issues of parental rights, children’s welfare principles, and children’s competence. Although I have been charting a trend in the nineteenth century that ascribed “interests” to children and considered those “interests” to take precedence over parental rights in custody cases, there are cases that also contradict this trend. In the case of *Cooke v. Cooke*, Mrs. Cooke, using the “interests” principle, asked for custody of one of her children, “a boy of the age of twelve years who had been an idiot from his birth, and was under the control of the husband” in order to place him in an asylum, where, she believed, he would be better cared for. The motion was denied. The Judge responded: ‘where the wife is the innocent party, I consider that she is entitled to the solace of having the custody of her children. . . . Here Mrs. Cooke asks for the custody of the child, not as solace to herself but for the welfare of the child. . . . The application is one which would more properly be made to the Court of Chancery. I decline to interfere’” (*The Law Journal Reports* 32: 181). While the argument could be made that changes in custody fell under the domain of the Chancery Court, I can’t help but wonder whether the same outcome would have prevailed had the child been “competent.” Here, the Judge seemed willing, at least theoretically, to make a change in custody. That the Judge might have found for the mother’s interests implies that the perhaps the “idiot” child was not understood as having his own “interests.”

⁴² See Forsyth on this in chapter 6, “Liberty of Choice Allowed to Infants in Questions of Custody.”

Giving a child a legal voice allows a child to take part in the creation of its own family, as well as the shaping of its own self. However, this kind of agency for children was never fully realized. Sarah Abramowicz argues that 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” (1345). Indeed, nineteenth-century custody reform engendered a kind of curious category of childhood agency: the law claimed to recognize children’s rights while simultaneously limiting parental rights; yet it ultimately gave the court determinative power over children. It also ushered in a new category of child “experts” who claimed to know the child, know more than the child, and certainly more than the child’s parents. The law did not, and perhaps cannot, fully define a child’s “interests,” and likewise, did not and perhaps cannot, fully recognize and represent a child’s voice. If the law can only suggest that the child has a voice and state that childhood “interests” exist, then literature is the way the child’s voice and interests were (and are) expressed.

“The child” was, and is, a projective figure as much as it is a real entity. In 1900, Swedish feminist Ellen Key wrote *The Century of the Child*, translated from German to English in 1909.⁴³ In it, she figures the twentieth century as a “small naked child” (1), and she forecasts that the twentieth century will revere the child, and in doing so, will uplift the human race.⁴⁴ The first chapter is titled “The Right of a Child to Choose its Parents” (seemingly echoing and expanding

⁴³ A 2012 exhibition at the Museum of Modern Art in New York City took its title and inspiration from Key’s book.

⁴⁴ This extends Rousseau’s theory that the well-being of the child is necessary for the well-being of society. Shuttleworth notes that “Key was influenced by the writings of Rousseau, and by the child study movement, which has offered for the first time, she notes, the possibility of understanding the psychology of the child” (357).

the trend Forsyth notes fifty years prior). Through this title, Key suggests an argument toward the child's authority over its parentage ends up being more of a symbolic argument than a real one—and a disturbingly eugenicist one at that. “Doctors should be allowed to end the misery of any child ‘who is incurably ill, physically and psychically’: ‘Only when death is inflicted through compassion, will the humanity of the future show itself.’ Mankind should learn to act in the spirit of natural selection: not only criminals should be hindered from perpetuating themselves, but also those ‘with inherited physical or psychical disease.’ Only this way will the child have the ‘choice’ of parents it deserves” (Shuttleworth 356). Thus, the child is equated with the human race and with the futurity of the species. In a way less alarming than Key's proposition, the figuration of the child as human potential is a major development in nineteenth-century narrative. “The idea of the child,” Carolyn Steedman argues, “was used both to recall and to express the past that each individual life contained: what was turned inside in the course of individual development was that which was also latent: the child *was* the story waiting to be told” (*Strange Dislocations* 11).⁴⁵ As much attention that was and is given by new disciplines and discourses to more concretely and intimately know the child, the child was and is also a figure for all sorts of identifications, misidentifications, projections, desires—a cipher to invent and reinvent.⁴⁶ As Karen Sanchez-Eppler contends, “the figure of the child demarcates the

⁴⁵ Shuttleworth proposes a similar idea, but views this in a more depressing context by the end of the century: “Wordsworth's famous line ‘The child is father of the man’ receives reinterpretation in Hardy's *Jude the Obscure*. No longer does ‘father’ suggest the potentiality of life to unfold. Father Time might, according to [Alexander] Chamberlain's vision of the child, be an embodiment of both the past and future history of his race, but if so, the ‘prophecy’ he offers is a decisively gloomy one, where the weight of the past can overwhelm the future” (353).

⁴⁶ The child has become over time such a fetishized symbol—and somehow so threatening to ideas of personhood itself—that the legal definition of “unborn child” continues to be fraught, to say the least. Take for example the newly formed “Personhood USA,” whose “Primary Mission” is “being an Advocate for those who cannot speak for themselves, the pre-born child. We serve by starting/coordinating efforts to establish legal ‘personhood’ for pre-born children.” The website states: “When the term ‘person’ is applied to a particular class of human beings, it is an affirmation of their individual rights. In other words,

boundaries of personhood, a limiting case for agency, voice, or enfranchisement” (qtd. in Chinn 34). Identifying and debating the “interests” of “the child” in the nineteenth century became, and still is, a way to articulate contemporaneous cultural, national, social, psychological, legal, and literary preoccupations.

The question of the child’s right to individual freedom and the guiding principle of children’s welfare that was established and reinforced in the nineteenth-century are the same issues we grapple with today. Family therapist Ruth Bettelheim’s 2012 op-ed in the *New York Times*, “In Whose Best Interests?” reveals these similar concerns. Bettelheim argues: “Once children have reached the age of reason—generally agreed to be about 7—they should be recognized as the ultimate experts on their own lives. We all resent it when others say that they know better than we do how we feel and what is good for us. Nevertheless, we subject children to this when we call in experts to evaluate their lives over a period of days or weeks, as part of the custody process, instead of just listening to them.” We can see in her argument evidence of Locke’s formulation of the “age of reason,” the nineteenth-century conceptualization of the age of seven as a demarcation in the period of childhood that signals “consciousness” or “knowing” and “self-knowing,” as well as the nebulous nature of the term “best interests.” Bettelheim ultimately argues: “Children’s wishes should be decisive, in place of those of experts and judges, as long as at least one parent agrees with them.” These same issues that formed the crux of nineteenth-century custody reform—the expansion of the realm (and the authority) of the child’s own voice, the relationship with its parents, the child’s relationship with the court, the

to be a person is to be protected by a series of God-given rights and constitutional guarantees such as life, liberty, and the pursuit of happiness should be enough. . . . The intrinsic humanity of unborn children, by definition, makes them persons, and should, therefore, guarantee their protection under the law.” With regard to Key’s argument in the context of “right to life,” movements, Shuttleworth importantly notes that “it is instructive to note that the ‘rights’ of the unborn child have been associated with eugenicist thought: not a right to life, but to death” (356).

(imprecise) standard of “best interests,” and the creation of childhood expertise—form the contemporary parameters of the questions concerning child custody today, suggesting how irresolvable these issues are.

2. Inventing the Mother: Moral Crimes and the Maternal Plot

The temptation to abduct the children, lies with the woman who is driven to desperation by her inability to see or gain intelligence of them; who is writhing under the infliction of a compulsory separation from them, which the law cannot relieve; who knows *she has but one alternative*.
(Caroline Norton, *Plain Letter*)

Anne Brontë's *The Tenant of Wildfell Hall* has been termed by critics as "the first custody novel."⁴⁷ Yet, little has been written about the novel's connection to historical and legal issues of child custody and the developing conceptualizations of childhood in the nineteenth century. For example, Laura Berry writes about "custody" and "the child" metaphorically. Meanwhile, Neil Hayward Cocks notes that "childhood is a subject rarely broached by critics of the novel" and examines childhood as a textual device (1125). Brontë's novel, however, directly engages the very real legal custody debates of its time as well as the fight for, and the passing of, the 1839 Custody of Infants Act. With regard to scholarship on the intersections of law and literature, Ian Ward observes that the Brontës "remain pretty much untouched" (7), and, seeking to "excavate a subterranean literary jurisprudence" in *Tenant* along with other novels by the Brontë sisters (13), reads "the case" of *Huntington v. Huntington*, within the legal narratives of "reform of matrimonial property law, infant custody," and "domestic abuse" (47). While he does importantly begin to treat the novel in the context of this significant legal background, *The Tenant of Wildfell Hall* begs to be read much more closely and primarily alongside its contemporaneous custody battles and emergent custody law in order to recognize and examine the historical-legal issues with regard to children and the correlating aesthetic concerns that the novel engages. Published in 1848, the novel tells the story of a wife and mother, Helen

⁴⁷ For example, see Tamara S. Wagner, "Speculations on Inheritance."

Huntington, who, with her five-year-old son, flees her alcoholic, abusive, and adulterous husband in order to protect her son from his father's corruption. Much of the story is narrated through the mother's point of view as written in her diary. Though the novel was published in 1848, Helen's account takes place in 1827, before the passing of the first Custody of Infants Act in 1839. Indeed, like many of those real mothers living in the reality of the state of the law concerning children in the early nineteenth-century, Helen's actions were in part determined by legal limitations. At this time, mothers in abusive marital circumstances were faced with untenable choices: stay in the marriage, leave with their children and live as fugitives, leave (or be made to leave) without their children. These mothers' stories have not been part of the dominant historical narrative.

This chapter addresses the stories of some of these mothers and children from the perspective of both law and literary narrative. Legal and literary scholar Peter Brooks, argues an essential difference between what the law can do and what narrative can do. Narrative, he argues, can be used

as a vehicle for dissent from traditional forms of legal reasoning and argumentation. In this view, storytelling serves to convey meanings excluded and marginalized by mainstream legal thinking and rhetoric. Narrative has a unique ability to embody the concrete experience of individuals and communities, to make other voices heard, to contest the very assumptions of legal judgment. Narrative is thus a form of countermajoritarian argument, a genre for oppositionists intent on showing up the exclusions that occur in legal business-as-usual—a way of saying, you cannot understand until you have listened to our story. This currently popular use of narrative in legal discourse bears analysis for

both its revisionary force and its limitations. (“Law as Narrative and Rhetoric”
16)

The Tenant of Wildfell Hall participates in this kind of revisionist argument. In the preface to the second edition of *Tenant*, Brontë states, “My object in writing the following pages, was not simply to amuse the Reader, neither was it to gratify my own taste, nor yet to ingratiate myself with the Press and the Public: I wished to tell the truth, for truth always conveys its own moral to those who are able to receive it. . . . I would rather whisper a few wholesome truths therein than much soft nonsense” (3). About her specific subject, she writes, “the case is an extreme one, as I trusted none would fail to perceive; but I know such characters do exist, and if I have warned one rash youth from following in their steps, or prevented one thoughtless girl from falling into the very natural error of my heroine, the book has not been written in vain” (4). In part, the truth is a cautionary tale for young women, like young Helen, who misread male suitors, only to later find themselves asking “what shall I do with the serious part of myself?” when it is already too late (170). In part, it is a study of a mother’s devotion to the welfare of her child, as well as the child’s need for the care of its mother, which was previously unrecognized either in the law or literature. In this chapter, I explore not only Brontë’s novel, but also various historical case studies, including two legal cases, *Rex v. Greenhill* (1836) and *In Re Spence* (1847), and the nonfictional diary and letters of Ellen (also known as Nelly) Weeton, written between 1807 and 1825. These narratives share major similarities, including corresponding plot elements: mothers and children living under the rule of an abusive father, the threat of a potential kidnapping of the children by the father, the plotting of the mother to run away with the children, and the influence of an intervening male figure. Each similarly develops the rhetoric of a mother’s love and the

necessity of the mother to the child, which prioritizes the child's needs over the mother's feelings. They raise similar questions over the conceptualization of the child as a body to possess or as an independent consciousness. There are analogous elements between affidavit, diary, and novel in terms of genre and narrative form. Finally, each uses an editor figure to legitimize or de-legitimize these mothers' stories. Taken up together, these case studies along with the novel construct an alternative history, and these historical sources recontextualize Brontë's novel.

The plot of the nineteenth-century novel is often about the formation of new families. What is particularly interesting in *Tenant* is the unusual construction of this specific family. That is, embedded within the two marriage plots is another one: the making of a new family of two, mother and child. If we consider that the marriage plot both constitutes one of the dominant narratives in nineteenth-century novels and provides the basis for the family structure, *The Tenant of Wildfell Hall* both uses the tradition and serves as an anomaly. It does "plot the failure of marriage" as Kelly Hager argues (5), and it also plots another marriage, or remarriage in this case, between Gilbert and Helen. Within her argument about the nineteenth-century divorce plot, Hager offers a reading of the child as a device a wife could use to "justify her decision to leave her husband" (28). I read the use of the child in this novel as generative: that is, not as a cover for the wife's true desires, but as a justification in its own right—one which participates in a new way of thinking about children and configurations of families. Figured as maternal obligation, the prioritization of the duty to the child (as opposed to the marital duty) generates the novel's plot.

This "maternal plot," as I am calling it, exposes the tension between Victorian maternal ideals and Victorian laws concerning women. In *Tenant*, laws and moral values conflict. Both marriage and divorce become unethical choices with regard to the care and concerns of the

children. Legal scholar Lucia Zedner argues that the “prescriptive ideology of femininity in Victorian England gave women an important moralizing role: not least the responsibility for maintaining the respectability of their family.” Thus, women were typically convicted for “crimes of morality”: “women’s crimes contravened not only the law but, perhaps more importantly, their idealized roles as wives and mothers” (2). “Alongside the State, the Church also regarded the family as both a source of moral values and a means of protecting them” (Zedner 13). Brontë’s Helen Huntington, though a legal criminal, is not a moral one: she is an exemplary mother, and her maternal motives are the same as those of the state in that she wants to maintain a child’s innocence and uphold traditional familial values. Legally, children, as well as married mothers, were virtually imprisoned within the familial framework. In the novel, the dissolution of and the subsequent radical reconstitution of the family is the only way to maintain morality. Paradoxically, choosing to be a morally responsible mother necessitates becoming an unlawful wife. Historical evidence reveals that this legal quandary was not just a fictional one. Due to the legislation (and lack of legislation) regarding divorce and custody, other—possibly many—mothers absconded with their children. These women, like Helen Huntington, lived their lives as outlaws. As much as the novel seems concerned with privacy and appears to keep secrets, Brontë makes this outlaw plot, and this mother’s representative plight, public. This previously unrecognized context shows *Tenant* to be both historically specific and simultaneously aesthetically innovative. When read alongside these other historical materials, the novel’s rewriting of a marginal (and criminal) woman as mother-heroine, its focus on the well-being of the child, and its exposure of the hidden corruption of domestic life (which had been in part perpetuated and concealed by the law), renders the novel not just brave or rebellious, but downright heroic.

Runaway Mothers: Case Studies

In the early nineteenth century, mothers were taking action despite the lack of custody law and outside of legally sanctioned means. These mothers' stories—as well as the kind of rhetoric these mothers were developing to defend (and define) their actions and to argue for legal change—must surely have influenced Brontë.⁴⁸ Some biographers of the Brontës have cited the experiences of a Mrs. John Collins, wife of a Busfield's curate in Keighley, who sought advice from Patrick Brontë, as a possible source for *Tenant*. Charlotte mentions Mrs. Collins in two of her letters to Ellen Nussey. In a letter dated “12 Nov 1840,” Charlotte wrote that during one of her visits, Mrs. Collins told “of her wretched husband's drunken, extravagant, profligate habits . . . [and] there was nothing, she said, but ruin before them . . . she knew from bitter experience that his vices were utterly hopeless. He treated her and her child savagely; with much more to the same effect. Papa advised her to leave him forever, and go home, if she had a home to go to. She said this was what she long revolved to do; and she would leave him directly” (qtd. in Barker 400). Several years later, in April 1847, Charlotte wrote that Mr. Collins had abandoned his wife “to disease and total destruction in Manchester—with two children and without a farthing.” Upon another visit from Mrs. Collins, who was “still interesting looking and cleanly and neatly dressed,” in which she told Charlotte “the narrative of her appalling distresses,” Charlotte proclaimed that Mrs. Collins's “constitution has triumphed over the hideous disease—and her excellent sense—her activity and perseverance have enabled her to regain a decent position in society and to procure a respectable maintenance for herself and her children” (qtd. in Barker 400-401). Biographer Juliet Barker, claims that “Anne seems to have been especially

⁴⁸We now know that this language eventually worked since it became part of public discourse and dominated late twentieth-century custody rulings.

fascinated by the fact that Mrs. Collins had not only survived the degradation of her marriage but emerged as an independent and morally strong woman—and in doing so had saved her children from corruption at the hands of their father” (626).

The experience of “appalling distress” that Mrs. Collins had with her husband and children, and the choices she had to consider were most likely not so unusual. The first letter Charlotte wrote about Mrs. Collins was in 1840, the year after the first Custody of Infants Act. Before the custody acts and subsequent case law (which is when Helen’s narrative in *Tenant* takes place), an equity court could interfere with a father’s rights to custody only if the child had property and was in “immediate danger of life and limb.” Thus, it is reasonable to conclude that women stayed married for fear of losing their children. Some historians assume that many couples simply separated, but this notion is challenged by the logic of the law: in the circumstance of an informal separation, the father would nonetheless retain legal custody of the children. Even if living apart, legally married women were still bound by the coverture laws that governed marriages and had no avenue with which to seek legal redress. There are only a small number of divorce cases to be found before the introduction of the Divorce Court in 1857 to provide evidence: one of the main reasons may be that the cost of a Parliamentary divorce was prohibitive for most people since “it involved three distinct legal cases: one for separation in the ecclesiastical courts; one for damages for crim. con.⁴⁹ in the common law courts; and one for divorce in Parliament” (Stone, *Road* 355). Historian Lawrence Stone explains: “Between 1700 and 1800, no wife even attempted to break the male monopoly of Parliamentary divorce” (360). In 1801, a Mrs. Addison “introduced a bill for divorce from her husband on the grounds of his

⁴⁹ “Crim. con.” or “criminal conversation” was a civil action by a husband against his wife’s lover on the grounds of adultery. If the husband prevailed, he was awarded damages (which further instated women as property).

incestuous adultery with her married sister.” Supported by two eminent lord chancellors, she unexpectedly “persuaded Parliament to break all precedents and to pass the first divorce bill submitted by a woman” (Stone, *Road* 360). In spite of this however, the handful of wives who subsequently tried to do the same did not prevail: “The one who came closest to success was Mrs. Moffat,” whose husband “had been unfaithful to her on their wedding night, had debauched all the maidservants in the house, had given his wife venereal disease, and was constantly drunk” (360-361). Stone notes: “In the thirty years from 1827 and 1857, only three petitions by wives were successful” (362).

Given these circumstances, runaway wives were, in all probability, not such a rarity. History suggests that there were countless wives we can never know about who fled abusive marriages and lived as fugitives with their children. Legal scholar Susan Maidment accounts for this supposition:

Social historians recognize the paucity of information about the family lives of all classes of society even in the nineteenth century but it can be assumed that custody disputes between separated couples which came to the courts must have been the very tip of an enormous iceberg. Wife sale occurred, and the desertion of wives may have been widespread, as may have been wives voluntarily leaving violent husbands. The actual number of marriage breakdowns is therefore likely to have been far greater than the number of divorces, magistrates’ court orders or custody cases would indicate. And the Victorian ideal of wifely domesticity would probably have resulted in most women taking their children with them, despite the official and legal recognition of paternal rights to custody. The conflict then between patriarchal rights and mothers’ claims to take care of children would

probably not arise often in practice, even perhaps where the wife was guilty of adultery. The cases where courts were called upon to settle custody disputes arose where the father chose to insist upon his “sacred rights” to custody of his children, probably in order to control the child’s property, or out of malice or spite (as in Caroline Norton’s case in 1837), or later in the century for religious reasons (as in *Re Agar-Ellis* (1883)). (154-155)

We can assume that many, if not most, mothers did not bring their disputes to court. Thus, wives and mothers had to find other means to resolve conflict, escape assault, and maintain relationships with their children.

There are two legal cases in particular brought on by fathers that are significant in this context, which can be used as evidence for Maidment’s claims as well as context for Brontë’s novel: *Rex v. Greenhill* (1836) and *In Re Spence* (1847). Both cases involve mothers fleeing the marital home and taking their children with them; each has a different outcome. In both cases, the fathers demanded delivery of the children by their mothers into their own custody using the law of *habeas corpus*. Latin for “that you have the body” and with origins in common law, *habeas corpus* dates back to the Magna Carta. *Habeas corpus* was used to protect persons from illegal detainment or imprisonment, thus protecting individual freedom. *Habeas corpus* recognizes personhood and acknowledges an essential right of the liberal subject: ownership over one’s own body. However, it was increasingly used by fathers in the nineteenth century in order to claim their paternal rights to their children. The application of the law in this way is fundamentally contradictory, since the law is meant to bring an individual back to his or her rightful state of liberty. As we will see, a father using it to claim a child is comparable to a kind

of legalized kidnapping. But to use this law at all with regard to children is problematic since children can never be the full owners of their bodies.

Preceding the *Greenhill* and *Spence* cases in the legal lineage of *habeas corpus* cases was *Ex parte Skinner* (1824). In the *Skinner* case, a child had been in the custody of a third party, but taken by force by its father. The court (while implying that it might be able to deliver a child to its mother from a third party) found that it did not have the authority to remove the child from the possession of its father. Thus even an unfit father had a better chance of keeping custody of his child if he already had the child in his possession—regardless of the means he took to get it.

Danaya Wright notes:

By 1827, both law and equity courts had made an important distinction between their ability to give the child to the father when the child was improperly restrained by someone else (including the mother) and their ability to take the child from the father, regardless of how he obtained possession. This distinction encouraged *fathers to kidnap their children*, even by force, which was apparently not viewed as evidence of ill-treatment. For if they once obtained custody, even sending the child to school would constitute a continuation of paternal control and would require a heightened showing of ill treatment to justify interference.

(“Crisis” 197, my emphasis)

That is to say, if a father already had physical custody of his child, a higher threshold for child endangerment would need to be met for a court to order his removal. *Habeas corpus* was used to “produce the bodies” of children, but encouraged paternal kidnapping when used in this way.

Applied to child custody, *habeas corpus* highlights the contradiction between two different notions of the child's body: the body as object to be produced versus the body in self-possession.

The notorious *Greenhill* case was widely publicized and its final verdict became a source of outrage in both England and America.⁵⁰ In several of her writings, Caroline Norton used the contemporary case of Mrs. Greenhill, who ultimately fled England with her children, as an example to bolster her own argument and from which to differentiate her own case. In 1835, Mrs. Greenhill, having three daughters all under the age of six, found out that her husband, "Mr. Greenhill had, during the years 1834 and 1835, lived in continued adultery with a Mrs. Graham, cohabiting with her at various lodgings in London and at Portsmouth" (*Rex v. Greenhill* 442). The couple even went so far as to hold themselves out as husband and wife, sometimes as "Mr. and Mrs. Graham," and sometimes as "Mr. and Mrs. Greenhill" (*Rex v. Greenhill* 442). Apparently, Mr. Greenhill had been away from his own home and family for so long that one of his children asked Mrs. Greenhill's uncle "if *he* was papa" (Norton, *Separation* 60). With the help of her brother, Mrs. Greenhill settled herself and three children under the protection of her mother. She proceeded to file for a separation and alimony in the Ecclesiastical courts. When her husband found out, he, through a letter from his attorney, demanded the return of the children, along with other objects such as "all of Mrs. Greenhill's jewels" as well as "the carriage" she took (Norton, *Separation* 57). When Mrs. Greenhill did not obey, Mr. Greenhill moved for a writ of *habeas corpus*, claiming the "custody and *possession* of them as a right, which he would not in any way abuse."⁵¹

⁵⁰ Information on the Greenhill case that is not parenthetically cited is gathered from Norton, Wright, and *Revised Reports*.

⁵¹ Strangely enough, Mr. Greenhill's attorney was Sergeant Talfourd, who later championed the bill that became the first *Custody of Infants Act* (1839), also known as the Talfourd Act. Mr. Greenhill suggested the children would have no contact with Mrs. Graham and that his mother would raise them. "In the

In a bold but seemingly prudent move, Mrs. Greenhill turned to the law for help in protecting her children: she settled property on the children and thus petitioned to have them made wards of the Chancery Court, and to have a “fit and proper” guardian appointed by the Court (*Rex v. Greenhill* 442). Though the public—as well as common sense—was on the side of Mrs. Greenhill, the Vice Chancellor found that “however bad and immoral the conduct of Mr. Greenhill might be, unless that conduct were brought so under the notice of the children as to render it probable that their minds would be contaminated, the Court of Chancery had no AUTHORITY TO INTERFERE with the common law right of the father, and that he had not THE POWER to order that Mrs. Greenhill should even SEE her children as a matter of right” (Norton, *Separation* 61). The shocking irony in this application of *habeas corpus* is that fathers could and did use it to claim the bodies of their children, as if those bodies were an extension of the fathers’ own selves, and kidnap them under the aegis of a law designed to set people at liberty.

The Greenhill case is an example of the competing ideologies of family values in this period: a father’s right to children versus a mother’s care of children. In the case, the father is figured as the possessor of the child’s body whereas the mother is figured as the producer of the child’s well-being. The language used by both parties is significant because it considers the children in very different ways. Mr. Greenhill simply wanted his wife to “produce the bodies” (*Rex v. Greenhill* 440), understanding that he owned them. But, after the father’s petition was

notorious case of *Ball*, in 1827, involving an adulterous father, and a mother who had already gained an ecclesiastical separation, the vice-chancellor of the Court of Chancery confirmed that “the court has nothing to do with the facts of the father’s adultery, unless the father brings the child into contact with the woman” (Ward 35). *Ball v. Ball* is yet another case in which a father kept a child from her mother, and having taken place in 1827, may also have influenced Anne Brontë. As Caroline Norton described it: “THE QUESTION REALLY IS, WHETHER A CHILD SHOULD BE DEPRIVED BY THE BRUTAL CONDUCT OF THE FATHER, OF THE COMPANY, ADVICE, AND PROTECTION OF A MOTHER, AGAINST WHOM NO IMPUTATION CAN BE RAISED” (*Separation* 51).

granted and his right was acknowledged by the Court, Mrs. Greenhill refused to comply: her lawyers argued that “the health and comfort of her three infants (under the age of six years), will be destroyed by their removal from her care, she prefers sacrificing *herself*, if it be called for, rather than so sacrifice her *children*; being well-assured, that their removal is with the ultimate intention of excluding her from all communication with them” (Norton, *Separation* 62). Her affidavit stated, “the children had been always brought up under her personal superintendence and care, and that, without her personal attention, their health and comfort would suffer” (*Rex v. Greenhill* 443). Her argument makes no claim for herself as having rights to possession of her children:

she only desired permission to continue bestowing upon her children the same personal care and attention which they had hitherto received from her, and which was necessary to their welfare. . . . She further stated that she would consent even to relinquish the custody and control of the children, if, by the rule or other direction of the Court, she might be assured of permission to give them her personal care and attention during their tender years. (*Rex v. Greenhill* 444).

When the Court affirmed the original ruling for the father, Mrs. Greenhill was left with no good option and, “becoming alarmed lest [the children] should be seized from her, [she] withdrew precipitously and left the kingdom, taking with her three little girls” (Norton, *Separation* 63). As Norton accurately claimed: “she is either to be an exile abroad, or a prisoner in England” (*Separation* 70).

In Re Spence (1847) reveals the development of *habeas corpus* and the relationship that was constructed between *habeas corpus* and *parens patriae*.⁵² Like the father in the *Greenhill* case, the father in the *Spence* case used *habeas corpus*, which, up until this time, had been a winning strategy for fathers. However, *habeas corpus* was used in the *Spence* case to extricate the child from both of its parents. But freeing the child's body from the father's did not necessarily provide direct access to the child for the mother. As the father once mediated the relationship between mother and child, the court came to mediate the relationship between both parents and their child. Potentially a parent's ally, the court could also function as a parent's adversary—and we see both of these outcomes in *In Re Spence*. In the case's first hearing, the Vice Chancellor granted the father's petition for *habeas corpus* and an order was made for the delivery of the children to the Court. However, in the appellate hearing, the Lord Chancellor overturned this verdict, using *habeas corpus* instead to bolster the court's role as *parens patriae*.

Christopher John Spence and Elizabeth Christiana Davidson were married in 1839. Prior to the marriage, they agreed to a settlement that gave Mrs. Spence the separate right to use the interest from certain funds that were established at the time of the marriage for both parties. At the time of the first petition, the funds were overseen by two trustees, one of whom, James Christopher Davidson, was a brother of Mrs. Spence (*Law Journal* 309). In 1842, Mr. Spence renounced Protestantism and became a Roman Catholic. Apparently at this same time, his business was breaking up and the family's livelihood and living situation were uncertain. While Mr. Spence was away, Mrs. Spence, pregnant with her third child, left with her two children with the help of her brother: "The affidavit of the brother stated, that the cause of his sister's flight

⁵² Danaya Wright has noted the similarities between *In re Spence* (1847) and *Tenant*: In both cases a wife, prompted by an immoral and abusive husband, and with the help of a brother, flees the home with the children, and is forced to live as a fugitive in order to keep custody of her children ("Crisis" 230).

with the children was not merely her husband's change of religion, and the apprehension she felt that he would execute a threat which he had frequently made, of taking them from her for the purpose of bringing them up in the doctrines of Roman Catholic Church, but also the harsh and unfeeling treatment she had received from him ever since their marriage" (*Reports* 249). At the time Mr. Spence petitioned the court, Mrs. Spence was living with her children in hiding. Mrs. Spence's brother, Mr. Davidson, and the other trustee, W. C. Newby, were in contact with her in order to remit the dividends of her settlement to her. Mr. Spence made a petition for *habeas corpus* against the mother, her brother, and the other trustee for the delivering up of the three children to the Court.

Unlike the Greenhill case, in which the mother had to settle property on the children for them to be considered wards of the court, the *In re Spence* appeal determined that the Chancery Court had the authority to interfere with all children because they are children and because they are subjects of the nation. In his ruling, the Lord Chancellor asserted, "The cases in which this court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of *any* body who is improperly detained. This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the crown as *parens patriae*, and the exercise of which is delegated to the great seal" (*Reports* 251). Thus, in this case, *habeas corpus* was superimposed on *parens patriae*, which affected future custody rulings. Under *habeas corpus*, the child's body, which was once treated as part of its father's body, was increasingly becoming part of the body of the nation.

Interestingly, in this ruling, the Lord Chancellor did not find for the father, stating that "[the mother's and children's] departure took place in September, 1843. The father, though he knew the circumstances, did not consider at that time that he had any case to make against" Mrs.

Spence's brother (*Reports* 253). Finding Mrs. Spence's brother, Mr. Davidson, to be a "mere witness," the Lord Chancellor did not hold the brother culpable for any wrongdoing by helping Mrs. Spence, or accountable for returning the children, asking, "Is there any thing to lead to the inference that [Mr. Davidson] is now in a condition to restore the children? The mother is probably living abroad; he, at Stockton" (*Reports* 253). This appellate judgment raises several questions: Did the physical removal of the children's bodies from the country help sever their legal ties to (the father and) the nation? Was a married woman's lack of legal personhood helpful in her aiding her concealment? Was this perhaps an implicit recognition of the importance of the mother-child relationship? If the father were Protestant, and not Roman Catholic, would his petition have been granted? That the mother got away (both physically and legally) is noteworthy not just in terms of the authenticity of the plot of *Tenant*, but even more so in terms of its implications of the implementation of the court as *parens patriae* in the context of *habeas corpus* (and the resulting expansions and limitations on the court's jurisdiction): the real issue is, who are the parents? Are they the biological parents? Is it the court (as an arm of the nation)? The court was no longer just adjudicating custody, it was also adjudicating parental identity itself and, the way *habeas corpus* was used in this case ended up influencing future cases under the custody acts. It also set the standard that then became part of the 1886 Guardianship of Infants Act. Thus, this judgment significantly expanded the custodial relationship of the Court to include all children of all classes. Moreover, it doesn't seem likely that the outcome would have been the same had the mother remained in England. Clearly, in order to realize custody of her children, the mother had to not only flee from her husband but escape England's court as well.⁵³

⁵³ This supports the veracity of Norton's statement concerning the Greenhill case.

Ellen Weeton's Diary

Like Caroline Norton, Ellen Weeton was a mother in a violent, and even sadistic, marriage, who was cast out by her husband and forced to abandon her daughter Mary. (Unlike Norton, she was not, nor did not become, a public figure.) There has not been much critical attention given to Ellen Weeton's writing or even to Weeton as a maternal figure, in the example she provides of an individual affected by the lack of child custody laws. For the most part, the literary critics who have looked at Ellen Weeton's life frame it in the context of *Jane Eyre*, concentrating on the four years Weeton worked as a governess. I read her as much more relevant to *Tenant*: Weeton and Brontë portray two different outcomes for mothers under a similar set of circumstances. Not only do their stories share similarities, but they share the narrative form of the diary, which is a particularly important genre in terms of legal evidence. Although married mothers were not allowed to testify in court (since, under coverture laws, wives were not legal "persons"), women's writings, including affidavits attached to motions as well as (what was assumed to be) private writings such as diaries, could be admitted as evidence. This public and authoritative use of women's writing changes previous held assumptions about diaries and, in particular, mothers' diaries.

The diary was a ubiquitous genre in the nineteenth century. It is traditionally understood within the context of life-writing: "as a site for self-examination and as a tool for self-management" (Millim 2). Critics have suggested that the form of the diary "challenges the sense of an audience," and that a diary is a "text without an addressee" (Delafield 12). Diaries have been understood as private (or "symbolically private") works of writing (Carter 251). More recently, Anne-Marie Millim has suggested that distinguished writers (who were also public figures) were well aware that their diaries might be published and thus, while considering

themselves as objects for examination, these diarists were also constructing public authorial personas. Consideration of the little-known letters and diary of Ellen Weeton, written between 1807 and 1825, suggests that the diary is a particularly potent form for a marginalized individual—or marginalized relationship between individuals, as it were. And, as we shall later see, this reading of the form can also be applied to *Tenant*. Although Weeton's writing claims authenticity, it is not private self-expression. Weeton did not just write letters to her absent daughter, Mary, but rather wrote her diary expressly "for Mary," explaining: "In writing a History of my own life, some apology would be necessary if I intended it to be made public; but as I only intend it for the perusal of a few, and of my own child in particular, I shall say little more here than all I write is the simple and entire truth. It seems probable from present circumstances that my child 'will know no more of her mother than what she may learn from these pages'" (1: 3). Thus, in becoming the subject of her own writing for her reading daughter, Weeton procures a textual mother for her.

Weeton kept her writings in secret during her lifetime, and at times expressed concern over the future security of them. But, despite her claims to the contrary, Weeton most likely wrote to be read by others as well (most likely after her death). According to her will, Weeton bequeathed nine volumes of journal entries and letters, a "religious diary" entitled *Occasional Reflections for the year 1818*, and a fragment entitled *The History of the Life of N. Stock, 1824* to her confidante, Reverend William Marshall. Weeton's diary engages the relations between writing and parenting, text and child, language and loss, and the diary as documentary evidence in the historical-legal conditions of child custody in the early nineteenth century. Weeton's writing functions as a substitute for the relationship with her child and as a form of agency. As

such, it suggests writing, in and of itself, as a form of maternal action, which also has implications for *Tenant*.

Weeton's story became known in 1925 to Edward Hall, a book dealer and collector, who happened upon one of her copy books in a bookshop in Wallgate, which contained her transcribed correspondence and journal entries from 1807-1811. Several years later, Hall found other volumes of Weeton's that contained letters and entries from 1812-1818 and 1822-1825, and published that as a second volume, filling in gaps with his own research, and revised the former edition. The first volume was published in 1936, the second in 1939. Both were republished and edited in 1969 by J. J. Bagely. In his forward, Hall meticulously rearranged the writings chronologically: "The method adopted for publication in the arrangement of this voluminous correspondence has been to allow Miss Weeton to unfold her own story in such extracts from her Letters and Journal" (1: n.p.). Born in 1776, Weeton was involved in helping her widowed school-mistress mother by teaching in her village school by the age of twelve. When her mother died in 1797, Weeton sacrificed her own personal income to contribute to the clerkship of her younger (and only) beloved brother, Tom, who became an attorney.⁵⁴

In 1814, with her brother's encouragement, Weeton married Aaron Stock, a widower, whose son from his first marriage had died. Marrying off his sister allowed Weeton's brother access to the inherited income they both would have shared. The marriage produced one child, Mary, named after Weeton's mother; but other than for the child Weeton's marriage turned out to be horrific: Stock kept his wife without money, without enough clothes, and without sufficient food. He regularly turned Weeton out of the house (Weeton took her daughter with her). Though

⁵⁴ Leonore Davidoff, in *Thicker than Water*, writes about Weeton's relationship with her brother. With regard to the responsibility of brothers and sisters in adulthood, see Davidoff's Chapter 6. Davidoff notes how brothers were "intermediaries in the courtship process" (2: 135), which is relevant to both Weeton and *Tenant*.

he verbally and physically abused his wife, and though she did at times flee the house, she always returned under the continual threat of “being sent to a Lunatic Asylum,” the “Prison,” and the “Gallows” (2: 176, 177, 183). Though Weeton quickly became disappointed with her marriage, she found happiness and fulfillment in her daughter, and appeared content and even pleased with Stock’s involvement with their child. She writes, “I am at present chearful in mind and well in health. My little Mary, now 2 years and 8 months old, is a most animated, interesting little girl; her father’s whole soul seems wrapped up in her” (2: 169). Soon after, however, their daughter, Mary, became an object of controversy and a pawn to be played. Summarizing parts of Weeton’s writing that he didn’t include, Hall writes, “Mary was old enough, apparently, to become an additional bone of contention, and either through perverseness, or in an honest desire to engage the affections and undivided duty of possibly the last of his legitimate children [Hall notes here that Stock had publicly a “kept mistress”], Aaron Stock evinced a desire to wean the child away from her mother, and to give her the benefit of an education which must inevitably deprive her of her mother’s influence for long periods” (2: 172-173).

Weeton’s brother is an interesting and particularly cruel and nefarious figure with regard to the child. Historical records show that brothers were “intermediaries in the courtship process,” and court reports of custody trials reveal brothers intervening and testifying as witnesses on behalf of their sisters⁵⁵ (Davidoff, *Thicker than Water* 135). So, it was not uncommon that a woman in this situation would turn to her brother for help. Weeton did just that. In a letter to her brother, she frames her supplication with what she cites as others’ suggestions: “Why do you not apply to your brother? As your brother lives so near, it is his duty to protect an only sister from the ill-usage of an unkind, unfeeling husband” (2: 161). Though it seems that Weeton’s brother

⁵⁵ This occurs in *In re Spence*, for example.

Tom might have helped her a bit in the beginning of her ordeal, he was the one responsible for the “Deed of Separation” which not only separated husband and wife but mother and child.

Weeton seems to have been duped into signing this agreement because of assurances made to her by her brother. Weeton notes, “After I had seen the Draft, Jan^y 1822, I wrote to my brother to make some inquiries respecting the restrictions, & c., but said nothing as to the income. To this he never returned any answer to me, considering himself to the last as not my legal advisor and persevering in his refusal to be so” (2: 181).

Indeed, Tom not only refused to aid his sister, but became Stock’s attorney and, according to Weeton, “advised him to insist upon harder terms than he would have done” (2: 183). She accuses him, “you advised Mr. Stock to get the Deed drawn and signed on his part, and then presented to me to sign, so that I could not be allowed to read it—only to hear it read. I had no alternative but signing in ignorance—or starvation, a lunatic Asylum, or a prison. Dreadful alternative! I signed . . . and I find I have for ever signed my child away!” (2: 183). Not only was her time with her child severely restricted—to three visits a year, it was also supervised by the headmaster of Mary’s school and his wife, aptly named Mr. and Mrs. Grundy. The Grundys, for the most part, were constrained by Tom’s directions to them. Weeton claims: “I would never have signed such an infamous Deed as the last, for your positive assurance that I could see Mary at any time. . . . Mr. Grundy has received positive orders not to let me see her, and is threatened, if he does, that she shall be removed where no one shall ever know where she is except her father” (2: 185). This is an example of the kind of all-too-common threat of paternal kidnapping that happened with regularity at the time. As we have also seen in the examples of the *Greenhill* and *Spence* legal cases, and as we will see in *Tenant*, the threat of child loss works both ways: if the

mother doesn't remove the child, the father will, either by physically relocating the child or casting out the mother.

Weeton's writing took on more significance in the context of the loss of her child. Weeton began writing letters to her daughter—it appears many were intercepted, but many were not. The letters not only offer maternal advice, but they establish the absent mother's love. Weeton does this in part by narrating her way back into Mary's life, by parenting through writing. One early letter that was accompanied by a doll is particularly significant and psychologically compelling. Weeton writes that she has sent her daughter a "little servant," about whom she states: "Her name is Ellen. I am afraid you will have a great deal to do to teach her, for she has never been in service before; but she is perfectly honest, no rambler nor a tell-tale, and as to her indolence, if you set her a good example, it may perhaps have a wonderful effect. I have made her a few cloaths, and furnished your cradle, and it has amused me very much; for indeed it is a pleasure to me to do anything for my little darling girl" (2: 174). Weeton figures Ellen, the doll—an object with her own name, passed through her own hands, and clothed by her—both as a maternal figure and a child. The doll becomes an object of transference, a kind of fetish. In doing this, she provides a path for her child to forge a bond of attachment with her. Though Weeton is physically absent, Mary can thus internalize the mother-child relationship, and by doing so experience her mother's presence. The letters, as objects of metonymic transference, function much like the doll, as figurations of the mother.

Weeton's story provides an example of one of the arguments that led to the passage of the 1839 Custody Act, which is that a mother is of special importance to the child (and not replaceable by a third party, as often happened). Eventually Weeton found ways to physically see her daughter during some of her school outings. During this time period, she developed

arguments about the parenting and education of a child. After fourteen months of estrangement, Weeton realizes that her daughter does not recognize her, and she finds Mary to be “exceedingly pale and thin.” But, “[b]y degrees,” she recounts, “we became more and more affectionate, and she chatted with me quite familiarly. My heart ached to discover a very wrong system of education pursued for my child; but I must submit to it in silence. *No father is fit to educate a daughter*, and Mary is only preparing for a sickly life, filled with vanity, pride, trifles—and a premature death. Poor, poor Mary, thy lot and mine is very sad!” (2: 228). One recognizable piece of evidence that reveals the father’s ill usage of his daughter is that Mary spent holidays not with her mother, but rather at home “with a *kept mistress in her mother’s place*” (2: 193). As Weeton argued to her husband, “If you sincerely loved her you would study *her* comfort and satisfaction. When in your house, what female society has she, capable of giving her proper instruction—none. Too ignorant are they, and of language and manners not for her to copy; and when she leaves school, she must come home to be the companion of servants” (2: 229). Weeton argues (like Caroline Norton and Anne Brontë after her) that the maternal role is not optional but obligatory: “Let me have free access to my child, that I may do a mother’s duty to her, and which she really stands in need of” (2: 248). The special role of mothers is a mix of the essential—that is, the mother has intuitive sense of daughter’s need—and the social—the mother is of the proper class and is morally fit to associate with the daughter.

While arguing maternal duty, Weeton’s own grief over the loss of her child is palpable. In one letter to Stock, she discloses: “I am childless—yet my child is not dead” (2: 229). And though steeped in her own sorrow, she pleads with Stock on the grounds of their child’s deprivation. Writing to and “for Mary” becomes a consolation, a recompense for her grief. In a way similar to how she imagines the doll she sends to Mary, Ellen Weeton’s writing becomes a

way for her to internalize her relationship with her absent daughter. Though many of the letters did not make it to their addressee, Weeton devised various ways they might, including both direct and indirect appeals to Mrs. Grundy and appeals to Stock. But throughout, Weeton kept up writing letters to her child, recounting her life in intimate detail, and because she received no response she had to both imagine and construct her reader. Through her struggles with writing and writer's block, she comes to cognitively reframe this relationship: "I have long contemplated writing a History of my life, and yet deferred it from month to month from what must appear a very strange reason by any one who sees the quantity of my writings – the reluctance I feel to attempt writing . . . whether it proceeds from indolence, or some other undefinable motive I cannot say; but whether I have a letter to write, a journal, or an account, it seems a task to me, and yet my mind perpetually urges me to it" (2: 254). Later on, she confesses, "This day I arranged my books and writing materials on my table, determining to begin, when such a depression of spirits seized me at the melancholy retrospect that I could not commence. I wept, I trembled, and my soul utterly refused comfort; like Rachel, I wept for my child" (2: 254).⁵⁶ And still later, she concludes, "It is for my daughter's sake I am desirous to do it, and on her account I feel it absolutely necessary" (2: 254-255). Here, writing and grief are conflated, and the writing itself becomes a compensatory activity that mitigates the grief and reinstates the presence of the lost child. While the letters and diary entries establish daughter as reader, the "Retrospect" establishes mother, not only as writer, but as subject, since, as Weeton projects, "When [Mary] is older, she will undoubtedly feel a great interest in everything relating to her mother . . . [and] it will be a matter of importance" (2: 3). The absence of each not only produces the writing, but imbues it with the presence of the other.

⁵⁶ It is interesting to note that in *The Tenant of Wildfell Hall*, Helen's maid and only female confidante is named Rachel.

The journal entries end in 1825, but the real ending of Weeton's story is surprisingly happy. After years of destitution, during which she spent wandering the country of England and Wales, Weeton eventually returned to Wigan, the town where she was from and where Mary resided (and where apparently the residential ban on her was lifted), and became a member of her former church (2: 405). Weeton's last known entry is dated 1825. However, Hall's research of church records⁵⁷ reveals pertinent information. Though not yet of legal age for a girl, it appears that at fourteen years old, Mary chose to live with her mother.⁵⁸ Apparently, Stock eventually left Wigan and began a new life elsewhere. Church records indicate that Weeton had a productive and accepted life in society after this. As Hall concludes, "Thus was Miss Weeton officially rehabilitated and vindicated, on an unimpeachable plane, for all locally to witness and wonder at (2: 404-406). Weeton spent the last years of her life with her then adult daughter's family in Liverpool. Before Mary's marriage however, there was apparently a reconstitution of a family, which was self-chosen, self-sustaining, and openly lived—and consisted of only a mother and her child. Interestingly, this part of her life is not narrated; the writing for Weeton appears to be only necessary during the years of her child's absence. Weeton's diary can be read as a kind of intervening historical document in the way Peter Brook suggests. It not only makes an individual present, but it makes present the relationship between mother and child.

The Custody Novel and its Heroine

Ian Ward reads *The Tenant of Wildfell Hall* as a "strategic literary intervention" in the public legal debates (26). In the novel, Brontë represents a mother, who, like other mothers

⁵⁷ The research of the Wigan Leisure and Culture Trust in the Wigan Museum Archives, which chronicle Weeton's life, also confirms this.

⁵⁸ This is indicated by Mary being received into the same church as her mother in 1829: Mary eventually became a full-fledged member of this church.

facing the loss of custody of their children, takes the law into her own hands. The rendering of this kind of mother is remarkable in the context of the nineteenth-century novel. Victorians, as Claudia Nelson describes, had a “fascination with the maternal”: “To the Victorians, the real concern was” not the “Woman Question,” but “the Mother Question” (*Invisible Men* 13). Yet, as important as they are, we don’t find many good mothers or even very many mothers at all in Victorian novels. In *Death and the Mother*, Carolyn Dever argues:

The ideal mother is the ghost that haunts the Victorian novel. Paradoxically, the world of Victorian fiction, so preoccupied with women’s power in the context of the domestic sphere, only rarely embodies that power in the figure of a mother. Instead, Victorian novels almost invariably feature protagonists whose mothers are dead or lost, swept away by menacing and often mysterious outside forces. The maternal ideal in fiction thus takes its shape and its power in the context of almost complete maternal absence, and I would argue, through the necessary vehicle of such a void. (xi)

Likewise, Sally Shuttleworth asserts: “Mothers in Victorian fiction are distinguished by their absence.” Even so, “Motherhood is simultaneously marginalized and given ideological centrality” (*Rewriting the Victorians* 44). This can also be said about the treatment of motherhood in literary criticism. Ellen Bayuk Rosenman and Claudia C. Klaver observe:

In spite of its importance, however, maternity itself is one of the least studied aspects of the Victorian era. It has been annexed to formulations of gender, the private sphere, and the consolidation of the bourgeois values. More recently, maternity has been implicated in the ideological structures of race and nation. Yet

detailed explorations that range beyond these ideas are rare. Although maternity is routinely placed at the center of constructions of femininity and domesticity, it has received surprisingly little attention as a distinct conception or experience. Most often, it is collapsed into treatments of femininity and domesticity, mentioned and then subsumed into a more general analysis of gender roles. (1-2)

The Tenant of Wildfell Hall resembles Ellen Weeton's diary much more than it does its contemporaneous fiction. The novel does not follow the "absent mother" tradition. Rather, like the diary, it treats maternity as very much a "as a distinct conception" and "experience." It is a narrative about the assertion of motherhood, with its representation of the mother front and center, and with a plot that depends upon its protagonist acting as a mother more than as a wife or woman.

The novel, like the diary, reveals, not just the separation of, but the conflict between the two domestic roles of mother and wife. As Sally Shuttleworth explains, "theorists were exercised by the problem of whether a woman's first concern should lie with the comfort of her husband or the upbringing of her children. Sarah Ellis solved the problem by producing two separate texts, *The Wives of England* (1843b) and *The Mothers of England* (1843a), both of which speak, to the virtual exclusion of the other sphere, of the all-encompassing centrality of their chosen theme. When conflict is unavoidable, Ellis pays lip service to the primary importance of the male, despite frequent projections of him as a spoilt and petulant child" (*Rewriting the Victorians* 33). *The Tenant of Wildfell Hall* participates in changing philosophies of parenting in the mid-nineteenth century. By replacing the marital plot with the maternal plot, *Tenant* argues that beyond anything else, the duty of a woman is to her child—and if a choice need be made, the

mother should, and most likely will, choose her child. For making this choice, Helen is seen as an outlier: “I was reproached . . . for preferring my child to my husband” (216), yet the novel makes it clear that Helen’s selection is the morally right one.

The choosing of the child presents a new predicament with regard to narrative plot. As Anne Humpherys observes:

[a] narrative problem in [Victorian divorce] novels is how to achieve the separation from an undesirable spouse without the heroine, whether she be the abused wife or the second love, losing the reader’s sympathy. That is, the problem is to maintain her heroine status as innocent and capable of unlimited self-sacrifice and still reward her with love and happiness. This problem provides the total narrative drive of *The Tenant of Wildfell Hall*. (44)

The problem in this novel is worked out specifically because the heroine is a mother, acting out of duty to the welfare of her child. The conflict here is less between the husband and the wife than it is between the father’s bad parenting and the mother’s responsibility for the child’s well-being. Helen explicitly and repeatedly claims her child as the motivation for her actions: “in duty to my son I must submit no longer, it was absolutely necessary that he should be delivered from his father’s corrupting influence. . . . I should be very happy . . . and should be quite contented to spend my life in obscurity devoting myself to the training up of my child, and teaching him to avoid the errors of both his parents” (327). Brontë makes certain that there is nothing in Helen’s character that belies this explanation. Helen is not an immediately likable character: not given to passionate outburst, Helen remains in utter self-control. When Mr. Hargrave cites Helen’s “super-human purity,” he may not be complimentary, but he is accurate. To extend Humpherys’s

argument, it is Helen's unflinching virtue that justifies the radical nature of her (unlawful) actions, which cannot help but keep the reader completely on her side.⁵⁹ Helen's duty as a mother, and her sense of Arthur as a father, far outweighs any of her own feelings toward him as a husband. In the representation of Arthur, the father, Brontë includes all the right (wrong) character traits: Arthur is much more than a drunk; he is a mean and petty narcissist with a brain addled with grandiosity. Further, his corruption of his family includes his installation of one of his mistresses as little Arthur's governess in the family home (apparently not an uncommon practice). Even before Helen knows of the extramarital relationship, she finds the idea of governess an intrusion upon her maternal jurisdiction: "I told [Arthur] it was quite unnecessary, not to say ridiculous, at the present season: I thought I was fully competent to the task of teaching him myself—for some years to come at least: the child's education was the only pleasure and business of my life" (324).

In "Plotting the Mother," Elizabeth Rose Gruner examines the relationship between female virtue and action in the context of motherhood: "The proper Victorian heroine neither acts nor plots. Heroines as disparate as Fanny Price of *Mansfield Park* and Gwendolen Harleth of *Daniel Deronda* prove their virtue by failing as actresses. When Fanny protests, 'Indeed, I cannot act,' we know that it is because she cannot be other than what she is: virtuous" (Gruner, "Plotting the Mother" 303). Gruner claims, "Anne Brontë's *The Tenant of Wildfell Hall* is centrally concerned with a heroine, Helen Huntingdon, whose flight from her marriage follows directly from her maternal ethic" (304). "Throughout the novel," she argues, "motherhood provides the impetus for plot, the reason for action" (310). Even more accurately, it is active *mothering* that "provides the impetus for plot." That is to say, motherhood, as a state of being,

⁵⁹ "Super-human purity" can also be used to accurately describe Ellen Weeton's representation of herself.

which can include a woman's own desire for her child and/or her own self-fulfillment as a mother, must take second place to her dedication to her child's welfare. This differentiation between, and hierarchization of, self-fulfillment as a mother and self-renunciation as a mother prescribes what a (good) mother is allowed to think and feel—or what she can reveal—about her thinking and feeling with regard to her actions. In this conceptualization of the virtuous mother, prioritizing the child precludes female self-realization and individuation. Helen's inner deliberations in which she considers her life as worth living only insofar as it is used in service to her child supports this reading:

I am weary of this life. And yet, I cannot wish to leave it: whatever afflictions assail me here, I cannot wish to go and leave my little darling in this dark wicked world alone, without a friend to guide him through its weary mazes, to warn him of its thousand snares, and guard him through its weary mazes, to warn him of its thousand snares, and guard him from the perils that beset him on every hand.

(276)

Good mothering necessitates a certain kind of maternal performance—a denial or sublimation of individual feelings and desires; “superhuman purity” negates female subjectivity. Brontë's novel reveals the necessity of this maternal performance in order to remain on the side of right. Part of the maternal plot requires that, in recognizing and fostering her child's subjectivity, the mother renounce (or perform the renunciation of) her own.⁶⁰

⁶⁰ Examining late-eighteenth century and nineteenth-century courtroom rhetoric in relation to the gothic, Marie Hockenhull Smith argues that prevailing constructions of mothers were bifurcated and essentialized. Considering attorney Thomas Erskine's argument in a 1797 “criminal conversion” trial, she writes, “The social repercussions [of this kind of rhetoric] seem inevitable, given the ominous suggestion of descriptions such as this: the children, ‘the fruits of honourable attachment and virtue’ are ‘subject to the infamy of their deluded and unfortunate mother;’ these ‘unoffending infants’ have been ‘deprived of the

Tenant develops not just of a rhetoric of parenting, but even more specifically, a rhetoric of mothering—in particular, with regard to education, maternal knowledge, protection, and childhood subjectivity. Brontë, along with the other examples of mothers in this chapter, represents the mother’s claim to an empathic and edifying relationship with her child, an idea that seems to have been set in motion in the early nineteenth century. This kind of representation of mothering reflects what Claudia Nelson notes as an “increased importance of childhood in the nineteenth century” in which the “goal of marriage was becoming not simply ‘the procreation of children’ but their maintenance in health and happiness” (*Invisible Men* 14). While Helen tells us that her feelings for her child are immediate, she worries that her husband Arthur, has none. Addressing her child, she speculates, “Would that your father could share it with me—that he could feel my love, my hope, and take an equal part in my resolves and projects for the future—nay if he could but sympathize in half my views, and share one half my feelings, it would indeed be a blessing to both himself and me” (203). Early on, she understands that Arthur views his child as an asset:

Perhaps he will feel awakening interest and affection for his child as it grows older. At present, he is pleased with the acquisition, and hopes it will become a fine boy and a worthy heir; and that is nearly all I can say. At first it was a thing to wonder and laugh at, not to touch: now, it is an object almost of indifference, except when his impatience is roused by its “utter helplessness” and

example of a worthy parent, capable of instilling into their tender minds the beauties of virtue, the principles of honour—to lead them forward in the sacred paths of truth, and lay the foundation of everything valued in civil society’; they are deprived of ‘the greatest blessings of the all-powerful deity.’ That implies they might cataclysmically lose their way. The woman is idealised here as the irreplaceable, absolutely necessary civiliser and educator. The sentimental rhetoric is not to establish an intrinsic value of the woman, but her value in relation to her role in the ideological imaginary (413). We see the same essentialism used in the opposite way in pro-mother arguments during this period.

“imperturbable stupidity” (as he calls it), or my too close attention to its wants.
(203)

Arthur objectifies his child, but Helen hopes that in time the object will accrue value.

Significantly, however, it is only Helen who can envision her child’s potential personhood.

This conceptualization of childhood subjectivity is particularly evident in the comparison between Gilbert’s and Helen’s descriptions of little Arthur. When we are first introduced to little Arthur, at five years old, we see him in objectified parts through Gilbert’s eyes: “a tiny hand,” “then another little hand,” “and then a small white forehead, surmounted with wreaths of light brown hair, with a pair of deep blue eyes beneath, and the upper portion of a diminutive ivory nose” (21). On the other hand, when Helen first references her son, she switches narrative strategy, turning away from journalistic description to present tense poetic address: “My little Arthur! There you lie in sweet unconscious slumber. . . . He wakes; his tiny arms are stretched towards me; his eyes unclose; they meet my gaze, but will not answer it. Little angel! You do not know me or love me yet; and yet how fervently my heart is knit to yours; how grateful I am for all the joy you give me!” (203). The figure of apostrophe reveals both the mother’s projection and also her expectation of interiority.

The passage recalls one of Brontë’s early poems, “Verses to a Child,” which is spoken from the maternal first-person perspective—it can be read as though it could be a companion piece to Wordsworth’s famous verse about the infant babe in the *Prelude*. From the positions of both retrospective adult poet and infant babe, Wordsworth states:

From early days,
Beginning not long after that first time

In which, a Babe, by intercourse of touch
 I held mute dialogues with my Mother's heart,
 I have endeavoured to display the means
 Whereby this infant sensibility,
 Great birthright of our being, was in me
 Augmented and sustained. (313-320)

Though it is the adult poet speaking, the infant communicates, holding “mute dialogues with my Mother's heart.” Nascent, inarticulable consciousness and poetic sensibility belonged to him, but needed to be recognized—“augmented and sustained”—by his mother. This could be a description of the scene between Helen and little Arthur, only from little Arthur's perspective: in particular, the “mute dialogue” between infant Arthur and his mother begins when “his eyes unclose; they meet my gaze, but will not answer it.”

Brontë seems to have had a preoccupation with mother-child relationship as demonstrated in her early poetry, which was perhaps connected with her own status as the youngest child, and her mother's death in her early childhood. Written in 1838, when Anne was eighteen, “Verses to a Child” employs the same structure of address. Speaking as Alexandria Zenobia, Brontë reveals in this poem that her baby's father has deserted them both.⁶¹ The poem begins with, as well as sustains, an address to the child:

O raise those eyes to me again
 And smile again so joyously,

⁶¹ It seems like that the poem may refer to the character, “Alexandria Zenobia Hybernia” in the Gondal stories. “Alexandria Zenobia” is also the speaker of three other poems by Anne Brontë. This poem was written four years after the first mention of the kingdom of Gondal, which she created together with her sister Emily.

And fear not, love; it was not pain
Nor grief that drew these tears from me;
Beloved child, thou canst not tell
The thoughts that in my bosom dwell
Whene'er I look on thee!

Thou knowest not that a glance of thine
Can bring back long departed years
And that thy blue eyes' magic shine
Can overflow my own with tears,
And that each feature soft and fair
And every curl of golden hair,
Some sweet remembrance bears. (1-14)

In these first two stanzas, Brontë represents both the mother's expectation of the child as a person as well as a relationship in which the child is used to construct mother's own subjectivity and memory. Thus, it is in even more alignment with the Wordsworthian "dialogue" figuration.

In the third stanza of "Verses to a Child," the child brings the mother to an imagined or recalled place in which she becomes "little child again":

Just then thou didst recall to me
A distant long forgotten scene,
One smile, and one sweet word from thee
Dispelled the years that rolled between;

I was a little child again,
 And every after joy and pain
 Seemed never to have been. (15-21)

In this stanza, Alexandria “rewrites” or “revises” the memory—collapsing time, leaving out her child’s father. Here, we witness an uncanny relation between mother and child: the speaker switches places with her child addressee, which establishes a kind of “metaphorical exchange and equality.”⁶² I want to concentrate on the point of “recall” since the process of “recall,” the act of memory, is itself the thing that is constitutive of identity, and, at the same time, the recall suggests that first lost lover. However, by the last stanza, the child becomes a kind of recompense, displacing, perhaps even replacing, the lover/father,

But though thy father loves me not,
 Yet I shall still be loved by thee,
 And though I am by him forgot,
 Say wilt thou not remember me!
 I will not cause thy heart to ache;
 For thy regretted father's sake
 I'll love and cherish thee. (50-56)

⁶² Barbara Johnson argues, “Apostrophe is thus both direct and indirect: based etymologically on the notion of turning aside, of digressing from straight speech, it manipulates the I/Thou structure of direct address in an indirect, fictionalized way. The absent, dead, or inanimate entity addressed is thereby made present, animate, and anthropomorphic. Apostrophe is a form of ventriloquism through which the speaker throws voice, life, and human form into the addressee, turning its silence into mute responsiveness.” In her reading of Percy Shelley’s “Ode to the West Wind,” Johnson discusses the figure of apostrophe: “In saying ‘be thou me,’ he is attempting to restore metaphorical exchange and equality. If apostrophe is the giving of voice, the throwing of voice, the giving of animation, then a poet using it is always in a sense saying to the addressee ‘Be thou me’” (“Apostrophe, Animation, Abortion,” *A World of Difference* 185, 188).

The child grants the mother a new life, giving the mother the love the father would have given her, incorporating the mother in its memory as the father should have done. However, the mother retains the “I” as pronoun even though she becomes the child’s object, thus maintaining both subject and object positions. Safe in the child’s memory, the mother is restored and can then replace the father for the child and can do the job of both parents, promising to the child (as in the traditional wedding vow) to “love and cherish thee.” This is akin to the structure of subjectivities in the diary in *Tenant*: while Helen performs a kind of self-sacrifice, she is still the speaking subject; however, this speaking subject is engendered and sustained by the needs of the child.

The figure of apostrophe has multiple levels of significance in the context of Brontë’s writing: it establishes the child’s status as potential, but not yet fully realized, person. Though inarticulate, the child is communicative. Moreover, the relationship between the mother and child is symbiotic. One can say that it is enacting its own kind of natural relationship of “coverture”: mother and child, once literally united in one being are still metaphorically so, the child being “incorporated” and “consolidated” under its mother.⁶³ In *Tenant*, when Helen calls her child “*flesh of my flesh*,” she revises the Biblical allusion to woman born of man, to child born of mother (202-203), making primary the mother-child relationship over the man-woman relationship. And in the additional sense of the word, the union “covers” the child under the protection of its mother. The apostrophic relation between mother and child engages imaginative speculation in a way that is similar to Ellen Weeton’s letters to Mary, both constituting and projecting its addressee. Though Helen’s child is present, unlike Ellen’s child who is absent, it is

⁶³ These are the words Blackstone uses in *Commentaries*.

the child's future self that is being addressed. In her use of the first-person structure of address, Brontë places herself in a Romantic—and male—tradition in which the feminized object is silent.⁶⁴ Though the child is in the feminized position, it is different than the Grecian urn or the West wind in the mother's real—as opposed to figurative—expectation of one day hearing an answer in reply. That is to say, the mother not only projects but also is vested in the child's voice. Like the absence of the mother in other Victorian fictions, the absence of the child's voice signals its (overwhelming) presence. The mother-child relationship is a complicated though significant one in terms of time and identity. An autobiographical address, as in the *Prelude*, would effect a kind of temporal self-division in juxtaposing the infant self with the retrospective speaking self—one person with two consciousnesses. The present retrospective distance allows the speaker to voice what could not have been spoken then. When we have a mother addressing her child, we don't have here the two consciousnesses of the one self, but we have two consciousnesses that are interrelated: the mother participates in the construction of the child's consciousness. Indeed it is through this figurative interchange that the child begins to become a person. Thus, the figure of apostrophe here seems to be very much a maternal one—it is a kind of poetic reproduction.⁶⁵

Mothering as a Matter of Life and Death

Linguistic absence and presence is as tenuous as the literal absence and presence of a child. Legally, Helen has very little, if any, leverage to both leave her husband and keep her child,

⁶⁴ See Barbara Johnson, "Muteness Envy."

⁶⁵ Jonathan Culler describes apostrophe in a way similar to how woman/mothers are figured: it is "the figure of all that is most radical, embarrassing, pretentious and mystificatory in the lyric" (qtd in Jacobus, *Lyric Poetry* 171). In regard to the *Prelude*, Mary Jacobus states that apostrophe is "Regarded as a digressive form, a sort of interruption, excess, or redundance" (171).

and Brontë indicates her awareness of these circumstances. When Helen declares she will leave her marriage, she firmly asserts: “My child goes with me” (301), and yet she knows, even after she has escaped, that she may still lose him: she believes that to “be allowed to keep him with me still and never to behold that father’s face again” is “a blessing I hardly dare reckon upon” (334). Thus, her sense of potential loss underlies her actions and emotions. In the first few pages of the novel, Gilbert recounts Helen’s fear of his early encounter with little Arthur:

“Give me the child!” she said in a voice scarcely louder than a whisper, but with a tone of starting vehemence, and seizing the boy, she snatched him from me, as if some dire contamination were in my touch, and then stood with one hand firmly clasping his, the other on his shoulder, fixing upon me, as if some dire contamination were in my touch, and then stood with one hand firmly clasping his, the other on his shoulder, fixing upon me her large, luminous, dark eyes—pale, breathless quivering with agitation. (22)

Gilbert’s reply, “You thought I was going to kidnap your son I suppose?” reveals Helen’s primary fear, not perhaps of him, but of her husband, Arthur, and the state of the legal system in general (22). When Helen returns home to take care of her ailing husband before his (convenient and necessary) death, she arrives with a “written agreement” that gave her claim to their son, which she insists he sign in the presence of a witness, Rachel. And, though Arthur resists, “he at length managed to ratify the agreement” (363). While it is significant that Brontë includes this, Helen’s contract would not be legally binding since coverture “would prevent a wife from entering into a contract for custody or disposition of property, even when the agreements would be in the best interests of the children” (Wright, “Crisis” 195).

Mothers living with the reality of potential child loss through custody equated this loss with child death. Ellen Weeton's poignant description of herself as "childless" likens her loss of custody of her child with the death of her child and the grief over the lost (but still living,) child is comparable to the grief over a dead child. In *Tenant*, after Arthur finds Helen's "manuscript" (as she calls it), takes her money and jewelry, and figures out her plan, we can see in Helen an example of this kind of hopelessness and helplessness, which produces in her a sort of death wish over the loss of her child through coverture:

all this day, when I have wandered about restless and objectless, shunning my husband, shrinking even from my child, knowing that I am unfit to be his teacher or companion, hoping nothing for his future life, and fervently wishing he had never been born,—I felt the full extent of my calamity, and I feel it now. I know that day after day such feelings will return upon me. I am a slave—a prisoner—but that is nothing; if it were myself alone I would not complain, but I am forbidden to rescue my son from ruin, and what was once my only consolation is become the crowning source of my despair. (312)

This sense of perpetual maternal loss seems to be connected with (and also fueled by) the belief that children are more likely to die without the care of their mothers. The preoccupation with and reality of child mortality in general at this time fostered both maternal responsibility and maternal grief and fear. For mothers, there was no way to win: not legal guardians of their children, they were still implicated in their children's death. Mothers' magazines, for example, armed with warnings, charged mothers with their children's mortality. An advertisement for Dr. Fennings's "widely publicized" *Every Mother's Book* in the monthly journal, *The Mother's*

Friend, cautioned “Do not let your children die,” advising that Fennings’s book could “save your child’s life by reading it. Its instructions have already saved thousands” (Branca 96). With all of the counsel and concern regarding children, infant mortality still “remained a perplexing problem for the Victorian mother. The infant deathbed scene so popular with religious writers, the grief of a bereaved mother at the loss of her child, which was a regular feature in many of the women’s magazines, reflected grim reality” (Branca 96). Caroline Norton was not even allowed to attend to her youngest son on his deathbed, and it was only after losing one child that her husband allowed her access to the others for the first time in six years. Nine-year-old Charles “Willie” Norton died of tetanus caused by a wound on his arm when he was thrown from a pony—at the time he left his home to go on the ride, he was on his own, unsupervised; his father was seldom home and did not provide adequate care for the boys (Atkinson, *Criminal Conversation* 301-302).

Had Caroline run away with her child, would he not have died? This is a question she asked herself, which must have haunted her days. In a letter to Samuel Rogers in 1842, she wrote:

I still feel stunned by this sudden blow. The accident happened here, and I have been sheltered here ever since, and do not leave till Thursday, when my fair young thing will be laid in the grave. The room here, where he died (and which was the first I entered)—the room where there was so much hurry and agony, and then such dismal silence and darkness—is empty and open again, and the little decorated coffin is lying at his father’s house (about two miles off)—ALONE; for Mr. Norton is gone to Lord Grantley’s (Grantley Hall) till to-morrow, which is fixed for the funeral. He died conscious; he prayed, and asked for me twice.⁶⁶ He

⁶⁶ Appallingly, the boy died from lockjaw, so he only could call for his mother twice, having literally no voice to use or be heard.

did not fear to die, and he bore the dreadful spasms of pain with a degree of courage which the doctor says he has rarely seen in so young a child. . . . It may be sinful to think bitterly at such a time; and at least, I have not uttered the thoughts of my heart; I have choked them back, to spare pain to one who never spared it to me! But it is not in the strength of human nature not to think, “this might not have happened had I watched over them!” (Clayden 2: 295)

Later, in 1855, in *A Letter to the Queen*, Norton directly implicates her own absence in her son’s death:

One of my children was afterwards killed [after being thrown from a horse], for want of the commonest care a mother would have given to her household. Mr. Norton allowed the child to lie ill for a week before he sent to inform me. Lady Kelly (who was an utter stranger to me) met me at the railway station. I said “I am here—is my boy better?” “No”, she said “he is not better—he is dead.” And I found, instead of a child, a corpse already coffined. (*Selected Writings* 69).

It makes sense that the potential for losing custodial rights to one’s own child fueled the already present fears about child loss and fostered a new kind of grief and new kinds of fear; a mother could lose her child by custody or by death or by an even more horrific combination of the two.

If the argument that the mother as essential to the life of her child stands, then by the same logic, a child without a mother is more likely to die—through illness or accident—or even by its own hands. Sally Shuttleworth notes, “Discussions in England of child suicide as a phenomenon dates back to the 1850s, when statistics were first published of child suicides in

France” (*Mind* 340). She continues, “The first European discussions of child suicide, drawing on French material, tended to stress parental ill-treatment as the dominating cause, but the first specifically English engagement with the topic, by James Crichton Browne in his 1860 essay ‘Psychical Diseases of Early Life,’ emphasized instead the role of heredity” (340). Brontë’s novel foreshadows these concerns. She represents Helen expressing her projected fears of Arthur’s death—and his own potential contemplation of death just as soon as he’s born: “But where hope rises, fear *must* lurk behind. . . . [O]ne of two thoughts is ever at hand to check my swelling bliss; the one: He may be taken from me; the other: He may live to curse his own existence” (202). Her child may be taken from her—by any of the three Fathers: God, Arthur, the Court. Or, in his own retrospective analysis he may wish to take away his own life. Death may even be the more virtuous outcome. When Helen realizes her husband does not want her, but “he wants my child,” she also knows that “I am not going to sell my child for gold, though it were to save both him and me from starving: it would be better that he should die with me than that he should live with his father” (334).

The Writing Mother

While part of the plot is mothering the child; part of the plot is the mother’s writing, and producing (and protecting) the writing is one of the narrative’s goals. In *Tenant*, as in Weeton’s diary, the writing is very much connected to the child. Both mothers use writing to assuage the heroine’s suffering and the mother’s worrying. Once even, the diary allows Helen to acknowledge privately what she can’t publically: “I have need of consolation in my son, for (to this silent paper I may confess it) I have but little in my husband” (205). Before she escapes from her husband (and while confronting the potential loss of her child), Helen writes, in a way similar

to Weeton, “I have found relief describing the very circumstances that have destroyed my peace” (262). In this way, the painful life experiences become transformed into text. Helen’s writing becomes an achievement in itself and, as with Weeton, the writing can be read as an embodiment of the mother-child relationship. Helen’s “manuscript” as an object in itself represents the thing (the child) that is yearned for—for Helen, the writing is her “cheering hope and secret comfort” (312). Helen’s writing, however, never becomes a kind of tell-all. Similar to its representation of the character of the heroine, the narrative is highly controlled, revealing only those feelings about Helen that its readers would find morally acceptable. Likewise, as much as Helen’s writing is concerned with Arthur, the text also functions as a kind of shield for him: while Helen’s diary allows for the rendering of her hidden child as well as her methods of parenting, for the most part, we see very little of Arthur. Helen effects his personhood, yet her writing reenacts her protective strategy with him.⁶⁷

Stylistically, Helen’s writing is surprisingly similar to Weeton’s. The maternal plot connects to the style and form of the writing. As Anne Humpherys argues:

This contradiction between the intent to expose legal injustice and the denial of any remedy . . . can destabilize the narrative and open fissures through which new types of narrative structures and closures are tried, not always successfully. For example, there can be an elongated exposition—that is the presentation of the heroine’s sufferings (as in *The Tenant of Wildfell Hall*, where the long and

⁶⁷ In the nineteenth century, parents, particularly mothers, used diaries as a record of their children’s lives. These diaries were increasingly published as sources of scientific evidence and they served an important historical purpose in knowing about and representing childhood. For example, in 1877, Darwin published “A Biographical Sketch of an Infant,” which he had written thirty-seven years earlier about one of his own children. In 1893, child scientist, James Sully, put out a call to parents for “first-hand observations carried out on children during the first five or six years of life” (*Mind* 2). Helen’s diary functions in a somewhat different way.

repetitive detailing of Helen Huntington's unhappy marriage takes up over half of the novel) at the expense of narrative development and climax. (46)

Interestingly, this same kind of "elongated exposition," the "long and repetitive detailing" of Helen Huntington's "unhappy marriage" can also be found in Weeton's diary. The possible public emergence of the diary in a legal setting highlights the constructed nature of its narrative. While not an aesthetic "remedy" perhaps, this repetition may possibly be an attempt at "remedy" in the context of the law, since it was the repetitious detailing of the circumstances that created evidence. Paternal unfitness was determined by danger to the life of the child. It was the accretion of wrongdoing that established this determination, and that might be used to defend a mother's actions as well as to maintain the judge's and reader's necessary sympathy for the heroine.

By the mid-nineteenth century, many fictions were written in the form of diaries, and published alongside "real" diaries without distinction (Summerscale 151). The genre itself makes authentication challenging. One example of a diary gone wrong was that of Mrs. Robinson; a large part of her divorce case (the first one in the new Divorce Court of 1857 under the new Divorce Act) was argument over whether the diary was real or fantasy. In *Tenant*, Brontë forecasts the necessity of the editor in authenticating the mother's story; the form of the diary with its editorial apparatus is used as a literary strategy. Although the editing of Weeton's journals happened over a century after Weeton wrote them, we can see (through the comparison of journals and novel) how the use of the editor becomes a strategic device in ethically interpreting and evaluating the autobiographical writer. The affect of "truth" in Helen's diary, the legitimacy of her own testimony, is bolstered by Gilbert's epistolary testimony. It is also

protected within Gilbert's epistolary narrative. It is important to note that Helen gives Gilbert her diary as evidence and that he believes it to be accurate. Through Helen's own representation of herself as a person and parent, Gilbert authenticates Helen in his role as her judge, jury, and reader. Moreover, Helen constructs herself as the heroine of the narrative—an exemplar mother—and Gilbert affirms that reading of her—in much the same way Weeton's editor validates—and valorizes—her. We, as readers, interpret these stories and feel for their heroine-protagonists through the sympathetic readings of Weeton's editor and Gilbert. This bears out when we look at the reception of *Tenant*: critics were outraged by its subject but not by Helen, the character. This functioning of the editor is similar to the functioning of the court, which has to interpret the case of the mother: both are rooted in the fact that women have no (legal) voice of their own, requiring an editor or other male representative to be heard. Thus, the relationship between diarist and editor-mediator mimetically reproduces the socio-legal relationship of the mother to the state.

The Matrilineal Model

Are fathers needed? Though they may have power, do they have a purposeful role? Helen's own father, we learn, gives her up once her mother dies. When they are courting she tells Arthur: "I always look upon my uncle and aunt as my guardians, for they are so in deed, though not in name. My father has entirely given me up to their care. I have never seen him since dear mamma died, when I was a very little girl, and my aunt, at her request, offered to take charge of me, and took me away to Staningley, where I have remained ever since; and I don't think he would object to anything for me that she thought proper to sanction." When he asks, "But would he sanction anything to which she thought proper to object?" she replies, "No, I don't think he

cares enough about me” (148-149). According to Caroline Norton, “the father’s custody is seldom or ever real, as the child, though nominally in its father’s possession, and under his authority, is almost always of necessity confided to a third party” (*Selected Writings* 53). The rhetoric of motherhood and the necessity of maternal care was being developed in the context of (an increasingly undermined) patriarchal power; at the same time, no rhetoric of fatherhood was being constructed. That is to say, even though fathers’ legal rights were under challenge (but to a large extent maintained), there was little discussion about what fathers could and should offer their children—and what (if anything) children needed from their fathers. While motherhood was figured as “natural,” fatherhood was mandated in the context of response to and from lawmakers. Claudia Nelson notes that, by 1850, there was a shift in thinking “that depended in part on a new respect for the individual, which undermined traditional hierarchies. . . . The effect of this shift was in general to reduce the perceived power of the father within the middle-class family, to elevate the status of the mother, and to bring the child into sudden prominence as an object of major concern both in the home and society as a whole” (*Invisible Men* 14). Nelson argues, “If the father’s role was not to be disciplinarian, the most distinctively male function left to him within the family was that of the provider” (*Invisible Men* 67). In *Tenant*, that particular “male function” is not even necessary. Brontë quite radically depicts a working mother and a self-sustaining, autonomous family of two. And though Helen is a working mother, she is still an ideal domestic model. As Nelson points out, “Women who worked outside the home commonly contracted out the care of their infants and toddlers to the youngsters’ siblings or to neighbors. . . . Women who earned money at home . . . could see to their children themselves” (*Family Ties* 49-50). Even Brontë’s choice of Helen’s alias suggests the reworking of family into a matrilineal

model. Helen writes about her selection of name, “My mother’s maiden name was Graham and therefore I fancy I have some claim to it” (329).

Like Ellen Weeton, Brontë imagines the possibility of a family without a father. However, Brontë does not portray the same kind of social acceptance for Helen and Arthur that Weeton apparently was able to achieve with her own daughter. While Gilbert is not necessary to Helen’s or little Arthur’s financial or emotional survival, his marriage to Helen provides the means for their integration back into society. Gilbert also functions as a device that works to make this novel fit into a recognizable tradition. The traditional marital plot superimposed on this very untraditional story uses Gilbert as Helen’s reward, indicating to the reader that Helen is worthy of a happy ending. Her actions, though unlawful, were morally fit. Though its use of tradition reveals the novel’s limitations, it also tries to open other perspectives. The marriage story is undercut by an equally important moment. Right after Gilbert’s proposal, when he and Helen are discussing their marriage, little Arthur appears, and Gilbert reflects:

Had he come a minute before [during the marriage proposal], I should have received him less graciously, but now I affectionately stroked his curling locks, and even kissed his ivory forehead: he was my own Helen’s son, and therefore mine; and as such I have ever since regarded him. That pretty child is now a fine young man: he has realized his mother’s brightest expectations, and is at present residing in Grassdale Manor with his young wife. (414)

Since Gilbert is the lens through which we are reading, his perspective focuses the readers’ eyes and feelings away from the couple and instead toward the child as well as toward Gilbert’s new attachment to him.

The end of the novel brings up new questions and suggests various possibilities with regard to families. Gilbert's impending marriage to Arthur's mother makes the child his; he is able to see Arthur through Helen's eyes. That is, Helen makes a father out of Gilbert. Thus, we can use this to argue that parental identity does not necessarily depend on biology. It can be constructed through other means such as adoption and affiliation. And, through Gilbert, we get a brief snippet of a new and loving father figure. In addition to the marriage between Gilbert and Helen, we learn the future of young Arthur, who having "realized his mother's brightest expectations," marries as well (414). This verdant and youthful description of Arthur's future (in his childhood home) suggests that mothers raising sons may be the way men become better husbands and fathers. Through this suggestion, we can imagine the possibility of a new era with regard to parents and children: if the child is the nation's priority, then law must better accommodate mothers and society must enlarge its scope of morality; doing so may benefit fathers as well. I do not mean to suggest that Brontë naively posits all mothers as good and all fathers bad—there are good fathers and bad mothers in this novel itself. However, as we can see in all of the examples in this chapter, nineteenth-century society in some ways (very much including the existing marital law) actually cultivated a certain kind of domestic abuse. These historical circumstances positioned the family's children in ways that fueled the adversarial parental dynamics and the child custody warfare we see here in these cases. Certainly, none of these problems came close to being solved by the passage of the 1839 Custody Act, radical though it was. In setting *Tenant* before the enactment of this law, Brontë allows the novel to elide the law's existence and thereby extend its own reach as it passes moral judgment on the law's shortsightedness and asserts its own sense of authenticity and authority.

3. Splitting the Baby: What Maisie Knew about Joint Custody

And the king said: Fetch me a sword. And they brought a sword before the king. And the King said: Divide the living child in two, and give half to the one, and half to the other. (Judgment of Solomon 11: 4)

Published within three months of each other in 1897, Henry James's novel, *What Maisie Knew*, and the official report of the English appellate court's child custody proceedings in the case of *In re A and B (infants)* are remarkable for their innovation and their similarity.

Documented in *The Law Reports*, the singular case of *In re A. and B (infants)* was the first recorded legal judgment in England of what we would now call "joint custody."⁶⁸ While the decision might read as commonplace today—so much so that by the end of the twentieth century it was given little more than a passing mention by legal scholars⁶⁹—at the time it was brought to court, it was nothing less than groundbreaking; as such, it provided the founding case law for the Court's far-reaching jurisdiction thereafter. Justice Chitty, the presiding judge, who heard it first in the Chancery Division, declared it to be a "very exceptional case" and in turn came up with a "very exceptional" solution that was not only upheld, but also morally sanctioned by three higher judges in the Court of Appeal (789). Literal "equal" or "joint custody" for parents in the late nineteenth century was noteworthy to say the least because it all but did not exist in theory or

⁶⁸ Contemporary usage of the term "joint custody" would differentiate between joint "legal" custody (decision-making) and joint "physical" custody (day-to-day care) but these distinctions were not made as such in the nineteenth century. Either these responsibilities were not differentiated at all, or in the second half of the century (such as in section 5 in the Guardianship of Infants Act 1886), distinguished by different and variable terms: at times "custody" refers to legal rights whereas "access" refers to physical time; at times "guardianship" is used to denote legal rights and "custody" is used indicate physical time. "Custody" and/or "guardianship" typically pertained to making decisions regarding a child's education and religion.

⁶⁹ E.g., Susan Maidment, who is considered to have written the most comprehensive synthesis of post-1850 British custody law.

practice at this time.⁷⁰ However, it was not only the verdict that made this case so compelling and unusual. The case is also extraordinary because of the Court's interpretation and application of the Guardianship of Infants Act of 1886 particularly regarding its discretionary powers over custody, its new definition of parental fitness and best interests, its use and attribution of importance of various third parties including the governess in the care of the children, assignment of money as it relates to custody and third parties, and the scandalous nature of both parties. At a time when the details of such divorce and custody cases were elaborated on in the law reports, the details of this case—especially those concerning the character of each of the parents and the facts of their lives—were apparently so appallingly unbearable that they were purposefully excised from the appellate judges' legal commentary.

What we do learn about the background of this case reads like a forbidden—and censored—novel. The mother and father (whose names were withheld) married in 1885 and had three children. Ten years later, in June 1895, they “ceased to live together” (787). Both the mother and father “had been guilty of adultery, but had condoned each other's offences” (787). The mother and father were both “persons of good position,” with parents who had “considerable wealth”; however, the “mother had a sufficient income secured by her marriage settlement,” whereas the father “had no independent means of his own” (787). The mother, “since the marriage contracted the habit of taking intoxicating liquors in excess, but had at the date of the [appellate] hearing and for upwards of twelve months prior thereto broken herself of that habit”

⁷⁰ Prior to 1839, children essentially belonged to their fathers under coverture laws. The 1839 Custody of Infants Act allowed a mother to petition for custody of her children under the age of seven and “access” to her children seven and older. The next reform in custody law occurred in 1873 and extended the age of a child of which a mother could petition for custody from seven to sixteen years old. By 1886, the Guardianship of Infants Act made the first priority of the courts in awarding custody the “welfare of the infant.” Even with these laws, the paternal presumption remained. That is, the law assumed a father to be the custodian of his children, whereas a mother needed to petition for custody of them. In practice, fathers often retained custody of the children, although there were a growing number of cases in the later part of the century that awarded mothers custody of young children and female children.

(787). The case was heard in various incarnations by three different courts: the Divorce Court, the Chancery Court, and the Court of Appeal. In the divorce proceedings, the Court granted the divorce, deeming the mother guilty of causing the circumstances that entitled the husband to a divorce, and made a custody order that divided up the children between the two parents. The mother lost custody of her two oldest children, a girl born in 1886 and a boy born in 1890 (the “A. and B. (infants)” of the case’s name) to the father, but retained custody of the youngest, a girl who was only two at the time (795).

Following the decision by the matrimonial court, the mother took out a summons in Chancery Court in November of 1895 under the Guardianship of Infants Act, “asking that she might forthwith be allowed access to [the two children], and that they may be placed in the custody of and so as to permanently reside with and under the control of the applicant, or that she might have access to the infants in such a manner and under such conditions as to the judge should seem fit” (786). Justice Chitty substantially changed the custody order of the Divorce Court. The father took Chitty’s judgment in the Chancery Court to the Court of Appeal in 1896. The appellate judges refused disclosure regarding details about this family and the other evidence presented in Chancery Court. What we do learn from Lord Justice Rigby, however, is that even though the Divorce Court found the mother guilty due to her conduct, the father’s behavior was just as reprehensible: Thus, all “Chitty J. had to consider was what was best to do under the circumstances of this unfortunate case” (795-796).

The presiding justice of the mother’s Chancery application upon which he made his novel order, Mr. Justice Joseph William Chitty, who was the presiding Justice of the mother’s Chancery application upon which he made his novel order, heard the pleadings “in camera,”

rather than hearing the case in open court, which was customary at the time.⁷¹ Chitty was well known and well liked. He was appreciated not only for his intellect and sound judgment, but also for his wit and proclivity to banter with counsel, which earned him the nickname, “Justice Chitty” (Matthews 112). He was the son of Thomas Chitty, a prominent lawyer and legal scholar, and had married into a prominent legal family as well. In March of 1885, Chitty was caricatured by Leslie Ward in *Vanity Fair* magazine. He was a Liberal and was progressive in his application of the law. His judgments set precedent. After his death, he was featured in Edward Manson’s *Builders of Our Law During the Reign of Queen Victoria*. Unlike the decisions of other judges, which reflected past common law practices, Chitty’s judgments, including the one concerning *In Re A. and B. (infants)*, rested on his original interpretation of current law. Chitty’s connections were wide and varied in legal and literary circles, and included Charles Dickens. While it is uncertain whether Henry James knew Justice Chitty personally, James was a follower of divorce cases in the media, and he was acquainted with many of those engaged with making and carrying out divorce and custody law. He was, for example, a close friend of parliamentary member James Bryce, the supporter of the 1884 bill that sought to create equal custody for parents, who certainly knew Chitty well.⁷² Indeed, Bryce and Chitty were both elected to parliament in 1880, and both members of the Liberal party.⁷³ James was also an old friend and correspondent of Justice Chitty’s nephew, the lawyer Frederic Pollock, who edited, among other legal digests, the

⁷¹ Reporters could not publish reports of anything that occurred “in camera.”

⁷² Bryce was also interested in translating divorce and child custody laws to make them understandable to the layman and he came to publish a history for the general reading public, *Marriage and Divorce* (1905), which came from a chapter of his *Studies in History and Jurisprudence* (1901).

⁷³ When Bryce was president of the Board of Trade, he appointed Chitty (then already a justice) as one of several members of a committee to consider amendments to the acts relating to Joint Stock Companies incorporated with limited liabilities (12).

Law Reports at the same time James was writing *What Maisie Knew*, and at the same time Pollock's uncle was hearing the appeal of *In re A. and B.*⁷⁴

In the Chancery Court order regarding *In re A. and B.*, Chitty split both control of the children as well as their physical care equally, treating the parents in exactly the same manner, with literal equality. The order provided that

the custody of the said infants be committed until further order to the applicant and respondent each for six months in the year at times to be agreed upon between them. . . . [W]hile the said infants are in the custody of the applicant they shall be accompanied by their governess, and shall be well cared for, educated, clothed and maintained at the expense of the applicant and her father. . . . [W]hile the said infants are in the custody of the said respondent they shall be accompanied by their governess, and shall be well cared for, educated clothed and maintained at the expense of the respondent and his father. (*Law Reports* 789)

Chitty explained that his rationale rested on section 5 of the Guardianship of Infants Act 1886:

This section confers upon the Court in terms a wide discretion as to the custody and access to infants; but the discretion is a judicial discretion and must be exercised having regard to the matters mentioned in the section. These are – (1.) the welfare of the infant, (2.) the conduct of the parents, and (3.) the wishes as well of the mother as of the father. On the first point, the position of the third child is very material. It is important for children that they should be brought up in their tender years on terms of affection with one another, and also that they

⁷⁴ Pollock was also good friends with George Meredith, who dedicated *Diana of the Crossroads* to him.

know both their parents. On the second point there is little to choose between the parents. On the third point “wishes” is a very wide term. (*Law Reports* 789)

In making his determination, Chitty essentially used the “wide discretion” with which he was invested, but there is nothing inherent in this act that provides for equal treatment of parents.

Guardianship of Infants Act (1886)

The 1886 Guardianship of Infants Act has an interesting history. Many believe that it created joint guardianship, but this is not quite right. Indeed, the act as it was passed, which differed from what was first proposed, was far less concerned with the parents than it was with the children and the court. The original intention of the advocates of the bills that led up to the act was one of equal rights of custody for mothers and fathers. That is, in the proposed bills, children would be removed from coverture law and both parents would be joint guardians of their children during the marriage. In the case of divorce, both parents would be recognized as equal guardians from the outset. This was a significantly new idea: as the law stood, fathers were presumed to have custody of his children whereas mothers had to petition for access to them. The 1886 act's predecessor, a bill introduced into the House of Commons by the suffragist Elizabeth Wolstenholme Elmy, and James Bryce in 1884, included exactly this idea of equal guardianship. Bryce, though not a supporter of equal rights in general, supported this bill on the grounds that equal authority between husband and wife over child would promote harmony within the family: “[T]he old system of giving the husband supreme power over the child hadn't worked well in the past. . . . When women had the power over their children, they generally used that power well—as well, on the whole as fathers did. . . . [I]t would improve the relations

between husband and wife, by removing from him an engine of tyranny, and from her a motive for attaining her ends by indirect methods” (qtd. in Maidment 127). The main objection to this argument was that joint guardianship would result in the opposite effect by creating further grounds for dispute between a husband and wife. As parliamentary member, Mr. Ince stated during the debate of the bill, “duality of control” was “a thing to be avoided,” particularly “within the domestic circle” (qtd. in Maidment 128).

The first version of this bill did not pass and, in the end, the “clause for joint custody was dropped in the committee stage” (Maidment 128). Although supporters brought back the clause when they tried to pass the bill again in 1885, it failed. Even though mothers were gaining traction by the custody acts, it seemed somehow easier for lawmakers to support the rights of children over women. What appeared in 1886 when the bill finally did pass was a new clause in Section 5 whereby the court, among other discretionary powers, and regardless of the age of the child, could “upon the application of the mother . . . make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant” (qtd. in *In Re A. and B.* 788). Through the new conceptualization of child welfare, the court’s own jurisdiction was enlarged.

Using this principle of welfare, Chitty essentially did grant what looked like equal rights to both mother and father. But in doing so, he more importantly began to craft a kind of rudimentary definition of what child welfare is with regard to custody, which included a child’s right to both parents. Thus, his version of “joint guardianship” was less about the mother and the father than it was about the benefit of children. Another significant part of Chitty’s definition of child welfare had to do with his unusual and innovative regard for the importance of keeping siblings together, which opposed the current trend of severing them from each other. Custody

cases after 1839 reveal a history of “split custody”; that is to say, splitting up or dividing up the children between parents. One way children were split up was according to age. The first custody act of 1839 created what is now known as the “tender years” concept, which theorized that young children under the age of seven to be in need of their mothers. Several years after the 1839 custody act that created the concept of “tender years” there were at least two cases in which mothers received custody of youngest child and fathers received custody of the older children (Wright 224).⁷⁵ Mid-nineteenth-century British history reveals this to be a growing trend. In her discussion of the “crisis of child custody” and “birth of family law,” Danaya Wright notes that in the 1858 case *Spratt v. Spratt*, “the father received custody of the oldest child, but despite her own adultery, the mother retained access to the oldest and ‘custody’ of the youngest, even though she was to leave the child in the physical custody of family friends. The court believed that the youngest was ‘of so tender and age, that there is no fear of its being contaminated by the alleged conduct of the mother’” (Wright 250). Mary Ann Mason notes a similar trend in the United States: For example, in *Stigall v. Stigall* (1847), “the court divided the three children, Elizabeth (aged one), Robert (aged three) and Charles (aged five), giving Charles to the father” and the younger children to the mother (62).

Along with the trend of dividing children by age, the courts divided children by gender: In *Martin v. Martin* (1860), “a husband guilty of violence lost custody of the two infant daughters, but was granted custody of a four year old boy” (Wright 251). Wright interprets this decision to result from the notion that the male heir should be treated differently from the other children, with property issues trumping others. However, even without landed property at stake,

⁷⁵ Even though the 1839 custody law explicitly precluded adulterous mothers access to their children, judges began to deviate from this legislation in cases in which both the mother and father were guilty of adultery, applying the “tender years” logic instead.

in cases in which “the husband is affectionately attached to his children, and has always been so, and engaged in a profitable business, any order which should take from him the custody of his sons would not be conducive to their future welfare. It is a very different matter with regard to the daughters. Their mother . . . is the natural person to have their custody” (*Lymington v. Lymington* as reported in Mews 280). Thus custody decisions that divide children between parents in this way also serve to reify the notion of discrete gender categories and “natural” forms of attachment. These kinds of decisions reconfigure ideas of what the family is, and how its members are aligned. Chitty reimagined and reconfigured the family further still. Rather than dividing up the children, Chitty divided up their time between parents, creating a sort of parallel familial structure. As his decision regarding the alternating time between parents refocused custody law’s prioritizing of the children, so too did this decision. In it the children are central; they become the new focus of the family, in a sense preserving what is left of the original “family,” and also creating an enduring connection between the parents that continues well after their divorce.

The Court Wars

Part of the confusion with regard to child custody was that three different courts were making these decisions, Divorce, Chancery, and Court of Appeals. Like the children’s divorcing parents, the courts were fighting with one another over custody of them. This suggests the child’s growing symbolic importance to the state, as we shall later see. None of the three courts had any special qualifications regarding children. While the Chancery Court had initial jurisdiction over child custody in 1839, the Marital Causes Act of 1857 gave that same authority to the newly created Divorce Court under the marriage acts. Although the law espoused child welfare and best

interests, its fundamental flaw was its lack of definition using any kind of evidence. Yet it still began to construct a realm of “expertise” regarding children on the part of the court, also without any grounds to do so and thus, paving the way for the field of legal child experts we have today. The judges themselves, while making claims that decided the fate of children, did not claim to have any special knowledge about them. Chitty, for example, was not only making custody orders but deciding a wide array of other issues concerning contracts, patents, wills, the liquidation of companies—and even deciding the fate of Jumbo, an elephant owned by the London Zoo and eventually purchased by P. T. Barnum.

While the Chancery Court was given authority to adjudicate custody under the custody laws, the Divorce Court was given authority to adjudicate custody, not under the custody and guardianship laws, but rather, under section 35 of the Matrimonial Causes Act 1857:

on any petition for dissolving a marriage . . . the Court may . . . make such provision in the final decree, as it may deem just and proper with respect to custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or proceeding, and may . . . direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.⁷⁶

As stated, the Divorce Court could either make final custody decisions or make the children wards of the Chancery Court, leaving the Chancery Court to determine custody. However, the Divorce Court regularly made final judgments itself (even though those judgments could be challenged in the Chancery Court as in *In re A. and B. (infants)*). This not only gave the

⁷⁶ When a divorce was not granted, but the parents were separated, the Chancery Court made custody decisions.

matrimonial court wider reaching power, but also collapsed issues of divorce and custody.

Divorces were granted upon the findings of wrongdoing by one of the parties toward the other.

Indeed, it became a general rule in practice that the “innocent party has a prima facie right to the custody of the children” (Mews 277-278). One rationale behind this rule was that the innocent party shouldn’t suffer. And, as Wright claims, this reasoning helped to police married mothers: “By keeping children in the custody of the non-guilty spouse, the courts maintained an ethic of traditional spousal performance in which custody became a reward for not violating the marriage contract” (259).

However, the determination of marital innocence and fault served another purpose as well: it became the criterion with which to establish parental fitness. Michael Grossberg points out that “In an 1891 revision of his treatise, [legal scholar] Joel Bishop argued that ‘because one who has done well or ill in the marriage relation will be likely to do the same in the parental, all courts lean palpably to the innocent parent in the divorce when determining the consequential custody of a child’” (*Governing the Hearth* 251).⁷⁷ The seventh section of the Guardianship of Infants Act 1886 made this historical connection between parental fitness and marital fault as determined by the Divorce Court explicit:

In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the

⁷⁷ Grossberg is writing about American law, but the same ideas were circulating in both countries, as well as similar laws. Nineteenth-century British and American legal scholars often used both British and American examples in their discussions about laws concerning children.

death of the other parent, be entitled as of right to the custody or guardianship of such children.⁷⁸ (qtd. in Hall 157)

Before *In re A. and B. (infants)*, the Chancery Court traditionally upheld the rulings of the Divorce Court.

Of course, a spouse's adultery was linked to a parent's capability to guide a child's moral upbringing. Since one spouse had to be at fault in order to obtain a divorce, then one parent had to be unfit. As we shall see, the linkage of fault and fitness in the case of *In re A. and B. (infants)* found in the Divorce Court was reworked under Chancery and the appellate courts: both parents were determined to be equally unfit. Thus, the child custody court wars produced a hierarchy in the court system as well as the differentiation of parental standards among the courts.

What is so novel about Chitty's decision concerning *In re A. and B. (infants)* is that, with it, he unilaterally equalized and neutralized marital fault (as well as gendered fault) and, in doing so, established the dominance of the Chancery Court over the Divorce Court with regard to custody decisions. Even though the Divorce Court had found the mother guilty, Chitty dismissed its presumption of parental rights based on its findings of marital conduct, stating: "On [this] point [of conduct] there is little to choose between the parents" (*Law Reports* 789). In the appellate court's 1896 decision to uphold Chitty's view, the parents' conduct was certainly a crucial determining factor in the joint custody decision, but not in the same way as it was in the judgment of the Divorce Court, which was influenced and constricted by marital law. Though the details of the parents' conduct were elided, the judges made their omissions explicit, and in doing so indicated that both parents had been bad—very bad indeed. But the primary task of the

⁷⁸ Later cases established that after the custodial parent's death, the other parent could prove that she or he had since become "fit" (cf. Eversley 533).

appellate court, as it claimed, was adjudicating Chitty's re-institution of child custody under the domain of the Chancery Court. Thus, their overarching focus was on "the order of Chitty and the construction of the [1886] Act" (790). Concentrating on section 5, all three judges adamantly maintained the discretionary authority of Chancery. As Lord Justice Lindley stated, "I am not in the least disposed to say anything that will narrow the ordinary construction of its words, thus concurring that Chitty had the right to judge the parents for himself by his own standards, as long as those standards served the children's interests (791).

Pointing to section 7, which addresses marital fault, Lord Justice Rigby explicitly asserted the authority of Chancery over the Divorce Court, with regard to children, stating that,

while the Legislature gave to the Matrimonial Court a power . . . of declaring the parent, by reason of whose misconduct a decree was made in Divorce Court, to be a person unfit to have the custody of the children of the marriage . . . they refused *absolutely*, according to my reading of that section, to treat as final the case of misconduct on the part of the wife. She might have been guilty, she might have caused a divorce, and might have been declared by the Court which had cognizance of the matter guilty of such conduct as to make her unfit for the custody of the children; and yet it was left open to her to ask for the guardianship, though she could not claim it as of right. . . . *I do not in the least say what might happen if there was misconduct on one side and not the other; but here that is not the state of things.* (795, my emphasis)

Through the appellate court's agreement with Chitty's presumption that a father is just as culpable as a mother in terms of conduct, we can see how a decision like this begins to cultivate

the idea of parents in a way that is different from spouses, and begins to separate marital fault from parental ability (or inability as in this case). Just as important as the consideration of parental fitness, however, is the appellate court's upholding of Chitty's re-institution of child custody under the domain of the Chancery Court. Such a move detached children from their biological parents, extricating them from their parents' divorce and divorce laws, and gave them a new and direct relation to the state under custody law.⁷⁹ *In re A. and B. (infants)* came to be the defining case under the Guardianship of Infants Act 1886. Using this case, Chitty effectively reinstated the Chancery Court's authority over custodial arrangements and thereby further increased its role as *parens patriae*.⁸⁰

Third Party Custody

As the Court increased its jurisdiction over children, so too did it enlarge others' rights to children. While the 1886 custody legislation, along with the divorce acts, gave courts authority over parents, the 1891 Custody of Children Act gave third parties—either related or unrelated—rights to the children they were caring for. This became a growing trend in case law: “Judges used their discretionary authority over child placement to revise the automatic preference given natural parents” (Grossberg, *Governing the Hearth* 254). Not surprisingly marital infidelity was the determining cause: In the 1865 divorce case, *Chetwynd v. Chetwynd*, “both parents lost custody of their children, he for committing adultery and she for just thinking about it,” as the wife's journal revealed (Wright 252). In 1873, in the case of *Godrich v. Godrich*, for judicial

⁷⁹ This is as opposed to habeas corpus as discussed in the last chapter.

⁸⁰ For a history of the origin of the *parens patriae* jurisdiction see Danaya Wright's “Policing Sexual Morality: Percy Shelley and the Expansive Scope of the *Parens Patriae* in the Law of Custody of Children.”

separation,⁸¹ brought by the wife because of the husband's adultery and cruelty, the court initially gave custody of the children to their mother. After the paternal grandfather intervened on grounds that the mother's conduct made her unfit, the Court "observed that it had power, after a decree had been pronounced, to allow third persons to intervene on an application for custody of the children of the marriage" (Arthur Gwynne Jeffreys Hall 642). The Custody of Children Act of 1891 is important to note because it is the legislation that came to be understood as supportive of this growing trend in case law. While the 1886 custody legislation, along with the divorce acts, gave courts authority over parents, the 1891 act allowed third parties—either related or unrelated—who were already in the position of caring for the children rights to those children as well. As Alfred Fellows notes in "Changes in the Law Between Husband and Wife" in 1906: "The father's common law rights have, however, been considerably encroached on in favour of the mother in the Guardianship of Infants Act, 1886 (as well appears in the case of *Re A. & B. infants* [1897] 1 Ch. 786 before Chitty J.), and *in favour of third parties* by the Custody of Children Act, 1891" (70, my emphasis).

Presumably there was no third party who stepped forward to intervene in the custody of A. and B. (as also in *What Maisie Knew*), even though while in the custody of their father, the children were in the care of their paternal grandparents. However, that didn't stop Chitty from using third parties in the custody order, which continued to restructure the family: the mother of A. and B., who had been residing with her parents, was ordered that should she not stay with them; she must "live with a suitable lady relation, friend, or companion" (789). More important, however, is the children's governess, who Chitty made into a stable and primary familial figure, ordering her to accompany the children at and between each household. Thus, in this case, the

⁸¹ For the difference between judicial separation and divorce, see *Marriage and Divorce 1867- 1906 Part I Summary, Laws, Foreign Statistics*.

children—along with their (third party) governess—replaced the husband and wife as the hub of the family.

Chitty's was certainly a creative solution: he established a third party as a kind of protection mechanism for the children, perhaps envisioning that parents, when removed from each other and their custody battle and given "equality," could possibly reform. But in a way he also estranged the children from their parents: while the children were both at the center of the family, and essential to the family, they were also extracted from the familial structure; the alternating arrangement effectively both orphaned and emancipated them. The parents remained, but on the periphery of their children's lives. This new familial structure, while giving the children a certain degree of autonomy by maintaining their unity and by extricating them from each of the parents, who at the very least have questionable judgment, begs the question of just whom children belong to. Furthermore, while the judgment of *In re A and B. (infants)* is child-centric, it does not take up the child's perspective.

What Maisie Knew

At almost exactly the same time as *In re A. and B. (infants)* was being heard by the Chancery Court and then on appeal, another radical restructuring of the family was taking place in the notebooks of Henry James. The notebooks reveal that James wrote *What Maisie Knew* in late 1895 through the summer of 1897. The novel was first published in serial form in the American periodical, the *Chap-Book*, from January through August of 1897 and in the British periodical, the *New Review*, from February through September 1897. The seed for *What Maisie Knew* was planted three years before James began writing it. On November 12, 1892, Henry James noted: "Two days ago, at a dinner at James Bryce's Mrs. Ashton, Mrs. Bryce's sister,

mentioned to me a situation she had known of, of which it immediately struck me that something might be made in a tale. A child was *divided* by its parents in consequence of their being divorced” (*Notebooks* 71).⁸² James stated that it was the “court” that “for some reason, didn’t as it might have done,” give “the child exclusively to either parent, but decreed that it was to spend its time equally with each—that is alternately” (*Notebooks* 71). After the divorce, both parents “married again, and the child went to them a month, or three months, about—finding with the one a new mother and with the other a new father” (*Notebooks* 71). He asked, “Might not something be done with the idea of an odd and particular relation springing up between the child and each of these new parents, 2nd between one of the new parents and the other—through the child—over and on account of and by means of the child?” (*Notebooks* 71). James was taken with this idea as the basis of a story and for the next several years struggled with the outline of a plot, working and reworking it. James imagined, with regard to the child, that the parents “should (from the moment they have ceased to quarrel about it) become indifferent to it, whereas the others have become interested and attached, finally passionately so” (*Notebooks* 71). Not inconsequentially, in this very first entry, James imagined that “the real parents die” (*Notebooks* 71), and he continued to wrestle with this idea of orphaning Maisie, at times forgetting the choices he seemed to have already settled on.

The notebooks reveal his approach to *Maisie* in fits and starts, and his puzzlings over the subject. It was almost another year before he even approached the story again. On August 26,

⁸² While the *Law Reports* did not include every case heard by the courts, it recorded the cases that set precedence. A verdict like this did impact the law, so one could assume that had there been a case with this kind of verdict, it would have been recorded. Furthermore, the mother-respondent/defendant (originally the applicant) did not substantiate her claim for equal rights to custody with any previous case law—she used only with the Guardianship of Infants Act, 1886, and previous acts. I have found no American case in which an equal custody verdict was issued during this time period. The case Mrs. Bryce was referring to might have been settled by the parties themselves—in a manner similar to what James describes in the novel.

1893, there is a very short entry in which he considered the case of the parents’—whom he called the Hurters—new marriages. Whereas he first considered having both parents die, he now considered having just Mr. Hurter die, but then changed his mind: “I must remember that if Hurter dies, the situation breaks, for his wife then gets the whole care of Maisie; which won’t do. No they both live” (*Notebooks* 77). More than three years later, on December 22, 1895—the month after A. and B.’s mother takes her appeal to Chancery—James records that he finally “put [his] pen to the little subject of the child, the little girl whose parents are divorced, and then each remarry again, then die, leaving her divided between the 2nd husband of the one and 2nd husband of the other. But the thing before I go further, requires some more ciphering out” (*Notebooks* 147). It is at this time that he begins to plan and plot the details of the novel.

In 1957, Ward S. Worden noted: “Whoever has compared the six notebook entries concerning *What Maisie Knew* with the novel in its finished form has surely noticed that there is much in the book that is scarcely hinted at, much less planned, in the preparatory write-ups” (“A Comparison” 371). One important addition to the novel that we don’t see in the notebooks is its opening—the few pages before the first chapter, titled neither preface nor chapter, which lay out the history of the legal proceedings and subsequent settlement of this “extraordinary case.” While many critics concentrate on the appended preface introduced in the New York edition of the novel in 1908,⁸³ eleven years after its first publication, this untitled prologue gets little critical attention—and yet it cannot be read as a throwaway or simply taken up together with the novel as a whole. It is deeply engaged with marital and custody law and its effects in the courtroom, on the public, and on its participants. In the context of the rest of the novel—the novel known now as the exemplary representation of childhood consciousness through free

⁸³ James wrote the preface in 1907 and in fact concluded it with the assertion that “‘Maisie’ is of 1907” (31).

indirect discourse—as well as the New York edition preface, the opening pages are stylistically anomalous from the rest of the narration precisely because of the narrator’s distance from the child. It reads as a self-contained piece—a mixture of genres, including court report, newspaper article, historical documentary, social commentary, and even theatre review in its detached ironic observations. It is a place where history, law, and literature meet, where “the real” and “the aesthetic” converge.

While Maisie’s case does not exactly mirror the “unfortunate” “painful” “extraordinary” case, *In re A. and B. (infants)*, those same adjectives could apply, and there are striking similarities between the two. The opening of *What Maisie Knew* is written in dense language that conceals as much as it reveals:

The litigation had seemed interminable and had in fact been complicated; but by the decision on the appeal the judgment of the divorce-court was confirmed as to the assignment of the child. The father, who, though bespattered from head to foot, had made good his case, was, in pursuance of this triumph, appointed to keep her: it was not so much that the mother’s character had been more absolutely damaged as that the brilliancy of a lady’s complexion (and this lady’s, in court, was immensely remarked) might be more regarded as showing the spots. (397)⁸⁴

Though the “facts” of the case are not directly stated, we can assume bad conduct on the part of both parents; that is to say, they each committed adultery—even though, like the mother of A. and B., it was Maisie’s mother who was the one found guilty and lost custody. And thus, it was

⁸⁴ I am using the first American edition, which was written and published during the period of time that concerns me, whereas the amended New York edition was published in 1908. I am using the New York edition for James’s “Preface,” which was not included in the first edition.

the mother who appealed the custody decision. The trickiness for so many readers seems to be the understanding of the result of the appeal: in fact, the cause for the joint custody arrangement in *Maisie* differs from the cause in the A. and B. case because the arrangement is the result of a settlement, not a court order.⁸⁵ In the novel, the order from the appellate court upholds the custody decision of the divorce court, but attaches a financial obligation to it: the father may keep custody but “should refund to his late wife the twenty-six hundred pounds put down by her, as it was called, some three years before, in the interest of the child’s maintenance, and precisely on a proved understanding that he would take no proceedings” (397).⁸⁶ The financial part of Chitty’s decision to assign costs equally and according to access is consistent with the 1886 act on child maintenance, which gives the court the power to “make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.” Like the father of A. and B., Maisie’s father has no money of his own to “produce” and cannot “raise it in any way,” and so a settlement deal, a “compromise,” is “proposed by his legal advisors and finally accepted by hers” (397).

Like Justice Chitty, James too comes up with a creative solution for this child that is “worthy of the judgment of Solomon”: “She was divided in two and the portions tossed impartially to the disputants. They would take her, in rotation, for six months at a time; she would spend half the year with each” (397). While Chitty kept the children together and divided the year between the parents, James, by using only one child, shows the alternate rotation not

⁸⁵ Many readers and critics assume this was a judicial decision—Irene Tucker, for example, who reads *Maisie* in relation to nineteenth-century contract law.

⁸⁶ A deal like this could not be upheld in court; pre-divorce custody contracts between parents are unenforceable on the grounds of “best interests.”

only as divided parental access but also as the division of the child.⁸⁷ Similar to Chitty, who holds the case in camera, James's narrator suppresses the sensational details of the case. Thus, we too are made to understand the spectacle without "seeing" it. In the same vein as the appellate judges of *In re A. and B. (infants)*, James's narrator ironically understands the resulting custody arrangement to reveal the parents as equally bad as opposed to equally good: "If each was to only get half, this seemed to concede that neither was so base as the other pretended, or, to put it differently, offered them as both bad indeed, since they were only as good as the other" (399). However, the judges and the narrator have different perspectives on the custody arrangement. The appellate case ends with the validating and valorizing words of Lord Justice Rigby: "Practically establishing equality in this case between husband and wife, was the wisest and best thing, and clearly for the benefit of the infants" (*In re A. and B.* 796). While seeing this solution as somehow inevitable, James's narrator also decries the legal process, claiming that both "husband and wife had been crippled alike by the heavy hand of justice" (399). Through rewriting joint custody from the perspective of the child, *What Maisie Knew* asserts its authority over legal determinations, revealing the aftermath of such an arrangement as a tragedy instead of a fair solution for a child of equally bad parents.

Rewriting the Family Plot

The autonomous prologue that opens *What Maisie Knew* depends upon knowledge of statutory law and appears to reflect a familiarity with case law and court proceedings; in the context of the novel as a whole, it changes what we know about, what we expect of, and how we

⁸⁷ James makes this case about one child, but *Maisie* is written in a framework of other child figures: Maisie and Morgan Moreen from *The Pupil*, Maisie and young Henry James in *A Small Boy and Others*. Maisie and her implicit counterparts prefigure the next iteration of "knowing" children, Flora and Miles in *The Turn of the Screw*.

understand novelistic plot.⁸⁸ I am thinking of plot in accord with Peter Brooks's theorizing of it in the context of the nineteenth-century novel and the novel's "relation to plot as a model of understanding" and the "role of plot in shaping texts and by extension, lives" (*Reading for the Plot* xii). For Brooks, plot is not just the novel's structural skeleton but is inherent to meaning-making, providing the kind of "knowledge and truth" that is "understandable (and expoundable) only by way of sequence, in a temporal unfolding" (*Reading for the Plot* xi-xii). In terms of the novel, and particularly the nineteenth-century novel, the ending of youth is marriage: as Ian Watt states, "the great majority of novels since *Pamela* have continued its basic pattern, and concentrated their main interest upon a courtship leading to marriage" (148-149).⁸⁹ The story of a divorce quite literally reverses this narrative trajectory, beginning instead with a marriage and concluding with its dissolution. In *Dickens and the Rise of Divorce*, Kelly Hager examines marriages unraveling within novels, and posits that perhaps "the novel's predilection for the failed marriage plot is a 'corollary of the importance of marriage to the novel form' and that it in fact 'reinforces the romance plot'" (5). However, she claims that although Watt defines marriage as the event that establishes closure, "marriage is just as frequently the impetus for further, often highly-elaborated, narrative development" (11). To extend this idea, it is, in *Maisie*, not only the marriage but the "the failure of marriage" that becomes the motivation for narrative expansion.

The other important sub-generic antecedent of *Maisie* is the Bildungsroman, particularly the orphan novel, which is linked to the marriage novel. Marriage is important to the Bildungsroman in two ways. Though the Bildungsroman often ends in marriage, we are also made to recognize the importance of marriage to the beginning. That is, the marriage of the

⁸⁸ These pages that I am calling the "prologue" serve as the original frame through which to read the novel, as opposed to the post-reframing that James does in the preface to the New York edition in 1908.

⁸⁹ Another way to look at this same trajectory is to use Franco Morretti, who reads marriage "as the definitive and classifying act par excellence" of the English Bildungsroman (7).

parents of the protagonist, which happens before the official narration begins, provides the kind of “primal scene” that Brooks identifies, and the origins from which the child springs and to which a child can (metaphorically) return to recognize and understand his or her own identity (96). Thus, the protagonist’s marriage can be read as both a closure and a recapitulation. Seen in these ways, marriage is both the culmination and commencement. When a custody decision results from the end of a marriage, and is tied to a divorce decree in the marital court, it too complicates narrative (and especially beginnings and endings) even further in its implications for the child both in knowing its past and projecting its future.⁹⁰ What the law does not consider is that a custody determination serves as both a death and a kind of re-engendering of the child. This kind of beginning for a child (because of the nature of the separation of the parents, and precisely because the parents are still alive but apart) always carries with it a kind of loss that fractures the child’s narrative of his or her life story.

Beginnings and endings are important in both life and its narration: “For plot starts (must give the illusion of starting) from that moment at which story, or ‘life,’ is stimulated from quiescence into a state of narratability, into a tension, a kind of irritation, which demands narration. Any reflection on novelistic beginnings shows the beginning as an awakening, an arousal, the birth of an appetency, ambition, desire or intention” (“Freud’s Masterplot” 291). And, as a recapitulation of life, death (symbolic or real) would be the end of the plot. In *Maisie*, James re-envisioned the legal determination of custody as both a beginning and an end for the child and understands the curious and far-reaching paradox regarding the child’s status as a person. That is to say, the developing custody law, invoking the “rights” of the child, with its language of welfare and best interests within the context of custodianship, positions the child as

⁹⁰ And the opportunity to retry custody decisions in Chancery and then again on appeal in the high court allow for multiple, repeated beginnings and endings.

both subject with potentiality and an object of possession. In the 1907 preface, James writes that Maisie “wonders” “to the end, to the death—the death of her childhood” (“Preface” 28). *Maisie* opens with a child who is no longer a child—and with the death of childhood as it was once known.

What happens when a novel begins at the point that the law acknowledges as the end, when a beginning is made out of an ending? The prologue is filled with endings and beginnings, through which we are made to understand both death and life. The first words we read seem to propel us right into the middle of the battle. However, we find the “termination” of the litigation by the second sentence, with the appeals court confirmation of the first decision, and by the end of the first paragraph, the “compromise” worked out by the parents’ attorneys concludes the resulting complications. The father’s concession is accepted by his “late wife.” The child is “disposed of” (397). “Poor little monkey,” the words uttered by the purported “good lady” who offers to take the child for six months, are “an epitaph for the tomb of Maisie’s childhood” (398). Maisie herself is not a person, but a trope: “the bone of contention,” “a ready vessel for bitterness,” “a deep little porcelain cup in which biting acids could be mixed,” wanted by her parents “not for any good they could do her, but for the harm they could, with her unconscious aid, do each other. She should serve their anger and seal their revenge” (397). And in this way, the novel opens up new possibilities for beginnings, unpleasant as they are, since through Maisie, the parents “felt as if their quarrel had only begun. They felt indeed more married than ever” (399). What James makes us see is the fundamental (re)making of the child into an object through the shared custody arrangement: the divorce between Maisie’s parents with its ensuing legal contracts and ruptures, financial agreements and disagreements, make Maisie’s objecthood as much a “reality” as a metaphor. The child here is an utter paradox: Maisie, without her own

agency, is the agent of the plot. Her objectification becomes the new “primal scene,” and the ending of the family becomes the new point of origin. Paradoxically, her subjecthood is born of objecthood at the moment when endings and origins collide.

If the narrative mode of the prologue is censorship, the one of the novel proper is exposure: exposure of the aftermath that leaves the child in fragments that need piecing together, but even more important, exposure to the inner workings of Maisie’s mind (of which we have had no sense thus far), through which we become privy to her exposure to a world that has not been made clearer, but more confusing (and more sordid in its confusion). We also are witness to Maisie’s exposure to suffering and cruelty—the kind of suffering that could only begin with this formulation of “family.” Julie Rivkin reads *What Maisie Knew* through Roland Barthes’s model of narrative, in which “every narrative lead[s] back to Oedipus” and “storytelling [is] always a way of searching for one’s origins, speaking one’s conflicts with the Law, entering into the dialectic of tenderness and hatred” (123). Rivkin writes, “In this formulation, the telos of narrative is the discovery of origins; identity is fixed when paternity is discovered. The unveiling of the secret is the confirmation of both the closure of narrative and the authority of its narrator” (123). However, in “*What Maisie Knew*, a novel of divorce, remarriage, adultery, and baroque child custody arrangements, the oedipal narrative is dislodged from its position as cultural standard and, under the estranging gaze of naiveté, made to show for the bizarre cultural form that it is” (122).⁹¹ Without the Oedipal narrative, James needed to find what Brooks calls a “driving force,” a telos, a way to make us read on. The novel proper begins by asking: what is the fate of the child? And though childhood—or what we thought of childhood—is already “dead” (or revealed to be a projective fiction), the child still exists, and it is this question of the child’s

⁹¹ I’m historicizing Rivkin’s psychoanalytic and deconstructive reading.

fate that propels us forward, keeps us reading. And the fate of the child is entwined with the custody arrangement, the parents' potential for remarriage, and the development of the child's consciousness in this restructured family narrative. *What Maisie Knew* can be read as a culmination of various strands of earlier novels that explore childhood consciousness and failed marriages within the context of family. In *Maisie*, James envisions the joint custody arrangement as way to take up and consolidate the interests in and the oddities of the psychological and formal issues of these writings into this tightly woven story.⁹²

James's notes imagined that when the child visits each parent, she finds

with the one a new mother and with the other a new father. Might not something be done with the idea of an odd and particular relation springing up 1st between the child and each of these new parents, 2nd between one of the new parents and the other—through the child—over and on account of and by means of the child? Suppose the real parents die, etc.—then the new parents marry each other in order to take care of it, etc. The basis of almost any story, any development would be, that the child should prefer the new husband and wife to the old. (*Notebooks* 71)

If the parents die, and the stepparents become the replacement parents, the family plot could play out in a normative (or at least recognizable) way. But three years after his initial idea for *Maisie*, James recognized that divorce offers many more possibilities for complicating the family structure, and the child's understanding of it. In 1895, he wrote: "I made a mistake . . . in thinking—in speaking—of the divorced parents as 'dying': they live—the very essence of the

⁹² For example, *Jane Eyre*, *David Copperfield*, and *The Mill on the Floss* each engage issues of orphanage, familial belonging and outcasting as well as questions of how to represent childhood subjectivity within a larger developmental narrative. As Kelly Hager argues, Victorian novels, such as *Middlemarch*, portray unhappy marriages as much as they do courtship. These novels also problematize beginnings and endings.

subject is in that” (*Notebooks* 148). By keeping the parents living (and remarrying), James keeps the number of parents multiplying (as opposed to staying the same through substitution), and in theory, this decision offers endless iterations and displacements.

The custody arrangement itself offers endless possibilities because it provides both a repetition (as well as a displacement) and a new start. Each six months, Maisie is physically (and emotionally) repositioned; within each half year Maisie is positioned (and positions herself) in relation to each of the parental figures as well as positions them in relation to each other as parents. During the first term with Miss Overmore and her father, Maisie “had conceived her first passion, and the object was her governess. It had not been put to her, and she couldn’t, or at any rate she didn’t put it to herself, that she liked Miss Overmore better than she liked papa” (411). During the next term, she realizes she likes Mrs. Wix better than her mother. And, she assesses, within the first hour of meeting her, that she is more of a mother than her own: Mrs. Wix “had struck at first, just after Miss Overmore, as terrible; but something in her voice at the end of an hour had touched the little girl in a spot that had never even yet been reached” (412). It is because Mrs. Wix “had had a little girl quite of her own, and the little girl had been killed on the spot. She had absolutely nothing else in the world, and her affliction had broken her heart” (412). “What Maisie felt was that she had been, with passion and anguish, *a mother*, and that this was something Miss Overmore was not, something, strangely confusingly that *mamma was even less*” (412). Maisie begins to define “mother” through the conception of attachment and the intensity of feeling—of longing for and belonging to. “Mamma,” she concludes, is not a mother.

At issue is not just parenting, but language itself—the naming of parents as a consequence of changing conceptualizations of parents (and who gets to be parents and who determines parentage) that in part have to do with changing parental legal status. This novel in

particular represents the exploitation of the instability (and the potential manipulations) of families through divorce, and the confusion it presents to the child. After Miss Overmore becomes Mrs. Beale, she alleges to Maisie, “He’s my husband, if you please, and I’m his little wife. So *now* we’ll see who’s your little mother! (433). Maisie, later assessing the consequences of the marriage between Miss Overmore and her father, asks Mrs. Wix, “*Is she my mother now?*” (603). Wix, with reference to Sir Claude, as if to challenge Maisie, asserts, “If she is, he’s equally your father.” To which Maisie logically figures, “Then my father and my mother --!” Unable to finish her sentence, Wix does it for her: “Ought to live together? Don’t begin it again!” (603). After Mrs. Beale and Sir Claude become lovers and renounce their former spouses, Mrs. Beale pronounces, “I’m your mother now, Maisie. And he’s your father (647). These names are used manipulatively by others to stimulate Maisie’s attachment, not to confirm the already attached relationship. “Mother” and “Father” become arbitrary signs, signifiers detached from what they signify.

The episode of Maisie’s tooth extraction serves as a kind of *mise en abyme* for the novel, metaphorically invoking the custodial “arrangement” and Maisie’s feelings within it: Maisie’s “periodical uprooting” that “played the part of the horrible forceps” (416). Though the procedure is being performed on Maisie, both she and Mrs. Wix “clung to each other with the frenzy of their determination not to scream” (416). Mrs. Wix figures as an idealized parent (and a figure for the narrator in terms of the relationship between narrator and subject in free indirect discourse); she is not just a compassionate observer as she takes Maisie’s “hand” but an empathic receptor of Maisie’s suffering. At the point when Maisie feels “most anguish,” it is not she, but Mrs. Wix who produces “an audible shriek, a spasm of stifled sympathy” (416). The metaphor of the “uprooting” is one that works reciprocally for both Maisie and Mrs. Wix, as she

feels too feels Maisie's "extraction": "Embedded in Mrs. Wix's nature as her tooth had been socketed in her gum, the operation of extracting her would really have been a case for chloroform." The "forceps" the dentist uses invoke the idea of birth as well as being the instrument of the "extraction." Maisie's attachment to Mrs. Wix now formed, her memory of the six-month parting is described in the language of child custody reform tracts: "She remembered the difference, when six months before, she had been torn from the breast of that more spirited protectress." Her father has become the legal "alternate parent" who is revealed to be the kind of seductive fiend that is reminiscent of the big bad wolf, fond of showing his teeth, who "stood over them with his open watch and his still more open grin." The sadism of both parents knows no ends: "Your mother loathes you," says Papa (529). "Your father wishes you were dead," says Mamma (551). The tooth extraction gives us a reading of the custodial arrangement as one that leaves the child in perpetual melancholia and psychic illness.

Childhood Subjectivity

The new familial arrangement becomes a way for James to explore the development of childhood consciousness and the playing out of childhood relationships. In the 1885 *Studies of Childhood*, the first and groundbreaking seven-volume study of what we now call child development, James Sully investigated "The Dawn of Reason" in childhood, which he describes as invoking a relation between observation, apprehension, and language: "The child not only observes but begins to reflect on what he observes, and does his best to understand the puzzling scene which meets his eye" (65):

The gradual gathering of a store of such clear memory-images is a necessary preliminary to reflexion and thought. It is because the child remembers as well as

sees, remembering even while he sees, that he grows thoughtful, inquiring about the meaning and reason of this and that, or boldly venturing on some explanation of his own. And just as the child's mind must take on many pictures of things before it reflects upon and tries to understand the world, so it must collect and arrange pictures of the successive scenes and events of its life, before it will grow self conscious and reflect upon its own existence. (69-70)

Maisie resides in the interstices between the vision of the "puzzling scene" and the ability to articulate its meaning. As James tells us in the preface to the New York edition, the "vision [of children] is at any moment much richer, their apprehension even consistently stronger, than their prompt, their at all producible vocabulary." Maisie's "little world" that begins as "phantasmagoric—strange shadows dancing on a sheet" (401), becomes one filled with potentially interpretable pictures:

By the time she had grown sharper . . . she found in her mind a collection of images and echoes to which meanings were attachable—Images and echoes kept for her in the childish dusk, the dim closet, the high drawers, like games she wasn't big enough to play. The great strain meanwhile was that of carrying by the right end the things her father said about her mother. . . . A wonderful assortment of objects of this kind she was to discover there later, all tumbled up too with the things, shuffled into the same receptacle, that her mother had said about her father. (403)

Maisie's external world is even more puzzling than other children's since it has been reordered into two realities from which and into which she must shift back and forth. Maisie's continual switching between her parents' perspectives forces her own subjectivity into being.

In his representation of Maisie's interiority, James anticipates modern psychoanalytic theories of childhood. Maisie is on an epistemological quest for origins, searching for her true parents—or at least the truth about her parents, as well as a sense of belonging and longing for a family unit. James also explores, through Maisie, what defines a parent, what good parenting is. He achieves this by making us see and feel such bad parenting through Maisie's perception. We are always aware of how Maisie feels towards her many parents and how they feel toward her. Freudian psychoanalysis posits a young child's ambivalence towards his or her parents (and the psychological grappling with the good parent/bad parent dynamic) as a normative part of development of individuation. Freud claims that as the child matures, he “gets to know the other parents and compare them with his own. . . . Small events in the child's life which make him feel dissatisfied afford him provocation for beginning to criticize his parents, and for using, in order to support his critical attitude, the knowledge which he has acquired that other parents are in some respects preferable to them. . . . [T]he most intense impulses of sexual rivalry contribute to this result. A feeling of being slighted is obviously what constitutes the subject-matter of such provocations. There are only too many occasions on which a child is slighted, or at least *feels* he has been slighted. . . . His sense that his own affection is not being fully reciprocated then finds a vent in the idea . . . of being a step-child or an adopted child” (“Family Romances” 298).⁹³ This kind of psychodrama is enacted in the novel—Maisie's parents' betrayal is big and real, not small and imagined.

⁹³ This was published right around the time James's New York edition preface for *Maisie* was published.

These conflicting feelings towards each of her parents are dramatized in Maisie's relationship with each of the love interests of her parents as well as by her experience of the rotating custody arrangement itself. Her internal feelings are exteriorized in the plot of the novel. Maisie engages in repeated testings of reality, and the way she learns or "knows" is always through comparison, within households and between households; it is always relational. The alternating custody arrangement frustrates the sequential telos of development, with its movement toward a definitive ending, because it is nonlinear. In this sense, the kind of "development" James represents through the child's experience of the alternating custody is more like the kind of child development theorized by Melanie Klein, who reworks the Freudian telos of "stages" into that of "positions."

Money, Motives, and Guardianship

Complicating the notion of family and parentage further is the function of money in relation to the love of and loyalty to a child. The novel never lets us forget that as a child, Maisie is a commodity, an object of exchange in an economic system, an object in which everyone, has a stake (including James himself). The alternating custody arrangement itself is a by-product of a lack of money. Thus, parenting time with Maisie has a monetary value. This is reflected in the 1891 Act,⁹⁴ which expanded the 1886 Guardianship of Infants Act and, in doing so, broadened the Court's role in determining parentage in a way that had financial implications regarding childcare. Under this act, the Court could, "if it orders the child to be given up to the parent," direct payment to third-party caretakers for past service: it was also able to "further order that the parent shall pay to such person, or to the guardians of such poor law union, or to such parochial

⁹⁴ 54 and 55 Vict. Chapter 3

board, the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the Court to be just and reasonable, having regard to all the circumstances of the case.” Thus, third-party guardians and caretakers received money for caring for a child.

Astonishingly, the 1891 Act enlarges the definition of the word “parent” itself to incorporate a child’s financial provider: “the expression ‘parent’ of a child includes any person at law liable to maintain such child or entitled to his custody, and ‘person’ includes any school or institution.”

Here “parent” is not defined through biological ties (and could even be an institution as opposed to a person), but through financial responsibility.

While Justice Chitty didn’t refer to 1891 explicitly in the case of *In re A. and B. (infants)*, he exercised the Court’s authority in an inventive and resourceful way by ordering that “the expense of the governess to be borne in equal moieties between the applicant and her father and the respondent and his father” (789). Moreover, Chitty linked parenting, money, and motives. Chitty summarily dismissed both parents’ claims upon their children based on best interests. He suggested something suspect, very likely something financially corrupt, with regard to their motivations and intentions when he asserted that on “the third point” of the law, “wishes” is “a very wide term” (789). In doing so, he also implicated the language of the law as inviting misappropriation. While it does cost money to raise a child, a child can also be used as a kind of commodity. This reading supports James’s representation in *Maisie*.

In the custody case *In re Violet Nevin* (1891), which was widely publicized in the newspapers, Chitty determined best interests based in part upon financial provisions for the child as opposed to religious and familial affiliation. This case, which was described as a case “of so much importance” by L. J. Kay, one of its appellate judges (*Law Reports* 314), may also have been one of James’s sources for *What Maisie Knew*. L. J. Lindley, one of the appellate court

judges (who also served in the case of *In re A. and B. (infants)*), proclaimed it a “peculiar” case, involving “a little girl of eight” (like Maisie) in which there “is no father, no mother, no guardian, so there is no one having a right to the custody of the child. Anybody may take out a summons for the appointment of a guardian, and the Court will protect the interests of the child. The paramount consideration is the child's welfare” (*Law Reports 1891* 310). Chitty found for the defendant, Miss Martin (a Mrs. Wix-like figure), over the plaintiff, Mr. Conolly, the mother’s brother. Miss Martin had already been financially providing for the child prior to her parents’ death and, Lindley characterized Miss Martin, who “having undertaken to maintain, clothe, and educate the infant, and in the case of her death, to provide [the child] with an income of £100 a year for life” as “the kindest person whom the parents knew” (312). L. J. Bowen concurred, adding: “What we have to consider is the benefit of the child; the child lived for years with Miss Martin, to whom she has become much attached, and from whom she has been taken away by force, and we consider it to be most for the child's benefit that the child should be restored to her” (*Law Reports* 314). Chitty’s decision (and its confirmation by the Court of Appeals) recognized emotional affiliation as well as the physical and financial care of the child. Notably, this legal family was constituted both through the child’s attachment, and through the financial commitment of the guardian.

In *Maisie*, James explores how the relationship between money and authentic attachment to the child can be confused and exploited. James has eight-year-old Maisie magically “provided for, thanks to a crafty godmother, a defunct aunt of Beale’s, who had left her something in such a manner that the parents could appropriate only the income” (400). Thus Maisie herself has a particular financial significance and is figured as such. We know early on that Miss Overmore/Mrs. Beale, who is first taken on as governess by Maisie’s mother, and then marries

Maisie's father, is "awfully poor" (406). She is at first a paid governess. When she marries Maisie's father, she (mistakenly) assumes he has money. Moreover, she believes her attachment to Maisie (or vice versa) secures her marriage. Likewise, Sir Claude marries Maisie's mother (also mistakenly) for financial gain. But, it is his second financial arrangement that is most curious. We learn about it when Mrs. Beale informs Maisie:

"She isn't your mamma any longer. . . . Sir Claude has paid her money to cease to be."

Then as if remembering how little, to the child, a pecuniary transaction must represent: "She lets him off supporting her if he'll let her off supporting you."

Mrs. Beale appeared, however, to have done injustice to her daughter's financial grasp. "And support me himself?" Maisie asked.

"Take the whole bother and burden of you and never let her hear of you again. It's a regular signed contract."

"Why that's lovely of her." Maisie cried.

"It's not so lovely, my dear, but that he'll get his divorce." (609)

Maisie's naïve perception allows us to see the cruel irony of the reversal taking place: Maisie is still a bargaining chip, but of a different kind. Her mother allows Claude his divorce if he will take on Maisie, who is figured here as a liability. Her mother thus profits by unloading her "debt." We can see here how the child works as a commodity in both ways—Maisie not only has financial value but has a monetary cost as well.

Third Parties and Third Person Narration

Like the fairy godmother who “provides” for Maisie, another third party is needed—someone to step forth, claim her, and make her divided self whole again. It is the narrator who makes her into a child-person, acting at times as impartial judge, interested third party, child expert, psychoanalyst, watchful audience, critical reader, and linguistic transcriber. Various critics have discussed the narrator’s intimate relationship with his subject, which has been described as everything from surrogate mothering to eroticized transference. Merla Wolk reads the narrator as the “nurturing” psychic mother Maisie does not have. Julie Rivkin suggests that “As attendant of the child—amplifier of her experience and translator of her perceptions—the narrator sounds very much like a caretaker. Is it possible that James’s narrator is the ‘proper third person’ called for at the trial, the figure who can serve in loco parentis?” (133). Sheila Teahan argues that the novel’s narrative mode is “improper”; the narrator’s “translation of Maisie’s knowledge” is not only presumptuous, but becomes the “death of Maisie’s point of view itself” (58).

The historical context of the novel establishes that the child is in need of third-person narration, both linguistically and legally. James Sully notes that the child is incapable of full articulation: “The earliest attitude of the wakening intelligence towards the confusion of novelties, which for us has become a world, is presumably indescribable, and further, by the time that a child comes to the use of words and can communicate his thoughts . . . the scene is already losing something of its first strangeness, the organizing work of experience has begun” (70). Dorrit Cohn points out that, “As James indicates in the [1907] preface, he had initially planned for Maisie to be the teller of her own tale. But he soon decided that this approach would fail, since ‘small children have many more perceptions than they have terms to translate them.’ . . . The narrator comes to play the role of simultaneous translator—or, better, transcriber—of a

potentially articulate mind, and his role is justified by Maisie's low verbal factor rather than by the subliminal level of her mental life" (Cohn 47-48).

However, James does not and cannot tell us all. Through his use of free indirect discourse, we share Maisie's point of view while we also partially see outside of it. Through Maisie, James portrays the difficulties in knowing children and thus, we experience our own puzzlement. Like a real child, the fictional Maisie requires our interpretation. William James writes that a

variety of the psychologist's fallacy is the assumption that the mental state studied must be conscious of itself as the psychologist itself is conscious of it. The mental state is aware of itself only from within; it grasps what we call its own content, and nothing more. The psychologist, on the contrary, is aware of it from without, and knows its relations with all sorts of other things. What the psychologist sees is the thought's object, plus the thought itself, plus possibly all the rest of the world.
(1: 197)

What Maisie Knew puts the epistemological burden, or the work of the psychologist (in the sense that William James describes) onto the reader. In this way, the reader too is a "third party."

Henry James may see the whole world, but what he gives us is the child's "mental state from within" or as he puts it, "the picture restricted" ("Preface" 27). The novel creates a reader who is privy to the objects of Maisie's mind and who must do the work of ordering and organizing them—or imagining them—into meaningful experience.

However, we as readers work not just for Maisie, but for enriching ourselves, and our own experience of seeing the world through her eyes. James makes this clear in the 1907 preface, aligning himself as writer of *Maisie* with the readers of *Maisie*:

Maisie's terms accordingly play their part—since her simpler conclusions quite depend on them; but our own commentary constantly attends and amplifies. This it is that on occasion, doubtless, seems to represent us as going so “behind” the facts of her spectacle as to exaggerate the activity of her relation to them. The difference here is but of a shade: it is her relation, her activity of spirit, that determines all our own concern—we simply take advantage of these things better than she herself. Only, even though it is her interest that mainly makes matters interesting for us, we inevitably note this in figures that are not yet at her command and that are nevertheless required whenever those aspects about her and those parts of her experience that she understands darken off into others that she rather tormentedly misses. (“Preface” 27-28)

Thus we too have a stake in Maisie. Maisie is our “light vessel of consciousness” (“Preface” 26), “our little wonder-working agent” (“Preface” 25), whose objects “become, as she deals with them, the stuff of poetry and tragedy and art: she simply has to wonder . . . about them, and they begin to have meanings, aspects, solidities, connexions—connexions with the ‘universal!’—that they could scarce have hoped for” (“Preface” 29).

Seeing through Maisie's vision gives us more than just an aesthetic experience, or an experience of something external to ourselves. Beginning in the nineteenth century, knowledge of the child was understood as the key to knowledge of adults: child studies argued that insofar as we could decipher childhood consciousness, we might better navigate “the intricacies of adult consciousness” (Sully 7). As a symbol of nascent development, Maisie becomes a synecdoche for our own (imagined) wholly constituted, fully knowing selves. Thus, there are problems with

James (and the narrator and even the reader) acting, like the court, as *parens patriae*, since no one can ever truly know the child's perspective, and no one is without self-interest, including the writer of the child's narrative. On December 22, 1895, after worrying over his writing contracts and the amount of words he needs to produce for his publisher, James had a revelation and realized that Maisie's own perspective was the key to this story: "Make my point of view, my line, the consciousness, the dim, sweet, sacred, wondering, clinging perception of the child, and one gets something like *this*" (*Notebooks* 148). Thus, James needed and used Maisie to his own advantage for aesthetic purposes and financial gain.⁹⁵

I read the retrospective preface to *Maisie* as defensive, even as an apologia. In it, James tells us that Maisie "wonders, in other words, to the end, to the death—the death of her childhood, properly speaking; after which (with the inevitable shift, sooner or later, of her point of view) her situation will change and become another affair, subject to other measurements and with a new centre altogether" ("Preface" 28). Sheila Teahan argues (less generously than Cohn) that James's use of "in other words" is "precisely resonant of the novel's representational scheme: it is the narrator's translation of Maisie's knowledge into other words, into figures not yet at her command, that is the agency of the death in question. The inevitable shift that produces a new center coincides not only with the death of Maisie's childhood but with the death of Maisie's

⁹⁵ In terms of the relationship between narrator and subject, various critics make the case that *Maisie* anticipates *Lolita* (or that Vladimir Nabokov used James's novel as the basis for *Lolita*). For example, Barbara Eckstein views *Lolita* as a "burlesque" of *What Maisie Knew*. Neil Hertz, in his application of James's treatment of Maisie to Freud's treatment of Dora, has an insightful reading of James's self-interest: "as James goes on to write of Maisie in sentences which exhibit that odd dexterity that allows a novelist to speak of his characters almost in the same breath both as products of his imagination and as autonomous beings, we sense that James' interest in Maisie is not simply that of a mimetic artist challenging himself to produce a tour de force of accuracy. The note of admiration we catch in the Preface suggests that, whatever it is that Maisie knew, James envies that knowledge and sets a peculiarly high value on it" (223).

point of view itself” (58). Representing the child in fiction presents many of the same dilemmas as representing the child in court.

Childhood, Personhood, Freedom, and Choice

James did not envision the ending of *Maisie* as he wrote it. In the December 22, 1895, notebook entry, he imagined Mrs. Wix as Maisie’s “only REAL guardian” (*Notebooks* 150). The novella was to end when the “old frumpy governess arrives, intervenes,” confronts the couple, “and carries off the child, to rescue her to save her. *She* will bring her up” (*Notebooks* 151). In the published novel, Maisie intervenes on her own behalf. This narrative shift from the originally imagined ending of Wix’s rescuing Maisie to the ultimate narration of Maisie’s own “choosing” reveals James’s newly conceived representation of Maisie’s maturation. In Post-Enlightenment Western history, psychological personhood is aligned with legal personhood in the sense that both construct individuation through freedom (and in particular, freedom from the family). Freud postulated: “The liberation of an individual, as he grows up, from the authority of his parents is one of the most necessary though one of the most painful results brought about by the course of his development. It is quite essential that that liberation should occur and it may be presumed that it has been to some extent achieved by everyone who has reached a normal state” (“Family Romances” 298). Maisie continually repeats the word “free” throughout the novel, believing often that she is. Historically, “freedom” and “knowing” go hand in hand. Legal personhood is defined as the freedom to enter into contract, and, the ability to choose freely and to exercise that freedom. It presumes an individual’s responsibility for his own self. With regard to legal personhood and the child, Holly Brewer argues: “The separate status of childhood is in many respects a consequence of this emphasis on an age of reason, a distinction that became critical to

the political legitimacy of government based on consent.”⁹⁶ By the nineteenth century, contracts made by children were considered void; however, children were able to contract through a proxy: “The question became who should consent for them: Parents? Guardians? State authorities?”⁹⁷ In terms of “freedom” and “knowing,” a child is both a potential person and not yet a person: the moment a child becomes an adult cannot be clearly demarcated because it is unclear just when a child does know.

Of course, it is that question of what Maisie knew that has plagued (and continues to preoccupy) critics. It is interesting in the context of my subject here to consider not what Maisie knows but how her knowledge is represented in what Sally Shuttleworth calls the novel’s “final bewildering scenes,” in which the “talk is all of freedom, and choice.”⁹⁸ “Freedom of choice,” Shuttleworth argues, “demands a unified selfhood, unconflicted desires, and an arena which will permit the exercise of such choice. Maisie has none of these: her tale is the reverse of a Bildungsroman.”⁹⁹ She claims that James “leaves his readers in no doubt of the irony of Maisie’s situation. Childhood freedom, a concept espoused so strongly by members of the child study movement, was not only illusory, but a concept deployed by the adult world to manipulate and control the child whilst saving their own consciences.”¹⁰⁰ The premise of child custody presents an inherent challenge to the ideas of freedom and choice: even when children are allowed to (freely) choose a guardian, they are doing just that—choosing a custodian, a keeper. However, I think James constructs “knowing” in a way that sidesteps this issue. I’d like to use one of Shuttleworth’s central readings of Maisie here to offer an alternative reading of the end of the novel. Shuttleworth reads Maisie as performing “childhood” by performing “stupidity”: “James

⁹⁷ This pertained to labor contracts (See Brewer 276, 282, 284).

portrays his heroine as embarking on a career of deceit, in which she explicitly conceals her capacity for understanding.”¹⁰¹ Sensing that revelation of her thinking would only provide more fodder for her parents’ manipulations of her, Maisie learns at early age to do as her mother wishes: “learn to keep your thoughts to yourself” (409). This strategy of concealment can also be seen at the end of the novel, but rather than performing childhood “stupidity,” it now can be read as Maisie’s performance of adulthood. That is to say, the turn into adulthood depends on the presumption of a fully realized interiority, which by definition is located inside—and is dependent on the construction of an inside and outside. To use Carolyn Steedman’s definition, “interiority” has been used to describe “an interiorised subjectivity, a sense of the self within—a quite richly detailed self.” (*Strange Dislocations* 4). Becoming aware of Maisie’s “concealment” means becoming aware of her having something to conceal. Maisie’s claims to knowledge are validated precisely by their non-disclosure.

By the end of the novel, the narrator does not—and seemingly cannot—narrate Maisie’s consciousness; he, as well as the reader, is closed off from it: “James, in other words, attempted to put across his full intentions by action and dialogue alone, with a minimum of authorial interpretation” (Worden, “A Cut Version” 504). The lack of “authorial interpretation” at the very end, the concealment of Maisie’s consciousness, both signals knowledge and indicates individuation. Third-person narration has reached its limits here: the novel provides “closure” in the sense that Maisie’s consciousness is now enclosed—it is hers alone and no longer accessible to the narrator (or the reader). Maisie’s “Oh I know!” punctuates the end of the novel. The trajectory of the novel propels us toward the conclusion of knowledge: our own engagement with child’s consciousness, our seeing along with Maisie, produces the effect of the experience of our own knowing. In this position, we are made to feel our own subjectivity; we can disavow our

own potential objectification (and ensuing self-alienation) onto Maisie, and use her eyes through which to see or in this case “know.” Yet if we ask ourselves what it is Maisie knows, or what we know for that matter, we are left like Mrs. Wix who gives “a sidelong look. She still had room for wonder at what Maisie knew” (649).

Thus, the only one who can possibly know what she should do, whom she should choose, is Maisie herself. For Brooks, the “final scene of the novel . . . registers her arrival at a sophisticated and usable practical knowledge of what is in her *best interests*” (*Melodramatic Imagination* 166, my emphasis). Through this representation, James solves ethical problems regarding the representation of another as well as the legal dilemma of child custody (the child knows and the child makes the choice). Yet, choosing whom to belong to is always choosing a subjected position. Maisie chooses Mrs. Wix because the one thing we are certain she knows is that she can’t be legally independent. But, like the narrator, Mrs. Wix does not have access to Maisie’s consciousness, nor is she Maisie’s savior, and Maisie no longer regards Mrs. Wix as a potential parent. The ending of the novel gestures toward the female Bildungsroman and marriage plot when Maisie asks Claude to give up Mrs. Beale in exchange for her giving up Mrs. Wix. It appears she has learned something about adult manipulation and commodities exchanges. Indeed, the failure of the quasi-sexual drama between Maisie and Claude can be read as the novel’s refusal of the marriage plot. Not having Claude in the way that she desires, Maisie stands alone. Turning away from Mrs. Wix, she knowingly articulates: “Oh you’re nobody” (611).

Child-centrism

The narrator describes Maisie as a “cynosure”; she is such in both senses of the word as both the center of attention (the focus of the plot) and the focus that becomes the reader’s visual

guide. While the two sets of parents provide structural solutions, disentangling Maisie from a family solves various problems as well. The novel is highly patterned in its moving through a series of potentially exchangeable stepparents, lovers, and governesses. Alternating custody is legally symmetrical. So, too, the custody arrangement provides aesthetic symmetry. Barbara Eckstein remarks:

This legal judgment sets the pattern for a novel in which there is a great deal of symmetry (dual marriages, dual governesses, dual separations, dual desertions) both in the form of the novel and in the psychodrama it creates. But the narrator's irony consistently disapproves of symmetry as an ethical solution to relationships even as it is embraced as an aesthetic solution to the demands of the plot. This ambivalence about symmetry becomes further deconstructed when Maisie finally gets her opportunity to act as subject, to solve the dilemma and end the novel with symmetry. (183)

In this novel of continual “distribution of parties” and “changing of places,” Maisie functions as the novel's aesthetic point of reference around which the other characters are placed: she is its aesthetic center, the center of attention, the central pretext, the center of consciousness, the center of morality. Maisie's presence is needed to explain and morally justify the presence of Miss Overmore in her father's house—and in her transportation to and from her parents' houses, she is the vehicle that brings together Sir Claude and Miss Overmore/Mrs. Beale. Had Maisie chosen the pair of stepparents, the novel would end with the potential for repetition: an endless cycle of marriage, divorce, and remarriage—a possibility that the law has no way of preventing or remedying. Part of the aesthetic closure of the novel as well as the solution to the legal

quandary it represents is that there are no more parents left. The novel ends “symmetrically” with a pair, a child and a widow, yet a pair devoid of reproductive potential. Without a marriage, and therefore without the possibility of replication, the cycle is over, not to be repeated. But the novel also ends with a single (if shrouded) point of view—Maisie’s. In its refusal of the marriage plot and its focalized consciousness, *Maisie* is James’s antidote to the “loose and baggy monsters” of the Victorian era.

4. "O how I do hate that Law": Rewriting the Law of the Father

Do ye hear the children weeping, O my brothers,
 Ere the sorrow comes with years ?
 They are leaning their young heads against their mothers, —
 And that cannot stop their tears.
 The young lambs are bleating in the meadows ;
 The young birds are chirping in the nest ;
 The young fawns are playing with the shadows ;
 The young flowers are blowing toward the west—
 But the young, young children, O my brothers,
 They are weeping bitterly !
 They are weeping in the playtime of the others,
 In the country of the free. (Elizabeth Barrett Browning, "The Cry of the Children" 1848)

For a small child his parents are at first the only authority and the source of all belief. (Sigmund Freud, "Family Romances" 1909)

By the turn of the century, England was a nation of children. In *The State and the Child* (1906), William Clarke Hall argued, "The proposition that one of the most important functions of the State is the careful preservation and right use of its assets may seem to be a truism, but it is one which needs to be continually emphasized. Of all the assets of which the State stands possessed, none are more valuable than the children, but of all its assets the State has in the past been of none so wasteful and so heedless" (xi). The end of the century ushered in the National Society for the Prevention of Cruelty to Children (NSPCC), as well as the 1889 Children's Charter, which was the first legislative act that explicitly gave the state the right to intervene in relations between non-divorced parents and their children. The act was the first law dedicated to protecting children from cruelty and suffering—and by 1894, it was reworked to recognize not only physical but also mental cruelty. The Chancery Court, which had declared itself as *parens patriae* concerning child custody became so concerning all aspects of child welfare, including child cruelty. Conceptualizations of cruelty to children have a complicated history that cannot be

neatly untangled as such cultural critics as Monica Flegel and George Behlmer have pointed out. The idea of cruelty to children and child protection and welfare engaged law, literature, science, psychology, religion, and pedagogy—all of which took on the project of making children into national subjects. The concept of childhood suffering became an impetus for social activism, and provided an opening through which to create meaning and purpose in individual lives and in the life of the nation.

In this chapter, I make new connections between the history of child law, child protection societies, nationalism, and literary interventions. Edmund Gosse's *Father and Son* declares itself to be a kind of literary intervention in the history of the developing rhetoric, and developing social and political movements concerning children. *Father and Son* is at once both stunningly original and still recognizable as a narrative of individual subject formation. In its use of the form of developmental narrative, it is indebted to the nineteenth-century Bildungsroman and nineteenth-century autobiographies. In particular, we can see the influence of John Stuart Mill's politics and ethics as well as the form of his autobiography. Although there were of course many fictional and nonfictional accounts of childhood by the end of the century, *Father and Son* is unlike others in that its entire narrative is an extended description of a childhood up until the moment of individuation upon which the narrative closes. And, as much as it is a singular story, it is much more than the story of a single individual. Gosse uses his own childhood to represent childhood in general. While Gosse doesn't directly refer to the laws of England, he uses the legal rhetoric built through nineteenth-century child custody and child welfare law in order to expand the correlation between the state of the child and the state of society. Gosse's description of childhood consciousness, development, and children's rights is not only made possible by and responsive to literary discourses, but it also takes up the developing socio-legal discourses of

child law and child welfare, which had begun to construct a national rhetoric prioritizing the nation's children such that they were constructed as quasi-citizens with individual rights and interior feelings.

Father and Son can be read as a testimonial that places children's rights within the category of human rights. Gosse's unusual use of narration can be read in the context of legal testimony and literary and legal truth claims. The preface of the autobiography is written from the third-person perspective, asserting that what follows is "scrupulously true" and offering it up "as a *document* or a record," a "study of the development of moral and intellectual ideas during the progress of infancy" (33). Gosse's use of the language of objectivity not only authorizes the text, it also legitimizes the child's authority as the interpreter of events. Combining retrospective narrative with third-person narration in its representation of intellectual and emotional deprivation, Gosse gives us the language with which to understand and describe childhood and children's needs. He bridges the gap between the culturally constructed child and the real one through his use of the legal structures of witnessing, testimony, and advocacy. Testimony gives confirms childhood knowing; advocacy paves the way for social agency. Arguing that narrative form, particularly the Bildungsroman, participated in the construction of international human rights, literary critic Joseph Slaughter expands upon Wayne Booth's proposition "that human rights be understood as protections of an individual's 'freedom to pursue a story line, a life plot.' His narratological vision . . . comprehends a human right to plot, what I have elsewhere called a 'right to narration'" (39).¹⁰² The "right to narration" is a central theme in *Father and Son*. As much as he constructs the mind of a child, Gosse grants the child voice. *Father and Son* is, in effect, the child's declaration of independence.

¹⁰² Slaughter also connects this argument about the narrative form of the Bildungsroman to what he calls the "*testimonio* genre" (41).

Child Cruelty

By the end of the nineteenth century, there were two developing strands of concern for children: the protection of children and the acknowledgement of children as legal persons. I argue that both were engendered by child custody law. While I trace these movements in order to expose their differences, I also show how they are each connected to the conceptualization of human rights in their historical context and in the way we understand individual rights today. Histories of Anglo-American child welfare reform leave out the critical component of the development of nineteenth-century family law.¹⁰³ Child protection laws have traditionally been viewed in the context of laws that prevent cruelty to animals. Historians such as Lawrence Stone have argued that the animal rights movement was the precursor to children's welfare movements. I'd like to suggest, however, another legal trajectory in order to reframe the development child welfare law and provide the neglected historical contributions of child custody law. Whereas animal law emphasizes protection and is concerned with caring for the nation's helpless, child custody law (though also concerned with protection) emphasizes personhood. Furthermore, child custody laws grapple with the concepts of child-knowing and the child as knowing.

In *Conceptualizing Cruelty to Children in Nineteenth-Century England*, Monica Flegel reworks the connection between animal and child protection movements, by constructing a more complicated relation between children and animals that entails both sameness and difference, locating the difference between the two within the distinction of "human" and "humane" in order to argue against the theory that "English children were somehow displaced as objects of charity by animals" (40). She traces two important movements: the constructing of children as "human"

¹⁰³ Though Pinchbeck and Hewitt consider the whole history of children in society, even they don't make this connection.

and the refashioning of society as “humane.” She suggests, “The discrepancy between the actual status of children and animals under the law and the perception of that status is captured perfectly in Benjamin Waugh’s complaint, published in *The Child’s Guardian*, that ‘if wretched children were only dogs, what sunlight would fall into their doomed and dismal lives!’” (40). In situating this movement not within animal rights but child custody, I am picking up the “human” strand of this argument and adding part of the untold history. While animal protection laws recognized physical suffering, child protection laws eventually recognized mental suffering. Further, the concept of mental suffering (in addition to physical suffering) had already been being recognized and developed through custody statute and case law. The idea of child welfare was circulating outside the court as well and there was mounting social interest fueled in part by the reporting of cases of parental divorce and child custody that recognized and addressed this concern. Custody law preceded and made possible an understanding of children as individuals, subject to mental harm and thus, set the stage for this larger-scale social intervention.

The History of the National Society for the Prevention of Cruelty to Children and the Children’s Charter

According to George Behlmer, “In the early 1880’s English philanthropists began to denounce child abuse as a gross social ill” (44). This period overlapped with the second wave of battles between divorcing parents, parents and courts, and the Divorce and Chancery courts over the determination of guardianship of children. The Prevention of Cruelty to, and the Protection of, Children Act 1889, known as the Children’s Charter was engendered by the child protection movement, which was originally philanthropic and separate from the state. The idea for the Society for the Protection of Children (SPCC) in England originally came out of New York. The

American movement, which started with the controversial NY SPCC, recognized “not that children needed the same legal protection as animals, or that children necessarily required separate and distinct legal protection from adults, but that abused children required advocates to represent them under the law. . . . The formation of the SPCC in America, then, represented the first step toward providing advocacy on behalf of abused children” (Flegel 19). The British movement was founded by Thomas Agnew, a visiting banker and philanthropist from Liverpool, who, when touring New York City in 1881, noticed signs for what was then an experimental child protection agency.¹⁰⁴ Agnew based England’s first agency, which was in Liverpool, on the New York SPCC. The origins of this agency were closely tied to animal protection and rescue operations. Indeed, Samuel Smith, the Liberal MP of Liverpool “converted a proposal for the formation of a Dog’s Home into an appeal for the defense of misused children” (Behlmer 53). Although the Liverpool Society was not connected to the nation, it did receive national attention. With the intent of developing a national society, Smith and Agnew met with Baroness Burdett-Coutts and Hesba Stretton in 1884 in London to develop a plan for a London society modeled after the Liverpool one. The London SPCC shared facilities, modeling and methods as the Royal Society for the Prevention of Cruelty to Animals (RSPCA), and even employed some of the same officials. The minister, Benjamin Waugh, spearheaded the movement to turn the philanthropic Society into a state-run institution. And, in 1887, the London SPCC founded *The Child’s Guardian* monthly magazine, edited by Waugh, and modeled on *Animal World*, which promoted child protection legislation (Behlmer 82). The London SPCC crossed class and cultural boundaries: “child-savers had shown themselves willing to meddle with the prosperous as well as with the poor” (Behlmer 70). Waugh claimed that the new legislation “is an embodiment of

¹⁰⁴ Much of this historical information comes from Behlmer, Flegel, Pinchbeck, and Hewitt.

the large spirit of the society that promoted it. That Society knows neither London children nor Birmingham children, but only English children, and all of them” (qtd. in Flegel 33).

The appeal to make what was a local and philanthropic movement into a national one depended upon state’s interference in the family—upon an enlargement of its already existing role as *parens patriae* in matters of child custody. Waugh was widely credited for turning the social movement into a state one and for legitimizing public interference into the private sphere of the family. A 1908 obituary for Waugh from *The Spectator* reads, “It was he who convinced the British public, first, that cruelty to children, and neglect amounting to cruelty, really did exist, and was even widespread; and secondly, that the privacy of the home must when necessary be invaded by the law” (443). Waugh already had been campaigning for children, and in particular for a separate juvenile court, believing that “the time will come when Englishmen will be ashamed that they ever dealt with the naughtiness of a child by police-courts and prisons, as they now are ashamed that they have ever traded in slaves” (qtd. in Behlmer 62). Concurrent with the protection movement was the child-rescue movement, one of the leaders of which was Thomas John Barnardo. He established what was known as the “Barnardo group” whose mission it was to patrol the streets, rounding up abandoned and homeless children to put into charity homes to be remade into “useful citizens” (Behlmer 58). These leaders of reform saw a wide “gulf” between “moral law” and “judicial law” (Behlmer 77), and wanted child protection to become institutionalized within the state. Both child-protection and child-rescue were based upon assumptions of parental incapability and a new kind of responsibility concerning children. Though he doesn’t trace this legal line, Behlmer does note that “circumventing the father’s hold over his offspring provided the key to child protection” (Behlmer 79), and that “the concept of *parens patriae* sanctioned the defense of all children as subjects of the Crown. Or so the London

SPCC would contend” (80). While appealing to the nation, the movement was underpinned by Christian morals. Children are figured as both helpless and as “subjects of the Crown.” Custody laws were not only interested in children as “subjects of the Crown” and they too distanced children from their parents. In doing so, they not only provided the gateway for these kinds of third-party interventions, but also explicitly authorized them. Child custody law presumed that others knew more and knew better than parents about children and their interests; it also engaged in the battle for authority over children.

In 1884 Waugh (somewhat scarily) imagined the nation united and personified with a far-reaching oversight of its children, as “one body with eyes and fingers everywhere to see and touch the cases” (qtd. in Behlmer 109). By 1885 Waugh and other members of the SPCC had proposed a bill based on the New York State Penal Amendment Act of 1884. Two months before the bill was passed, the London SPCC was incorporated into the state and became the National Society for the Prevention of Cruelty to Children (NSPCC). And, thus, with the creation of a national children’s aid society, cruelty to children was institutionalized. Flegel argues that this new framework then necessitated the disassociation of both children from animals and children from parents, in order to foster the representation of them as the nation’s subjects: “if the linkage of the child and the animal allowed for a productive, if problematic, space in which to examine questions about the nature of the child, the relationship between humans and the ‘lower creation,’ and the concept of cruelty itself, this connection also, ultimately, proved to be a liability within the new rationality of child protection” (41). She argues that it became necessary to differentiate children from animals in order to garner attention to and support for children, and to raise the urgency of child protection, since the “concern for animal welfare displaced the proper concern for human beings” (65). The child as a feeling and sensitive victim and in need of intervention

and protection was represented within the framework of Christianity: “The child *as* animal had to be replaced with the child of God, whose care was a divine and ethical injunction” (Flegel 70).

This argument bears out in Waugh’s 1886 “The Child of the English Savage,” written with Cardinal Manning. The title is reversal of the long-held belief and portrayal of child as primitive. It opens: “The Christianity and the civilization of a people may both be measured by their treatment of childhood. In the old Roman world fathers had power of life and death over their children; they might inflict torture upon them, they might sell them as slaves, they might cast them out to die. Children were the father’s chattels, and as he neither knew God nor his own soul, his children were to him without rights and he to them without obligations. He knew no Creator and Law-giver to whom he must give account” (3). Waugh and Manning claimed that the “National will can effect immense revolutions in the conditions of child existence . . . not alone because it can impose direct annoyances and miseries on its savage abusers, but because it can set up a standard of right and wrong, and community obligation, which is a still more powerful influence” (Behlmer 81). In this interesting reversal, Waugh and Manning represent parents as savage animals, further distancing children from parents. Although they shift the responsibility of children to the nation, they construe national responsibility from the perspective of Christianity. Relatedly, “the abused child had to be presented as inherently separate and distinct from the abusive parents” in order “to demonstrate the necessity—and possibility—of shaping that child through [religious] guidance and protection” (Flegel 71).

Most literary critics and historians consider that the Children’s Charter¹⁰⁵ “was England’s first attempt to deal comprehensively with the domestic relationship between parent and child.

¹⁰⁵ Prevention of Cruelty to, and Protection of, Children Act 1889 Chapter 44

Limitations on parental power over their offspring, previously vague, if defined at all, were now made explicit in a single statute” (Behlmer 109). This is not as novel as critics propose since the intervention between parents and children was already in play in child custody law decades earlier. The 1889 act primarily considered physical abuse of children, although it does include “suffering” (without qualification) as an offence. It states that “[a]ny person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanor.” Legal punishments for parents and guardians included “imprisonment” and “hard labour.” By 1894, the Children’s Charter was amended to include, “as an offence of cruelty,” anything that caused “mental derangement” to a child. By this time, children were also allowed to give evidence in court: “the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received . . . if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.” It was thought that even well-meaning parents might potentially, without realizing it, commit punishable offences. In an 1888 article, “Character in Children” in the popular *Murray’s Magazine*, Charlotte M. Mason declared: “It is the age of child-worship; and very lovely are the well-brought-up children of Christian and cultured parents. But alas, how many of us degrade the thing we love! Think of the multitude of innocents to be launched on the world, already

mutilated, spiritually and morally, at the hands of doting parents” (Grylls 64). Flegel argues that the

construction of the child as a “feeling subject,” as a victim in need of aid, was essential to the eventual emergence of cruelty to children at the end of the nineteenth century. . . . The narrative of child protection that emerged with organizations like the NSPCC owed much to representations of the feeling, suffering child, particularly because the possibility that every child could be a victim, regardless of class was a central tenet of the NSPCC’s definition of cruelty to children. (15)

While children were understood as important, the narratives of victimhood that circulated in the sphere of the child protection movement rendered them powerless. They may have been “feeling” but they were not speaking; rather, they needed to be spoken for.

Legal Constructions of Childhood Interiority and Citizenship in Custody Cases

The child protection movement did not define child welfare in positive terms; instead it defined it negatively, as anti-cruelty. However, a year before the 1894 amendment to Children’s Charter, which recognized the offense mental cruelty, two child custody cases defined “welfare” in explicit ways that continue to construct children as “human” by attending to their emotional and intellectual needs. Our modern legal definition of child “welfare” originated in these two late-nineteenth-century cases, *In re MacGrath* and *In re Gyngall*. In the case of *In re McGrath*, an orphaned child was being raised by a Protestant guardian appointed by the mother before her death. The father’s Roman Catholic aunt appealed to have the child placed with her, arguing that it was the wish of the deceased father to have his child raised as a Roman Catholic. With regard

to children's religious education, Lord Justice Lindley¹⁰⁶ stated that it was "settled law that the wishes of the father must be regarded by the Court and must be enforced, unless there is some strong reason for disregarding them" (148). However, Lindley did find just that:

The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded. (148)

The child wished to remain with the guardian. Lindley, having more regard for the "welfare" of the child than the wishes of the father, allowed the child to remain with the Protestant guardian.

The innovation in *In re Gyngall* was the determination that the Court could redirect the custody of a child even when there was no misconduct on the part of the parent. The logic was that Chancery jurisdiction is "a jurisdiction which is wholly independent of common-law jurisdiction" (562). This independent jurisdiction "was a jurisdiction not to determine rights as between a parent and strangers or as between a parent and child. *It was a paternal jurisdiction.* The Court of Chancery was put in a position to act, on behalf of the Queen, as the guardian of all infants, in place of the parent. That jurisdiction was to be exercised by the Court *as if it were the parent of the child and as superseding the natural parentage which existed*" (562, my emphasis).

¹⁰⁶ LJ Lindley also adjudicated the appellate case of *In re A. and B. (infants)* 1897, which I discussed in the previous chapter.

This was a case in which a Roman Catholic mother applied to have her fifteen-year-old daughter brought to her through habeas corpus. The father was deceased. The child spent much of her life without her mother because her mother worked as a lady's maid in different families, which required her to move from place to place. At the time of the petition, the child was at Miss Gyngall's home and "was being trained as at a public elementary school as a pupil-teacher." "[G]radually, without being influenced by any person, her religious views had begun to change and to tend toward Protestantism" (560). The child wished to remain where she was. The Court in this case used and enlarged the definition of "welfare" LJ Lindley put forth. Regarding Lindley's description, Lord Esher, MR claimed:

That is not exhaustive. The truth is that the Court has to consider the whole circumstances of the case—the position of the parent; the actual position of the child; its age; the question of the religion of the child, so far as it can be said to have any religion; and the happiness of the child. . . . It is a question of the "welfare" of the child in its largest and widest sense, as has been so well pointed out by Lord Justice Lindley. The Court has to consider what would lie for the welfare of the child, including its *happiness of mind*, its prospects in life—what it would be in a very short time, and what it would be if the mother should take it away. The Court has, therefore, to consider the condition both of the child and the mother . . . [even though the] mother has not, it seems to me, done anything which would derogate from her rights as between her and these persons to have control and custody of her child. (564, my emphasis)

He concluded:

The Court, acting as a high-toned, wise, and careful parent would act, is obliged to consider the *child's mind*. The one thing, if done, would keep the child happy, while the other would make here unhappy. . . . The Court ought to know what the child's wish is, and the test is, what will conduce to the happiness and welfare of the child in such a serious and important matter? The wishes of the child with regard to religion, therefore, have become important in this case. (565, my emphasis)

Both cases broadened the definition of “welfare” and both decisions recognize the wishes of the children.¹⁰⁷ Moreover, while the Court functions as an ideal parent, its explicit recognition of “the child’s mind” in *In re Gyngall* promotes the consideration of the child’s wishes, allowing children to have a degree of agency. Furthermore the critical word “happiness” entered the definition of child welfare for the first time.

Happy Citizens

Because the right to happiness is a principle deeply connected to human rights in general,, it is significant that this principle was extended to children in a court of law. Indeed, the U.S. Declaration of Independence asserted in 1776 “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and

¹⁰⁷ We may well wonder if religion played a part in these judgments: would the children’s wishes be honored if their chosen guardians were Roman Catholic? Nonetheless, the language of welfare used and developed in these cases is still significant, and this language affected future judgments of cases that did not have religious concerns. These two cases also help me make my point in the epilogue: decisions with regard to child welfare can never be neutral. Whether or not the justices themselves realized it, the children’s wishes were most likely aligned with their own religious predilections and therefore held more weight.

the Pursuit of Happiness.” Almost a century later, in *Utilitarianism* (1861), John Stuart Mill argued that “happiness” is “an aim” for each (and every) individual and is “the end of human action” (142-143). Mill claims that the “pleasures of the intellect, of the feelings and imagination and of the moral sentiments” are theorized (throughout the history of philosophy) to be of “a much higher value as pleasures than to those of mere sensation” (138). Mill’s “proof” of the happiness theory rests on the same logic as Jefferson’s “truths,” which he declares as “self-evident”: “No reason can be given why the general happiness is desirable, except that each person, so far as he believes it to be attainable, desires his own happiness” and since “each person’s happiness is a good to that person,” “the general happiness, therefore,” is “good to the aggregate of all persons” (169). While happiness, as a feeling, can seem relative, politically speaking, the right to pursue “happiness” equates with freedom itself.

In “On Liberty,” Mill asserts that “the free development of individuality is one of the leading essentials of well-being”; it is “one of the principle ingredients of human happiness, and quite the chief ingredient of individual and social progress” (85). Thus, “personal independence” is the free will to determine oneself. It is akin to what Joseph Slaughter understands as “the vision of free and full human personality development projected in international human rights law” (40).¹⁰⁸ Mill argues, “In proportion to the development of his individuality, each person

¹⁰⁸ In *Human Rights, Inc.*, Slaughter argues that “the *Bildungsroman* is the novelistic genre that most fully corresponds to—and, indeed, is implicitly invoked by—the norms and narrative assumptions that underwrite the vision of free and full personality development projected in international human rights law” (40). I am using end expanding upon his definition of *Bildung*. Slaughter recounts how international human rights law was directly influenced by Defoe’s *Robinson Crusoe*: “It was to settle these questions [of individualistic bias in the 1946 drafting of human rights law] that the delegates invoked *Robinson Crusoe*, and Daniel Defoe took his official place among the unacknowledged legislators of the world” (47). Interestingly, *Robinson Crusoe* was the only book Rousseau suggested children read: “For Rousseau, the possibilities and failures of the child’s natural citizenship are closely tied to the possibilities and failures associated with language. Rousseau makes clear that language and society are bound up together, each requiring the other. Thus, it is difficult to see how language can play a role in transforming existing systems. . . . He links society’s corruption to children’s learning of language from books, famously

becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fulness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them” (“Liberty” 90). Thus, one’s investment in oneself is an investment in others, in the community at large. Happiness then, as it relates to the production of individuality, is fundamental to citizenship.¹⁰⁹ So to grant children the right of happiness or to suggest that to have happiness is a right that children should possess suggests more than a right to a state of mind or a condition of feeling. It suggests the potential access of children to what we consider to be inalienable human rights.

The Family’s Members and the Nation’s Citizens

Children occupy a tenuous and ambiguous position in the context of human rights and citizenship, one that hinges in part upon the child’s position to and in the family. In *Ancient Law*, published in 1861, legal scholar, Henry Maine historicized law, tracing the roots of the conceptualization of individual liberty. The family was the origin of socio-political law: “society in primitive times was not what it is assumed to be at present, a collection of *individuals*. In fact, and in the view of the men who composed it, it was *an aggregation of families*. The contrast may be most forcibly expressed by saying that the *unit* of an ancient society was the Family, of a modern society the Individual” (52). Under Roman law, upon which English common law was

declaring that his young charge, Émile, shall read nothing except Daniel Defoe’s *Robinson Crusoe*” (*Imaginary Citizens* 180).

¹⁰⁹ James Kinkaid argues that England, as a nation, was invested in happy children and Victorian literature played a part in the dispersion of what became a moral imperative: “An unhappy child was and is unnatural, an indictment of somebody: parent, institution, nation. Hugo, Dickens, Dostoevsky, the Brontës, Gaskell, Stowe, Hardy all channeled fierce indignation through the weeping child” (80). However, Kinkaid is cynical about the underlying motivation: “The child was not to be happy; or no, as a severe childrearing manual put it, to be *seen* as unhappy. . . . We must, whatever may befall, *regard* children as happy; if we so regard them, that’s what they will be” (80).

founded, the father was the *paterfamilias*, who held *patria potestas* (absolute power) over his *filius familias* (son). Maine argues that “the Son under Power has no true place in law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity” (68). In “On Liberty,” Mill reworks the concept of individual freedom within the context of the family. As Slaughter notes, “For Mill, the right to liberty attaches to human beings only upon their completion of a successful sociocivil apprenticeship” (122). This is to say, that children, not having participated in society long enough, would not have earned the same rights as adults. However, this is only partially true. Mill does preface “On Liberty” with this qualification:

It is, perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as external injury. (48)

Nonetheless, Mill does speak of children and young persons. Indeed, he not only speaks of them, but also advocates for them in much the same way as he does for adults:

A person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs. The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of the family relations, a case, in its

direct influence on *human happiness*, more important than all others taken together. . . .

It is in the case of children, that misapplied notions of liberty are a real obstacle to the fulfillment by the State of its duties. One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them; more jealous than of almost any interference with his own freedom of action: so much less do the generality of mankind value liberty than power. Consider, for example, the case of education. Is it not almost a self-evident axiom, that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen? Yet who is there that is not afraid to recognise and assert this truth? Hardly any one indeed will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself. But while this is unanimously declared to be the father's duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it. Instead of his being required to make any exertion or sacrifice for securing education to the child, it is left to his choice to accept it or not when it is provided gratis! It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfil this obligation,

the State ought to see it fulfilled, at the charge, as far as possible, of the parent.
 (“On Liberty” 123, my emphasis)

Mill’s views on childhood, liberty, and citizenship are contradictory in various ways. While first denying that children are born with the right to citizenship, he then applies the logic of natural citizenship to argue for the State’s usurpation of authority in families, and specifically, of the father’s authority over his child. The obvious assumption is that the child is already a “human being,” an individual. Thus, the child is born a citizen, and citizenship is a natural right. Mill’s claims also implicitly address custody law,¹¹⁰ and the proposed outcome of his counsel is similar to that of the outcome of custody law: the detachment of children from the father and the father’s rule, and the institution of a direct relationship between children and State. Indeed, the State has the obligation to right the father’s wrong. It is interesting that Mill uses education, that which nourishes the child’s mind, as his example, and that the state’s requirement of it is a “self-evident axiom,” which echoes the “self-evident” right to liberty of the individual.¹¹¹ The failure of father in this respect is both a failure of the father and a failure of the state. Claudia Nelson notes, “Nineteenth-century observers saw a direct correlation between parenting methods and the nation’s strength. Individuals who lived up to what middle-class society defined as their responsibility vis-à-vis their children . . . were considered to be making an important contribution to England” (*Family Ties* 71). Paradoxically, in order to be considered as an individual, a child must be disassociated from its family and reattached to the state, thus becoming a child of the

¹¹⁰ Mill addresses custody law explicitly in *The Subjection of Women*. Many of the same claims about the subjection of women can be applied to children. The question was: are women full and equal individuals?

¹¹¹ During this same time period, new child education laws were instituted that made education no longer simply advisable, but rather legally required.

state. If the family won't function as a just state for children, then the state should (and will) become the new family.

Gosse: Child-Suffering and the Knowing Child

Gosse was born in 1849 and more than middle-aged at the time he wrote *Father and Son*, which was ultimately published in 1907. Thus, Gosse wasn't writing in the heat of the moment, but was deliberately choosing the arc of this story. Indeed, he had already written a biography of his father, *The Life of Philip Henry Gosse*, in 1890. Gosse wrote of *Father and Son*, "This particular book causes me more nervous anxiety than anything I ever published before" (Thwaite 431). When it was published, it was received as a "sensation on both sides of the Atlantic" (Thwaite 434). The *Athenaeum* announced: "This book is unique. It is at once a profound and illuminating study in the concrete development of a child's mind, and also an historical document of great value" (Thwaite 435). Ann Thwaite, who wrote the definitive biography of Edmund Gosse, describes that the publication of *Father and Son* "brought Gosse hundreds of letters. It aroused in particular a great chorus from people who said they had been through the same sort of thing themselves" (436). Henry James wrote to Gosse that *Father and Son* was "the very best thing you have ever written. It has immense and unfailing *life*, an extraordinary sort and degree, quite, of vivacity and intensity, and it *holds* and entertains from beginning to end—its *parti-pris* of absolute and utter frankness and objectivity being, it strikes me, brilliantly maintained—carried through with rare audacity" (*Selected Letters to Gosse* 230). "On the *whole* . . . I think the tenderness of the book is, given the detachment, remarkable—as an intellectual reflective thing," which has "the advantage of a living, intimate subject" (*Selected Letters* 231). (Indeed, it seems to have influenced James's preface to the New York edition of

What Maisie Knew, published as part of a series in 1907-1908.) Rudyard Kipling claimed, “It’s *extraordinarily* interesting – more interesting than *David Copperfield* because it’s *true*” (qtd. in Thwaite 436, my emphasis).

A reading of Edmund Gosse’s *Father and Son* in this historical context reveals just how much genre matters. To even call it an “autobiography” terribly limits its purpose, major contentions, and the ensuing controversies it was meant to provoke. Published anonymously, Gosse casts himself as a representative case-study, and he offers the study to the public as a “document”: “This book is the record of a struggle between two temperaments, two consciences and almost two epochs” (35). It is, he claims, a “genuine slice of life.” And yet it is “not another memoir of public individuals. . . . My serious duty, as I venture to hold it, is other” (43). It is “the record of a state of soul once not uncommon in Protestant Europe, of which my parents were perhaps the latest exemplars among people of light and leading” (43). It is this bold claim of exemplarity that elevates the status of this writing to historical document. Gosse’s truthfulness is, in part, effected through his use of form and his use of the third-person perspective. In the preface, he asserts,

At the present hour, when fiction takes forms so ingenious and so specious, it is perhaps necessary to say that the following narrative, in all its parts, and so far as the punctilious attention of the writer has been able to keep it so, is scrupulously true. If it were not true, in this strict sense, to publish it would be to trifle with all those who may be induced to read it. It is offered to them as a document, as a record of educational and religious conditions which, having passed away, will never return. In this respect, as the diagnosis of a dying Puritanism, it is hoped that the narrative will not be altogether without significance. (33)

In *Guardians and Angels*, an examination of parents and children in nineteenth-century literature, David Grylls asserts: “In scope [*Father and Son*] is a strange and pioneering work, a blend of biography, autobiography, and social and religious history” (172). In *The Mind of the Child*, Sally Shuttleworth claims that “Gosse sets his work directly within the framework established by all those conscientious recorders of child and infant development of the 1890s,” and he “offers his life as a kind of experiment: a careful study of what happens when a child is denied a childhood” (304). However, it reaches further than a study: *Father and Son* is a work of revolutionary writing.

While critics claim a link between Gosse’s “objectivity” and science, other evidence reveals that Gosse rejected a personal participation in science. For Gosse, science was not an expansive area of inquiry but, in its lack of recognition of humanity and individuality, just as stifling as religious observation. With regard to science Gosse wrote to his friend, Robert Ross, “Science is religion, and both are suffocating, deadening: Probably, if the hideous new religions of Science do not smother all liberty, we are in the darkness before the dawn of a humane and intelligent recognition of the right to differences” (Charteris, *Letters* 310). As he’s rejecting science as religion (and thus, the Father), he is embracing the legal authority of personal testimony, the passion of literature, and the politics of individualism. He supplants the law of the Father with the law of the Individual. In doing so, he is rewriting patriarchal law including the “law of genre.” To figure this particular father and son as representations of two eras is a wildly huge claim. The personal story of his own childhood becomes a kind of historical and legal intervention, a work of revisionist history. *Father and Son* can be read as a testimonial and work of child-advocacy with far-reaching implications. Gosse makes the condition of childhood

representative of the condition of the state and his form of representing childhood constitutive of individual identity.¹¹²

These childhood recordings provide the basis for Gosse's evidence for theorizing broadly. Like the Court, Gosse interprets "welfare" in its "widest terms." His advocacy is like that of an attorney; his the third-person injunctions read like trial findings and his assessments of the child's personal testimony are like those of a judge; his social claims move far beyond those of the nation's welfare societies. *Father and Son* gives us an example in which the familial space functions as a socio-political space and the family is a miniature of society at large. In it, Gosse transforms legal language into a narrative of child subjectivity within the structure of the family. In *The Subjection of Women* (1869), Mill decried modern families for their autocratic practices and reimagined an ethical redistribution of power, arguing that the family both reflects society and the family should mirror an ideal society:

The family is a school of despotism, in which the virtues of despotism, but also its vices, are largely nourished. Citizenship, in free countries, is partly a school of society in equality; but citizenship fills only a small place in modern life, and does not come near the daily habits or inmost sentiments. The family, justly constituted, would be the real school of the virtues of freedom. It is sure to be a sufficient one of everything else. It will always be a school of obedience for the children, of command for the parents. What is needed is that it should be a school of sympathy in equality, of living together in love, without power on one side or obedience on the other. (*Subjection* 168)

¹¹² See Gosse's "The Agony of the Victorian Age" in *Edinburgh Review*: Gosse equates "the agony of the child" with "the agony of the age."

According to Theodor Adorno, “the human being is capable of realizing himself as an individual only within a just and humane society” (46). Gosse represents the Evangelical family in which he was reared as neither “just” nor “humane.” It was not a “school of sympathy in equality.” The story of *Father and Son* is a narrative of social regulation and individual liberation. Gosse’s symbolic use of the figure of the suffering child suggests that knowing the child is knowing the state of society. The child can be read as a kind of allegory of agency and free will.

Michael McKeon’s theory of the “epistemological crisis” concerning “questions of truth” and “questions of virtue” that results from late seventeenth- and early eighteenth-century shifting generic and social categories can be applied to Gosse at the turn of the next century. McKeon asks, “What kind of authority or evidence is required of narrative to permit it to signify truth to its readers? What kind of social existence or behavior signifies an individual’s virtue to others?” (*The Origins of the English Novel* 20). Thwaite has made clear the many differences between the book and the life. She claims as a child, Gosse was “wrapped in a lavish love and parental concern unusual for the period” and Gosse’s letters to his father are filled with affection and exclamations of love (7). Yet *Father and Son* was—and still is—taken for truth.¹¹³ And, even when critics wrestle with the accuracy of the facts, they uphold the legitimacy of the narrative. For example, William J. Gracie Jr. suggests,

As skillful as Gosse’s blend of biography and autobiography may be, it necessarily involves its author in at least two “kinds” of truth: truth of fact and truth of experience. There is little enough evidence that Gosse’s *Father and Son* is not factually true. There may be minor flaws in the narrative, but the usual cause for such slips—faulty memory—can be hardly called reprehensible. As was the

¹¹³ See, for example, Stanley Williams, “Two Boyhoods” and O’Neill, “Children’s Rights.”

case with John Stuart Mill in his claim that he read Coleridge during his first mental crisis [he actually read Coleridge much later], the entire narrative does not stand or fall on the matter of factual accuracy. But Gosse introduces into his narrative some of the devices of the novelist—especially symbolism and dramatic structure—and once he does so, he necessarily involves his narrative in something clearly beyond factual accuracy. The perceptions, insights, and of character which invest and control Edmund and Philip Henry Gosse involve the biographer-autobiographer in what we may call, lacking a better phrase, a kind of truth of experience. (3)

Charles Swann labels *Father and Son* “autobiographiction,” claiming, “Gosse may declare it to be pure autobiography, but it moves beyond autobiography and, at least in its first anonymous edition, raises intriguing questions about an author's authority, about the relation of the book to reality” (30). Its lack of verifiable facts that highlights Gosse’s own claims about the larger story—the two epochs—the larger narrative that takes places at the crossroads between the individual and society. The narrative cultivates reader identification in its universality, in its story of the development from childhood to adulthood, and in its subject formation.

Simultaneously, by resisting strict adherence to fact, it is a story of coming to the expression of individuality through writing.

How then can we read this unusual generic amalgamation? *Father and Son* has generic roots in confession narratives that historically paved the way for legal testimony. At the same time, Gosse’s claim that this text is a “genuine slice of life” also situates it within the genre of realist fiction, which makes those same kind of truth claims. My argument here is that the effect

of truth in both of these writing traditions are connected in the nineteenth century to legal forms of objectivity, testimony, and the new and growing regard for the child's direct experience. Working through Foucault's history of Judeo-Christian confession, Regenia Gagnier argues that the self is not "constituted by its community" but rather, "by its Christian 'confession'—confession, whether to priest or analyst, being for Foucault, the master narrative of Western subjectivity" (236). Confession necessitates self-examination, consciousness of the self, objective assessment of one's own self. Legal testimony has the same requirements; it employs the double perspectives of subjectivity and objectivity. According to Jan-Melissa Schramm, "The English criminal trial at common law is a fact-finding model which has long been dependant on the testimony of witnesses. . . . the presentation of evidence in a court of law has often served authors of fiction as a coherent and influential model of 'reality', and writers have long imitated the strategies of persuasion privileged by legal forensic methodology" (1). Schramm claims that in the nineteenth century, law and literature diverge in their forms of narration. Although both were used as paths to truth-telling, law promoted advocacy whereas literature embraced testimony.

Gosse combines these two forms of narration: as a child, he is his own witness; as an adult he is his own advocate. This structure of testimony and advocacy is in alignment with the linguistic and temporal feat of autobiography itself, but this has more of an effect when Gosse's "I" becomes a third-person observer. Gosse does not retrospectively reinterpret the child's experiences, but rather objectively reports it and then use it to comment on childhood itself. He maintains that his memory of childhood is "still perfectly vivid" and "unbiased by the forgetfulness or the sensibility of advancing years" (33). Through his assertion of impartial detachment, he claims the mode of objectivity from his father and assumes it for himself,

positioning himself as both the object of evidence and the eyewitness: “I, the son of a man who looked through a microscope and painted what he saw there, would fain observe for myself, and paint my observations” (146). The doubled linguistic subject position of first- and third-person perspective is also deployed as a psychological construct, which correlates to the representation of his psyche. For example, Gosse writes, “In the course of this, my sixth year, there happened a series of minute and soundless incidents which, elementary as they may seem when told, were second in real importance to none in my mental history. . . . What came to me was the consciousness of self, as a force and as a companion, and it came as the result of one or two shocks, which I will relate” (55). The “consciousness of self” comes into being as a result of knowing the limits of his father’s knowledge. Up until this moment, Gosse tells us that he “confused him [i.e., his father] in some sense with God” (56). Gosse’s epiphany is born of an epistemological crisis: “Here was the appalling discovery, never suspected before, that my father was not God, and did not know everything” (56). It is this knowing of his father’s unknowing that precipitates Gosse’s transformation into his own self-contained unit of knowledge and self-compassion; he describes his “ontological birth” as the transformation into both a “self” and an “other” that function independently and apart from either parent:

But of all the thoughts which rushed upon my savage and undeveloped little brain at this crisis, the most curious was that I had found a companion and confidante in myself. There was a secret in this world and it belonged to me and to a somebody who lived in the same body with me. There were two of us, and we could talk with one another. . . . [I]t was in this dual form that the sense of my individuality now suddenly descended upon me, and it is equally certain that it was a great solace to me to find a sympathizer in my own breast. (58)

The “dual form” of self is structured as a model of empathy. Gosse’s subjectivity is born through the process of bearing witness, but he is, remarkably, witness to his own suffering.

This construction of the doubled self both mitigates and replicates the familial and religious structures of authority. Throughout the narrative Gosse refers to himself in different ways as subjected, imprisoned, and in bondage, suffering both psychic and physical constriction and restraint. The physical body endures its own kind of subjection in not being taken care of properly, in being made to endure at times rigorous conditions, and in the clothes that contain it, for every Sunday it “was hotly and tightly dressed in black” (195). The essence of mind that Gosse postulates is affected in the same ways as the physical body; he is physically trapped in his own psychic suffering and suffocation. He tells us, “There was no past and no future for me, and the present felt as though it were sealed up in a Leyden jar” (85), describing, in effect, a kind of temporal locked-in syndrome. This dual form of self reproduces his victimization and suffering; Gosse describes his treatment of his body as a kind of fetishistic object: “All this ferment of mind was entirely unobserved by my parents. But when I formed the belief that it was necessary, for the success of my practical magic, that I should hurt myself, and when, as a matter of fact, I began, in extreme secrecy, to run pins in my flesh and bang my joints with books” (61). Here, the boy’s actions are self-sacrificial, reminiscent of Christian martyrdom.

This other childhood self is figured quite literally as the witnessing self, and Gosse describes this witnessing self as his potential source of liberation:

Being so restricted then, and yet so active, my mind took refuge in an infantile species of natural magic. . . . During morning and evening prayers, which were extremely lengthy and fatiguing, I fancied that one of my two selves could flit up,

and sit clinging to the cornice, and look down on my other self and the rest of us, if only I could find the key. I was convinced . . . I should suddenly, on reaching some far-distant figure, find myself in possession of the great secret. (60-1)

Gosse describes “these ideas of magic” as comparable to “the ideas of savages at a very early stage of development” (61). The figuration of the two selves can be read as a representation of primitive childhood knowledge.¹¹⁴ In this reading, the “great secret” is interiority itself. The “key” eventually becomes Gosse’s own narrative voice with which to express the inside. The witnessing self has the capacity for testimony, for telling one’s story, for advocacy, and for individual liberation and thus, the potential for the “just and humane society.” These episodes can be read as the struggle through which the child develops autonomy and empathy. As Lynn Hunt describes human rights’ dependence on the cultivation of autonomy and empathy:

Autonomy and empathy are cultural practices, not just ideas, and they are therefore quite literally embodied, that is, they have physical and emotional dimensions. Individual autonomy hinges on an increasing sense of the separation and sacredness of human bodies: your body is yours and my body is mine, and we should both respect the boundaries between each other’s bodies. Empathy depends on the recognition that others feel and think as we do, that our inner feelings are alike in some fundamental fashion. To be autonomous, a person has

¹¹⁴ In 1869, anthropologist John Lubbock argued that “the life of each individual is an epitome of the history of the race, and the gradual development of the child illustrates that of the species” (qtd. in Shuttleworth, “Psychology of Childhood” 89). The notion that “ontology recapitulates phylogeny” influenced other discourses during this period. The child’s “primitive” understanding of the dual self is also the basis of the child’s constitution of the “I” and the other/not the “I.” This understanding is needed for the development of empathy toward others. (See William T. Preyer’s “Development of the Feeling of Self” in *The Mind of the Child* Part II.)

to be legitimately separate and protected in his or her separation; but to have rights go along with that bodily separation a person's selfhood must be appreciated in some more emotional fashion. Human rights depend both on self-possession and on the recognition that all others are equally self-possessed. (29)

Law of Religion v. Law of Individual

Though subsumed in the nation's agenda, the principles of child welfare as recognized by the NSPCC were founded in religion. *Father and Son* is also a narrative about extricating child advocacy from Christianity and positing it in the democratic claim to natural human rights, which includes the freedom to individual intellectual and emotional development and self-expression. There was no room, nor desire, for any of this in Gosse's family. Describing the ethical principles of his parents, Gosse recounts: "My parents founded every action, every attitude, upon their interpretation of the Scriptures, and upon the guidance of the Divine Will as revealed to them by direct answer to prayer" (43). He further explains,

The peculiarities of a family life, founded upon such principles, are, in relation to a little child obvious; but I may be permitted to recapitulate them. Here was perfect purity, perfect intrepidity, perfect abnegation; yet there was also narrowness, isolation, an absence of perspective, let it be boldly admitted, an absence of humanity.

So confident were they of the reality of their intercourse with God, that they asked for no other guide. . . . They lived in an intellectual cell, bounded at its

sides by the walls of their own house, but open above to the very heart of uttermost heavens.”

This then, was the scene in which the soul of a little child was planted, not as in an ordinary flower-border or gracefully tended social *parterre*, but as on a ledge, split in the granite of some mountain. (45)

Planted precipitously, without proper nourishment, the child’s growth and development is precarious. The metaphor of child as plant is extended throughout this narrative. Using this conceit, Gosse posits child development as a natural process, which is frustrated by religion, or the “absence of humanity,” in this family.

As a child, Gosse lives under his father’s law—“his code”—which was “the Bible, and the Bible only” (Gosse, *Life of Philip Henry Gosse* 328). According to Gosse, “everything” his father “did was justified, by reference to Scripture” (65):

My father’s religious teaching to me was almost exclusively doctrinal. . . . Some glimmer of suspicion that he was sailing on the wrong track must, I should suppose, have broken in upon him when we had reached the eighth and ninth chapters of Hebrews, where, addressing readers who had been brought up under the Jewish dispensation, and had the formalities of the Law of Moses in their very blood, the apostles battles with their dangerous conservatism. It is a very noble piece of spiritual casuistry, but it is singularly unfitted for the comprehension of a child. Suddenly by my flushing up with anger and saying, “O how I do hate that Law,” my Father perceived, and paused in amazement to perceive that I took the Law to be a person of malignant temper from whose cruel bondage, and from

whose intolerable tyranny and unfairness, some excellent person was crying out to be delivered. I wished to hit Law with my fist, for being so mean and unreasonable. (93)

Unlike his father, Gosse believes that all law requires individual interpretation, and the Bible in particular, which is “full of dark sayings,” requires “an interpreter” (*Life of Philip Henry Gosse* 328).¹¹⁵ Though Gosse’s Father’s law is that of religion, we can extend their positions to any kind of law (or any kind of overarching institution that can potentially sublimate individuality). “I think,” Gosse tells us, “that, with all his justice, [my Father] had no conception of the importance of liberty” (123). The issue for Gosse is not just about the rejection of the law of religion; it is about how law is applied, and Gosse and his father have very different methods. One supports the authority of the institution; the other supports the authority of the individual.

The Father uses religious law to pass judgment on his child’s behavior, and moreover, as a justification to manage his child’s feelings and direct his beliefs. “Liberty” for Gosse, as the opposite of “justice,” is the freedom to possess his body, his mind, and his inner feelings; it includes the concept of civil liberty, which is essential to the self. Without these fundamental human freedoms, Gosse recounts that his development, as a child, was thwarted:

Certain portions of my intellect were growing with unwholesome activity, while others were stunted or had never stirred at all. I was like a plant on which a pot has been placed, with the effect that the centre is crushed and arrested, while

¹¹⁵ Application of the law works in a similar way. As with Biblical literalism, legal textualism mandates application of the law in the way it was given, as it is written. Conversely, judicial activism (like literary analysis), is interpretive: it is not “the art of construing but the art of constructing” meaning; “Different notions of what it is to read . . . are finally different notions of what it is to be human” “The ability to interpret is not acquired. It is constitutive of being human” (Stanley Fish, *Is There a Text in This Class* 95, 172).

shoots are straggling up to the light on all sides. My Father himself was aware of this, and in a spasmodic way he wished to regulate my thoughts. But all he did was to try to straighten the shoots without removing the pot which kept them resolutely down. (210-211)

[T]he conventionality around me, the intellectual drought, gave me no opportunity of outward growth. They did not destroy, but they cooped up, and rendered slow and inefficient, that internal life which continued, as I have said to live on unseen. (219-20)

The Father's law could potentially eviscerate the child's individual self. Gosse's fight with his Father is akin to a fight for life itself.

The battle between Father and Son is one of authority and also one of epistemology, a battle between modes of knowing and forms of knowing as well as who can claim to know. In the Father's model, knowledge comes as revelation without human question or introspection; in the Son's, knowledge necessitates individual intellectual participation in its creation. The Father "had private knowledge of the Divine Will. . . . It was the prerogative of his faith to know, and of his character to overpower objection; between these two millstones I was rapidly ground to powder" (244). Gosse describes several childhood episodes in which he tests his father's way of knowing, which is deeply founded on religious faith and belief. In the central religious "de-conversion" episode, Gosse tests out the consequences of idolatry, substituting "O Chair" for the address to God in his daily prayer (66). Nothing happened: "I had committed idolatry, fragrantly and deliberately, and God did not care. The result of this ridiculous act was not to make me

question the existence and power of God; those were forces which I did not [yet] dream of ignoring. But what it did was to lessen still further my confidence in my Father's knowledge of the Divine mind" (67). Later, when he was still trying to reconcile his belief in literature with his Father's religion, he made one last attempt to receive God: "'Come now, Lord Jesus,' I cried, 'Come now and Take me to be for ever with Thee in Thy Paradise. . . . Oh come now and take me before I have known the temptations of life, before I have to go to London and all the dreadful things that happen there!' And I raised myself on the sofa, and leaned upon the window-sill, and waited for the glorious apparition." He waits, and waits: "Still I gazed and still I hoped." He is awakened from his reverie by the Wordsworthian "little breeze," which "sprang up," announcing the ordinary sights and sounds of earthly life. "The tea-bell rang,—last word of prose to shatter my mystical poetry. 'The Lord has not come, the Lord will never come,' I muttered. . . . From that moment forth my Father and I, though the fact was long successfully concealed from him and even from myself, walked in opposite hemispheres of the soul" (234-235).

Gosse posits that children have the core of that which constitutes a unique individual as well as the potential for the expression of individuality within a conducive social framework:

Through thick and thin I clung to a hard nut of individuality deep down in my childish nature. To the pressure from without I resigned everything else, my thoughts, my words my anticipations, my assurances, but there was something which I never resigned, my innate and persistent self. Meek as I seemed, and gently respondent, I was always conscious of that innermost quality which I had learned to recognize in my earlier days in Islington, that existence of two in the depths who could speak to one another in inviolable secrecy (168).

Individuality is tenuous. Interestingly, “[i]ndividual originally meant indivisible. That now sounds like a paradox. ‘Individual’ stresses a distinction from others; ‘indivisible’ a necessary connection” (Raymond Williams 161). However, both of these meanings are in play when constituting oneself as an individual in society. As Drucilla Cornell argues, “individuation is a fragile achievement, and one, as the word implies, that is necessarily dependant on constitutive relations with others” (220).

Father and Mother and Son

Gosse’s narrative of child development is a narrative that delegitimizes and even denaturalizes the Father, who we can see as a figure that encompasses the biological father, God the Father, and Patriarchal Law. In “Sexing the Aesthete,” Alexis Harley argues,

the emphasis on “Father” here also aligns Henry Gosse’s truth-denying intellectual hubris with patriarchy. Gosse’s childhood alignment of his father with God means that his self-authorship in *Father and Son* makes up both for the loss of God the Father *and* for the Father as God. But not only is this autobiographical de-conversion narrative a *response* to the Father’s and God’s de-authorization, it is also a *means* of de-authorizing them. The emergence of Gosse’s sense of self is dependent on his contention with this figure of theocratic and patriarchal authority. Indeed, to a considerable extent, Gosse invents the figure of theocratic and patriarchal authority in order to contend with it. (2)

John Tosh argues that as the role of mothers grew more important, fathers held on to what they could in terms of childrearing: “Some fathers appeared almost pathologically unable to see

familial relations in anything but terms of authority. Harshness and inflexibility were the result” (95). Tosh claims that boys became men through acts of filial rebellion and that male individuation came about by boys’ rejection of their fathers’ authority, and claiming it as their own. “How boys become men,” Tosh claims, “takes on the appearance of the natural, or at the very least becomes the social norm” (110). In its power to determine future of children, the court system was equated with the father; like the father, it operated under “the principle of total paternal control”; it became the embodiment of the British patriarch (Nelson, *Invisible Men* 110, 111). Therefore, male individuation can also be understood in this context as dependent upon rejection of the Court; that is to say, rejection of the absolute laws of the nation in favor of the natural inalienable laws governing human beings, which include free will and independent agency.

The Narrating Mother

As Gosse figures his individuation from his father and as necessary to establishing his own subjectivity, he in turn figures his identification with his mother as just as important, if not more so. Gosse figures his mother as the source of his potentially liberated subjectivity, thereby reworking the traditional familial structure of authority. *Father and Son* draws upon both of his parents’ writing. We are first given Philip Gosse’s uneventful recording of his son’s birth in his own diary: “E. delivered of a son. Received green swallow from Jamaica” (38). While his father’s diary is dry and sterile, his mother’s is filled with imaginative riches, which are figured as the nourishment for Edmund’s mind and as the source of language. Though Gosse “was slow in learning to speak,” he quickly learned how to read, recalling, “I cannot recollect a time when a printed page was closed to me” (47). His earliest influence was a poem that his Mother repeated

to him nightly, which he had “always taken for granted that she had herself composed, a poem which had a romantic place in [his] early mental history” (47). Yet, as Thwaite reveals, it was actually Gosse’s mother who restricted his reading. Gosse himself acknowledges this: “No fiction of any kind, religious or secular, was admitted into the house. In this it was to my mother, not to my Father, that the prohibition is due. She had a remarkable, I confess to me still somewhat unaccountable, impression that to ‘tell a story’, that is, to compose fictitious narrative of any kind, was a sin. She carried this conviction to extreme lengths” (48). And he begrudgingly admits, “It must have been my Father who taught me my letters” (47). But he reconstructs his mother through his reading of her private writing, and he reminds us throughout the narrative that he is repeatedly “indebted to her secret notes, in a little locked volume” (39-40). And, intertwined with his own longing, he nostalgically recounts his Mother’s “longing to invent stories” (49), asking “Was my mother intended by nature to be a novelist?” (49).

Indeed, the absence of, and desire for, stories are crucial to Gosse’s childhood:

My own state, however, was I should think, almost unique among the children of cultivated parents. In consequence of the stern ordinance which I have described, not a single fiction was read or told to me during my infancy. The rapture of the child who delays the process of going to bed by cajoling a “story” out of his mother or his nurse, as he sits upon her knee, well tucked up, at the corner of the nursery fire,—this was unknown to me. Never in all my early childhood did anyone address to me the affecting preamble, “Once upon a time!” (49-50)

Like the custody judges, Gosse does not just advocate for child protection, that is, the prohibition of negative actions toward children, but rather advocates positively for what the child needs:

children need to hear “Once upon a time.” Children need stories because, as human beings, they need the symbolic. While the Father “deprived all things, human life among the rest of their mystery,” the Mother feeds the life of the mind. The Mother is linked with stories and subjectivity, with the particular cognitive and affective needs of the child.

Gosse’s symbolic use of “Mother” aligns with and further develops the conceptualization of mothers as agents of childhood subjectivity, which came into being in the nineteenth century through custody law and literature. If, for Gosse, the Father symbolizes societal structures of authority, the Mother provides the shield from society, establishing a space for the growth of inner life, the education of the mind. “Rousseau called on mothers to build psychological walls between their children and all external and social pressures. ‘Set up early on,’ he urged, ‘an enclosure around your child’s soul’” (qtd. in Hunt 61). Even more influential than Rousseau on child education in England by the mid-nineteenth century was the founder of kindergarten, Friedrich Froebel, who advocated that “the ideal teacher of young children is like a ‘mother made conscious’” (Steedman, “Mother” 149).¹¹⁶ Froebel argued, “The destiny of nations lies far more in the hands of women—the mothers—than in the possessors of power, or those of innovators who for the most part do not understand themselves. We must cultivate women, who are the educators of the human race, else the new generation cannot accomplish its task” (von Marenholz-Bulow 4). Interestingly, this “cultivation” did not require formal education, but was understood by Froebel to be instinctual. This argument raises two contradictions concerning parenting and personhood: the state took over the father’s legal and domestic authority in part by inventing motherhood as a symbolic vocation; in this way it incorporated mothers into the

¹¹⁶ After 1850, the Froebelian education movement took hold in England; the Froebel Society was established in 1874 (Steedman, *Childhood* 82). In 1901, John Dewey stated, “in a certain sense the School endeavours throughout its whole course—now including children between four and thirteen—to carry into effect certain principles which Froebel was perhaps the first consciously to set forth” (5).

national rhetoric at the same time it was taking over the role of parent.¹¹⁷ However, through its elevation of motherhood and its connection between the mother and the child's mind, it also recognized (and naturalized) childhood subjectivity.

As much as his mother's absence influences *Father and Son*, so too does her presence.

Gosse figures his Mother as a kind of specter: he claims that

she exercised, without suspecting it, a magnetic power over the will and nature of my Father. . . . Hence, while it was with my Father that the long struggle which I narrate took place, behind my Father stood the ethereal memory of my Mother's will. . . . And when the inevitable disruption came, what was unspeakably painful was to realize that it was not from one, but from both parents that the purpose of the child was separated. (42)

Edmund's mother, Emily Gosse, was well-known. Her posthumously published diaries, *Tell Jesus: Recollections of Emily Gosse*, compiled and edited by Anna Shipton, were widely read and "hugely popular." What is more surprising, however, is that when Edmund was a young boy, his mother wrote a parenting manual called *Abraham and His Children*. The manual opens with Wordsworth: "The most philosophic of poets has said, 'The child is father of the man;' —and when we reflect that whatever of good or ill we see in the active world around us was formed in the cradles and nurseries of a generation ago, we can scarcely exaggerate the importance of a little child. In him is folded up, as it were, the hope of the future; like a tiny acorn which incloses the pride of the future forest" (iii). Emily Gosse backs up this poetic authority with a kind of post-Lockean and pre-Freudian argument: "And the child, the incipient man, is in our hands; the

¹¹⁷ In that they were and are both used symbolically and both marginalized with limited rights, women and children have continuously occupied similar positions and can therefore be described similarly. Lynn Hunt refers to them as "passive citizens" (148).

opening intellect, the budding feelings, the dawning conscience, are committed to our care; that immortal being with all his vast relations, will largely be just what we make him” (iii). It is worth noting that Gosse uses the same “hallowed proverb” by Wordsworth to make clear how unfitting it was to apply to his own childhood (216).

Emily, however, does not sustain this kind of humanist thinking, for she claims:

But here human wisdom is insufficient. The Christian parent at least feels, with intense anxiety, the solemnity of the task which he cannot evade, and desires heavenly aid in the momentous work. And is it not given? The writer believes it is; not grudgingly, not feebly, not uncertainly; but clearly, fully and abundantly: at sundry times and in divers manners, in forms suited to various intelligences and capacities, by precept, by doctrine, by example, by beacon, has God directed his people to train up a child in the way he should go. (v)

In this vision, parents are arms of God, training children to be the same. What is astounding, when taking Emily’s parenting manual into account, is that we can see how Gosse not only writes against his Father, but also, through his own accounting of childhood development and prescriptions for child-rearing, argues against his mother. Thus, it is not only his mother, but also his mother’s public writing, that is the specter behind his own. And, though he diverges from this maternal specter, we can well imagine how his mother’s manual must have provided the foundation for his own writing and the basis for his revision. In this way, her writing functions as a kind of palimpsest for him, and we can say that it is her writing that births his.

Narrating Voice

Father and Son can be read as a story about the son's production of voice as a constitutive element of identity, particularly when seen through the lens of linguist Émile Benveniste's view that "in and through language man constitutes himself as a subject." In this way it can be read as a testimonial of the self. For Gosse, testimony is a familiar form; he tells us that as a child: "The fact that I was 'a believer' [made it] my duty to be 'testifying for my Lord, in season and out of season'" (177). *Father and Son* is Gosse's reworking and revision of his former testimony, itself a form of knowledge. Legally, testimony functions as a proof, a form of evidence. Testimony as knowledge and evidence requires words, language. Gosse's poetic conversion makes him preoccupied with language, his lack of articulation, and his desire for self-expression:

The great subject of my curiosity at this time was words, as instruments of expression. I was incessant in adding to my vocabulary, and in finding accurate and individual terms for things. . . . I was busy providing myself with words before I had any ideas to express with them. When I read Shakespeare and came upon the passage in which Prospero tells Caliban that he had no thoughts till his master taught him words, I remember starting with amazement at the poet's intuition, for such a Caliban I had been. (220)

Shoshana Felman describes testimony as a "discursive practice": to testify is to "*produce* one's own speech as material evidence for truth" (5). "In the testimony, language itself is in process and in trial." Testimony is a "discursive practice. . . . To testify—to vow, to tell, to promise and produce one's own speech as material evidence for truth is to accomplish a speech act" (Felman 4). Etymologically, "to testify" is "to bear witness" ("Testify, v."). Thus, the testimony does not

just speak for oneself: it is “an appointment to . . . speak for and to others” (Felman 3). We can and should read Gosse’s *Father and Son* and his insistence that it “is not an autobiography” (217), in exactly this way; it focuses on speaking for others in both the sense of speaking for Gosse’s other child self and the sense of speaking for humankind. Though Gosse rejects society’s structures, this production of language, of speech itself, participates in the social.

We can say about most autobiographical writing that it is where the self is (or attempts to be) constituted; however, Gosse engages with the larger issues of giving evidence for children and advocating for children’s rights to be recognized as selves. Gosse tells us that his Father “could never learn to speak the ethical language of the nineteenth century; he was seventeenth century in spirit and manner to the last” (*Life of Philip Henry Gosse* 335). Unlike Edmund:

Philip Gosse as a draughtsman was trained in the school of the miniature painters. When a child he had been accustomed to see his father inscribe the outline of a portrait on the tiny area of the ivory, and then fill it in with stipplings of pure body-colour. He possessed to the last the limitations of the miniaturist. He had no distance, no breadth of tone, no perspective; but a miraculous exactitude in rendering shades of colour and minute peculiarities of form and marking. (*Life of Philip Henry Gosse* 341)

Not only does Philip Gosse use the microscope, he views the world through a microscopic perspective. While Edmund Gosse pays attention to small detail, he steps back and views them through a wide lens. *Father and Son* employs the kind of larger patterning that Northrop Frye describes: “Most autobiographies are inspired by a creative, and therefore fictional, impulse to select only those events and experiences in the writer’s life that go to build up an integrated

pattern. This pattern may be something larger than himself with which he has come to identify himself” (8). In this way, the narrative pattern of *Father and Son* can be read through Slaughter’s argument about narrative pattern of the Bildungsroman: “as a human rights claim, it is a narrative instrument for historically marginalized people to assert their right to be included in the franchise of the public sphere and to participate in the deliberate systems that shape social normativity itself . . . to make the socially unrepresentative figure representative” (157). In representing himself as a child, Gosse frequently alludes to bondage and imprisonment along with the language of otherness.¹¹⁸ Children are fundamentally disenfranchised. A child is inherently a figure that encourages identification (in that we were all once children) and is also inherently othered (in our distance from our child selves). We can read *Father and Son* as a narrative of de-othering and demarginalizing through this exploration and representation of childhood feeling, thinking, and inner emotional and intellectual life. The child “with the pale cheek pressed against the window-pane” is brought outside and included into the mainstream. Through his use of narrative form, Gosse enfranchises children.

The Plot of Self-Fashioning

It is a fundamental human right and aim of human happiness not only to express one’s own self, but also to create one’s own self. Mill claims that “the doctrine of freewill” is “the conviction that we have real power over the formation of our character; that our will, by influencing some of our circumstances, can modify our future habits or capabilities of willing”

¹¹⁸ Jane Eyre describes herself in this way as well. Further paralleling Jane Eyre, Gosse writes: “I felt like a small and solitary bird, caught and hung out hopelessly and endlessly in a glittering cage . . . imprisoned for ever in the religious system which had caught me and would whirl my helpless spirit as in the concentric wheels of my nightly vision” (167). “My soul was shut up, like Fatima, in a tower . . . and it really might have been starved to death . . . if my captor, by some freak not yet perfectly accounted for, had not gratuitously opened a little window in it and added a powerful telescope” (170).

(“Liberty” 102). While children are individuals, they are also in the process of becoming individuals. It is this concept of development, rooted in the nineteenth century, which informs contemporary human rights: “The human person is the central subject of development and should be the active participant and beneficiary of the right to development” (Slaughter 205). “[H]uman development” is “a process of enlarging people’s choices . . . to develop their potential” (Slaughter 211). Gosse’s story asks the fundamental question of development: “What is he to be?” (213). Furthermore, how is he to get there? In positing this kind of developmental narrative, *Father and Son* also suggests the teleological movement of becoming.

Gosse’s childhood liberation is ultimately founded upon a series of epistemological crises that place him at an “aesthetic juncture” (205). It is written, in part, in the tradition of the poetic epiphany. Gosse’s apostasy from his father’s faith to fiction is realized in a way indebted to Mill’s conversion from paternal control to emotional feeling. In “A Crisis in My Mental History,” Mill describes the recognition of his own subjectivity as the reason for relief from his depression: “I was not a stock or stone” (85). “I, for the first time, gave its proper place among the prime necessities of human well-being, to the internal culture of the individual” (86). Tending to the “internal culture of the human being,” he turns to poetry:

What made Wordsworth’s poems a medicine for my state of mind, was that they expressed not mere outward beauty, but states of feeling, and of thought coloured by feeling, under the excitement of beauty. . . . In them I seemed to draw from a source of inward joy, of sympathetic and imaginative pleasure, which could be shared in by all human beings” and “would be made richer by every improvement in the physical or social condition of mankind. From them I seemed to learn what

would be the perennial sources of happiness. . . . And I felt myself at once better and happier as I came under their influence. (89)

It is poetry that finally incites Gosse's intellectual growth:

My sluggish brain waked up at last . . . Shakespeare now passed into my possession entire. . . . I made acquaintance with Keats, who entirely captivated me; with Shelley, whose 'Queen Mab' at first repelled me from the threshold of his edifice; and with Wordsworth, for the exercise of whose magic I was still far too young. (230)

As with Mill, literature feeds internal life: it stimulates his intellect and even, as he describes, brings about physical reparation; it is a balm for his emotional wounds and, as it is internalized, becomes the foundation for his beliefs. Slaughter notes that in an early essay on *Wilhelm Meister*, "Lukacs attributes Wilhelm's decision to leave home and join the [theatre] troupe to 'his insight that only the theatre will enable him fully to develop his human capacities under the given social conditions. Hence theatre and dramatic poetry are only means here to the free and complete development of the personality'" (96). We can see a similar happening here. But what is so remarkable is that the crisis and the awakening for Gosse happens in childhood.

Father and Son ends when Gosse is fifteen, but includes a crucial epilogue that focuses in on the year he was twenty-one and gaining a "reliance upon self" (247). Gosse recounts: "For this kind of independence my Father had no respect or consideration" (248). At one point, he tells us: "I desire not to recall the whimpering sentences in which I begged to be let alone, in which I demanded the right to think for myself, in which I repudiated the idea that my Father

was responsible to God for my secret thoughts and my most intimate convictions” (249). He then transcribes a long letter he received from his father after which he moves into third-person narration:

All I need further say is to point out that when such defiance is offered to the intelligence of a thoughtful and honest young man . . . there are but two alternatives. Either he must cease to think for himself; or his individualism must be instantly confirmed, and the necessity of religious independence must be emphasized.

No compromise, it is seen, was offered; no proposal of a truce would have been acceptable. It was a case of “Everything” or “Nothing”; and thus desperately challenges, the young man’s conscience threw off once for all the yoke of his “dedication”, and, as respectfully as he could, without parade or remonstrance, he took a human being’s privilege to fashion his inner life for himself. (251)

Although he is a young adult by now, these are the same claims he makes for children. Not only does Gosse participate in demarginalizing the child through this narrative form, he does so through his use of this particular language. Gosse’s ending declaration alludes to the U.S. Declaration of Independence. A “declaration” is “[t]he action of stating, telling, setting forth, or announcing openly, explicitly or formally; positive statement or assertion; an assertion, announcement or proclamation in emphatic, solemn, or legal terms . . . A proclamation or public statement as embodied in a document, instrument, or public act . . . The creation or acknowledgement of a *trust* or *use* in some form of writing; any writing whereby a trust or use is

constituted or proved to exist” (“Declaration, n.”).¹¹⁹ Hunt writes: “The history of the word ‘declaration’ gives a first indication of the shift of sovereignty. . . . Over the course of the seventeenth century, it increasingly pertained to the public statements of the king. In other words, the act of declaring was linked to sovereignty” (114). Using J. L. Austin’s speech-act theory, declaring is a “performative utterance” and therefore doesn’t just describe an action but rather is itself the action.

Not only is it a human right to form one’s own self, but also it is a human right to have that self recognized by others. The Universal Declaration of Human Rights states: “Everyone has the right to recognition everywhere as a person before the law” (qtd. in Slaughter 45). Slaughter contends, “Contemporary human rights law proposes to regulate the relations between the individual and the state most conducive to the free and full development of the human personality. It takes two persons as its subjects; the individual human being and the state” (89). That is, the right to become and express oneself as an individual is also a national right, in which the nation is invested: “human rights law aspires to normalize, publicize, and disseminate both its plot of human personality development and responsibility for it, so that rebellion—as an act of collective self-assertion—might be trans-plotted into socially acceptable modes of narrative protest that make individual claims on the state” (Slaughter 91). In this way the perceived conflict between individual and society is resolved.

¹¹⁹ “Jefferson therefore began the Declaration of Independence with this explanation of the need to proclaim it: ‘When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should *declare* the causes which impel them to the separation.’ An expression of ‘decent respect’ could not obscure the main point: the colonies were declaring themselves a separate and equal state and seizing their own sovereignty” (Hunt 115, my emphasis.)

Gosse, not only advocates for, but also claims a new kind of children's rights that we take for granted today, that include not just protection, but the right to "the free and full development of the human personality." He makes his argument through uses of narrative that are not only sanctioned by the state, but also extolled by the state. While fostering reader identification, Gosse cultivates the principles of individualism and the liberal subject's right to self-possession, applying these inalienable human rights to children. In this way, he constitutes children as fully realized citizens. *Father and Son* ends at the moment of the Son's maturation. The narrative is fully sustained by and during the period of childhood; there is no need for it to advance further for this story is fully told. With his proclamation of liberty, his final claiming of "a human being's privilege to fashion his inner life for himself," Gosse announces the end of the Victorian period.

Epilogue: Our Children/Ourselves

Father and Son, *What Maisie Knew*, and *The Tenant of Wildfell Hall* are narratives that question childhood and figure childhood suffering: what do children need? Who do children need? How do we know what a child sees and knows? Who should be in charge of children and why? What does knowing about children reveal about the larger world? How do we constitute children in the context of human rights? How does knowing about children reveal something about ourselves? Diana Fuss argues that the “human has always been a politically charged referent with a complicated and difficult and complicated social history. . . . The human may, in fact, be one of our most elastic fictions. As the dividing lines between humans and ‘non-humans’ have been historically redrafted to accommodate new systems of classification and new discourses of knowledge, the human has proceeded to mutate many times over” (2). The “child, by its very closeness to the human, may pose the most contested limitcase of all” (5). This period that began with the birth of child custody law engendered that which we take for granted about children, that with which we are preoccupied, and that with which we still struggle.

Published in 2014, Ian McEwan’s novel, *The Children Act*, opens with a draft of a judgment by Fiona Maye, a British justice in the Family Division of the High Court, which deals with the “larger estates”: “Wealth mostly failed to bring extended happiness. Parents soon learned the new vocabulary and patient procedures of the law, and were dazed to find themselves in vicious combat with the one they once loved. And waiting offstage, boys and girls, first-named in the court documents, troubled little Bens and Sarahs, huddling together while the gods above them fought to the last, from the Family Proceedings Court, to the High Court, to the Court of Appeals” (17-18). Fiona, however, “believed she brought reasonableness to hopeless situations. On the whole, she believed in the provisions of family law. In her optimistic moments

she took it as a significant marker in civilization's progress to fix in the statutes the child's need above its parents'" (18-19). Attention to her writing of the draft is intertwined with retrospective episodes from her own marriage, her own childlessness, the lack of power she felt in her personal life, and "the power" she had "to remove a child from an unkind parent and she sometimes did" (24), along with the cases that hovered about her: "a despairing Englishwoman, gaunt, pale, highly educated, mother of a five-year-old girl, convinced, despite assurances to the court to the contrary, that her daughter was about to be removed from the jurisdiction by her father, a Moroccan businessman and strict Muslim, to a new life in Rabat, where he intended to settle" (17); the battle between two divorced parents (both raised in the orthodox Haredi community) over the education of their school-age daughters. The mother is represented as uncomely, crude, and inappropriately self-involved; the father, an arrogant and impractical man who tried to persuade the Court that his wife had "anger-management" problems: "On the surface, the dispute concerned Rachel and Nora's schooling. However, at stake was the entire context of the girls' growing up. It was a fight for their souls" (30).

In the final version of her judgment, Fiona "quoted from an 1893 judgment by Lord Justice Lindley to the effect that welfare was not to be gauged in purely financial terms, or merely by reference to physical comfort. She would take the widest possible view. Welfare, happiness, well-being must embrace the philosophical concept of the good life. She listed some relevant ingredients, goals toward which a child might grow" (40-41). Lord Justice Lindley has appeared in two of my preceding chapters; in this novel, McEwan makes use of the case I discuss earlier, the case in which Lindley so importantly expands the scope of "welfare" while leaving the definition up to interpretation. The Children Act of 1989, a later incarnation of the 1889 Children's Charter, is the act that governs England today. Under "Welfare of the Child," the act

states that “a court shall have regard in particular to the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).”

The case that occupies the majority of McEwan’s novel is about childhood knowing and childhood agency: a frail and beautiful boy who writes poetry, almost eighteen, who has leukemia, is refusing a blood transfusion (without which he will die), because he identifies and has been raised as a Jehovah’s Witness. This case too hinges upon the word “welfare”: “That observation was crystallized in the clear injunction of the Children Act of 1989, which declares in its opening lines for the primacy of the child’s welfare. I take ‘welfare’ to encompass ‘well-being’ and ‘interest.’ I’m also bound to take into account A’s wishes (247-248). And though A has “wishes” and has “expressed them clearly,” Fiona concludes, “I do not believe that A’s mind, his opinions, are entirely his own” (249). Thus, she decides, “He must be protected from such a decision. He must be protected from his religion and from himself” (251). In this application of the law, Child “welfare” potentially includes child agency, but agency can only be granted when autonomy is evident, when what is in the child’s mind is known to be its own. From Fiona’s perspective, it isn’t. Therefore, by denying Adam’s wishes, Fiona believes—at least consciously—that she is granting Adam the time to come to know his own wishes, and thus, the right to become an autonomous individual. Just how valid is this decision? How important is it that Adam is almost a legal adult? How much of it is affected by Fiona’s own atheist beliefs? Does some part of her believe she is protecting Adam, saving him from himself? If Adam’s beliefs were aligned with hers, would she have come to a different verdict?

Literature has had, and still does have, a stake in exploring how these questions are and can be engaged. Literature itself is considered a form of knowledge in issues of child custody and understanding children. *What Maisie Knew*—precisely because it places us in the child’s

perspective—is used as a case study and cited by various legal professionals as evidence against “50/50” custody schedules for children.¹²⁰ For example, Joan Wexler, a widely cited attorney and law professor, in arguing against joint physical custody, claims that “the best interests prong of the test often at least gives lip service to the social policy that stability and continuity are usually in a child’s best interests.” In a footnote, along with seven legal custody cases stated as evidence, she includes: “See H. JAMES, WHAT MAISIE KNEW 4-5 (1897) (parents, each awarded custody for six months annually, ‘had wanted [the child], not for any good they could do her, but for the harm they could, with her unconscious aid, do each other’” (763). Sociologist Debra Friedman argues: “It is possible for parents—and courts—to conceive of and execute custody arrangements in the name of the child, behind the rhetoric of the child’s interests. James saw with clarity what most modern observers and critics of child custody arrangements cannot or will not see: that parents have interests separable from those of their child and that they can be expected to act on those interests” (3). Indeed, Friedman ends her book with Henry James’s words regarding Maisie: “Nothing could have been more touching at first than her failure to suspect the ordeal that awaited her little unspotted soul” (Friedman 141).

What Friedman herself, like Wexler (and others), leaves out is that in the same way parents have interests, so do the courts, along with (the growing and highly lucrative fields of) child experts, parent coordinators, forensic experts, divorce attorneys and the court-assigned attorneys for children.¹²¹ These child attorneys, formerly known as “law guardians” most often

¹²⁰ *What Maisie Knew* is used and/or cited in various contemporary discussions concerning joint custody and its effects on and consequences for the child: See for example, Margaret F. Brinig, “Penalty Defaults in Family Law: The Case of Child Custody”; Francis J. Catania, Jr., “Learning from the Process of Decision: The Parenting Plan”; James DiFonzo, “Customized Marriage”; Debra Friedman, *Towards a Structure of Indifference: The Social Origins of Maternal Custody*; Leslie Shear, “Then and Now”; and Joan Wexler, “Rethinking the Modification of Child Custody Decrees.”

¹²¹ I am using New York State as my example here, which operates, in matters of child custody, in ways similar to much of the western world (and particularly England).

were not advocates of children's positions, but rather, as arms of the court, advocates for what they believed was in the children's best interests. In 2010, however, New York Governor David Paterson signed into law a momentous change in the legal representation of children in custody cases by changing the confusing term "law guardian" into that of "attorney for the child." This was not only a change in nomenclature, but also a fundamental change of practice in the relationship between the child and his or her attorney, and how that relationship functions in the courtroom. The New York State Bar Association makes special mention of this:

Amongst the many twenty-first century changes reflected in the Standards [for Attorneys Representing Children], perhaps two merit special mention. The first is the evolution from a "best interests" representation paradigm to one in which, barring exceptional circumstances, "the attorney for the child must zealously advocate the child's position" (Rule 7.2(b), Standards and Administrative Policies, Rules of the Chief Judge). The second is the recent legislative replacement of the always misleading and now archaic title "law guardian" by the accurate and far more descriptive title "attorney for the child."

This change in law clearly provides the child with the same kind of representation as the parents (or any other adult for that matter). Under this practice, the child, like his or her parents, is one of the legal parties, with the ability to file motions, responses, etc. Operating under these standards, the child's position would be a contributing factor to the court's determination of the child's "best interests."

There is one caveat. Under the rules of the New York State Chief Judge, "if the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be

directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.” However, if “the attorney for the child is convinced” that “the child lacks the capacity for knowing, voluntary, and considered judgment,” “the attorney for the child would be justified in advocating a position that is contrary to the child’s wishes.” But if the attorney does advocate a different position, “the attorney for the child must inform the court of the child’s articulated wishes if the child wants the attorney to do so, notwithstanding the attorney’s position.” While many believe children as young as four, and even younger in some cases, know enough, many are invested in their not knowing (and thus in their own knowing). Thus, we come back to the same questions. As with England’s 1839 Custody of Infants Act, New York’s change in legal language is remarkable; however, its principle, for the most part, is not yet practiced.

It is impossible to come to any epistemological certainties concerning children because, the problem is that as much as a child can know, a child’s mind is not fully accessible and thus, to a degree, inexpressible in language. As Edmund Gosse even admits:

As my mental horizon widened, my Father followed the direction of my spiritual eyes with some bewilderment, and knew not at what I gazed. Nor could I have put into words, nor can I even now define, the visions which held my vague and timid attention. As a child develops, those who regard it with tenderness or impatience are seldom even approximately correct in their analysis of its intellectual movements, largely because, if there is anything to record, *it defies adult definition*. (196, my emphasis)

However, we must still engage these questions. And the only ethical way to do so is to know that our projected answers are historically and psychologically informed. That is, if the questions of how we can know children and of what children know are universal but will remain only partially answered, then we must recognize how much our desire to speak as though we know is bound by our own cultural and historical circumstances and our own need to project ourselves as knowable, knowing, and in some way outside of time and history. This is not to say that our preoccupation with children is always narcissistic and/or solipsistic (although it certainly can be for some), but it is to say that we must consider just how much knowing the child, knowing what the child knows, is bound up with our own personhood.

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