

**Gender and the Law in Nineteenth-Century England**

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“Neither does it avail anything to say that the *nature* of the two sexes adapts them to their present functions and position, renders these appropriate to them. Standing on the ground of common sense . . . I deny that any one knows, or can know the nature of the two sexes, as long as they have only been seen in their present relation to one another.”

-John Stuart Mill, “The Subjection of Women,” (*Collected Works* 21: 276)(1)

<1>In his mid-nineteenth-century essay, “The Subjection of Women,” John Stuart Mill preemptively dismisses the claim that reliable evidence of inherent differences between men and women can be found by simply observing mid-Victorian English society. Mill suggests that what we imagine to be nature is quite possibly a social and artificial construct. In doing so, he takes aim at theories that justify social and legal inequalities based on claims to knowledge of natural difference. Instead, he argues, the sexes’ “present relation to one another” was one formed by acultural, religious, social, and legal structures; throw those off, Mill suggests, and who knows what men and women might be and do. While the term was not used then as it is now, Mill was, of course, talking about gender in “The Subjection.” But he was also talking about the law, “the subjection” being, in its sharpest formulation, a legal one.

<2>While now the pairing of the terms, gender and law, is not an uncommon one, it is worth taking a moment to think about what the two have in common, today as well as in the nineteenth century. Gender, as opposed to sex, always suggests social constructions, ones that engage with shifting interpretations and readings of biological sex, even as gender breaks away from biology. Gender pivots away from any concept of “nature,” rejecting the claim that men and women are simply biologically hard wired to occupy “separate spheres” of influence. But in doing so, by necessity it also references back to biological notions of men, women, and sexuality, even if only to move past such notions. Thus gender always brings to the fore a tension between claims of what “is,” based on a supposed natural order, and what “can be,” based on a recognition that natural orders are really always partly, if not wholly, socially constructed. Mill was one of several thinkers in nineteenth-century England who insisted that the status quo was both not natural and open to deconstruction. He was preceded by Mary Wollstonecraft, who, on the cusp

of the nineteenth century, provided her own prescient critique of gender and rights in her polemic, “A Vindication of the Rights of Woman.” Wollstonecraft also urges her readers to imagine alternative possibilities to present conditions, and she does so by showing the ways in which women have been conditioned to embrace gendered limits on education and concurrent limits on legal rights. This “vindication” was Wollstonecraft’s intellectual call to arms for women, a demand that women and men awaken to see their ways of being in the world—ways presumed timeless and natural—as instead artificial and limited.

<3> In its own attention to what has been, what is, and what could be, the law shares something with gender. Here too what has been considered natural or given often comes to be understood as social, and the results of such debates have real and lasting effects on the lives of subjects and citizens (we might think here of contemporary deliberations about the legalization of same-sex marriage). Gender and law, then, both serve as means to organize people into groups that sometimes have, in the nineteenth century and today, profoundly different sets of rights. In addition, they often borrow from each other to accomplish this work. As an historical example of this borrowing, we can think of the oft-cited law of coverture, the effects of which did not begin to be diminished until the passage of the first Married Women’s Property Act in 1870. Coverture subsumed the personhood of a wife into that of her husband. In legal terms, a wife’s property would be transferred to her husband upon marriage, and she did not have the right to enter a contract, nor the right to her own earnings. This would, of course, create a position of practical and legal dependency on one’s husband. And coverture operated based upon the assumption that women could not function independently, that they needed to depend upon the male figures in their lives, be they husbands or fathers. Here we see the ways in which gender and law come together in coverture: assumptions about gender informed the law, and the law perpetuated assumptions about gender. The two—law and gender—continually speak to each other; shifting conceptions of gender inform the creation and dismantling of law, and laws have real effects on shifting (or sometimes static) understandings of gender.

<4> While the nineteenth century is often thought of as a time in which gender binaries, such as the division between public and private domains, were strictly and even legally enforced, in fact what makes it such an interesting period are the ways in which these divides were regularly challenged—both in and out of court. The nineteenth century was a period rife with watershed moments in the history of law and gender in England. It is also a period marked by contradictions: legislation that granted women greater rights under the law took place in fits and starts, and was never unaccompanied by cultural and social backlash. The period began, in 1801, with a national census that revealed women outnumbered men by more than several hundred thousand. It included both the passing and subsequent repeal of the discriminatory Contagious Diseases Acts and it saw the passage of the first and second Married Women’s Property Acts. Debates about the relationship between women and the law, and their attendant questions (*Were* women legal persons? *Could* they be?), permeated the legislation, court cases, newspapers, serials, and novels of the day. The roles, and legal power, of English men were also in flux during the period. The rise of industrialism, as well as the middle class, challenged the masculinity of the landed and leisured male aristocrat. Laws that granted women greater rights in marriage, divorce, and ownership of earnings and property served to challenge the centrality of the male patriarch in traditional family structures. In turn, masculinity became increasingly defined by both state-sponsored and independent imperial ventures in the colonies. And by the end of the

nineteenth century, a new version of manhood came into being. The rise of the aesthetes, as represented by the publicity surrounding Oscar Wilde, and the criticism of the aesthetes, as symbolized by his rather public trials, serve as the most infamous example of events that brought to light growing anxieties about masculinity, sexuality, and the law.

<5>All of the articles in this special issue complicate, then, any accepted notions we might have about a clear relationship between gender and law in nineteenth-century England. Critical readings of mid-century novels by Charles Dickens, Wilkie Collins, Edward Bulwer-Lytton, Mary Elizabeth Braddon, and Anthony Trollope show that the Victorian lawyer need not be a monolithic cultural figure. Instead, literary lawyers (as opposed to practicing lawyers) can be male or female, queer or straight, married or bachelor. Legal cases from the period, as well as an analysis of novelistic portrayals of domestic life, reveal that the portions of England's common law dealing with "private" family matters involve shifting notions of gender and, at times, a snapshot of social engineering in progress. Finally, literary responses to the great social evils of the nineteenth century, such as prostitution and the institutional flaws of the criminal justice system, include radical voices that demand greater enfranchisement for women in an effort to promote a more equal society.

<6>In the lead article of this special issue, Christine Krueger, author of *Reading for the Law: British Literary History and Gender Advocacy*, provides a powerful queer reading of Charles Dickens's heroic lawyer, Sydney Carton, from *A Tale of Two Cities*. Reading Carton's intimate conversations with Lucie Manette as a veiled scene of coming out in which "the conventional declaration of romantic love becomes a coded confession of a secret desire," Krueger argues that Dickens's hero sacrifices himself so that the family unit can continue. Read in this way, Krueger concludes, the novel's Victorian representation of queer heroism resonates with today's discourses surrounding LGBTQ issues.

<7>Analyzing a "usual suspect" for discussions of law, literature, and gender—*The Law and the Lady* by Wilkie Collins—Catherine Siemann provides an innovative reading of the novel by arguing that its heroine, Valeria, successfully performs the role of appellate attorney, as well as the well-documented role of detective. In challenging a Scottish Verdict of Not Proven rendered against her husband at a trial for the murder of his first wife, Siemann argues, Valeria successfully brings traditionally "feminine" characteristics to the practice of law. In so doing, she proves to be more, rather than less, successful than her male counterparts.

<8> Matthew Ingleby also investigates portrayals of the lawyer through a novel approach. Through readings of Edward Bulwyer-Lytton's *What Will He Do With It?* and Mary Elizabeth Braddon's *The Lady's Mile*, Ingleby maps out the shifting geography in Bloomsbury as it becomes a center less hospitable to the families of middle-class lawyers and more popular for bachelors. In doing so, Ingleby draws our attention to the neglected importance of domestic spaces to male professionals. Through his spatial reading of "metropolitan domesticity," he continues to complicate our understanding of separate spheres in the period.

<9>These articles draw our attention to the networks in which the legal professional found him-, or, in the case of Collins, herself. Lawyers in Victorian fiction, Krueger, Siemann, and Ingleby

show, are simultaneously professionals and private individuals. It is perhaps because of this nexus that the fictional lawyer is so often the location of gender construction and contestation. Moving more specifically into the legal dynamics of nineteenth-century families, articles by Gregory Brennen and Danaya C. Wright investigate what might be called “private” (as opposed to criminal) law within England’s legal system. Brennen analyzes the relationship between coverture and what he theorizes as the literary construct and legal fiction of “the noble patriarch” in Wilkie Collins’s *The Woman in White* and Anthony Trollope’s *The Eustace Diamonds*. In his readings, Brennen unveils the fraught relationship between the state and family patriarchs as both attempt to enact an assumed duty to “protect and govern.” The legal relationship between the two is one in which each alternately reinforces and undermines the other. The novels, Brennen argues, expose the disastrous consequences of a state’s investment in “fallible men” with power over female dependents, and thus creatively promote legal reform.

<10>Danaya C. Wright also interrogates the relationship between nineteenth-century families and the law in “Policing Sexual Morality,” but she does so through an examination of the shifting grounds on which custody cases were decided in the period. She details the ways in which the *parens patriae*, or the doctrine “invoked by judges to protect the interests of persons unable to protect themselves at law,” was significantly expanded in and after the case of *Shelley v. Westbrooke*. Percy Bysshe Shelley’s claims for custody over his children by Harriet Westbrooke, and Lord Eldon’s denial of this custody, served as a watershed moment in the nineteenth century: before the decision, Wright argues, parents were denied custody only if children were in danger physically or economically. Wright suggests that larger concerns about political, even revolutionary, unrest in England contributed to Eldon’s decision that Shelley’s claim to a right to educate his children as he saw fit required state intervention. After *Shelley v. Westbrooke*, Wright details, parents were denied custody based upon a wide range of increasingly conservative social bases.

<12>Topics such as coverture and the *parens patriae* demonstrate the profound impact of law on private and domestic lives of nineteenth-century women and men. The criminal law of this period has its own social impact, and Clare McGlynn and Colleen Fenno show its impact on women in particular in their articles. The severity of the law’s disenfranchisement of women, particularly in quasi-criminal contexts, caused political activists such as John Stuart Mill and Mary Wollstonecraft to write passionately about “the Wrongs of Woman.” These radical voices in nineteenth-century literature create a counter-narrative to the all-too-familiar prescriptive ideologies of Victorian gender norms.

<13>Through her analysis of the oft-neglected writings by John Stuart Mill on prostitution in the period, Clare McGlynn makes a case for a reading of Mill as not a liberal feminist, but a radical feminist. McGlynn traces Mill’s nuanced thinking about prostitution in his evidence before a Royal Commission on the regulation of prostitution, his positions in “On Liberty,” and his personal correspondence. In bringing together these public and private strands of writing, she reveals the ways in which, while Mill took issue with prostitution on ethical grounds, he broke with other Victorian moralists in his rationale for legal reform, and in his challenge to “assumptions about male sexual right.”

<14>Colleen Fenno also turns our attention to the relationship between women, rights, and work in her article on Wollstonecraft's novel, *Maria: Or the Wrongs of Woman*. Fenno breaks new ground by analyzing the working-class character, Jemima, rather than Wollstonecraft's eponymous middle-class protagonist. Jemima's story, Fenno argues, embodies a severe disenfranchisement from the criminal justice system based on class, as well as gender. Connecting this turn-of-the-nineteenth-century novel to modern-day legal theories regarding victims' advocacy, Fenno further argues that Wollstonecraft anticipates a restorative and therapeutic role for victim testimony in cases involving crimes against women.

<15>Taken together, the articles in this special issue illuminate the significant impact that the legal systems of the nineteenth century had on the construction, deconstruction, and renegotiation of gender, as captured in the literature and essays of the period. Via points of intersection with contemporary debates over law and gender, they simultaneously reaffirm, as Foucault so famously did for twentieth-century readers in the *History of Sexuality*, that we twenty-first-century readers are not so unlike our Victorian predecessors.

#### Endnotes

(1) Mill, John Stuart. *Collected Works of John Stuart Mill*. Vol. 21. *Essays on Equality, Law, and Education*. Ed. John Robson. Toronto. 33 vols. Toronto: University of Toronto P, 1963-1991. Available via the [Online Library of Liberty](#).(^)