

**Policing Sexual Morality:  
Percy Shelley and the Expansive Scope of the *Parens Patriae* in the Law of Custody of  
Children**

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<1>In 1817, the poet Percy Bysshe Shelley lost custody of his children because he insisted on his right to educate them to be government critics, reformists, and atheists (*Shelley*). In 1827, William Wellesley Pole lost custody of his children because he taught them to swear, smoke cigars, play with street urchins, and because he exposed them to life with his mistress (*Wellesley*). In 1851, a clergyman father lost custody of his children because he engaged in homosexual relations in the back room of taverns and inns, most often with “common soldiers” (*Anonymous*). In 1870, the widowed Helen Skinner lost custody of her daughter when she converted to Islam and entered into a polygamous marriage (*Re Matter of Victoria Skinner*). In 1879, Annie Besant lost custody of her daughter to her estranged husband, the Rev. Frank Besant, because she had written a book on birth control, a book the Lord Chancellor deemed to be obscene (*Re Besant*).

<2>Throughout the nineteenth century, judges faced a variety of petitioners asking for the removal of children from their parents or guardians because the children were abused, neglected, exposed to religious beliefs or forms of sexuality that violated social norms, or because it was feared their property was at risk. When children were removed from parents it was always based on a judicial determination that the child’s welfare required interference with the legal rights of a parent or guardian. The state’s power to remove children lies in the *parens patriae* jurisdiction, a doctrine invoked by judges to protect the interests of persons unable to protect themselves at law; i.e., infants, lunatics, imbeciles, and married women.<sup>(1)</sup> But protect them from what? Prior to the nineteenth century, the child welfare standard protected children from physical harm (violence or sexual abuse) or economic harm (squandering of their estates). Mental abuse, corporal punishment, neglect of children’s educations or religious or moral values, and forcing children into unhappy marriages may have been considered social evils, but they were not illegal. Courts did not interfere in parenting decisions that they believed did not endanger the life or limb of children. Religious and moral training was left to parents, and judges did not impose their own views, or the views of a traditional public morality on parents. Throughout the seventeenth and eighteenth centuries, when asked to intervene, judges did so cautiously and only when there was palpable physical or economic harm. The *Shelley* case in 1817 profoundly changed that, expanding the doctrine to include removal to protect children from the social stigma of non-conforming parents who created what judges believed were immoral home environments.

<3>The Victorian period is, of course, well known for its construction of a repressive sexual morality, from the public scandals surrounding George IV and Queen Caroline to the obscenity trial of Annie Besant and the gross indecency trial of Oscar Wilde. The public debates over divorce reform in mid-century and the rise of the temperance movement coalesced around the goal of maintaining the purity of the marital bedroom and reining in illicit sexuality (Wright 244-49). And judges and lawmakers became quite avid proponents of using the coercive power of law to punish what they considered to be a variety of activities that contributed to the decline in sexual morals, enacting laws against abortions, infanticide, adultery, publication of obscene materials, and prostitution. But one of the most lasting changes came in the expansion of the *parens patriae* jurisdiction of the Chancery to allow the court to remove children from their parents' custody when parents exposed children to sexual practices and ideas that deviated from acceptable sexual norms.

<4>A detailed examination of the origins of the *parens patriae* and the expansion of the jurisdiction in the nineteenth century in cases involving non-traditional sexuality reveals both the limits of judicial doctrine as well as the legacy of nineteenth-century attitudes of sexual repression. Fearing that children would grow into licentious harlots or libertines, nineteenth-century judges added their weight, and the weight of law, to the creation of a society in which children were to be protected from adult sexuality until they reached an age when they could express their own sexuality in socially acceptable ways. But as the acceptable forms of sexual expression became more constrained, the scope of judicial interference became greater, and judges stood alongside religious leaders, temperance advocates, and social reformers to infuse the child welfare standard with normative values about what was socially acceptable sexual behavior and to punish deviant parents with the stigma of the loss of their children.

### **The Origins of the *Parens Patriae* Jurisdiction**

<5>The *parens patriae* sprang fully formed from the brows of the Lord Chancellors in the eighteenth century in disputes originally involving guardianship and custody of children by non-parents.<sup>(2)</sup> In a time of plagues, wars, unsanitary conditions, and spotty medical treatment, few children reached adulthood without losing at least one parent. And if the father died, underage heirs could easily become prey to the machinations of relatives or neighbors if there did not exist a superior power to check the abuses of legal and *de facto* guardians. In the early modern period, this power was located in the extended family, as courts were only involved in custodial matters under the *writ of ravishment of ward* when children were kidnapped by marital adventurers (Holdsworth 427-30).

<6>Even in the seventeenth and eighteenth centuries, disputes involving the care and upbringing of children were ancillary to guardianship matters, matters that instead centered around the preservation of the child's estate. But as the eighteenth century progressed, disputes over the right to control a child's marriage, education, or religious teachings began to appear in the court records. The Court of King's Bench, under an evolving *habeas corpus* jurisdiction, began to interfere in disputes between parents and third parties over physical custody of minor children when control over a child's marriage was in dispute (Halliday 121-33). But the court's limited jurisdiction extended only to allowing those children over the age of discretion, usually age

fourteen, to be released from the custody of whatever adult claimed them, and to be free to go where they wished. Children under age fourteen were deemed too young to be consulted about their custody, and thus were always returned to their fathers, who were held to have the absolute legal rights to custody of their legitimate children so long as they had not forfeited their rights through physical violence. The King's Bench would not appoint a child to the custody of her or his mother, unless the child was illegitimate, and it would not remove a child from the custody of her or his legal guardian unless that person had forfeited his rights through physical endangerment or entrapment that jeopardized the child's estate. What was best for the child was irrelevant so long as the child's person or estate was not being harmed. And what constituted a moral upbringing was not a factor in the *habeas* cases until the 1760s under the leadership of the progressive Lord Mansfield.

<7>In 1763, Lord Mansfield had much to say about the court's role as guardian of social mores. In that case, *Rex v. Delavel*, a fifteen-year-old girl, Ann Catley, was apprenticed to a teacher to learn vocal music and perform for his financial benefit. Two years later, the wealthy Sir Francis Delavel saw her on stage and seduced her. Shortly thereafter, he had his attorney prepare articles of apprenticeship to transfer the girl from the music teacher to Sir Francis, who brought her to his home as his kept mistress. Upon a petition by the father to reclaim his daughter, allegedly only for the purpose of extracting further money from Sir Francis, Lord Mansfield explained: "this Court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*" (*Rex v. Delavel* 915). Although the courts had punished people for violating moral norms, like the commission of adultery or public displays of drunkenness, they entered a new terrain when they tied the *parens patriae* jurisdiction to the production of a particular moral environment.

<8>Mansfield first issued a *habeas corpus* against Sir Francis to produce the girl in court where she was released from her indenture and charges were laid against the music teacher, Sir Francis, and his attorney for fraudulently assigning a female apprentice for the purpose of prostitution. Despite Mansfield's affirming the charges against Sir Francis, Ann Catley, who was released to go where she would, brazenly returned with Sir Francis in his carriage, thumbing her nose at the court's assertion of moral authority. Although the court would not order her into the custody of parents, especially parents who had either neglected her or connived at the prostitution, it nullified the articles of indenture and affirmed the charges of fraud against Sir Francis. But ultimately, since Ann Catley was of an age to choose her own residence, the court could only rail against the immoral arrangement.

<9>The *Delavel* case marked an important development in the law curtailing parental rights. Despite the fact that Ann Catley rode off with Sir Francis, the *Delavel* case established that a parent or master who placed a child into prostitution, or the scoundrel responsible for debauching her, would be held liable and the parent would be denied his legal rights to reclaim custody of his child if he raised her into immorality. And although the court did not use the term *parens patriae*, Mansfield's assertion of the court's jurisdiction as "*custos morum* of the people" resonated with the growing willingness of the Chancellors, on the other side of Westminster Hall, to intervene on moral or religious grounds with parents and guardians under expanded trust law principles. The law of trust had been used for centuries to impose fiduciary obligations on guardians of property to manage a ward's property, but it was not until the eighteenth century that trust

notions were expanded to include non–property-based custodial decisions.

<10>The Court of Chancery, under its trust jurisdiction, had begun imposing duties on guardians to provide properly for the care and education of their wards, and not just their estates, as early as the 1720s (*Duke of Beaufort; Eyre*). Throughout the century, guardians were held to strict standards in educating, marrying, and even supervising the religious training of their wards because these aspects of a child’s upbringing could directly affect her economic interests (*Smith; Gordon*). Although a father could neglect his child’s education or marry his child to a social or economic inferior, a guardian could not.<sup>(3)</sup> But over time, the Chancellors expanded the trust obligations of guardians to apply to parents as well, holding as early as 1732 that a father could not reclaim custody of a child who he had allowed to be raised by a wealthy relative when the latter appointed a testamentary guardian to have the care and control of the child because reclaiming the child jeopardized his future prospects (*Ex. p. Hopkins*). And, by 1756, Lord Hardwicke had no qualms about denying a father’s petition for custody when doing so harmed the children’s economic interests (*Blake*). At the end of the century, Lord Thurlow refused a petition by a father who had returned to reclaim his abandoned children after they received legacies from relatives, stating: “this Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child” (*Creuze* 113).

<11>But trust law is a branch of property law; it is the law governing a person’s dominion and control over *things*, not *people*. So long as a parent or guardian maintained a child’s estate intact, it was hard to use trust law to justify interfering if a parent was teaching a child to swear, smoke cigars, or reject established religious precepts. As the *parens patriae* evolved in the last half of the eighteenth century, it provided a mechanism for greater interference with guardians in many quasi-economic aspects of care and control of their wards than the economic-based trust law had allowed. And as judges expanded the *parens patriae* to apply to parents, the welfare standard absorbed both the trust standards of economic caretaking, as well as the indirect aspects of education, religious training, and marriage that were necessary to maintaining the child’s status in respectable society.

<12>It was only a matter of time, however, before the purely non-economic, normative aspects of a child’s upbringing would appear before the court, and the “full potential of the *parens patriae* jurisdiction could be realized” (Seymour 178). As the decadence of the Regency occupied the tabloids, George IV’s own marital infidelities became the subject of high-level government intrigue, and public support for Queen Caroline brought her marital woes to public attention, it was only logical that the conservative Lord Chancellors Thurlow and Eldon would view the *parens patriae* as an appropriate tool for taming the sexual license of the late Georgian family. Unable to effectively intervene in the education of the wildly beloved Princess Charlotte, who was caught in her parents’ bitter marital war, the Lord Chancellors could intervene in the lives of lesser children whose fates brought them before the court. The turning point between a welfare standard ultimately based in property and trust law, and one based in a moral and religious code, occurred in 1817 as all eyes were on the threat of revolution, and demands for parliamentary reform, and the suspension of *habeas corpus* occupied lawmakers. It was when the non-conformist son of a baronet, publisher of revolutionary and atheistic writings, found himself suddenly before the disdainful eye of Lord Eldon that the law of *parens patriae* was finally unhitched from its property roots, ready to become the tool of Victorian moralists.

### *Shelley v. Westbrooke*

<13>The Romantic poet, Percy Bysshe Shelley, was the eldest son of a baronet, Sir Timothy Shelley, and was educated as befit his sex and class.<sup>(4)</sup> But Percy was a rebel. At age 18 he was expelled from Oxford for writing an anti-royalist and atheistical tract. This infuriated his Tory father, who refused further communication with his wayward son. So Percy was on his own with a sizable allowance in London, when he met Harriet Westbrooke, the daughter of John Westbrooke, the owner of the Mount Coffeehouse, a successful tavern and political hangout. A few months later, outraged that Harriet was to be sent back to her conformist school by her tyrannical father, Percy and Harriet escaped to Edinburgh where they were secretly married. Percy was nineteen; Harriet was sixteen. When Sir Timothy learned of his son's hasty marriage, he stopped Percy's allowance altogether. This meant that the couple was stuck in Edinburgh for months until they could raise the money from friends to allow them to leave.

<14>They finally returned to London where Percy worked on his first major poem, *Alastor*, and soon afterwards traveled to Ireland where Percy's *Letter to the Irish People* encouraged Irish independence and Catholic emancipation. At this time, he came under the surveillance of the government for his Irish reform pamphlet and became known as a troublemaker to the government. Upon their return from Ireland, they took a lonely house in Wales where Percy barely stopped an assassin (which some believe was a government agent, others a petulant local sheep farmer). After that, they returned to London where Harriet gave birth to their first child, a daughter Elizabeth Ianthe. At this time Harriet's sister Eliza came to live with them. Things went downhill once Eliza moved in and Percy began to realize his marriage was a mistake. In early 1814, during a long trek to visit his mother in Sussex, Percy decided that he and Harriet were not the soul mates that his romantic sensibilities led him to crave. But within a month of making this decision, he and Harriet were remarried in London, with John Westbrooke giving permission for Harriet who was still underage. Harriet became pregnant a second time.

<15>After the remarriage, Percy looked elsewhere for new intellectual stimulation in London, which he found in the home of William Godwin and his wife and three daughters. Within three months of his remarriage with Harriet, Percy ran off with Mary Wollstonecraft Godwin, the daughter of his two idols, Mary Wollstonecraft and William Godwin. Mary was sixteen; Percy was twenty-two. They traveled to Italy and Switzerland, but a few months later, out of money, they returned to London to face William Godwin's wrath and Harriet's despair. Even still, Percy was unapologetic. He was in love with Mary and he would never return to Harriet, who had moved to her father's house with her sister and daughter. In November, when baby Charles was born, Harriet would not have seen Percy for at least six months.

<16>Their separation continued for the next two years until November 1816, when a pregnant Harriet<sup>(5)</sup> moved out of her father's house and took lodgings. Her two children were sent away to a preacher in County Kent by their grandfather so they would not be exposed to Harriet's shame. But within a week of taking lodgings, she disappeared, and five weeks later Harriet's pregnant body was pulled from the Serpentine River in Hyde Park. This was the first week in December, and the day Percy learned the sad news, he visited John Westbrooke to retrieve his children by Harriet. But he was told they were not there and would not be turned over to him. For three weeks Percy stopped by almost daily, demanding his children, and he consulted with

his lawyer, Pyncheon Wilmot Longdill, about his legal rights to custody of his legitimate children.

<17>Longdill assured Percy that he had no reason to fear losing his children because the only grounds for removing children from their fathers had been for their physical safety and their economic well being. Where fathers had sent their children to live with wealthy relatives, they could not always reclaim them if doing so jeopardized the children's economic prospects. And of course, when fathers were bankrupts, beat their children, or put them into prostitution, they lost custodial rights. Percy had done none of these things. Furthermore, on 28 December, 1816, he married Mary Godwin, thus removing the taint of adultery that hung over his house and twice belying his youthful rant against the straitjacket of conventional marriage. Despite his opposition to marriage, he had married a second time in order to influence the Chancery suit he correctly feared would be filed by John Westbrooke.

<18>On January 8, 1817, Westbrooke filed suit for an injunction to prevent Percy from reclaiming his children. In his answer to the petition, Percy was calm and assured (Medwin 470-73). He was their natural father, he had not deserted them for he provided Harriet with 200 £ per annum for their support, and he had married the mother of his current children. He was in every way a respectable late Georgian father. When Percy avowed that he would raise his children virtuously and in conformity with his paternal duties, he felt confident that he would soon have his children with him. But this was not to be.

<19>Other events intervened that had profound consequences on Percy's claims to his children. The Chancellor, John Scott, Lord Eldon, was one of the most conservative politicians of his day. He had also been Attorney General in 1794 when *habeas corpus* was suspended under fears of Jacobite revolution, and he had personally prosecuted Horne Tooke and Thomas Hardy for sedition. Although the prosecutions were unsuccessful, Eldon had formed a hatred of reform writing and revolutionary activities (Melikan 251). As Lord Chancellor he was notoriously unsympathetic to the reform movements under Charles Fox and the reform Whig ministries. He had stoutly protected mad King George III's right to rule. When the regency was established under George's son, Eldon had insisted that political stability must trump the demands for parliamentary reform, even under threat of revolution. Although the regency was eventually established in 1811, Eldon put a brake on all parliamentary reform for nearly two more decades. But early 1817 was a particularly tense period. If Shelley was let off easily in 1814 when his youthful writings brought him before the Oxford dons, the political tensions of 1817, and Lord Eldon's unique place in quashing political reforms, made it unlikely Shelley would walk away unscathed this time.

<20>On 8 January 1817, the suit was filed and on 18 January the answer was filed. The first hearing occurred on 24 January. But four days later, before a decision could be handed down, a stone was thrown through the window of the Prince Regent's carriage as he returned from opening Parliament. Many thought it was an assassin's bullet and, within days, Eldon led the charge to suspend *habeas corpus* again. Though it was merely a rock from a disgruntled bystander, the entire government was on edge, fearful of bloody uprising. On 24 February, *habeas corpus* was suspended, and within days publishers of reform pamphlets were detained. During February, Percy Shelley went from being fretful to downright frightened that he would not only lose custody of Ianthe and Charles, but that he might also lose the children he had with

Mary and be imprisoned for his writings as well.(6)

<21>When the Chancellor's decision came down on 27 March, 1817, it was no surprise to Chancery watchers that Lord Eldon denied Shelley custody of his children. His reason: not that he was an atheist, not that he was an adulterer, and not that he was anti-royalist. It was that he avowed to raise his children as he thought fit. Shelley's downfall was in thinking that the rights of a father included the right to control the education of his children. Eldon explained:

This is a case in which . . . the father's principles cannot be misunderstood, in which his conduct, which I cannot but consider as highly immoral, has been established in proof, and established as the effect of those principles: conduct nevertheless, which he represents to himself and others, not as conduct to be considered as immoral, but to be recommended and observed in practice, and as worthy of approbation. I consider this, therefore, as a case in which the father has demonstrated that he must, and does deem it to be a matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community. I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr. S. wishes it to be intrusted. (*Shelley* 267)

<22>Lord Eldon's decision departed significantly from earlier cases where the immorality of the parent was excused so long as the parent did not bring the child into contact with his or her immoral ways. Thus, adulterous fathers had been allowed to retain custody of their children when they did not expose their children to their mistresses. And parents who espoused non-traditional religious views had generally been allowed to retain custody so long as there was considered to be no direct harm to the children, which did happen in cases involving Jews and Catholics, who faced significant legal disabilities. But as Eldon explained in *Shelley*, the father's immoral views and behavior were not only presented to the children as acceptable, but Shelley espoused the right of a father to control the education of his children, an education that Eldon quite correctly knew would involve teaching his children to believe as he did. The right of the parent or guardian to control the education of minor children had previously been interfered with only to insure that children were educated in a manner consistent with their social status. It was in the *Shelley* case that the Chancellors first linked the parent's right to educate his children with the public interest in protecting children's moral values. By moving beyond protecting children from witnessing immoral sexual behavior in their homes, to regulating the substantive content of the child's education, the door was thrown wide open for judicial interference with the normative aspects of parental rights.

<23>Parents who exposed their children to immoral sexual or religious ideas were assumed to hold an intention to inculcate those immoral values in their children. Thus, a parent's modeling of immoral behavior blended into and became constitutive of a parent's legal rights to educate his children. The courts used the education line of cases, which had allowed interference with parents or guardians who failed to educate children appropriately for their social and economic

status, to remove children from what were deemed by judges to be immoral home environments.

<24>Denying Percy physical custody, Eldon then ordered the parties to put forth suitable education plans for the children. Eventually a plan was approved in 1818 where the children would live with Shelley's chosen guardians, Dr. and Mrs. Hume, a Fellow of the College of Physicians, and Physician to His Majesty's Forces and his wife Caroline, where they would receive a respectable education that involved religious training and the same boarding school for his son that Percy had attended and loathed. Moreover, Eldon's order permitted Percy and the Westbrookes to be at liberty to visit the children once every month, but Percy's visits were to be under the constant supervision of Dr. Hume. However, by that time, Percy and Mary had already left for Italy; Percy would not return.

<25>Lord Eldon acknowledged that his decision might be going against the well-established rule that a court should interfere only when the economic interests of the children demanded it. In this case, he realized that his decision might in fact harm the children's pecuniary interests, and yet he explicitly subordinated the economic interests to the moral interests of the children. He stated: "I add, that the attention which I have been called upon to give to the consideration, how far the pecuniary interests of these children may be affected, has not been called for in vain. I should deeply regret if any act of mine materially affects those interests. But to such interests I cannot sacrifice what I deem to be interests of greater value and higher importance" (*Shelley* 268).

<26>From the time of his departure to Italy in the summer of 1817 and his death in 1822, Percy never again saw his two children by Harriet. Charles was eventually sent to live at a boarding school near his paternal grandfather's estate of Field Place, where he died of tuberculosis. Ianthe remained with the Humes until after her father's death, at which time she went to live with her aunt, Eliza Westbrooke, with the approval of Sir Timothy. All but one of Percy and Mary's children died in childhood; only the youngest, Percy Florence, lived with Mary in England after Percy's death, and he assumed the titles that descended from Percy's father and grandfather. But Percy Florence died childless and the titles and estates that had been the subject of so much family bitterness passed to collateral relatives.

<27>The *Shelley* case, for Lord Eldon, was ultimately about political reform as much as sexual and moral impropriety. It was about a father's claim to possess the legal right to educate his children according to his own moral code, a claim that threatened the fragile political stability of Regency England. Yet ironically, Shelley's moral code was not terribly threatening. He committed adultery and had abandoned his family to run off with his mistress, Mary Godwin. But infidelity and even abandonment were not unusual, and Shelley did provide financially for his family, something not done by the fathers in many of the *parens patriae* cases of the prior century. Elite men throughout the century often had mistresses and the law excused their actions so long as they did not bring their adultery within the family home (*Rex v. Greenhill, Ball, Ex. p. Skinner, Warde*).

<28>Shelley also had published works that challenged traditional moral and religious norms, but his only work that was censored prior to the Chancery case was *Queen Mab*, which his publishers insisted he rewrite to avoid prosecution. Shelley did not bring his mistress into the home or expose his children to his adultery. By Regency standards, Shelley's behavior was quite

tame, even if Lord Eldon's fear of political reform brought down a harsher penalty than was to be expected. But as the century progressed, and sexual propriety became an important element of Victorian social reform, the case came to be associated with lax sexual behavior rather than Parliamentary reform. Later judges relied on it for denying spendthrift and profligate fathers custody of their children when their actions violated Victorian social and sexual norms.

### **Expansion of the *Parens Patriae* and the Legacy of *Shelley v. Westbrook***

<29>As the nineteenth century progressed, the *parens patriae* was used to remove children whose parents were profligate spendthrifts, homosexuals, unrepentant adulterers, and religious dissenters, all coming in for their share in the moral opprobrium espoused by the conservative Chancellors. As the political turmoil of the early decades of the century died down, especially after the 1832 Reform Act, the *parens patriae* justified the removal of children primarily in the cases of non-traditional moral or religious environments as economic interests were downplayed. The unique confluence of political dissent, government resistance, and threats to freedom of the press that formed the backdrop of Percy Shelley's claims to his children in 1817 passed on as social policymakers turned to reforming sexual mores in the Victorian Age.

<30>As the *Shelley* case came to be about sexual knowledge and the need to protect children from exposure to those who were considered debased and profligate parents, the *parens patriae* came to be applied primarily in cases where parents were exposing their children to adult or nontraditional sexuality and claiming the legal right to educate them accordingly. Thus, in 1827, Lord Eldon used the *Shelley* case to justify interfering with William Wellesley Pole on the grounds of Pole's profligate lifestyle. Pole had married the wealthiest heiress in Regency England, Elizabeth Tydney Long, from whose estates he raised over £100,000 and yet, within nine years, he and his family were forced to flee England to escape their creditors. William and Elizabeth had three children, who she took with her back to England when William's flagrant adultery forced her to leave him. He had introduced his mistress, the very married Helena Bligh, into the family home and he had been treated by his doctor for secondary effects of venereal disease, a scourge he had transmitted to his wife.

<31>Shortly after returning to England, Elizabeth died, but she extracted a promise from her two younger sisters never to allow William to regain custody of their children. They agreed, and thus commenced a protracted and bitter custody dispute between William and his sisters-in-law. After evidence was produced that William had taught his children to swear, had encouraged them to smoke cigars, insisted that they learn the behavior and language of young ruffians, and allowed them to share company with his mistress, Lord Eldon sided with the Miss Longs and denied William custody of his children. The grounds were his rampant adultery and his unwillingness to shield his children from his own immoral behavior. Even William's family, including his uncle the Duke of Wellington and his father Lord Maryborough, refused to support his petition for custody, some going so far as to assert that allowing the children to remain with William would be their moral downfall.

<32>In deciding the case, Lord Eldon first explained the origins of the court's jurisdiction. He announced: "I do apprehend, that, notwithstanding all the doubts that may exist as to the origin of this jurisdiction [the *parens patriae*], it will be found to be absolutely necessary that such a

jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the judge, that he is to look most strictly into the merits of every case of this kind, and with the utmost anxiety to be right” (*Wellesley* 301). Animadverting upon the outrageousness of Mr. Wellesley’s adultery and drunkenness, Eldon found suitable evidence to deny the father custody of his children, stating:

from the moment Mr. Wellesley and Mrs. Bligh left Florence and came to Paris, the system of adultery has been carried on . . . in the most shameless manner. . . . in a manner so disgraceful to Mrs. Bligh, that I do declare, that I ought to be hunted out of society if I hesitated for one moment to say, that I would sooner forfeit my life than permit the girl Victoria to go into the company of such a woman, or into the care and protection of a man who had the slightest connection with that woman. (*Wellesley* 305)

For Lord Eldon, protector of social propriety, the father’s sin was in exposing his daughter to the shameless adultery of Mrs. Bligh. Regarding Wellesley’s method of education of the sons, Eldon read affidavits of witnesses to give the court a full flavor of the father’s depraved plans.

Mr. Wellesley repeatedly stated . . . that he considered [his teachings] the principal branch of his children’s education, that they should know how, if necessary, to make themselves perfect blackguards; it being his wish that they should be qualified to enter into and associate with the lowest and most vulgar society, without the persons with whom they should associate being able to discern that they were the children of a gentleman. . . . That . . . if the sole and uncontrolled management of their education be left to and intrusted with their father, they will be trained up in a course of conduct, and with feelings and sentiments, which must inevitably destroy their moral and civil characters, and render them unfit for the society to which their birth and station in life entitle them. (*Wellesley* 308)

<33>As with *Shelley*, the key issue for Lord Eldon again was Wellesley’s professed intention to educate his children in a particular, profligate way; it was not simply to model the immoral behavior but to teach his children to emulate it. He purportedly advised his two sons to “debauch all the women you meet with, young and old,” (*Wellesley* 309), advice that he apparently followed himself. Eldon’s moral outrage at Wellesley’s behavior dripped from the opinion, as he gave a much lengthier justification for his actions than he did in *Shelley*. Although these children were not in physical danger, nor were their estates open to their father’s spendthrift habits, they were removed to protect their moral and civil characters. Eldon feared they would, indeed, grow up to be men just like their father, or women just like Mrs. Bligh, who left her husband to be Mr. Wellesley’s paramour and later his second wife.

<34>The *Wellesley* case became the precedent of choice after 1827 when the Chancellors or Vice Chancellors removed children from the custody or control of parents, usually fathers, who threatened their children with moral taint. Ironically, however, the moral outrage against adulterous fathers did not extend so far as to give mothers any legal priority in separation cases, for in 1836, in *Rex v. Greenhill*, Chief Justice Denman would not assign custody to a separated mother, even though the father had committed adultery with a married woman who traveled with him under the name of Mrs. Greenhill. Denman explained:

The Court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or of contamination by some exhibition of gross profligacy. But here it is impossible to say that such danger exists. Although there is an illicit connection between Mr. Greenhill and Mrs. Graham, it is not pretended that she is keeping the house to which the children are to be brought, or that there is anything in the conduct of the parties so offensive to decency as to render it improper that the children should be left under the control of their father. And he promises the same conduct with respect to them for the future. (*Rex v. Greenhill* 640-41)

Apparently, modeling discretion for one's children is admirable, and a father's promise that he won't encourage his children to act or believe as he does was sufficient to protect his legal rights to custody, even against the claims of the innocent mother who was the principal victim of her husband's marital breach. In this case, because the husband purportedly accepted the social propriety of keeping his affair from his children, despite flaunting it publicly, he was permitted to retain control over them. Mr. Greenhill, therefore, was allowed to act immorally so long as he voiced the belief that his children should not be educated to do as he did, that they should be shielded from his own profligacy in the hopes they would not imitate him. The irony, of course, is that for Mr. Greenhill to continue his adulterous relation with Mrs. Graham without bringing the children into contact with her he would have to send them off to school where they would live without contact with either parent.

<35>But flagrant adultery, especially when brought into the family home, soon became enough to justify judicial interference as social and legal reformers harshly criticized the sexual double standard that underlay the law of child custody. In 1849, in *Warde v. Warde*, Lord Chancellor Cottenham cited *Shelley* and *Wellesley* for the principle that children could be removed from parents on moral grounds, although Mr. Warde had forced sexual relations on his children's nurse while they slept in the same room:

In *Shelley v. Westbrook*, the main ground on which the Court proceeded was the impiety and irreligion of the father; but the case which establishes the principle on which I am about to act beyond all doubt was that of *Wellesley v. The Duke of Beaufort*. There was, in that case, profligacy, adultery, and profaneness, a great deal of which is to be found in the present case: and Lord Eldon expressed his opinion without hesitation, that it was both the right and the duty of the Court to remove the children from the contamination to which they were exposed from such an example. (*Warde* 1149)

<36>The shift from *Shelley* to *Wellesley* as the dominant precedent made sense as the focus shifted away from government reform toward social purity. Because *Wellesley* was an adulterer who brought his mistress to live in the family home, he had squandered his wife's fortune and brought his children into economic peril, and because he encouraged his children to flaunt class boundaries, his was the better precedent for the expansion of the *parens patriae* to cases involving a dissolute moral dissolution.

<37>It was not accidental that the *parens patriae* came to be used in cases of sexual misconduct

during the Victorian era to police the boundaries of traditional sexuality and the doctrine expanded from situations where fathers claimed a right to educate their children to simply the mere exposure of the children to sexual taint. In 1851 a clergyman was removed from custody of his children after his wife separated from him on the grounds of his homosexuality. The Vice Chancellor, Lord Cranworth, explained that the Court will deny a parent custody of his children if “they cannot associate with him without moral contamination—or if, because they associate with him, other persons will shun their society” (*Anonymous* 266). This case was particularly interesting as there was never any indication that the father had exposed his children to his homosexuality or in any way encouraged his children to act as he did. But in 1851 sodomy was a capital crime and the drawing rooms of the gentry would be closed to his children who would suffer socially from mere association with their father.

<38>Mid-Victorian judges were certainly not immune to the policies of social and sexual restraint that characterized the century, and these were often associated with the temperance movement and evangelicalism. An important influence also came with the contrasts between English society and its colonies, especially those in the East. A particularly interesting case arose in the late 1860s when the native widow of a British subject in India lost custody of her daughter when she entered into a purportedly polygamous marriage. Helen Skinner was widowed when her husband was killed during the Indian Rebellion of 1857 in Meerut. Ten years later, after raising her daughter as a Christian and sending her to a Christian boarding school, Helen Skinner converted to Islam when she began a relationship with a man who was already married. John Thomas John had a Christian wife, but he converted when he met Helen Skinner, allegedly so that he could marry her in a legal Islamic marriage. After the marriage ceremony, Helen adopted traditional Muslim ways, including seclusion and purdah, and withdrew her teenaged daughter from school to join her. The local court in Meerut granted a petition by Victoria’s paternal relations to gain custody of her and continue her upbringing in the Christian tradition, and the High Court of Judicature affirmed. On appeal to the Court of Appeal of England and Wales, the Indian decisions were again affirmed in large part because the justices felt that the conversion to Islam was to mask the adulterous liaison between Helen Skinner and Mr. John. Lord Justice James spoke for the court when he explained that “their Lordships can entertain no doubt, that when the connection between John Thomas John and the Widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl” (*Re Matter of Victoria Skinner* 808). They accused the mother of pressuring her daughter into converting, noting that “it would be very easy, of course, for a Mother under such circumstances, to procure from a young Daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school” (*Re Matter of Victoria Skinner* 809). Despite the child’s age and expressed desire to remain with her mother, the court removed her because the justices were convinced that the mother’s conversion to Islam was a sham to cover her adulterous relationship. Furthermore, this mother had used her position to improperly pressure (educate) her child into adopting religious beliefs the justices disdained, primarily the adoption of purdah, removal from further schooling, and tolerance of polygamy.

<39>Adulterous mothers had been denied custody of their children absolutely prior to the adoption of civil divorce in 1858. But as divorce claims exploded in the 1860s, the Judge Ordinary of the Divorce and Matrimonial Causes Court was often faced with divorce petitions

that involved adultery by both husband and wife, where the wife's adultery was less egregious and often prompted by the husband's behavior. The dissonance between a meaningful child welfare standard and an absolute bar on custody of an adulterous mother led to reform in 1875 removing the bar when the best interests of the child demanded custody be assigned to the mother. But mothers had a far more difficult time claiming custody rights to their children if they deviated from strict gender norms, norms that included sexual purity and moral piety. The sexual double standard was highlighted in the case of Annie Besant, noted theosophist, women's right's reformer, birth control advocate, and secularist.

<40>In 1879, Master of the Rolls, Sir George Jessel,<sup>(7)</sup> removed Annie Besant's eight-year-old daughter from her custody, despite a private separation agreement in which her estranged husband, the Rev. Frank Besant, had agreed to allow Annie to have custody for eleven months out of every year. Jessel explained his reasons for denying Besant her daughter.

I am glad to say that as far as I can see Mrs. Besant has been kind and affectionate in her conduct and behaviour towards the child, and has taken the greatest possible care of her, so far as regards her physical welfare. . . . But, unfortunately, since her separation from her husband, Mrs. Besant has taken upon herself not merely to ignore religion, not merely to believe in no religion, but to publish and avow that unbelief, and to become the publisher of pamphlets written by her, and to deliver lectures composed by herself, stating her disbelief in religion altogether, and avowing that she has no belief in the existence of a Providence or a God. . . . I must, as a man of the world, consider what effect on a woman's position this course of conduct must lead to. I know, and must know, as a man of the world, that her course of conduct must quite cut her off, practically, not merely from the sympathy of, but from social intercourse with, the great majority of her sex. . . . I must take that into consideration in determining what effect it would have upon the child if brought up by a woman of such reputation. But the matter does not stop here. Not only does Mrs. Besant entertain those opinions which are reprobated by the great mass of mankind . . . but she carries those speculative opinions into practice as regards the education of the child, and from the moment she does that she brings herself within the lines of the decisions of Lord Chancellors and eminent Judges with reference to the custody of children by persons holding speculative opinions, and in those cases it has been held that before giving the custody of a child to those who entertain such speculative opinions, the Court must consider what effect infusing those opinions as part of its practical education would have upon the child. (*Re Besant* 512-14)

<41>One of Annie Besant's publications was a book on birth control written by Charles Knowlton that she and Charles Bradlaugh published in 1877, and over which they were tried for obscenity. Although the charges were dropped, Besant and Bradlaugh became household names, associated with political reform, religious dissent, and scientific enlightenment. Like the political events of the Regency that overshadowed the *Shelley* case, the 1871 publication of Charles Darwin's controversial *The Descent of Man* hung heavily over the *Besant* case. Claiming the right to not only believe speculative ideas, but to educate their children in those ideas, was an assertion of parental rights the Lord Chancellors simply could not condone.

<42>As the century wound to a close, mothers and fathers continued to lose custody of their

children if they espoused non-traditional gender roles, sexual attitudes, or religious beliefs, or if they claimed the right to raise their children to act and believe as they did. The *Shelley* case, born out of demands for Parliamentary reform, provided an ideal precedent for an expansive recasting of the *parens patriae* from its eighteenth-century roots in trust and guardianship law. After *Shelley*, the *parens patriae* could be used to police licentious behavior, transgressive gender roles, and espousal of speculative ideas in the name of protecting children's moral and civil characters.

### **The Limitless *Parens Patriae***

<43>The shift from property-based trust doctrines, which had underlain guardianship law for centuries, to the normative *parens patriae* reflected in the *Shelley* case, marked a distinct shift in the law of child custody. The use of the *parens patriae* to police the sexual morality of parents was an important tool in the social control of the Victorian family. The expansive doctrine, coupled with repressive sexual attitudes and new scientific theories of deviance and criminality led to unprecedented state removal of children and their placement into institutions, foster homes, and ultimately being put up for adoption. Whether it was to counter the exposure to controversial sexual practices or to quash the avowed right of the parent to raise his children to act and believe as he did, the *parens patriae* had become one of the most effective tools in repressing sexual beliefs and non-conformist behavior.

<44>Bright lines are difficult to draw in law as well as in moral or religious beliefs. In anticipation of the Chancery suit, Percy Shelley had predicted the dangerous power that lay in the Chancellor's hands. In a rough draft of a statement he drew up to place before the court, Shelley explained:

I consider the institution of marriage, as it exists precisely in the laws and opinions of this country, a mischievous and tyrannical institution, and shall express publicly the reasonings on which that persuasion is founded. If I am judged to be an improper guardian for my children on this account, no men of a liberal and inquiring spirit will remain in the community, who . . . must . . . live in the daily terror lest a court of justice should be converted into an instrument of private vengeance, and its edicts be directed, under some remote allegement of public good, against the most deep and sacred interests of his heart. (Dowden 346-47)

<45>The unique circumstances of Shelley's case profoundly expanded the law of *parens patriae*. Whether the law would have expanded anyway, and whether it would be become such a powerful tool of Victorian social and sexual repression cannot be known. But we can be certain that parents today who hold speculative opinions risk the loss of their children in part because of the fortuity of a rock thrown through a carriage window in 1817.

(1) My use of the term *parens patriae* throughout this article is limited to the crown's/state's jurisdiction to protect infants, imbeciles and lunatics, as expressed by Joseph Chitty in his *Treatise on the Law of the Prerogatives of the Crown*. Chitty explained: "[t]he King is in legal contemplation the guardian of his people; and in that amiable capacity is entitled, (or rather it is his Majesty's duty, in return for the allegiance paid him,) to take care of such of his subjects, as are legally unable, on account of mental incapacity, whether it proceed from 1st nonage: 2 idiocy: or 3. lunacy: to take proper care of themselves and their property" (Chitty 155). The *parens patriae* has also been used to allow the state to bring suit generally on behalf of the welfare of the general populace. For a discussion of the differences, see Curtis, John Seymour, and Custer.(^)

(2) After the Restoration, and the abolition of the feudal wardship that had plagued the landed estates of the elite, all land was held in free and common socage. Unlike the military tenure of the Tudor/Stuart period, which gave overlords the power to retake the possession and income of land descending to minor heirs, and charge them a hefty fee (usually two years' income) to regain the land, socage tenure had strict rules based in trust law to govern the actions of guardians who held possession of land or other property that would descend to minor children. See John Seymour for the links between feudal wardship and the *parens patriae*.(^)

(3) Fathers could be guardians of their children's estates, as when a grandparent left property on a minor and the father was alive. In that case, his fiduciary obligations to maintain the estate would be the same as any other guardian. But the indirect effects were generally not imposed on fathers to educate their children to appropriately manage their estates when they came of age.(^)

(4) The history of Shelley's life has been taken from numerous biographies and anthologies of his letters, including: Roger Ingpen, *Shelley in England*; Thomas Medwin, *The Life of Percy Bysshe Shelley*, New ed.; Thomas Jefferson Hogg, *The Life of Percy Bysshe Shelley*; Edward Dowden, *The Life of Percy Bysshe Shelley*; James Bieri, *Percy Bysshe Shelley: A Biography*; Donald Reiman's *Percy Bysshe Shelley*; Kenneth Neill Cameron's *Shelley and his Circle: 1773-1822*; R.H. Hill (Ed.), *The Shelley Correspondence in the Bodleian Library*; Roger Ingpen (Ed.), *The Letters of Percy Bysshe Shelley*; Leslie Hotson (Ed.), *Shelley's Lost Letters to Harriet*; Muriel Spark, *Mary Shelley: A Biography*; and Miranda Seymour, *Mary Shelley*. See also Rousseau Burch, "The Case of Shelley v. Westbrooke"; Michael Kohler, "Shelley in Chancery: The Reimagination of the Paternalist State in *The Cenci*"; Bryan Rivers, "'Revolted Burial': A Victorian Commentary on the Harriet Shelley Inquest"; and Bryan Rivers, "'Tenderly' and 'With Care': Thomas Hood's 'The Bridge of Sighs' and the Suicide of Harriet Shelley."(^)

(5) There has been much speculation about the father of Harriet's baby. She told her landlady that she was married to a seaman who had just returned to sea. But biographers have sought in vain the identity of her paramour, and the Westbrookes were understandably silent about Harriet's transgressions, as that would have justified a divorce by Percy, which would have deprived her of custody of the children and deprived the family of the financial support of the Baronet.(^)

(6) Percy's Irish reform pamphlet, his "Declaration of Rights" (1812) and his "Letter to Lord Ellenborough" (1812) were well known to the government.(^)

(7)It is ironic that Jessel should be the judge to hear Besant's case as he was the first Jew to serve on the bench and was, at the time of his appointment, disqualified from membership in the bar. His religion prevented him from matriculating at Cambridge or Oxford, and yet he was quite judgmental of Besant's atheism.(^)

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