ON 25 AUGUST 1857 QUEEN VICTORIA GAVE HER ROYAL ASSENT TO THE ACT for Divorce and Matrimonial Causes (20 & 21 Vict; c. 85). The public debate stirred by the effort to pass the Divorce Act was a significant — although tentative — first step in the campaign to improve the legal status of married women which took place in the second half of the nineteenth century. This aspect of the history of the Divorce Act has been largely overlooked, however, since most scholars have discussed the Divorce Act as part of the judicial reform movement which culminated in the Judicature Act of 1873. They have interpreted the Divorce Act as having made a necessary reform in judicial procedure by creating a new civil court for divorce and matrimonial causes, and to have been otherwise unremarkable.1 But although the

1 I wish to thank Anthony S. Wohl for helpful suggestions on an earlier version of this article.


SPRING 1982
divorce bill was initially conceived simply as a measure to take authority away from the ecclesiastical courts, halfway through its legislative consideration feminists sparked a controversy over two of its features. They denounced the sexual double standard implicit in the differing grounds of divorce for men and women, and they deplored the inability of married women — including wives who were separated but not divorced from their husbands — to hold property in their own names.

The final version of the Divorce Act answered neither of these complaints satisfactorily. Women could only divorce their husbands for adultery aggravated by incest, bigamy, or cruelty, whereas they might be divorced for adultery alone. And married women might control their own property only if legally separated from or deserted by their husbands. The Divorce Act did overturn the ecclesiastical doctrine of the indissolubility of marriage, nonetheless, and members of parliament managed to create narrow grounds for wives to divorce their husbands where initially none had been proposed. Similarly, despite the failure of efforts to pass a full Married Women's Property Bill in 1857, the debates over two provisions of the Divorce Act to give separated and deserted wives some rights over their own property challenged the notion that upon marriage a woman must become, for nearly all legal intents and purposes, “one” with her husband. In altering, however slightly, the ecclesiastical doctrine of the indissolubility of marriage and the common law doctrine of spousal unity, the Divorce Act constituted the opening wedge in the effort to obtain legal recognition of the independent personality of married women. The small band of feminists who carried on the agitation for these reforms stimulated a reform movement of great significance for the legal status of married women, and their efforts provoked a reconsideration of marriage which was central to the development of feminist thought in the later nineteenth century.

I

The traditional law of divorce in England essentially followed the canon law inherited from Rome. The ecclesiastical courts, which

In 1552 Archbishop Cranmer had supported the adoption of a more liberal divorce law in the Reformatio Legum Ecclesiasticarum, a treatise which recommended that both adultery and desertion be grounds for divorce. But Henry VIII died before he could force the reforms through parliament, and the House of Commons defeated them under Edward VI. While other European Protestant countries and the American colonies made legal provisions for divorce, English law recognized only actions for separation. For information on early divorce law in England see Howard, II, 60-75 and L. Chilton Powell, English Domestic Relations 1487-1653 (New York: Columbia University Press, 1917), pp. 61-65.
had jurisdiction over divorce cases, issued two kinds of decrees. A divorce *à mensà et thoro* (divorce from bed and board) was granted only for adultery, extreme cruelty, or desertion, and it allowed neither partner to remarry. A divorce *à vinculo matrimonii* (divorce from the bonds of marriage), an absolute dissolution of the marriage bond with permission to remarry, was granted only when the marriage itself was found to have been invalid due to age, mental incompetence, sexual impotence, or fraud.

Except for a brief period under the Commonwealth, there was no provision for civil divorce other than the extraordinary procedure of a private act of parliament. By the nineteenth century some ten private acts for divorce passed parliament each year. Until 1804 all successful plaintiffs were men protesting their wives' adultery, and only three women—two of whom complained of adultery aggravated by incest and one of adultery aggravated by bigamy—ever received a parliamentary divorce. Divorce was seen essentially as a punitive measure and as a way for a man to assure himself of legitimate offspring. Obtaining a parliamentary divorce, however, was legally complex and extraordinarily expensive. A plaintiff first had to obtain a decree of divorce *à mensà et thoro* from the ecclesiastical courts. A man then had to win damages against his wife's paramour in a civil action by proving his wife's adultery with the accused. Only after success in these two proceedings could a man present a bill for parliamentary divorce.

In 1850 the government appointed a Royal Commission on Divorce against the background of a long series of unsuccessful efforts to alter the traditional law of divorce. The commission, composed largely of prominent Whigs who had been associated with earlier
efforts to reform the law, focused upon such matters as the jurisdiction of the ecclesiastical courts over what the reformers regarded as secular matters and the inappropriateness of relying on parliament to conduct an essentially judicial proceeding.\textsuperscript{5} Their report of 1853 recommended the establishment of a civil court empowered to grant divorce \textit{à vinculo} and to hear the matrimonial causes then heard by the ecclesiastical courts. The commissioners recommended that the only ground for divorce \textit{à vinculo} should be a wife's adultery, while divorce \textit{à mensa et thoro} should be granted to men and women alike for adultery, gross cruelty, and perhaps willful desertion for an extended period.\textsuperscript{6}

The government adopted the proposals of the Royal Commissioners, and in June 1854, Cranworth, the lord chancellor, submitted to the House of Lords a divorce bill drawing on the report of the commissioners. The only significant deviation in the bill from the recommendations of the Royal Commission was a clause permitting a wife to sue for divorce \textit{à vinculo} if her husband was guilty of adultery aggravated by incest, bigamy, or gross cruelty, a change which reflected past parliamentary practice. Due to the lateness of the session and the opposition of some to any provision whatsoever for divorce, the bill died after a second reading in the House of Lords.\textsuperscript{7}

In 1856 and in both sessions of 1857 the government tried again to pass a divorce bill. But in these sessions the parliament's debates became more complex and impassioned. Members of parliament and the public alike discussed the divorce bill not simply as a measure to curtail the jurisdiction of the ecclesiastical courts and to get rid of the anomaly of divorce by private act of parliament, but also as a measure which might alter the legal status of married women.

The impetus to broaden the discussion came from three distinct sources: the agitation of Caroline Norton, the reforming impulses of the Law Amendment Society, and the writing and organizational skills of Barbara Leigh Smith. In quite diverse ways these people sparked discussion of two issues which hitherto had received little legislative attention: the grounds for divorce for women, and the right of married women separated from their husbands to hold property in their own names.

Caroline Norton, a granddaughter of the playwright Richard Sheridan, was a popular and widely-read writer, a society beauty.

\textsuperscript{5} The members of the Royal Commission were Lord Campbell, Stephen Lushington, Lord Beaumont, Spencer Walpole, William Page Wood, Edward Pleydell Bouverie, and Lord Redesdale.

\textsuperscript{6} PP, 1852-53, (1604), XL, 16, and 22. There was no dissenting opinion in favor of a more liberal view; only one commissioner, Lord Redesdale, who could not accept divorce \textit{à vinculo} on any grounds, filed a separate opinion.

\textsuperscript{7} On Lord Chancellor Cranworth's bill of 1854, see 3 Hansard, cxxxiv, 1-28.
and a prominent Whig hostess. She had first made a reputation as a political pamphleteer with the publication in 1837 of *A Plain Letter to the Lord Chancellor on the Infant Custody Bill*, an outraged protest against the laws which gave a father undivided custody over his children. Norton's husband had denied her all access to her children after she was separated from him. The separation occurred after George Norton, by all accounts a greedy and dishonorable man, had sued Lord Melbourne, then prime minister, for "criminal conversation" with his wife. The sensationalist press delighted in the scandal, but the jury found Melbourne innocent. The Infant Custody Act of 1839, with a provision for obtaining a court order for maternal visitation rights, was in part a response to the public concern generated by the Norton case and by Caroline Norton's acerbic pen.8

The submission of the divorce bill of 1854 to parliament provided Caroline Norton with another opportunity to protest women's legal disabilities. That year a renewal of her own marital problems had prompted her to print and circulate privately *English Laws for Women in the Nineteenth Century*, which not only rehearsed her complaints against her husband but also argued with justice that the deplorable laws of England affecting married women contributed to her plight.9 In 1855 she published *A Letter to the Queen on Lord Chancellor Cranworth's Marriage Bill*, its title echoing that of her most successful pamphlet. It contained two criticisms of the proposed divorce bill: that it lent legislative sanction to the sexual double standard, and that it did not address the economic vulnerability of wives in unhappy marriages:

[Our] legislators and legislatures . . . never will satisfy, with measures that give one law for one sex and the rich, another law for the other sex and the poor. Nor will they ever succeed in acting on the legal fiction that married women are "non-existent," and man and wife are still "one," in cases of alienation, separation, and enmity, when they are about as much "one" as those ingenious twisted groups of animal death we sometimes see in sculpture; one creature wild to resist, and the other fierce to destroy.10

Norton urged that women be allowed to divorce adulterous husbands

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9 In 1853 the Nortons were again in court, this time over financial matters. When George Norton learned that Caroline had received an income of £480 for life upon her mother's death in 1851, he refused to pay her the yearly sum he had agreed to in a separation agreement of 1848. Caroline learned to her dismay that the agreement was not legally binding, and she saw no other recourse than to default on some debts and leave her creditors to sue her husband for their payment. The ensuing litigation resurrected the entire Melbourne scandal in the press.

(especially after repeated cases of adultery), and that women who did not live with their husbands be given control of their own property.  

In 1855 other efforts to change the law governing married women's property were underway. In 1851 the Law Amendment Society, an organization founded in 1844 by Lord Brougham, the former lord chancellor, and other legal reformers, recommended the fusion of the courts of law and equity as a way to eliminate the legal complications and conflicts caused by having two courts administering two distinct and often contradictory bodies of legal rules. In 1854 perhaps inspired by a resurgence of public interest in the Norton case, *The Law Review*, an organ of the Law Amendment Society, pointed specifically to the confusion and injustice engendered by the two sets of rules governing the property of married women as an example of the hardship caused by the conflict between the common law and equity. From this point on the issue of married women's property rights became intertwined with the efforts to procure a divorce bill. The subsequent history of the Divorce Act cannot be understood without an appreciation of the issue of married women's property.

II

Under the common law a married woman had no legal identity apart from her husband. This was known as the doctrine of spousal unity, or of the "coverture" of the wife. William Blackstone, in his *Commentaries on the Laws of England*, stated the rationale of the law succinctly: if husband and wife were "one body" before God, they were "one person" in the law, and that person was represented by the husband. This meant that a man assumed legal rights over his wife's property at marriage, and of any property that came to her during marriage. While a husband could not alienate his wife's real property entirely, any rents or other income from it belonged to him. On the other hand, a woman's personal property, including money she might

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11 Caroline Norton was not an unqualified proponent of women's equal rights with men. She thought that husbands were obligated by natural and divine law, as well as civil law, to support and protect their wives. Her campaigns focused on increasing the legal rights of wives who were separated from their husbands, not of those in ongoing marriages. See, for example, *English Laws for Women in the Nineteenth Century*, 2, 167.


have saved before her marriage or earned while married, passed entirely to her husband for him to use and dispose of as he saw fit. Thus, said an irate pamphleteer inspired by Caroline Norton, the common law with respect to married women, combined with the ecclesiastical doctrine of indissolubility, amounted to a “nefarious custom” by which women when they marry “are despoiled of their money, goods, and chattels . . . and condemned to prison for life.”

Equally galling to opponents of the doctrine of spousal unity, a married woman could not sue or be sued, could not sign contracts, and could not make a will unless her husband joined her in these actions.

There was a way to avoid the provisions of the common law, but it was a path open only to the well-to-do. They frequently used the device of trusts, governed by equity rather than the common law, to allow property to be held in trust for the benefit of a married woman who could not herself hold property. A rich parent could set up trusts for a daughter by designating certain parts of her property or inheritance as her “separate property” or “separate estate,” free from her husband’s common law rights of control and possession. While a married woman’s specific rights over her separate property depended on the terms of the trust, a wife with a separate estate could receive the income from her lands or investments, could sue or be sued with respect to her separate estate, could make her estate liable for her debts, and could will her separate estate to whomever she chose, dealing with her property as if she were unmarried, or what the law called a feme sole.

In 1854 twenty-eight year old Barbara Leigh Smith, a preeminent founder of organized feminism in England, published A Brief Summary . . . of the most important Laws of England concerning Women.

While Caroline Norton’s pamphlets were rambling and im-

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5 Remarks on the Law of Marriage and Divorce; suggested by the Honorable Mrs. Norton’s Letter to the Queen (London: James Ridgway, 1855), 4.

6 Era Reiss, The Rights and Duties of Englishwomen (Manchester: Sheratt & Hughes, 1934) is an excellent source on property laws. Reiss makes the observation that even under the law of equity there were significant differences between a married woman with a separate estate and a feme sole. For example, while a married woman with a separate estate controlled property which came to her by gift, bequest, or other means, her husband had common law rights over her other property such as earnings. In addition her contract did not bind her personally as it bound a feme sole or a man, but bound only her property. “She charged a particular estate which was actually hers at the time the debt was incurred, and any property which might come to her at a later date could not be held liable to satisfy the debt” (p. 25).


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passioned, Barbara Leigh Smith's was concise and measured, but Leigh Smith was no less outraged than Norton at what amounted to the civil death of women under the common law doctrine of coverture. She insisted that parliament give statutory recognition to married women's rights to hold property, to contract, to sue and be sued in their own names, and otherwise to enjoy an independent legal personality from that of their husbands. Richard Monckton Milnes submitted Leigh Smith's pamphlet to the Law Amendment Society's Personal Laws Committee, and in the spring of 1856 the society issued a report calling for the revision of the laws governing married women's property, and embarked on a campaign to enact a law giving every married woman the status of feme sole with respect to her property and contracts. On 31 May the society held an open meeting on the status of women under the law. Consistent with its earlier efforts to eliminate the conflict between law and equity, the assembly unanimously adopted a resolution condemning the common law rule of married women's property and endorsed the equitable concept of separate estates.

The encouragement of the Law Amendment Society inspired Barbara Leigh Smith to further action. She and six colleagues drafted and circulated a petition for a married women's property law. With some 3,000 signatures, it was the most impressive of the nearly seventy petitions, with 24,000 signatures in all, which poured into parliament that spring. On 10 June Sir Erskine Perry presented the resolution condemning the common law rules of property respecting married women to the House of Commons. On the assurance of the government that it would take up the matter the following year, Perry agreed to withdraw his resolution (3 Hansard, cxlii, 1284).

This activity, which took place while the Lords were considering the divorce bill, apparently convinced some members of the public and the Lords of the need for financial protections for separated wives in the new legislation. On 21 May a lengthy letter in The Times by one "Maritus," almost certainly an attorney familiar with Caroline Norton's pamphlet and the Law Amendment Society's report, argued that Cranworth's divorce bill gave women too little opportunity to divorce profligate husbands and too little protection for the property and earnings of separated or deserted women. The following week, on the occasion of the second reading of the divorce bill, Lord Lynd-
hurst, the former lord chancellor, successfully moved the establishment of a Select Committee to consider amending the bill on two points: equalization of the grounds for divorce, and protection of the property of married women (3 Hansard, cxlii, 408-413).20

Lord Lyndhurst's Select Committee marked a turning point in the history of the Divorce Act. It proposed first that cruelty, bigamy, and willful desertion for four years be added to incest as aggravations justifying divorce for women, and second that a wife separated from her husband by a divorce à mensà et thoro be treated as a feme sole with respect to her own property and contracts.21 These proposals altered parliament's consideration of the divorce bill from a measure concerned with the jurisdiction of the ecclesiastical courts and parliament over divorce to one also affecting the rights and legal status of married women. These new concerns were evident in both the Lords and Commons debates of 1856 and 1857.

III

Unlike the debates of 1854, which had dealt primarily with jurisprudential issues—such as the composition of the court, the frequency of its sittings, and the expenses of its proceedings—the more extensive discussion of 1856 found the Lords grappling with issues concerning the marital relationship itself. Lord Lyndhurst, the staunchest supporter in either House for equalizing the grounds of divorce for men and women, believed that "in principle, there ought to be no distinction made between the adultery of the husband and that of the wife" (3 Hansard, cxlii, 416). William Gladstone, who led the opposition to the divorce bill itself, agreed that divorce, if allowed, should be granted equally to men and women. Gladstone typically referred to scripture in defending his opinion: "It is the special and peculiar doctrine of the Gospel respecting the personal relation in which every Christian, whether man or woman, is placed to the person of our Lord that forms the firm, the broad, the indestructible basis of the equality of the sexes under the Christian law" (3 Hansard, cxlvii, 1272). In a more secular vein, Henry Drummond accused his colleagues who treated a woman's infidelity more severely than a man's of being like

20 Lord Lyndhurst's interest in redressing at least some wrongs of married women may be traced back to 1838 when he introduced the Infant Custody Act.
21 Great Britain, Parliament, Sessional Papers (Lords), 1856 (H.L. 181), vol. xxiv, "Report from the Select Committee of the House of Lords on the Divorce and Matrimonial Causes Bill . . . together with the Proceedings of the Committee."
"Turks legislating for the inhabitants of the seraglio," or slave traders voting against abolition (3 Hansard, cxlvii, 1268, 1587).

But proponents of sexual equality were clearly in the minority, and the proposal to equalize the grounds of divorce for men and women was rebuffed first in the Select Committee and subsequently by both the Lords and the Commons. To support their view that a wife's adultery was a unique and fatal offense against marriage, members of parliament repeatedly quoted the scriptural admonition, "but I say to you, that whosoever shall put away his wife, saving for the cause of fornication, causes her to commit adultery." Secular considerations were also important. The most frequently mentioned evil of female adultery was, as Lord Cranworth put it, that it might be "the means of palming spurious offspring upon the husband" (3 Hansard, cxlv, 813). In the House of Commons, Spencer Walpole, who had sat on the Royal Commission on the Divorce Law in 1850, appealed to the same patrilineal concern about property and family inheritance to defeat a proposal for equal grounds of divorce for men and women (3 Hansard, cxlvii, 1282). Constance Rover has argued that the fact that parliament did not similarly regard a husband's adultery as posing a threat to a family line reflected the assumption that men committed adultery with women who had no families or who did not belong to the "respectable classes" and whose family life was consequently considered unimportant.

The debates over the Divorce Act support Judith Walkowitz's observation that "an unthinking acceptance of male sexual license set the tone for parliamentary discussions of prostitution, regulation, and the age of consent during most of the Victorian period." Parliament's greater tolerance of male than female philandering was clear in Cranworth's statement in 1854 that it would be too harsh to bring the law to bear against a husband who was "a little profligate" (3 Hansard, cxxxiv, 7). The fact that Cranworth's offhand remark provoked some outraged comment when it was reported in the press, however, indicates that opinion on the sexual double standard was more in flux outside parliament than inside. The anonymous author of Remarks upon the Law of Marriage and Divorce (1855), observed that to call a

22 Matthew 5:32; see also Matthew 19:9.
23 Constance Rover, Love, Morals and the Feminists (London: Routledge and Kegan Paul, 1970), pp. 42-43. Other threats to family life which might follow from a husband's adultery, such as venereal disease, were not even considered during the debates.
husband's adultery "a little profligate" while making a wife's adultery the grounds for divorce was like refusing to prosecute a murder because it was not parricide.\textsuperscript{25} The Times also rebuked Cranworth for his "unfortunate phrase."\textsuperscript{26}

By 1857 Cranworth had moderated his language, but his opinion as to the relative importance of male and female chastity remained unchanged. In response to a proposal by the Earl of Donoughmore to equalize the grounds of divorce he replied that parliament had to consider not "whether the sin was as great in one case as in the other, but . . . to adopt such legislation as would be most expedient for this country" (3 Hansard, cxlv, 813). The majority of parliament readily acceded to the proposition that a woman's adultery was most inexpedient, while that of her husband was not.\textsuperscript{27}

Despite parliament's general tolerance of the sexual double standard, the debates also revealed an undercurrent of fear concerning the socially disruptive potential of unrestrained sexuality. In vain, speakers favoring the bill reminded their listeners that Scotland, where divorce for adultery was permitted to men and women alike, suffered no greater licentiousness than England (3 Hansard, cxlvii, 868). Gladstone warned his colleagues: "Take care, then, how you damage the character of your countrymen. You know how apt the English nature is to escape from restraint and control: you know what passion dwells in the Englishman" (3 Hansard, cxlvii, 854). Viscount Dungannon feared that the bill "would supply additional encouragement to the indulgence of illicit desires . . . " (3 Hansard, cxlv, 514).

Members of parliament regarded the poor and women as particularly susceptible to moral lapses. In 1856 parliament had debated and defeated, as it did more than nineteen times between 1849 and 1907, a bill to remove the ban on marriage with a deceased wife's sister. The greatest temptation to illicit sex with a wife's sister would occur, according to both proponents and opponents of the bill, in poorer households where a spinster aunt joined the family to keep a roof over her head and to help with housework and child care (3 Hansard, cxli, 1497-1526). Concern over the disruptive power of sexual passion also helped pass the Obscene Publications Act of 1857. The debates on

\textsuperscript{25} Remarks upon the Law of Marriage and Divorce . . . , 35.
\textsuperscript{26} The Times, "The Law of Divorce," 27 January 1857, p. 4b.
\textsuperscript{27} The resistance in parliament to the total abolition of the action for criminal conversation and the retention of an action for the recovery of damages against a wife's lover also reflected many Victorian gentlemen's conviction that a wife's adultery was a unique and abhorrent offense which they had a right to prosecute. See, for example, the debate in the House of Lords, 3 Hansard, cxlv, 917-930.
this measure made it clear that the members of parliament were not as offended by the contents of pornography (which some of them contended was no more explicit than the poems and plays of classical authors) as they were by the fact that sexually provocative tracts could now be purchased for a few shillings and thus were widely available (3 Hansard, cxlvi, 327-338; cxlvii, 1475-81). During the debates on the Divorce Act the Earl of Desart expressed his fear that if allowed to divorce, the poor in particular would come to regard marriage as no more than “conubial concubinage” (3 Hansard, cxliii, 244). The Bishop of Oxford was sure that “facilities [for divorce] could not be given to the lower classes without endangering the moral purity of married life” (3 Hansard, cxlii, 1980). The fears that the Divorce Act would increase lower class immorality were like those which Edward Bristow found in the years after the French Revolution, that “irreligion, immorality, and sexual licence were the harbingers of social dissolution,” and that sexual order and restraint were essential preconditions of social order. Perhaps due to concern about lower class immorality the act effectively barred the lower classes from divorce by establishing only one court, situated in London, to grant divorce, despite the reformers’ insistence that one of their aims in abolishing divorce by private act of parliament was to get rid of “one law for the rich, one for the poor.”

Parliament’s fear of the disruptive potential of female sexuality was as great as its distrust of the unrestrained passions of the poor. Hostility to women was clearest in the Bishop of Oxford’s proposal to prohibit the remarriage of adulterers. Because the provisions for divorcing a husband were so narrow, this prohibition would have applied overwhelmingly to women. That was what the bishop intended: he could not believe that “the woman who had committed adultery [should] be entitled, by reason of her sin, to greater privileges than those extended to other women” (3 Hansard, clxv, 524). Lord John Manners warned the Commons that, without the amendment, the bill would “teach the disappointed wife that if she had only the bad courage to sin blindly and boldly,” she could ultimately find happiness elsewhere (3 Hansard, cxlvii, 770). Had the amendment passed, a husband would have been able to commit adultery repeatedly with

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29 Edward Bristow, Vice and Vigilance: Purity Movements in Britain since 1700 (Totawa, New Jersey: Rowman and Littlefield, 1977), p. 3.
total legal impunity, while a single transgression by a wife would have subjected her to divorce without the possibility of any subsequent licit union. The amendment was finally defeated because of the fear that its adoption would doom an adulteress to a life of repeated sin, even prostitution, rather than one of enforced celibacy. That attitude itself revealed parliament’s apprehension that female sexuality, if unchecked, might lead to social disorder.

IV

Despite the prevailing misogyny and the general adherence to old canonical law strictures evidenced in these parliamentary debates, the arguments put forward by proponents of a new divorce law were potentially more radical than even the reformers acknowledged at the time. Arguments for a more liberal divorce law were generally of two kinds. One stressed the similarities between marriage and other civil contracts; the other emphasized the nonreproductive and companionable aspects of matrimony.

In order to make any headway in providing for divorce, advocates of the Divorce Act had to make a frontal assault on the ecclesiastical doctrine of the indissolubility of marriage. In doing so they tended to emphasize the contractual nature of the marriage bond, for if marriage was a contract, then like any other contract it might be dissolved if one party violated its terms. Lord Lyndhurst adopted contractarian language in arguing that a woman should be able to divorce her husband for willful desertion:

The man promises during their joint lives to support, protect, and cherish the woman, and that he will never forsake her for another. There can be no more sacred promises . . . no contract more binding. But if he disregards that promise, and abandons his wife, why was the contract still to be binding upon her? In commercial contracts if one party violated the agreement the other was released from it. Why should not the same principles be extended to cases such as he had mentioned?

(3 Hansard, cxlv, 505).

Lord Lyndhurst’s use of contractual imagery emphasized both the

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30 See Lord Brougham’s denunciation of the suggested prohibition on the remarriage of adulterers, 3 Hansard, cxlv, 1098.

31 Early in the century the dissenter William Fox had used just such an argument in favor of divorce: “[T]he marriage contract . . . should be regarded by the law merely as a civil transaction” which would allow Englishmen to rid themselves of the mistaken idea that marriage was indissoluble (William J. Fox, “The Dissenting Marriage Question,” Monthly Repository, 7 [1833], 141).

SPRING 1982
equality of the marriage partners and the notion that it was up to the partners to determine if their relationship should continue.

Some legislators feared that parliament was liberalizing the law beyond what it intended. Lord Campbell wondered, "the moment they went one step beyond the case of adultery, where and when would they stop?" (3 Hansard, cxlv, 817). Similarly, Sir William Heathcote argued that if any grounds other than adultery were admitted, "the only consistent conclusion of such a course of legislation was to declare that even the mutual consent of the parties was sufficient to dissolve a marriage" (3 Hansard, cxlvii, 737). Heathcote intended only to be an obstructionist, but in fact his logic was sound. If marriage was a contractual relationship whose partners were pledged to provide each other with mutual solace and happiness, then the partners themselves should be able to terminate the contract when marriage became a burden rather than a comfort. But parliamentary opinion in 1857 was very far from even entertaining such reasoning, and in fact the new law prohibited divorce if there was any evidence of connivance or collusion between the parties.32

While parliamentary opinion generally regarded a wife's adultery as the most fundamental offense against marriage, some members were unwilling to close the possibility of divorce to women altogether. The House of Lords heatedly argued about the possible aggravations which would, when combined with adultery, justify a woman in seeking release from her marriage vows. From a list which included rape, sodomy, desertion, transportation, penal servitude, incest, bigamy, and cruelty, they accepted only the last three.33 In 1857 the Commons debated the same question in long and grueling sessions. Finally Lord John Manners proposed that "adultery committed in the conjugal residence" entitled a wife to divorce (3 Hansard, cxlvii, 1632). As Margaret Woodhouse has noted, the obstructionists took hold of the amendment and "worked themselves and many other members into a hypnotic frenzy over the possibility of sin" (Woodhouse, 272). The members were not, however, simply exercising prurient imaginations, but were trying to convey their varying views of the conditions which disrupted marital companionship. Disputes over the grounds of divorce were, in essence, disputes over what constituted a violation of the marriage contract, and therefore over the fundamental purpose of

32 20 & 21 Vict. c. 85, xxix-xxxi. Similarly, when Lord Cranworth suggested that the new divorce court might grant decrees of separation (not divorce) after the couple had filed a separation deed, the opposition was immediate and unequivocal. See, for example, Lord St. Leonard's objection, 3 Hansard, cxlv, 1703.
33 Sessional Papers (Lords), 1856 (H.L. 181), xxiv, 6-7, and 3 Hansard cxlv, 812-819.
marriage. The notion that only adultery justified severing the marriage bond assumed that sexual relationships and the legitimacy of a man's offspring were the basic considerations of the marriage contract. While the majority of parliament did not consider male adultery a significant threat to such companionship, aggravations such as cruelty, desertion, or bigamy did seem to threaten this aspect of marriage. The discussions over the grounds for a wife's divorce contained the seeds of the idea that marriage could not properly be understood solely as an institution for sexual or reproductive bonding, but as a locus for companionship and mutual support. Thus by rejecting the ecclesiastical doctrine of the indissolubility of marriage and by debating aggravating grounds for divorcing an adulterous husband, parliament had opened the door to further debate about the purpose and nature of marriage itself. The majority of parliament of 1857, however, would go no further than to allow women to divorce their husbands for the most egregious offenses, a reflection of their ardent desire to change the traditional law of marriage, and the traditional status of married women, as little as possible.

The Divorce Act of 1857 was important in shaping the legal concept of marriage not only by allowing marital dissolution on specified grounds, but also because its provisions to protect the property of separated and deserted wives undercut the hierarchical conception of marriage perpetuated by the doctrine of coverture. Again, however, parliament showed how unwilling it was to change the traditional understanding of marriage as a male-dominated institution when it rejected a more thorough-going Married Women's Property Bill and limited its reforms to cases where a marriage was for all intents and purposes dissolved.

When Lord Lyndhurst moved the establishment of a Select Committee in 1856 he pointed out that the matter of married women's property "is closely connected with the law of divorce, but is not touched by the present bill" (3 Hansard, cxlii, 408). One of his concerns was the economic vulnerability of a married woman separated from her husband by a decree from the ecclesiastical courts. Since such a woman was still legally married, she continued to be governed by the common law rules concerning the property of married women. Any legacy left to her became her husband's, income from any real

SPRING 1982
property was at his disposal, and “if a wife tries to eke out a scanty subsistence for herself and her children by the exercise of any art . . . the husband can seize upon the proceeds of her industry and bestow them upon his mistress” (3 Hansard, cxlii, 409). As Lord Lyndhurst summed up the situation, from the moment of separation “the wife is almost in a state of outlawry. She may not enter into a contract, or, if she do, she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost wholly destitute of civil rights . . .” (3 Hansard, cxlii, 410). Parliament’s solution to these problems was to amend the divorce bill so that any woman who obtained a decree of judicial separation (which under the Divorce Act replaced the ecclesiastical divorce à mensá et thoro) should henceforth be treated as a feme sole with respect to her property and contracts (20 & 21 Vict. c. 85, xxv-xxvi).

The following year, in 1857, Lord St. Leonards moved the addition of a similar provision, this time to protect the property of wives deserted by their husbands. This amendment provided that a woman who was deserted by her husband could go before a local magistrate and receive an order allowing her henceforth to control her earnings as a feme sole. Lord St. Leonards’s proposal, it is important to note, was the only provision of the Divorce Act which could possibly be of use to the poorer classes, since it did not require litigation but only an appeal to a magistrate (20 & 21 Vict. c. 85, xxi). Lord Lyndhurst’s and Lord St. Leonards’s amendments were theoretically significant additions to the divorce bill because they implicitly rejected the doctrine of spousal unity as it affected married women’s property rights. But neither measure recognized the principle that a wife in an ongoing marriage had a right to control her own property. They simply suspended the common law rules in cases where cohabitation had ceased, and the marriage was for all practical purposes at an end.

The limitations of these amendments with respect to married women’s rights are even clearer in comparison to an alternative measure which parliament considered during the sessions of 1857. Early in this short session, Lord Brougham introduced a Married Women’s Property Bill which would have abolished altogether the common law doctrine of spousal unity with respect to married women’s property. The speech introducing the bill was one of the most eloquent of Brougham’s later years, reminding the Lords of previous reform measures which had seemed visionary at first but later triumphed (3 Hansard, cxliv, 605-619). The speech revealed Brougham’s perception of
the issue of married women's property as only the logical extension of Whig principles of individual freedom and responsibility, but the bill was virtually without support in the Lords and died after its first reading. Parliament was on the point of dissolving for the March general election, and any such new measure was doomed for that session.

When parliament reconvened, Sir Erskine Perry and Monckton Milnes presented a similar bill to the House of Commons (3 Hansard, cxlv, 266). Milnes explained that the “object of the Bill . . . was to make that the law for all classes, which by custom it had become for the wealthy classes,” that is to substitute the rules of equity for those of the common law (3 Hansard, cxlvi, 1516). Perry reminded his colleagues that the bill rested on principles which the Law Amendment Society had adopted almost unanimously (3 Hansard, cxlv, 267). He contended that the common law was “unjust in principle and grievous in operation, and ought to be altered” (3 Hansard, cxlvi, 1520). J. A. Roebuck agreed that the law should “continue the wife as a legal entity after her marriage” rather than “[merge] her existence in that of her husband” (3 Hansard, cxlvi, 1522).

While proponents of a married women’s property bill in parliament drew the bulk of their argument from the Law Amendment Society’s campaign to abolish the conflict between law and equity, feminists outside parliament emphasized every woman’s right to an independent legal personality. The most thorough exposition of this position was an article written by Caroline Cornwallis and published in the Westminster Review in 1856. In Cornwallis’s eyes a married women’s property law was needed not only to end the confusion between equity and the common law, but also because the recognition of a woman’s individual personality in marriage was only just. Why, asked Cornwallis, would any rational creature agree to a permanent suspension of her legal personality and property rights in order to marry? “What crime [has] the woman committed by the act of marriage that she is instantly deprived of all civil rights, which in most countries is considered as the punishment of a felon?” Cornwallis did not romanticize the supposed unity of a married couple: “Marriage makes no mental change in the individual; the will remains as strong, the reason as clear as before; individual needs are as separate as ever . . .” (Cornwallis, p. 399).

The most interesting feminist arguments, however, were those which argued for married women’s rights in the name of a new vision of
a companionable and more intimate marriage. Such thinkers regarded female autonomy as a crucial prerequisite for realizing true understanding between husband and wife. Only by recognizing women's rights could marriage cease to be hierarchical and become a true marriage of equals. Thus, in 1851, Herbert Spencer, a formidable individualist, urged the legal emancipation of women not only as a matter of right but as a precondition for a new kind of marriage because "love and coercion cannot possibly flourish together."\(^{34}\) In the same year Harriet Taylor Mill's "The Enfranchisement of Women" asserted that marriage must involve "that genuine friendship, which only exists between equals in privileges as in faculties."\(^{35}\) Barbara Leigh Smith Bodichon (who had married in 1857) wrote in 1859 that "adult women must not be supported by men if they are to stand as dignified rational creatures before God. Esteem and friendship would not give nor accept such a position; and love is destroyed by it. . . ." Only the possibility of economic independence allows men and women "to form equal unions."\(^{36}\) And Annie Besant more than a decade later observed that marriage law in its un-reformed state "sweeps away all the tenderness, all the grace, all the generosity of love, and transforms conjugal affection into a hard and brutal legal right."\(^{37}\)

John Stuart Mill's *The Subjection of Women* was the most thorough and philosophically sophisticated explanation of the obstacles to happiness engendered by marriage laws based on the doctrine of spousal unity. Contemporary marriage was, Mill said, "the primitive state of slavery lasting on," with all the moral and psychological corruption that implied for both men and women. Marriage, however, *should* be a "school of genuine moral sentiment," which could only be found in a "society between equals."\(^{38}\) As Ellen Ross has said, from such a perspective efforts to retain the legal supremacy of the husband while glorifying the woman's sphere and marital love "could yield only

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\(^{35}\) Harriet Taylor Mill, "Enfranchisement of Women," *Westminster Review*, 55 (1851), 149-161. Alice Rossi has argued persuasively that the bulk of the article was written by Harriet Taylor Mill, although at the time it was attributed to J. S. Mill (Alice Rossi, ed., *Essays on Sex Equality* [Chicago: University of Chicago Press, 1970], pp. 41-43).


\(^{37}\) Annie Besant, *Marriage: as it was, as it is, and as it should be* (New York: Asa K. Butts, n.d.), p. 12.

foolishness and idealization; without equality no real love could emerge."

The efforts of these feminists to get parliament to adopt a married women's property law were clearly motivated both by a commitment to individual rights and by a belief in the importance of marital friendship.

The feminists' goal of providing a new legal basis for a more egalitarian relationship between husband and wife was not shared by the majority of members of parliament. During the debate on the second reading of his Married Women's Property Bill, Sir Erskine Perry remarked that he entertained not "the slightest expectation" of passing the bill that session (3 Hansard, cxlvi, 1253). The session was well-advanced, and the government was not enthusiastic about the measure. In addition during the debate in the Commons both Perry and Milnes acknowledged that if the Divorce Act should pass, there would be little chance of advancing the Married Women's Property Bill. The Divorce Act's provisions to protect the property of separated and deserted wives by dealing with the most egregious cases of economic hardship would lessen the pressure to pass a comprehensive property act. Perry asked that the property bill be read a second time in order that "in the event of the Divorce Bill being thrown out, the House would discuss, at a morning session, the principles embodied in the measure" (3 Hansard, cxlvi, 1523; see also 3 Hansard, cxlvi, 1517). On these terms the Commons voted for the second reading, but in the wake of the passage of the Divorce Act, the Married Women's Property Bill was not brought forward for a third reading.

It is futile to speculate on what the fate of the married women's property bills might have been had they not been introduced in the midst of the debates on divorce, but it is quite clear that the conjunction of the measures deeply threatened many members' sense of the stability and unity of the home. Indeed the idea of married women's property rights posed an even greater threat to the notion of family unity than did the provisions for divorce itself. Divorce simply gave legal recognition to de facto marital breakdown. A married women's property law, on the other hand, would recognize the existence of two separate wills within an ongoing marriage.

Very few members of parliament believed that two independent wills could exist in one household without inviting disaster. As John Stuart Mill later observed, his contemporaries had little experience of

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"the marriage relationship as it would exist between equals," and most men harbored a deep-seated fear of domestic equality.40 Certainly the parliament of 1857 was deeply suspicious of the idea that the legal equality of husband and wife would lead to anything but disaster. When Lord Brougham presented his married women’s property bill, Lord Campbell advised that the measure “would lead to perpetual discord . . . it was a proposal shocking to all the habits of the people of the country” (3 Hansard, cxlv, 619). In the Commons, J. D. Fitzgerald asserted that Perry’s bill would “effect a complete revolution in the law, which would disturb all the relations of husband and wife” (3 Hansard, cxvi, 1521). Beresford Hope complained that parliament’s deliberations on the topic were a response to the “rather extravagant demands of the large and manly body of ‘strong-minded women’” who in meetings and pamphlets were beginning to press for a larger scope for female activities and for greater equality before the law. The feminists’ efforts, he predicted, if not stoutly resisted, would lead to “the breakdown of . . . the distinguishing characteristic of Englishmen – the love of home, the purity of husband and wife, and the union of one family” (3 Hansard, cxlv, 278, 280).

Lord St. Leonards in proposing his amendment to protect the property of deserted wives appealed to the widespread fear that a married women’s property law would upset domestic order. He urged his colleagues to adopt the measure precisely because it “did not go anything like the length of the bill which had been introduced in the other House (that is, Perry’s married women’s property bill), the effect of which would be “to place the whole marriage law of this country on a different footing, and would, in fact, give a wife all the distinct rights of citizenship” (3 Hansard, cxlv, 800). Lord St. Leonards knew that his colleagues in both Houses would wish to avoid this “greater evil” by adopting the mild measure he proposed.

Members of parliament were willing to carry the idea of separate property for married women no further than to concede its practicality for those whose marriages for all intents and purposes had ended. Many who struggled with the proposed reforms found it impossible to imagine sustaining the collective interests of a marital couple without the legal fiction of spousal unity. Indeed without that doctrine the common interests of a married couple would have to be supported by agreement rather than by the husband’s will alone. In

1857 the majority of Victorian gentlemen could not envision a form of marriage in which husband and wife met as political and economic, as well as spiritual, equals. They could only conceive of maintaining unity through hierarchy and authority. Like a writer in the *Law Review*, they believed that "in the words of the proverb, 'If two ride on a horse, one must ride behind.'"41

While the initial impetus for the Divorce Act came from legal reformers concerned with jurisdictional issues, the effort to pass it sparked a discussion which undermined both of the central tenets of traditional marriage law in England: the ecclesiastical doctrine of indissolubility, and the common law doctrine of coverture. The parliament of 1857, however, did all that it could to minimize the radical potential of the act. It was unwilling to apply the individualistic and contractarian principles it used to argue for the dissolubility of marriage to the relationship between husband and wife in an ongoing marriage. Not until the Married Women's Property Acts of 1870 and 1882 did parliament make any concession to the recognition of a married woman's independent legal personality. Even the Married Women's Property Acts did not do away with other aspects of coverture, such as those which denied a married woman a right to separate domicile or which made it difficult to prosecute her for torts committed in her husband's presence.

Nor did the pleas that parliament revoke the laws which sanctioned the sexual double standard meet with ready success. More than fifty years passed before the Royal Commission on Divorce of 1912 recommended that the grounds for divorce be equalized for men and women, and their suggestion was not put into law until the Matrimonial Causes Act of 1923, which allowed a wife to divorce her husband for his adultery. It took even longer for parliament to abandon its patrilineal thinking and accept the idea that offenses other than sexual infidelity might sever the marriage bond. Eighty years after the Divorce Act of 1857 parliament finally extended the grounds of divorce for both men and women to include cruelty, desertion, and insanity in addition to adultery.

What parliament accomplished in the Divorce Act must in the final analysis be judged in the light of what it failed to do. It made possible the dissolution of marriages in a secular court, and it provided

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the first legislative recognition of the needs of nominally married but deserted or separated women for economic independence. But parliament rejected proposals to grant married women the same legal status as their husbands either by equalizing the grounds for divorce or by allowing them to control their own property. The contractarian and individualistic arguments of men such as Lord Lyndhurst and Sir Erskine Perry found little support in parliament, while the broader feminist goal of a reformed, more egalitarian, and more intimate marriage scarcely received a hearing. In the wake of the Divorce Act of 1857, it was clear that the nineteenth-century campaign to achieve the legal emancipation of married women would meet stubborn and deep-seated resistance in parliament.

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