Law in Everyday Life

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Abigail Bailey's Coverture: Law in a Married Woman's Consciousness

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It is now nearly forty-five years since the publication of Mary Beard's neglected classic, *Woman as Force in History*. In that time the field of women's history has grown up, a field whose reason for being is to challenge, as Beard did, "the haunting idea" of conventional history:

It is the image of woman throughout long ages of the past as a being always and everywhere subject to man or as a ghostly creature too shadowy to be even that real.... As for centuries the Ptolemaic conception of the astrophysical universe dominated discussions and "reasonings" in astronomy, so the theory of woman's subjection to man, the obliteration of her personality from consideration, governs innumerable discussions and reasonings in relation to human affairs. Here, there, and almost everywhere, it gives animus, tendency, and opinionative assurance to the man-woman controversies of our day.¹

Beard regarded with particular scorn the Anglo-American legal historical assumption that the "very being" of married women was "suspended during the marriage, or at least ... incorporated and consolidated into that of the husband." Nothing, she thought, was further from the truth as a description of the ordinary lives of most women. And she blamed the survival of that notion into the present day on the rhetorical skill of nineteenth-century feminists and law reformers, who had used the formula for polemical purposes. The historian's day, after he or she has finished unfolding yet another paean to human agency, structures of submission and docility still remain, if only as contexts and markers against which we measure our subjects' lives. They are monuments to the intractability of habit and the continuing reality of sexual and domestic power in human history.

Of course, Mary Beard was right. At all times in human history, women had identities and personalities. Even married women, subject in the Anglo-American world to the strictures of common-law covertures, were never just feme coverts—women whose identities had been merged into those of their husbands. As Beard argued, many found in alternative legal regimes, notably that of equity law, legal means for establishing separate legal identities. Still, most wives—meaning most women for a large portion of their lives—were feme coverts. Legally, that meant they could neither contract nor manage any property. In many situations, they would have no standing in court. Their domicile was, in legal theory, their husband's, as was the exclusive right to their sexuality. It is true that the connections between these rules and the practices of everyday life were complex and difficult. Wives, we know, often contracted, managed property, testified in court, sued and were sued, had affairs. A variety of norms and cultural understandings restrained husbands from exercising legal power over their wives. Yet, the fact that the relationship between the rules of coverture and everyday life was complex and difficult, that life did not conform to the art of the legal imagination, does not mean that the art of the legal imagination did not shape those lives.

What difference did such legal constructs make? What can we say about the roles legal structures played in the life and identity of a married woman? What can we learn from a close reading of one woman's autobiography?

In this essay, I will use the memoirs of Abigail Bailey, an eighteenth-century American wife, to illustrate two claims: first, that the terms of widely submission in the common law, coverture, did find reflection in one woman's expressed beliefs and values, and second, that the normative order of which coverture was a part also provided Abigail Bailey with the moral and political authority to free herself from her husband as oppressor. Neither of these claims are in the least novel or controversial, stated abstractly. Only in the details—in the exploration of voice and the particularities of situation—do they become interesting or important. That is why those of us interested in understanding the role of legal values and legal institutions in the shaping of ordinary social identities attend to autobiographies and memoirs like those of Abigail Bailey.

Bailey's narrative, first published posthumously in 1815 and just now reprinted in a superb edition edited by Ann Taves, focused on events that occurred in the late 1780s and early 1790s. It tells a story.

5. Coverture was the term given at common law to the legal condition or state of a married woman, who, as a feme covert, was covered by her husband. As a matter of conventional legal theory, a married woman no longer had a legal identity—neither legal rights nor legal personality. And thus, legal understanding of coverture always began with husbands' rights.
about the discovery of autonomy and rebellion by a deeply submissive, self-consciously conservative woman. Abigail Bailey, born in 1746, lived in New Hampshire and was married to a violent and hard man who, after twenty years of marriage and the birth of fourteen children, sexually abused one of their daughters. The bulk of her memoirs details her struggle to separate herself from that husband after she became aware of the incest. Eventually, she learned to think of him as her “enemy,” and from that time on the modern reader can begin to see her as an individual in modern dress. But that transformation of husband into otherness occurs quite late in the story, and even then incompletely, as we shall see. Her struggle, for what in the nineteenth century would be called “self-ownership,” occurred entirely within a legal and religious culture that made her identity contingent and dependent on that of her husband.

Abigail Bailey’s memoirs illuminate a central interpretive difficulty in the history of individualism and individual identity. As Natalie Davis has written, the exploration of the self in early modern Europe (and America) could only have occurred in conscious relation to the groups to which one belonged. Women and men worked out strategies of self-expression and autonomy within the boundaries of structures of authority and domination and ascribed status. Davis suggests that in sixteenth-century France women and men often experienced themselves as physically continuous with parents, children, husbands, and wives. Only with difficulty could they identify themselves as separate selves at all. And they could never free themselves from an awareness of identity within a structured hierarchy. Yet, even so, aspects of that hierarchical, patriarchal order still led some of its members toward self-discovery and self-presentation. They found effective “strategies for achieving some personal autonomy in a world where in principle parents and husbands ruled and where, because of openings into other bodies and minds, it was not always certain where one person ended and another began.”

What were Abigail Bailey’s strategies for achieving personal autonomy? How did she (tentatively and partially) break the habit of submission? Most importantly, for our purposes, what, if anything, did law have to do with the habits and changes that marked her life?


Some Problems of Method

Cultural representations of marriage do not reflect actual relations of power and dependence as organized by marital instability. They reflect what people say in the process of claiming, justifying, contesting, and manipulating the privileges that power relations make possible.

This chapter means to be a contribution to the study of law in everyday life. But Abigail Bailey’s memoirs are not for the most part a description of what she thought of as her everyday life. Nor is her book about law. Her memoirs are, rather, a reconstruction of the “great trials, and wonderful mercies,” that were her “lot” at the hands of her “Heavenly Father” (178). The narrative describes the extraordinary events that disrupted her ordinary life as a wife and mother. But little in the text describes her everyday life as a wife and mother. The problem the narrative poses is how she, as a Christian, ought to respond to extraordinary events.

Abigail Bailey’s unswerving focus throughout the memoirs is on her conversations with and monologues about her husband. The work represents an intense reflection on her marital relations. She carefully reconstructs arguments, prayers, invocations of religious authority. She constantly monitors the changing discourse of her marriage.

In that discourse law played an apparently prominent role. The book is filled with assertions about legal rights, legal remedies, and the sanctions of public institutions. Talk about rights and remedies—


9. There are a variety of responses a social historian or ethnographer might make to the question of how this narrative connects to the study of everyday life. One possible response: nothing in this paper is inconsistent with George Marcus’s conclusion that “while law is certainly part of everyday culture and society, it tends not to be intimately present in this life except in very banal ways” (see Marcus in this volume). Other responses: incest and domestic violence, we know today, are hardly so unusual as they seemed to her to be. More, the process of separation from husband is and was a relatively ordinary aspect of human experience. Many women did it then, just as many do it now. Likewise, Abigail’s husband’s resistance to her separation hardly marks him as distinctive or unusual. Nor, as we shall see, were the weapons he used in resisting her that much out of the ordinary. Finally, the very construction of “the exceptional,” conceived as an antinomic category, may help us to understand the mundane and the everyday. Even without intending to do so, Abigail Bailey may have told us much about her everyday life.
about what she could do to him, if he would not abide by her wishes, about what he had a right to do to her, if she would not abide by his—appear to have been the foundation of their relationship, particularly in its latter days. Those conversations reproduced power relations and notions of the self within marriage. Those conversations also justified and explained her need for rebellion and autonomy.

Did Abigail Bailey accurately reproduce the talk of her marital life? Although the memoir was first published posthumously, nearly a quarter century after the events it recorded, the memoir reads as if it were constructed from a diary written at the time of those events. Yet the reader has no way of knowing if that is in fact the case; there is no way of knowing whether she accurately reproduced her conversations with her husband, let alone her monologues. Ann Taves, the modern editor of the new edition, has exhaustively and scrupulously established the accuracy of most of the facts recorded in the text. Bailey’s story is, in its essentials, a true story. Yet Bailey was unquestionably telling a story with a particular message, a story that used her life, as she understood it, to illustrate the mysteries of God’s love (and along the way how she, a dutiful and good wife, became a divorced woman). Her memoirs also confirmed in important ways to contemporary fictional genres of “captive narratives” and of the “pilgrim’s progress.”

We cannot treat Abigail Bailey’s memoirs as a clear window onto the talk of her marriage. Still, for the purposes of this paper, we can use the memoirs as a text about marriage and the changing identity of a married woman. I am reading her memoirs in search of the commonsense assumptions about law and marital power and personal transformation that informed her description of her marriage. Given those goals, it does not matter to me that, by the time she sat down to write her memoirs, she may have forgotten precisely what he had said to her, or who had won which argument. I am relatively uninterested in the extent to which she shaped her memoirs to conform to contemporary genres. What is important, for me, is that Abigail Bailey reproduced the pivotal events of her married life as a set of conversations and monologues about power and legal right.10

10. "I focus on discourses because it is in discourse that culture and power are joined. Power relations provide the necessity for, and the contexts of, ongoing and recurring conversations. At the same time, such conversations, by requiring and producing particular understandings of the social world, presume unexamined assumptions that grant power to some and not to others.” Collier, Marriage and Inequality, 6-7.

11. She gave, for example, an exhaustive description of how she was tricked by her husband into traveling with him across Vermont into New York, because he believed that in New York, unlike New Hampshire, the laws were far more protective of husband’s prerogatives. When they got there, “He told me, we are now in the State of New York, and now you must be governed by the laws of this State, which are far more suitable to govern such women as you, than are the laws of New Hampshire” (124). Was Asa Bailey right? Was New York’s general law of husband-wife relations significantly more patriarchal than that of New Hampshire? Probably not. In fact, it is hard to judge the truth of his (and her) belief in the relative efficacy of eighteenth-century laws in different jurisdictions. New York did not grant divorces through most of the eighteenth century, while New Hampshire did. But at the time that Mr. Bailey coerced Mrs. Bailey into traveling with him, she was only contemplating an informal separation, not a full divorce. Given the localized quality of justice in the eighteenth century, moreover, generalizations about state law would be of limited relevance in predicting the availability of remedies from particular courts. Of much greater importance than the formal legal regime would have been her separation in New York from friends and relations, her isolation among strangers.

12. As we will see, their negotiations over separation were framed both by their (particularly her) uncertainties about the legal import of a separation and also by the legal ambiguity of the status of marital separation.

13. Collier, Marriage and Inequality, 6.

14. Here and throughout most of the rest of this paper, I focus on Abigail’s normative universe, rather than that of Asa, whom we see only through her eyes. For a suggestion of the terms of his world, see n. 51.
they referred. The relevant legal context for their negotiations was one that they produced through their interpretations and reconstructions of their normative universe.

How then can one talk about Abigail Bailey’s realizing herself as a more autonomous self within the legal context of her eighteenth-century marriage? What is the legal context? The problem is real. Yet the problem is more frightening stated abstractly, in terms of a schematized “self” and a theoretical “context,” than when confronted in terms of historical particularities and descriptions. Relevant contexts are created through interpretations, yet interpretations are constrained and limited by historically specific structures that restrict the range of available interpretive postures. The Baileys may have interpreted or understood law wrongly. They could not interpret it in ways that would not find support and reinforcement in the cultural and institutional structures that surrounded them. When they were wrong in their statements about legal rights and remedies, they were wrong in ways that were plausible and coherent with available understandings about marriage and moral identity.

The central normative structure in Abigail Bailey’s life—a structure that radically constrained her interpretive options—was that of eighteenth-century evangelical Christianity. To understand the relationship of legal context to moral identity, we need first to understand the structural significance of religious belief in her life (that is, I suppose, something like the relationship of moral context to legal identity). Legal rules, rights, and remedies would be interpreted, would be recognized by her within that order. For Abigail Bailey, human law was always secondary to God and his “wonderful” plan. Legal power was ultimately ineffectual against the power of prayer and submission to God’s will.

Unless one appreciates the distinctive parallax of her Christianity, there is no way to make historical sense of the pivotal problem in her narrative: that is, knowing when it would become right for her to act separately from and in opposition to her husband. From the time she first became aware of the incest in 1788, she theoretically possessed formal legal rights against her husband. She might have had a right to a full divorce. She certainly had a right to a separation from bed and board (a court-ordered limited divorce), including an equitable distribution of marital property. She had a right to have articles of the peace drawn up against him. She could always threaten her husband with indictment for a capital crime. Yet, she waited and prayed and suffered for the better part of four years before invoking formal legal processes. In Taves’s slightly anachronistic reading, Bailey’s long hesitation and apparent passivity exemplifies the “battered wife” syndrome of modern social policy. She should have acted much sooner, although Taves would understand and forgive her reluctance, because today we understand that reluctance as constituted by a structure of sexual power (28).

Surprisingly, the anonymous clerical editor of the 1815 publication of Bailey’s memoirs apparently shared Taves’s judgment. He too felt that Abigail Bailey was wrong to wait so long. Like Taves, he also saw her weakness as the explanation for her misjudgment:

The discreet reader will repeatedly wonder that this pious sufferer did not look abroad for help for so vile a son of Beliel, and avail herself of the law of the land, by swearing the peace against him. Her forbearance does indeed seem to have been carried to excess. But when we consider her delicate situation at this time; her peaceable habits from youth; her native tenderness of mind; her long fears of a tyrannical cruel husband; her having no time of her sufferings seen all that we now see of his abominable character as a reason why he should have been brought to justice; her wishes and hopes that he might be brought to reformation; her desires not to have the family honor sacrificed; and the difficulty of exhibiting sufficient evidence against a popular subtle man, to prove such horrid crimes;—these things plead much in her behalf. After all, it will be difficult to resist the

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16. As we shall see, there were moments when Asa evidently agreed with her on this.

conviction which will be excited in the course of these memoirs
that Mrs. B. did truly err, in not having her husband brought
to justice. The law is made for the lawless and disobedient. (72)

What both editors miss is Abigail Bailey’s understanding of
prayer as active and primary, and of legal rights as secondary and
derivative. Both also assume that her prolonged passivity reflected
a personal weakness, an absence, if you will, of personal identity
and strength. Patience is for them (and probably for most of us) not
much of a virtue. For Bailey, by contrast, waiting for the moment
when public action was requisite was essential for her moral identity.
She could not act until she knew and understood God’s will for her;
yet, she recognized that God’s will would not be revealed in easy
fashion. She knew that she could learn what she ought to do about
her husband only at the end of a long spiritual journey. And her
memoirs are, in the first place, a detailed description of that journey.

The Submissive Self

...for all tame animals there is an advantage in being under
human control, as this secures their survival. And as regards
the relationship between male and female, the former is
naturally superior, the latter inferior; the former rules and the
latter is subject.

—Aristotle, Politics

Abigail Bailey lived in the second half of the eighteenth century, a
time unmarked by evidence of significant change in the legal status
of married women. There is today a lively and unsettled debate among
historians about whether women’s lives altered during this era of
political revolution. And we are gradually coming to realize the
degree of variation from jurisdiction to jurisdiction (both as colonies

20. Marylynn Salmon, Women and the Law of Property in Early America

21. Voices sometimes regarded as rebellious, like the Abigail Adams of the
“Remember the Ladies” letter, were fully ensconced within domestic identities. See
Edith B. Celles, “The Abigail Industry,” William and Mary Quarterly, 3d ser., 45
(1988): 656–83. Early English feminists, like Mary Astell and Mary Wollstonecraft,
took the power relations of marriage as given and unchangeable; instead of empha-
sizing the possibilities of legal or secular reform, they cautioned women against
entering into marriages. See Ruth Perry, The Celebrated Mary Astell, An Early
English Feminist (Chicago: University of Chicago Press, 1986); Bridget Hill, ed.,
The First English Feminist: Reflections upon Marriage and Other Writings by Mary Astell
(New York: St. Martin’s Press, 1986); and Mary Wollstonecraft, A Vindication of the

22. This is, of course, true, whether or not a wife had a separate estate protected
by trustees and by the rules of equity. Today, legal historians typically treat coverture
as nothing more than an earlier regime of marital property, one that disappeared
sometime during the nineteenth century. I want, in a large project just beginning,
to explore the extent to which coverture remained descriptive of general nineteenth-
century (and, to a surprising extent, twentieth-century) political understandings about
marriage, husband-wife relations, and domestic rights (including ostensibly personal
rights). The reading I have done so far in a variety of corners of American domestic
relations legal doctrine—custody law, criminal conversation cases, marital property
cases, separation and divorce law—convinces me that through the nineteenth century
the patriarchal symbols of coverture remained of central (although contested) sig-
nificance. But that conviction remains both controversial and, I should add, subject
to revision and reconsideration. That marriage in the late eighteenth century was,
legally speaking, described by coverture is, by contrast, neither controversial nor
interesting.


19. See Mary Beth Norton, “The Evolution of White Women’s Experience in
Early America,” American Historical Review 89 (1984): 593–619; Linda Kerber,
Women of the Republic (Chapel Hill: University of North Carolina Press, 1980);
Linda Kerber et al., “Forum: Beyond Roles, Beyond Spheres: Thinking about Gender
marriage as requiring the loss of a prior self.\textsuperscript{23} Indeed, we might better think of her as finding herself through her hierarchical relationships. She was, at least as she described herself in her memoir, fulfilling her destiny, being true to her nature.

Although she longed for a relationship with her husband founded on friendship, she soon learned that he would only intermittently offer that. Yet, she insisted, she could be happy as his wife. God had, she believed, given her “a heart to resolve never to be obstinate, or disobedient” to her husband. Rather, she would “be always kind, obedient, and obliging in all things not contrary to the word of God.” She thought, “[I]f Mr. B. were sometimes unreasonable, I would be reasonable, and would rather suffer wrong than do wrong.” She would be so because it was her nature so to be. When he treated her badly, as he did from the first, she hoped that it resulted “not from ill will,” but “from the usual depravity of the human heart.” She felt, during a good period in their marriage, “the tenderest affection for him as my head and husband. I ever rejoiced when he returned from abroad. Nor did I see him come in from his daily business without sensible delight. Much pleasure I took in waiting upon him, and in doing all in my power to make him happy” (57–58, 66).\textsuperscript{24}

Abigail Bailey’s stated willingness to subsume her identity into that of her husband, to live as a dependent within his household, might seem to reflect the normative vision of common-law coverture. She knew that she was “under his legal control,” and that “he could overrule all my plans as he pleased.” She knew, as she told him in one of their many conversations after the discovery of the incest, “I well knew I had been placed under his lawful government and authority, and likewise under his care and protection. And most delightful would it have been to me, to have been able quietly and safely to remain there as long as I lived. Gladly would I have remained a kind faithful, obedient wife to him, as I had even been” (77–78).

Her description of her marriage as a natural fate conforms, moreover, to the conventional legal understanding, as presented in an eighteenth-century legal text, “that all Women, in the Eye of the Law,

\textsuperscript{25} A Treatise of Feme Covert: Or, The Lady’s Law (1732; South Hackensack, N.J.: Rothman Reprints, 1974), v.

\textsuperscript{26} As James Wilson said in law lectures delivered in the 1790s, while in “very pressing emergencies” it might be necessary for public authority to intervene in the relations of husband and wife, in general, “[t]he rights, the enjoyments, the obligations, and the infelicities of the matrimonial state” are removed from legal attention. Towards a married couple, the law “will not appear as an arbitress; but, like a candid and benevolent neighbour, will presume . . . all to be well.” Instead of “municipal regulations,” women would have to rely on “the influence of that legitimate honour, which we have described as the inseparable friend and companion of virtue.” Robert Green McCloskey, ed., The Works of James Wilson (Cambridge: Harvard University Press, 1967), 1:599–602.

\textsuperscript{27} In her study, Good Wives (New York: Knopf, 1982), Laurel Ulrich writes that for seventeenth-century New England women, “Submission to God and submission to one’s husband were part of the same religious duty” (6). For Abigail Bailey, by contrast, both submissions were religious duties, but they were certainly not the same religious duty. One would like to know whether the Pauline admonition was a part of the religious teachings of the late eighteenth century New England community in which Abigail Bailey lived, but I have been unable to find evidence on the question.


\textsuperscript{24} As one might expect, he was quite dependent on her in their daily lives. He trusted her with his money and his property. And with “prudent management,” she could sometimes keep him in “a pleasant mode” for weeks (65).
no sooner did she write this than she stopped and noted that she quickly "recollected, that in all my troubles, Christ was my hiding place." She, the memorialist, was telling the reader that she, the wife, was wrong to look to her husband for succor that only God could provide (68).

Rather than a woman transformed by marriage into a feme covert, we would do better to think of Abigail Bailey as a self "covered" by her husband during marriage.28 Being covered by her husband, being submissive to him, was not a denial of her self. On the contrary, it constituted the central test of her self and of the strength of her religious identity. It is a mistake to think that marriage made a woman like Abigail Bailey into an absence of self, as nineteenth-century women's rights advocates and law reformers argued.29 For Abigail Bailey, by contrast, marriage was both destiny and achievement. "[I]t had ever been my greatest care and pleasure (among my earthly comforts) to obey and please him." What she called "the habit of obedience" was a learned and practiced habit, crucial to her because in it she would find her salvation. She had hoped, when she married, "to find a companion of meek, peaceable temper; a lover of truth; discreet and pleasant... But the allwise God, who has made all things for himself, has a right, and knows how to govern all things for his own glory." It was, she quickly learned, "the sovereign pleasure" of that same "allwise God to try me with afflictions in that relation from which I had hoped to receive the greatest of my earthly comforts" (78, 69, 56–57).

Thinking of submission as a test helps to suggest some of the complexity in the eighteenth-century idea of a feme covert. To men, perhaps, coverture suggested simple merger and unity.30 To Abigail Bailey and, presumably, to other women, it suggested the task for a lifetime, a way of establishing credentials as a worthy Christian. Coverture was hard work for the self. It was also necessary work for a self that would realize her own salvation through submission.31

29. See Beard, Woman as Force.
30. Mike Grossberg suggests in conversation that there was probably a more complex and religiously based male conception of the meaning of marriage, one tied to the idea of duties toward subordinates and of Christian charity to the weak and dependent. Such a conception might provide a measure against which she judged her husband's acts.

Abigail Bailey's Coverture

To understand Abigail Bailey's legal identity, the reader must work through paragraph after paragraph in which she reflects on God's goodness in testing her through the affliction of her husband. It was God's wondrous way to make her life so miserable. When her friends and relatives told her that Asa was "a cunning, crafty man" who was likely to leave his family destitute if she did not take legal action against him, she replied that "there is a time to speak; and a time to keep silence, and that, at the present time, the latter was my duty" (111–12). Like Job, the difficulty of her situation came close to providing a measure of the strength and quality of her faith:

The preacher says, "Surely oppression maketh a wise man mad." If so, what must become of me, a poor simple woman, under distressing oppression? But O, it is no matter of discouragement, though much matter of humility, to behold my own weakness, while God enables me by faith to behold at the same time his all-sufficiency, and the fulness of grace in the Captain of our salvation. It is with inexpressible delight that I contemplate the power, wisdom, goodness and faithfulness of God; that he does regard his people; that he has a tender care for all his chosen in Christ. Now, "when I am weak, then am I strong." Even divine corrections are in love and faithfulness. "All things shall work together for good to them that love God." I see such safety in trusting in him, that though the earth be removed, such as confide in him need not fear. There is the greatest satisfaction in casting our burdens on such a God. Unworthy as I am, I am sure God careth for me. For it has been his supporting mercy, that has held me up under the trials I have endured, and has given me a patient resignation to the divine will, and a confidence in God of deliverance. (106–7)

And yet, the test God had given her was more difficult even than simply bearing up under the burdens of an oppressive husband. She knew that there would come a time when she must "henceforth look out, and take care of" herself, when she must rid herself of her husband, when the habit of obedience would no longer be a virtue (135). There was a time when the test of marital submission had been passed, to be replaced by a test of separation.

But when would that point occur? And how would she recognize it? And what kinds of actions would be appropriate? Her husband's
oppression, as such, would never justify resistance and rebellion. Nor would his sinful conduct alone. All these were little else than the markers of God's wonderful (and totally inscrutable) plan for her. As she wrote, in describing her reaction to her first suspicions of her husband's incestuous behavior, “I saw that it was as much my duty to submit to God under one trial, as under another.” How could she know when change was requisite and, more difficult yet, what forms of change would be obligatory in her legal and moral situation?

Those questions established the terms of her narrative of change and transformation.

**The Story of Change**

The Narrative

Abigail Bailey’s memoirs tell of her marriage to Asa Bailey. They begin with her wedding in 1767. They end with her divorce in 1792.32

We might divide the narrative of what happened into the following six stages.

Premotions

Although she did not expect her husband to be a religious man, she had hoped when she wed that “He would wish for good regulations in his family, and would have its external order accord with the word of God.” But, she soon found that he was rash and frequently unreasonable, capable of hard and cruel treatment. Still, she worked at loving him and “confided in him, as my real friend” (57–58).

Three years into their marriage he had an affair with a serving girl working in their house in Landaff, New Hampshire. The girl was eventually sent away, but Abigail felt as if her “earthly joys were fled,” and she “mourned the loss” of her husband (58). Yet, she kept her troubles to herself and, in effect, “condoned” the affair by staying with him.33

32. She covers her childhood in one paragraph, the first twenty-one years of her marriage in 13 pages, the next four years in 110 pages.

33. Condonation remained until the recent past a standard part of divorce and separation law and practice. It is defined as “[t]he conditional remission or forgiveness, by means of continuance or resumption of marital cohabitation, by one of the married parties, of a known matrimonial offense committed by the other, that would constitute a cause of divorce [or separation]; the condition being that the offense shall not be repeated” (Black's Law Dictionary).

Abigail Bailey's Coverture

She did, however, begin to “vent” her grief and “broken heart” by writing about her spiritual situation (58). In these writings she focused on man’s depravity, on how those who should be friends often become the worst of enemies, and on how it was wrong to put one’s trust in mankind.

Three years later, in 1773, her husband sexually assaulted another serving girl, who would eventually go before the local grand jury to charge him. When Abigail confronted him with what had happened, “Mr. B. . . . fell into a passion” with her. He was overcome with anger and took to his bed. She went out milking and while there tried in prayer to intercede on his behalf. She still believed he could be brought to repentance. She then returned to the house, where she was met by her husband, who told her that he had thought about killing her. But suddenly:

[H]e had a most frightful view of himself. All his sins stared him in the face. All his wickedness, from his childhood to that hour, was presented to his mind, and appeared inexpressibly dreadful.

All the terrors of the law, he said, pressed upon his soul.

He had cried out to God for mercy. And then, he said, he had experienced a sudden revelation of grace. She knew better than to believe that. But she continued to live in “peace and comfort” with her husband, “willing to forgive all that was past, if he might but behave well in future” (60–61).

Over the next fifteen years, they grew prosperous, and he became a leading citizen of the town, holding a variety of local offices.

Incest

In 1788, Asa Bailey took a trip to the West, through New York and perhaps to Ohio. He was gone for several weeks, and while he was gone, Abigail had several frightening dreams. He returned and proposed that they all should move west.

In December, he began to behave strangely. He told her again of his plan to move to Ohio, and he asked for her consent and the consent of the children. None of them were pleased with the idea, but all “wished to be obedient”; all agreed “to follow our head and guide, wherever he should think best, for our family had ever been
in the habit of obedience" (68–69). He proposed to take one son and one daughter with him to help him and serve him while he looked for a place for them all to live, a plan quickly changed to one where he would only take the one daughter. Abigail later realized that all this had been just a ruse to get the daughter, Phoebe, alone with him. But at the time, none of this was apparent.

He began spending extra time with Phoebe, while avoiding his wife and other children. He would tell her stories and riddles and sing songs to her.

He thus pursued a course of conduct, which had the most direct tendency to corrupt young and tender minds, and lead them the greatest distance from every serious subject. He would try to make his daughter tell stories with him; wishing to make her free and social, and to erase from her mind all that fear and reserve, which he had ever taught his children to feel toward him. (70)

Phoebe found all this uncomfortable and disagreeable. She tried to stay out of his way, to avoid him. “But as his will had ever been the law of the family, she saw no way to deliver herself from her cruel father” (71). She also did not dare talk to her mother, or to any other person, about her situation, for she knew that her father watched her constantly.

Soon, his conduct toward this daughter changed again. Instead of “idle songs, fawning and flattery,” he would be angry with her, would punish her and beat her for imaginary infractions, would forbid her from doing anything with her mother or any of the other children. He would keep her confined in the house. His conduct became more and more violent. Sometimes he beat Phoebe with a “rod,” sometimes with a “beach [sic] stick, large enough for the driving of a team”; sometimes he threatened to whip her to death, if she tried to run from him again. The daughter, who had always been “obedient to him in all lawful commands,” was ashamed, would not look anyone in the face (72, 75–76).

Meanwhile, Abigail slowly had to admit to herself what she saw before her. This was, as she said, “so different” from anything that had happened before or that she might have expected. And she almost abandoned herself to grief. She did not, at first, see any way to stop the evil. Even when convinced of what was going on, she did not believe that she could testify in court against her own husband. She had no way of getting her daughter to confide in her, let alone testify against her father. “Fear, shame, youthful inexperience, and the terrible peculiarities of her case, all conspired to close her mouth against affording me, or any one, proper information” (75–76).

It is important to note that her grief was only to a limited extent for her daughter. Toward her daughter, she felt a mixture of resentment and pity: resentment that her daughter would not or could not speak up against her father, pity for someone who was, like herself, basically powerless. “How pitiful must be the case of a poor young female, to be subjected to such barbarous treatment by her own father; so that she knew of no way of redress!” Her husband’s actions were, more importantly, an affliction that she, Abigail, had to withstand or survive. The nature of the affliction remains unclear. To some extent, the affliction was the pain and cruelty inflicted on Phoebe. But to a much greater extent, it was, I think, the revelation that she was the wife of such an evil and uncontrolled man, that she was part of his household and under his government. “It was not an enemy; then I could have borne it. Neither was it he that hated me in days past; for then I would have hid myself from him. But it was the man mine equal, my guide, my friend, my husband!” (73).

First Separation

While the assault on her daughter continued, Abigail Bailey was also pregnant (for at least the fifteenth time), and in September 1789 she gave birth to twins, one of whom died after seventeen days. Once her health returned, she decided to “adopt a new mode of treatment with Mr. B.” She introduced the subject of incest and told him what she thought of his wicked conduct. She had waited until God would tell her that the right moment had come. Now it had, and she would do what she could to stop his “abominable wickedness and cruelties,” for, if she didn’t, she would be condoning his sins (77).

His response was to assert his legal power over her. “He wished to know whether I had considered how difficult it would be for me to do any such thing against him? as I was under his legal control; and he could overrule all my plans as I pleased.” She answered that while she would gladly have remained his faithful and obedient wife
for her life, he knew he had violated the covenant of their marriage and "hence had forfeited all legal and just right and authority over me" (77–78).

He quickly realized how bold and determined she was, and he became panic-stricken. He tried to flatter her into abandoning any plans she might have to begin a legal process. He took an oath of innocence, which disgusted her.

He asked her forgiveness, which she said she might grant if she had real evidence of reformation, but at the same time she insisted that she could never more live with him "in the most endearing relation" (79). He grew terrified at the idea of her seeking a separation. She told him that he had brought it on himself by his actions and that she regarded it as her duty to save her family from further moral destruction.

Then she thought again of the difficulties of proving the crimes she alleged against him, since Phoebe had not yet consented to testify. She gave him one last chance to reform.

But a few weeks later she received evidence that he had again assaulted his daughter. She confronted him and told him she would never believe him again. He offered to leave; he would move "to some distant country, where I should be troubled with him no more" (82). They did not need, he said, a formal legal separation. He would simply go.

Meanwhile, Phoebe turned eighteen and moved out of the house. She remained for a time unwilling to testify against her father. But Abigail would eventually hear more evidence of his conduct toward Phoebe from another daughter, and soon thereafter Phoebe agreed to talk to her.

Abigail fasted and prayed. Gradually, she came to the settled conviction that she should seek a separation from her husband. But should he also be turned over to criminal justice? Doing the latter looked to her to be "inexpressibly painful" (87). She convinced herself that if he would do the right thing by her and their children, relative to their property, and if he would go far away, she should not have to prosecute him.

She told him her resolution. "I informed him, I now could see no better way for him than this; that I had rather see him gone forever, than to see him brought to trial, and have the law executed upon him, to the torture of myself and family; as it would be, unless he prevented it by flight" (88). She proposed that he should sell a one-hundred-acre farm he owned and that he should take the proceeds of that sale for himself, leaving the rest for her and the children. She then packed his belongings, including in his saddlebags some letters—exhortations directed to his spiritual salvation—to read on his way. One of these described how his conduct had probably brought on an eternal separation between them. She closed the letter describing herself as his "afflicted and forever deserted wife" (92).

He then left on 8 September 1790.

Second and Third Separations

After he left, she tried to keep the cause of his going a secret, but she soon learned that others in the community already knew of his conduct. She told the children "that they must no longer expect to derive the least advantage from being known as the children of Major Bailey" (95).

Five weeks later, he returned. He worked hard to convince her to take him back, to convince her of his moral reformation. He had had no peace of mind while on the road. He was constantly tormented by the sight of other men with their wives and children. She was hurt at seeing him so broken, felt compassion for his situation, and began to weaken. He played on her fear of taking full responsibility over their family.

In the end, though, she did not believe in his penitence. His situation must, she said to him, be distressing. "For a man of such a temper, such a disposition, who had ever felt so important, so wilful, and haughty, and so unwilling to acknowledge any wrong;—for him now to be upon his knees, upon his face, and begging of me to put my feet upon his neck; appeared like a strange turn of things." She agreed with him that the family needed "a head, a kind friend, a comforter, a guide, to protect us from the thousand evils, to which we were exposed." Yet she still insisted on a separation and a property division. Without the latter, she worried that he would retain the power "to injure and distress us" (97–99).

He again prepared to leave. But before he did, the selectmen of Landaff came one day to talk with him. He tried to avoid them and escape the shame of talking with them about his situation. But they
found him, and he confessed to them that his conduct had been bad, and he promised them that he would leave his family well provided.

He left again.

When he returned several months later, he was no longer humble or penitent. His attention was focused on their property and on the property division. Although he said he would stay only for a few days, he stayed longer. He proposed one plan of division after another. Sometimes he would tell Abigail to forget the past. Sometimes he would call her “stubborn and rebellious” (103). He warned that if she ever went to complain to the selectmen, he would kill everybody. He worried that she prayed for his damnation, clearly frightened of her religious authority.

In fact, she was still unwilling to begin a legal process against him. (She was also pregnant again.)34 And finally, he agreed to a fifty-fifty split of his property. They would sell all the land and divide the proceeds.

His property was put into the hands of his brother, who, she thought, was ordered to sell it. Asa departed, taking two of their sons with him to work for him. One of the sons was later left to work as a hired man on a farm nearby in Hartford, Vermont. The other went with his father to New York, where he too was hired out to a farmer.

She heard nothing from her husband or son for eight months, until one day a man named Ludlow, a lawyer, appeared to tell her that Asa was living in Whitestown, New York. Ludlow was sent by her husband to buy his property, to exchange it for “wild land” in New York. She refused to consent to the transaction.35 Ludlow tried to convince her to reconcile with her husband. He had evidently been told something of their situation by her husband, but not enough. He told her that if she did not reconcile she was in danger of losing her interest in the family property. She replied: “I told him, he could talk very fast, and make things seem smooth, and fair:—But his talk was in vain” (112–13). And, after talking to some of her neighbors, Ludlow relinquished his goal of bringing about a reconciliation.

34. Nancy Hartog thinks I should be able to explain why she let herself become pregnant again at this late date in their negotiations. I can’t.
35. Assuming that the land was in fact land owned by Asa, its sale would still require the consent of Abigail to release her dower rights in the property.

Journey to New York

Soon thereafter, in the winter of 1792, her husband came to Newbury, Vermont, across the Connecticut River from Landaff. He was unwilling to come to Landaff (perhaps for fear of legal process). She went over to meet with him to settle their affairs. They talked for several days, trading the Landaff farm for one in Bradford, Vermont, which would be easier to sell.

He then told her that a Captain Gould in Granville, New York, would give them five hundred pounds for the Bradford farm, but they needed to reach him before spring in order to close the transaction. She must come along, because her signature would be necessary, presumably in order to release her dower rights. She did not wish to go, since she would have to leave eight young children behind, but she saw no other way to conclude the business between them.

The trip to New York, alone with her husband, was a terrifying experience. As they went along, she became more and more convinced that the trip was all a trick. Yet, according to the memoirs, she remained passive and obedient. He continued to deny any bad motive, but on the fifth day of their trip, he stated “that if he had been so crafty as to lead me from home, as he had done, to answer his own worldly purposes, he could not be to blame for so doing” (123). The next day, after they had crossed into New York, he admitted that he was not selling his property to any Captain Gould. His sole purpose was to get her into that state, whose laws are “more suitable to govern such women as you,” away from her relatives and friends, where he could bring her to more advantageous terms. “And now, if I would drop all that was past, and concerning which I had made so much noise, and would promise never to make any more rout about any of those things; and to be a kind and obedient wife to him, without any more ado; it was well!” (124). If not, he might carry her on to the Ohio, or take her among the Dutch, where she would not understand the language, or to Albany, where he might sell her on board of a ship. She would never go home again, he assured her. But if she should escape and get home, he would empower his brother to keep all property out of her hands and to advertise in his name that she should not be trusted with the purchase of any necessaries on his credit. No one could harbor or trust her.
Later, when she pleaded to be allowed to return to her children, he told her that she too was tarred by the same brush as he. What crime had she committed, she asked. He replied that he understood my fault was, in being too favorable to him, after it was believed he had committed such abominable crimes” (136). She replied that even if it were true that that was how people felt, she would never run from them.

They traveled on, she now thinking of herself as his captive and of him as her enemy. They reached Whitestown, where there was smallpox. She decided that she had better have herself inoculated. They lived in a dirt hovel, where she became quite ill and weak.

The Return

He had told her that he would leave her in Whitestown, return to New Hampshire, settle their property relations, and pack up the children who would be brought to New York. She was convinced that he meant to disperse the children into other households, not to bring them to her. She was also desperately worried about their condition, as they had been left basically on their own. She began to plan her escape. She had never before ridden anywhere unaccompanied. Now, she would have to travel 270 miles alone.

Her husband left Whitestown on 9 May 1792, about two months after they had first left Landaff. A few days later, she left, even though she was still quite weak. Everything was new and hard for her. She had, for example, to stay in a tavern by herself. But every day she got stronger. On 30 May, she crossed the North River (the Hudson), “not as a captive, or in fear of falling through the ice, as when I came over it before. I well remembered the wormwood and the gall, when I was dragged over it by the man who vaunted over me, and seemed to rejoice in the imagination, that no power could take me out of his hands.” As she traveled, she was struck by how different everything appeared when she had been dragged along with her husband four months earlier. “Now God smiled upon me. His providence smiled. And all his works and creatures seemed to smile” (166).

She reached the Connecticut River, only a few days behind her husband. She crossed over on a Saturday with her brothers and found her children well and still together, as well as her husband. He was, needless to say, shaken and tried to talk with her alone. She turned to return across the river. He asked if she did not mean to stay with her children. She said she could not. He tried to forbid her brothers from harboring her without his permission, but they all ignored him.

In Newbury, she swore the peace against her husband before a justice of the peace, who issued a writ to have Asa Bailey arrested on Monday.36

Over the weekend, Asa made plans to pack the children off to New York. On Monday he was arrested (a “solemn sight,” to see “the husband of my youth, whom I had tenderly loved, as my companion, in years past, now a prisoner of civil justice” [173]), but before he was taken into custody, he told a confederate to put the children in a cart and to drive on as fast as he could. She and her brothers went immediately to an attorney, who told them that he knew of no authority by which she could take the children back. “The law had given a man a right to move his children where he should think best and the wife had no right by law to take them from him” (174). But, he added, no law kept her from trying to frighten her husband’s confederate.

Abigail wrote a note to the man, telling him that he might expect serious trouble, if he did not return the children. Her brother rode after the cart, gave the confederate the note, and told him that no one would wish to harm him if he would comply with the note immediately. And the children were “released from captivity” (174–75).

The final negotiations between Asa and Abigail Bailey were prolonged. He sat in the local jail. She and her brothers had decided that if he would come to an honorable settlement, they would rather he would simply go. And so they put off the court hearing, while trying to get him to come to terms.

Still, he procrastinated and resisted. He still did not want a formal legal separation, insisting that it was “costly to settle in law” and trying to get her to agree to an informal separation. He still relied on her “tender feelings,” believing that they would “set him at liberty” (176).

36. Typically, such writs required the defendant to post a bond as security to require him to maintain the “peace,” and to protect the complainant from any further violence or abuse. See generally, Hendrik Hartog, “The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts,” American Journal of Legal History 20 (1976): 282–329.
Finally, she and her brothers decided to take him to New Hampshire, across the river, and have him indicted for incest, a capital crime. He broke down, and he quickly came to terms. They divided the property. He relinquished his rights over all the children, except for the three oldest sons. He first insisted on retaining custody over all the sons but relented when the younger ones cried for their mother. He left with the three sons.

Abigail petitioned for a divorce, which was quickly granted.

The Uses of Law

The Law of Separation

Reduced to its barest legal essentials, Abigail Bailey’s memoirs appear to tell a very modern story. Mr. and Mrs. Bailey married; they divorced. As it is for many modern couples, periods of separation provided a necessary, but nearly inevitable, transition toward the divorce, which was the final (and relatively complete) conclusion of the marriage.

And yet, that rendition is, of course, not the legal story of Abigail and Asa Bailey, for it misses entirely the contextual significance of the legal choices they made and unmade. In particular, it misunderstands the struggle over separation that lay at the heart of the narrative of their marriage. Abigail Bailey worked to separate herself from her husband. That the story ends with her divorce is an unexplained and perhaps accidental conclusion to the narrative.²⁷

³⁸ An exception to the notion of its permanence in colonial Connecticut and Massachusetts, if one’s spouse had disappeared long enough to be declared legally dead—usually seven years—one could get a full divorce and marry again. After 1751, it was theoretically possible to seek a divorce for abandonment after three years in New Hampshire. But see Mary F — v. Samuel F , 1 N.H. 198 (1818), where the New Hampshire court denied a divorce sought by a woman whose husband had “absented himself from her for the space of three years together, without making suitable provision for her support and maintenance,” since it did not appear that he had the financial ability to make any provision for her because he was a poor man. See generally, Salmon, Women and the Law of Property, 58–80; and Cott, “Divorce and the Changing Status of Women,” 586–614. In New York, by contrast, bigamy was the only choice, since only proof of adultery would give the court discretion to order a divorce. Abandonment was never enough. See Williamson v. Williamson, 1 Johns. Ch. 488 (1815).

³⁹ This sentence was repeated by judge after judge and in numerous treatises in England and in America. It is usually ascribed to Lord Kenyon. See Hendrik Hartog, “Marital Exits and Marital Expectations in Nineteenth Century America,” Georgetown Law Journal 80 (October 1991): 95–129.

⁴⁰ There is a robust historical literature on divorce in early America, a literature that is largely an artifact of the relative availability of records. See sources collected in Salmon, Women and the Law of Property, 209. By contrast, little attention has been paid to separation. According to Taves, only eleven petitions for divorce were granted by the Grafton County Superior Court (the county court of Landaff, New Hampshire) between 1786 and 1800 (43–44); Between 1766 and 1784, divorces were the responsibility of the General Court, the legislature of the province. Over that eighteen-year period, eighteen divorces were granted for the whole province. If today
What was separation? Let me try to give a very preliminary sketch. It was, in the first place, a condition of daily life, a situation. One lived life in the awkward condition of a wife without a husband or a husband without a wife. This situation of daily life carried with it legal consequences, in terms of the capacities of both husband and wife to carry on a variety of legal transactions—buying, selling, borrowing, inheriting, remarrying, fornicating, disciplining children, among others. But this situation of daily life also carried with it the core consequence that one was still a husband or a wife, even though separated from one’s mate. Separations occurred within, although at the boundaries of, marriage and coverture.

The quasi-legal category of separation incorporated three linked legal categories: a divorce à mensa et thoro (otherwise known as a judicially ordered limited divorce), a separation shaped by an equitably enforceable separate maintenance agreement, and a variety of “informal” separations—including abandonment and bigamy—some framed by an unenforceable written agreement, some not.

we typically make separation a function of divorce, in the eighteenth century it may be that divorce was a subset of separation. Many separated; some few of those who did would eventually get a divorce. Of the eighteen successful divorces in New Hampshire between 1766 and 1784, ten involved separations of more than seven years' duration. See Laws of New Hampshire, vol. 3, 376, 554-55, 584, and Laws of New Hampshire, vol. 4, 145, 220-21, 225, 245, 297, 352, 361, 366, 425, 426, 462, 463, 490, 511, 531-32.

41. I am writing here in summary terms about conditions and categories that appear to me to have been continuous from roughly the mid-eighteenth century to the 1840s in both England and in the northern colonies (states) of America. See generally, Salmon, Women and the Law of Property, who properly emphasizes the differences between the various American jurisdictions.

42. A limited divorce would allow the wife to live alone. Where the husband was named as the guilty party, as was usually the case, the court order would also order an alimony and maintenance award, would allow the wife to regain control of property she had brought to the marriage, might free the husband from his obligation to provide for her necessities, might, occasionally, give her custody over her children, but would not give either party the right to remarry. Such a court order required proof of conduct—of adultery or of abuse or, in New England at least, of abandonment—as would make it (morally or physically) unsafe for the wife to remain “within” the husband’s household. The trial that preceded such a court order had much of the flavor of a criminal proceeding, requiring a proof of guilt. It was, in this regard, indistinguishable from an action for a full divorce. See Van Veghien v. Van Veghien, 4 Johns. Ch., 501 (1820); Haviland v. Myers, 6 Johns. Ch. 25, 178 (1822); Codd v. Codd, 2 Johns. Ch. 141 (1816); Barrere v. Barrere, 4 Johns. Ch. 187 (1819).

The terms of a separate maintenance agreement between husband and wife could incorporate any or all of the terms of a judicially ordered limited divorce, but it was

The boundaries between these legal categories were fuzzy. Indeed, it may be that they are better seen as a continuum of remedies ranging from limited divorce at the formal side, through a variety of enforceable voluntary separations in the middle, to simple and unremedied abandonment on the informal side. An informal separation was often simply an unenforceable formal separation. The covenants contained within a formal separate maintenance agreement—covenants granting a wife control of her separate property under the supervision of trustees, or ones allowing her custody of her children, or ones freeing the husband from any liability for her future support, for example—might be enforceable in equity, if they did not violate some moral norm. But nearly all formal separate maintenance agreements were unenforceable as separation agreements, as agreements to live apart, for courts would not enforce an immoral agreement to live outside of the bonds of matrimony, except in those limited circumstances when one of the parties might have been anyway entitled to a divorce (limited or full).

In one sense, there were as many forms of separation as there were separations by husbands and wives. Unlike divorce, whose form was determined by legislative enactment, couples created their own separations. But they did so using a conceptual and a moral vocabulary shaped and limited by legal practices and expectations.

never certain which, if any, of those terms would actually be enforceable in court. These agreements, both in England and in the various American jurisdictions, were the stuff of continuing doctrinal conflict throughout the eighteenth century (and continuing on into the nineteenth century). Courts—both in equity and at common law—rejected the notion that a married couple should be free to construct their own “private” marital arrangements. Yet those same courts found ways of enforcing some of those private arrangements. See Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America (Boston, 1836), vol. 2; James Kent, Commentaries on American Law (New York, 1827), vol. 2, lectures 26, 27, 28; John Joseph Powell, Essay upon the Law of Contracts and Agreements (Dublin, 1790); and James Clancy, A Treatise of the Rights, Duties and Liabilities of Husband and Wife, at Law and in Equity, 2d American ed., from the last London edition (New York, 1837). See also Salmon, Women and the Law of Property.

Informal separations occurred by definition outside of the law. Couples parted, sometimes with an (unenforceable) agreement; husbands abandoned wives; wives deserted husbands. These partings could not be ratified by the law. Yet, courts dealt constantly with the consequences of desertions, as well as with those resulting from more consensual separations. They dealt with those consequences in actions for necessaries against husbands by merchants who sold goods to separated wives, in actions by town selectmen against husbands to remove ("warn out") abandoned wives from their towns before they became public charges, and in conflicts over marital property—including dower rights—between separated spouses.
More importantly, the categories and the situation of separation stood in an unstable relation with the categories and the situation of marriage (and of divorce). Separation, as a general category, often shared features of divorce. A separation might have been founded variously on the agreement of the parties to live apart, or the abandonment of one of the parties, or the decision of a court to allow one to live apart from the other. But an enforceable agreement to separate, as well as a court-ordered separation, required proof that one of the two spouses had breached a fundamental marital obligation. “Guilt” was central to legal separation. Adultery was, of course, the paradigm case for separations as well as for divorce. Both situations required a demonstration of guilt. It probably did not matter very much, therefore, whether Abigail Bailey “ended” her marriage with a formal separation or with a divorce. Either way, Asa would be identified as the guilty party, and the nature of his guilt would be publicly revealed.

On the other side, how to distinguish separations founded on economic necessity or economic opportunity or military service from separations founded on marital breach? How to distinguish the man who went to sea for two years and more in order to earn a living from the man who abandoned his wife and children in the wake of his (or her) adultery? All separations remained legal marriages; some separations were not “separations” at all in any legal sense. Asa Bailey went west in 1788, leaving his family for several months. Two years later he went west because his wife no longer would live with him. He and she knew that the two separations were different, but one can well imagine Asa’s desire to maintain the public illusion of an “informal” separation.

A marriage was, of course, more than merely a relationship for life. Although both Puritan religious thought and legal theory declared that marriage was a civil contract, there was another aspirational vision that competed with the formal contractual understanding. Marriage promised the permanent union of two souls. Through eternity. Did a separation that ratified a temporal breach in the unity of husband and wife also breach their eternal unity? Perhaps, but perhaps not. They were, after all, still married. When Abigail Bailey described Asa’s conduct as having possibly brought on an “eternal separation” and described herself as “forever deserted,” we should understand these as literal images, ones that suggest the serious consequences of separation. But these images also tell us something of the uncertain relationship between marriage and separation. On the one hand, their separation did not end their eternal relationship; on the other hand, his conduct might have (presumably because he was going to hell, while she had hopes of a better future). Because of their presumptively eternal relationship, moreover, she had to separate from him or risk being implicated in his own sinful conduct, which would result in her own eternal damnation (90–91).

Separation did not mean legally that husband and wife were generally released from the bonds of matrimony. Particular agreements that allowed a wife, for example, to live apart and keep her own wages or income, or that substituted a property settlement, as in the Bailey’s case, for the husband’s general obligation to support his wife, might be enforceable by a court of equity. But in the absence of such agreements all marital obligations continued.

At the same time, all marital obligations were framed by images of reciprocity. If a wife disobediently left the care of her husband, separated without cause, all he had to do was advertise that fact in local newspapers and he would be absolved of any obligation to provide for her support. Merchants would be placed on notice that if they “trusted” her and allowed her to purchase her necessities on his credit, they would not be able to recover from him. This is, of course, what Asa threatened Abigail with when she protested her captivity with him in New York. Conversely, if Abigail had good cause for her separation (as she had), or if he was responsible for the separation (or, in other cases, for the failure of efforts to reconcile), his duty of support, his responsibility for her necessities, would have continued (or revived), whether or not he advertised. Abigail might not have known it at the time that he threatened her, but in fact he had no legal grounds to threaten her with. She could probably have continued to rely on her husband’s credit, even if they were not living together.

A wife’s duty to obey and to accept her husband’s continuing authority over her life was conditioned on his good conduct as a ruler. In that sense, Asa’s misconduct gave Abigail an immediate

43. See Mary F—— v. Samuel F——, 1 N.H.298 (1818)

44. This is, of course, the subtext of Kate’s famous last speech in the Taming
right to live apart from him. Indeed, she had a legal, as well as a moral, obligation to act immediately on that right. Otherwise, she would be condoning his conduct, as she had with his earlier infidelities. Condonation would deprive her of the right to separate, since she would be legally implicated in his conduct. On the other hand, an immediate legal separation would provide a public notice of his misconduct, and of her moral separation from his sin.

And yet, to raise the obvious tension lurking in the early American law of separation, misconduct by one spouse did not necessarily free the other from the moral or legal bonds of matrimony. The indissolubility of marriage was a serious commitment and an organizing understanding for marriages in early America. Marital unity meant that one’s moral identity was intertwined with that of the other. One took the spouse as he or she was, for better or worse. Conflict was an expected and accepted part of the relationship, not an opportunity for termination of the relationship. Of course the law did not require you to commit physical or moral suicide—to accept abuse or treatment that endangered you or your children or that put you in a position of public disgrace. But knowing when separation was proper and called for remained a tricky business.

The Law in Separation

From a slightly anachronistic perspective, we can imagine Abigail Bailey’s narrative as incorporating six negotiating sessions over the

of the Shrew:

| Thy husband is thy lord, thy life, thy keeper,       |
| Thy head, thy sovereign; one that cares for thee,   |
| And for thy maintenance commits his body           |
| To painful labour both by sea and land,            |
| To watch the night in storms, the day in cold,     |
| Whilst thou liest warm at home, secure and safe    |
| And craves no other tribute at thy hands           |
| But love, fair looks and true obedience            |
| Too little payment for so great a debt.            |
| Such duty as the subject owes the prince           |
| Even such a woman oweth to her husband;            |
| And when she is froward, peevish, sullen, sour,    |
| And not obedient to his honest will,               |
| What is she but a foul contending rebel,           |
| And graceless traitor to her loving lord?         |

((act 5, scene 2))

45. Thus, Asa’s statement to her, while they were on their way to Whitestown, New York, that she was believed to be at fault “in being too favorable to him,” suggests the close links between community sentiments and the legal rules of coverture and separation (136).

necessity for and the terms of separation with Asa. The first two sessions occurred in the approximately nine months between September 1789 and late spring 1790, when he was first confronted with her knowledge of his conduct. The third occurred when he returned from his first separation, the fourth when he returned after his second separation, the fifth when she crossed the Connecticut River to talk with him in Newbury, and the sixth while he sat in jail after their separate returns from New York. In these sessions, what was the law that they bargained in the shadow of, to use the modern image? How did the complex and contradictory “law” of separation sketched in the last few pages shape the negotiating strategies of Asa and Abigail Bailey? How much did they know of this law?

To begin with an answer to the last question, they knew some things, certainly, about the law of separation. Both clearly understood that Abigail had a “right” to a separation based on Asa’s conduct. When, after the birth of her twins, Abigail first told Asa that she would no longer tolerate his conduct within the family, he tried, as we have seen, to assert his legal power over her—arguing that she was “under his legal control,” and that he could overrule her plans “as he pleased.” Her response was that because of his violation of the marriage covenant he had “forfeited all legal and just right and authority” over her. “You,” she said to her husband, “have done all in your power to bring about such a separation, and to ruin and destroy our family. And I meet it as my duty now to do all in my power to save them from further destruction.” Thus, her actions were founded on “principle” (77–79). He apparently must have agreed with her, for from then on, he never challenged her legal right to separate. He intimidated her; he played to her fears of managing a family alone and her longstanding identity as a married woman; he tried to convince her of the high cost of seeking a formal separation; he worked to make her feel implicated in his conduct; he worried her about difficulties of proof; he threatened her with the loss of her children; he asserted his repentance. He knew, however, that she had


47. How specifically they came by that knowledge I cannot say. I am assuming that their knowledge represented common sense or conventional wisdom that would have been available (and part of the normative universe) of many rural Americans living in the late eighteenth century.
a legal right to live outside of his control and authority, in the wake of his immoral and illegal conduct.

More than just the possessor of a right, Abigail grew to understand she had a duty to make a final separation from Asa in the months that followed the conversation described in the last paragraph. In that early conversation, she had declared that she could no longer live with him "in the most endearing relation," that she no longer "could, or ought to do it!" (79). But in the end, she gave him one more chance. When, however, she received renewed evidence of incest a few months later, she made it clear to him that they should never live together again. And then, following a period of prayer and reflection, she came to the "settled conviction" that she "ought to seek a separation" from her "wicked husband." After talking to Phoebe, she told Asa of her resolution: "He asked me, what I intended to do? I replied, that one thing was settled: I would never live with him any more!" His anguish in response to this statement moved her, but she realized the need for "Christian fortitude" and for being "firm in pursuing my duty." She was "determined to put on firmness, and go through with the most interesting and undesirable business, to which God, in his providence, had called me, and which I had undertaken" (86–89). Until now, her husband had rejected all her religious and moral counsel, but now he would have to listen.

And so, she told him, she would rather that he left immediately, without any public trial or proceedings, so long as he no longer afflicted any in the family. He should take a horse and enough property "to make him comfortable." (At this point, she had obviously not thought about the fact that an informal separation would leave her without any control over the property remaining.) She hoped he would repent and reform, and she wished him well "and so much peace as was consistent with the holy and wise purposes of God." But it is clear that under no circumstances was she willing to live with him again (86–89).

From this moment on in the late spring of 1790 until the end of the narrative, 2½ years later, when Asa had left, and she was about to get a divorce, her settled conviction never wavered. She did not change. It was, rather, Asa's increasingly desperate and erratic responses to that conviction, his unsuccessful efforts to regain control over his wife, that shaped the story of the end of their marriage.

The question, then, of when she became autonomous, a separate individual, no longer "covered" by her husband, is quite complicated and difficult. Many of us retain a Protestant vision of how change occurs, that there must be a moment when the earth shook, when truth filled the soul, when an inner light glowed. And all was suddenly changed. Abigail Bailey's memoirs make it apparent that there was no such moment in her life with her husband. There were no radical discontinuities, no sudden moments of transformation. She did not, all of a sudden, come to a realization of her rights as a married woman, that she did not have to put up with his sexual abuse of her daughter, or with the other actions of this violent man. She always knew she had those rights, although her husband often tried to threaten her with visions of his unilateral authority. She understood that it was "no small thing for a husband and wife to part, and their family of children to be broken up; that such a separation could not be rendered expedient or lawful, without great sin indeed: and that I would not be the cause of it, and of breaking up our family, for all the world" (79). But that cost was one she was willing to assume, given what he had done.

On the other hand, she did not realize how resistant her husband would be. For too long, she assumed that he would eventually come to an appreciation of his own sinfulness, his own evil, and withdraw. She implicitly believed (fantasized?) that the decision to separate would be a decision they could come to together, a shared understanding, based on what he would learn from her that he needed to do. In a sense, the decision to separate would be a decision to live (apart, not together) in a different marital relationship. She assumed—in common with much legal doctrine—that separation was intertwined with their marriage, not an end to their marriage. And that was her great mistake.

For Abigail Bailey, knowing when one had a right or even a duty to separate from one's husband was not the same thing as knowing when one ought to invoke legal power as support for the former decision. The first came easily; the latter awaited her discovery of her husband as her unambiguous enemy.

In their negotiations, Abigail and Asa made a variety of assumptions about separation law. Some of them conformed to doctrinal statements of that law; some did not. My goal is not, however, to line up their understanding of separation with the law of separation as expounded in case law and treatises. It is, rather, to explore their
commonsense understanding of law both as constraint and as tactical weapon. They constantly referred to law as an external force shaping their conduct. Yet the legal shadow within which they bargained was in large part the product of their own interpretations, interpretations constructed out of mixed images of legal and religious and local authority, as well as of structures of formal law.48

Neither of them, for example, knew or cared much about the differing legal categories of separation. Both, by contrast, saw a sharp and important practical distinction between a formal and an informal separation, between one involving a public statement of grounds and legally enforceable remedies and one in which the two of them simply parted, perhaps with a property settlement. Asa continually pressed her to accept an informal separation. When she first told him that she would no longer live with him, he replied that she “need not be at any trouble to obtain a legal separation. For he would depart to some distant country, where I should be troubled with him no more” (82). At the very end of the story, while he sat in the jail, he again worked on her “tender feelings,” to convince her to come to an informal agreement:

He said it was costly settling differences in the law. That our interest was now wasting as dew before the sun; and our poor little innocent children must suffer for our folly. That if I would be persuaded to take this matter out of the law, he would do what was fully right; and our friends might assist in the settlement, as well as the court. That it would hence be much better for our family to have it taken out of the law. (176)

We can imagine that for Asa an informal separation represented a way of blurring the line between a parting caused by his immoral conduct and the sorts of separations that occurred regularly—and more or less innocently—between couples, when jobs or military service or lack of love drove them apart.49 The meaning of the sep-


49. This statement, while accurate as an image, is formally anachronistic, because lack of love would never have been a proper explanation for separation in early America.

aration—the reasons that he and Abigail would find themselves in the awkward position of separated spouses—could remain ambiguous and private. Such a separation would, moreover, leave him with the option of publicly regarding himself as a husband and also with the possibility of later reinserting himself back into the family.

Abigail had her own reasons for preferring an informal separation, for not invoking a process that would have brought Asa’s domestic conduct into public view. She wished only “for an equitable adjustment of our affairs of interest; and then for Mr. B. to be gone.” She worried that she lacked sufficient evidence to bring legal charges against him. More importantly, she felt that suing him—making him “a monument of civil justice”—would be “inexpressibly painful,” and she wanted to spare herself “the dreadful scene of prosecuting my husband” (87). Reading slightly between the lines, one senses her own feelings of being implicated in the failure of the marriage. She too would be shamed in a public process.

She assumed wrongly that the unexercised but continuing threat of public exposure would force him to make an adequate property settlement, so that she and their children would be supported. And that would be enough. She believed that with such a settlement, he would lose the power “to injure and distress” her and her children (103, 86–88, 100). She must have assumed that a property division between husband and wife would be legal and enforceable if the two agreed. In fact (meaning, in formal law), absent a transfer to trustees, such a division—even one voluntarily arrived at—was patently unlawful. Given the unity of husband and wife under coverture, a husband would only be giving property to himself, an act he could undo at will. Moreover, she evidently did not understand until the very end that a simple parting, even with a property division, would not change any of the terms of the marital relation. For too long she did not worry about the fact that she would still be formally under his legal control and power, even if they lived 270 miles apart. Perhaps she believed that shame on his part, combined with the support of her friends and relatives in the local community, would prevent him from daring to exercise any of his continuing legal rights.

One senses that for Abigail Bailey the best resolution of their marital situation would have been one that left her unchanged in her social position as a married woman, even as she rid herself of the presence of her husband. She was a wife, and she wished to retain
her identity as one, even as she demanded a separation. Thus it makes sense that she, like her husband, at first hoped for an informal separation. What she learned from her trip to New York was how degraded her position as a married woman had become, how little social value that identity provided. Thus, on her return she had grown willing to sue out articles of the peace against her husband, to make him the subject of a public process, and she had become insistent on the need for a more formal separation.

Legal concepts and ideas played three different but overlapping roles in their negotiations: as organizing assumptions, as background threats, and as overt tactical tools. We have already seen instances of the first two roles. The distinction between formal and informal separations was an organizing assumption of their discussions. The usually unstated but always present possibility that Abigail would charge him publicly, either by suing for a formal separation, or by taking out articles of the peace against him, or by charging him with the crime of incest, exemplified the use of law as a background threat, as did Asa’s implicit threat that he would disperse all of their children if she was anything but compliant in New York.

The overt tactical uses of legal images litter the narrative. Asa was clearly much more legally sophisticated than Abigail and continually used his knowledge tactically. Thus, the trip to New York; thus, also, his attempt in New York to convince her that she had waited too long to act, that she had implicitly condoned his conduct and had therefore lost her right to act alone. Asa’s tactics were designed to make her believe that he knew the law and that the law gave him full and continuing power over her: that New York’s laws gave him the right to make her live anywhere he chose, even to sell her to a ship if that were his pleasure, that he could advertise her as a runaway if she escaped him. When she confronted him after their separate returns to Landaff, he tried to reassert his control over his marriage by trying to keep her brothers from “harboring” her. Sometimes, as in the latter example, these tactical uses of legal power failed. Often, these tactical invocations of legal rights were fraudulent. No husband had the right to sell his wife onto a ship. Asa, in particular, did not have the right to advertise Abigail as a runaway and to refuse to pay for her necessaries if she escaped from his control.


But, given her relative ignorance, these invocations could be used to terrify her, whether or not they were accurate.

By the end of the story, on the other hand, Abigail too had learned to use legal knowledge tactically. When Asa attempted to have their children driven away, after his arrest, she had the autonomy and the character to ignore the attorney’s statement of the legal rule that her husband had the right to move his children where he chose and to focus, instead, on the attorney’s advice that no law would stop her from trying to scare Asa’s confederate. When Asa continued obdurate even after his arrest, she used the explicit threat of criminal charges, of the shadow of the criminal law, to force him to terms.

These tactical moves and countermoves are of enormous significance in shaping the narrative of change, as are the roles of legal concepts as organizing assumptions and background threats. Still, we are left with the question of what role, if any, the law played in helping her break the habit of submission mandated both by coverture and by the religious norms of marital unity.

We can tell her story in a way that makes law crucial. That is, Asa violated a series of legal expectations implicit in legal marriage: he committed adultery, he was violent and abusive, he committed incest. Abigail responded by declaring that she had both a legal right and a duty to separate from him, that his legal authority over her should be at an end. That statement led him, in terror at the shame and the loss of control over his domestic situation, to increasingly desperate acts, notably dragging her to New York. These acts brought her to the realization that she shared nothing with him, that he was merely her enemy. And thus she became free from him, willing to invoke legal processes against him, no longer just a feme covert.

But, of course, that story is only a distinctively “legal” story if we choose to characterize it as such. We could, as easily and more convincingly, emphasize Asa’s violation of moral and religious norms and Abigail’s assertion of religious authority as the cause of change. Such a religious characterization would also be limited by its terms, just as the legal story is limited and partial, for, in part hers was a story of legal change. Neither variation, legal or religious, is complete without the other. But an emphasis on religious motive would better capture her understanding of what went on in the last days of their marriage than one focused exclusively or largely on legal identities and legal tactics.  

51. Or, there might be a third variation. We could tell her story as fundamentally
This paper is about the roles law played in her story. But it is about honor. Buried in her memoir is another story—Asa Bailey's story—that is also about the evolution of a self. In his case, rather than a story about the exploration of the self by a person locked within a hierarchical and patriarchal identity, it is about the loss of a privileged self, about the destruction of an autonomous identity. It is a story about honor, and focusing on it for a moment may remind us of the intimate links between conceptions of honor and coverture.

Men could pretend that they were not changed by marriage. Women became wives, feme covets; men remained men, albeit with increased responsibilities. But, in fact, early American male identity was bound up with notions of the care of dependents. Indeed, in legal theory, the husband's personhood was extended to incorporate his dependents. Notions of marital unity, of the "one flesh" of the married couple, were taken quite seriously. If his wife were seduced, a husband would sue the seducer for the tort of criminal conversation, under a theory of trespass. The seducer had robbed him of his exclusive right in his wife's sexuality. If his wife or his children were taken from him, or, indeed, if they left of their own accord, he would sue out a writ of habeas corpus, alleging that they were being held under unlawful restraint, that is, not under his control. There was, in fact, little difference between the writ he would take out if he were deprived of his own liberty and the writ he would take out to regain control of his dependents. Although it is not true that the law confirmed a husband's right to use physical force against his wife, it is true that legal discussions of domestic violence were laced with quips about the legal significance of a man striking himself. See Elizabeth Pleck, Domestic Tyranny (New York: Oxford University Press, 1987), The Laws Respecting Women, As They Regard Their Natural Rights, Or Their Connections and Conduct (London, 1777); Codd v. Codd, 2 Johns. Ch. 141 (1816); A Faithful Report of the Trial of Doctor William Little, on an Indictment for an Assault and Battery, Committed upon the Body of his Lawful Wife, Mrs. Jane Little, a Black Lady (New York, 1808); William Jeffers vs. John Tyson, being an Action for Crim. Con. [Common Pleas, October 28, 1808] (New York, 1808); and George Parker vs. Alexander M'Dougall, being an action for Crim. Con. tried at the present sitting of the Mayor's Court, before the Recorder of the City of New-York, on Wednesday, the 19th of October, 1808 (New York, 1808).

Being a householder, being someone who cared for and controlled a family, gave a man political significance. It was a foundation for republican virtue. As the possessor of women, children, and servants, a man became the sovereign of a domain, able to meet with other rulers and to participate with them in government. Indeed, it is hard to imagine any other way for a man to develop a political identity, except through the possession of dependents. See Ruth Bloch, "The Gendered Meanings of Virtue in Revolutionary America," Signs 13 (1987): 37-58; Kerber, et al., Beyond Roles"; and Hendrik Hartog, "Imposing Constitutional Traditions," William and Mary Law Review 29 (1987): 78-82.

Conversely, loss of a household identity, loss of control over one's dependents, could only have been seen as a disaster, a source of overwhelming shame. It is easy for us to rush past Asa Bailey's situation, to blame him for his conduct and his lack of self-control. But as we do so, we should not forget the extent to which Abigail's tentative, although unambiguous, assertions of a right to separate, to break up the family, and to hold him to public shame, endangered what we might imagine was an already somewhat embattled sense of self. As she noted in one of their conversations, he was the first victim of his actions. The result was that he "degrade[d] and ruin[ed] himself, soul and body." He seemed "to be too willing to throw himself away, as though he were of no worth." But her actions, in insisting on making him leave and in demanding a property settlement, made him into a different kind of victim, for they threatened to hold him up to public scorn. "I asked, if any sum of money would induce him to be willing that those gentlemen should know that of him, which I knew!" (82).

During his first separation from her, wherever he went he found himself tormented by the sight of "men at home, with their wives and children.... [H]e could not endure the sight, but was obliged to get away to bed as soon as possible, that he might hide from the face of mortals, and gnaw his own tongue for anguish of soul." When he returned and tried to persuade her of his reformation and contrition, she could only note "how distressing" his situation must be, that "a man of such a temper, such a disposition, who had ever felt so important, so willful, and haughty, and so unwilling to acknowledge any wrong," should now be begging for forgiveness from his wife. When he left the second time, he announced that he would have to leave by cover of night. "He could not endure to be seen in this town, or in these parts, where he was known.... He once was not afraid to be seen; was fond of home, and of quiet nights. But now the scene was changed. His iniquities had found him out, and were hateful." Worst of all, the selectmen of Landaff came to see him before he could get away (101, 101, 102). Once he himself had been one of them, a selectman himself. See Stanley P. Currier and Edgar T. Clement, History of Landaff, New Hampshire (Littleton, N.H.: Courier Print Co., 1966). Now, he was being treated as the object of town concern and scrutiny, as the kind of man who might not be able to care for his family, as someone who might leave them dependent on local charity.

We can well imagine how terrified he would have been of his wife's tentative moves toward separation. We can well imagine that tricking her into coming with him to New York appeared as an attractive solution to his situation, a way of recreating honor in a new location.

Is honor a legal category?
**A Note on What Did Not Change**

At the end of the story, at least as Abigail Bailey told it, Asa Bailey was a broken man, who appeared "as though he sensibly felt himself to be beaten and defeated." He gave her half of "his" property; they divided their furnishing; and he "relinquished" to Abigail all but their three oldest sons. He had wanted to take "several more of the young sons" and made plans to do so, but these young children had cried so plaintively at the thought of being separated from their mother that he had given in on this as well. She noted that in this final concession, "His self-interest here wrought in my favor. He knew not what to do with them" (177–78).

In the disposition of their children, Abigail assumed she was without legal power. Even after all that had happened in the family, even after what he had done to his daughter, nothing would change the legal fact of his patriarchal authority. She might receive custody of the youngest children, because he alienated his custody rights over them, but if he wished to retain control over the three oldest boys until they reached their majority, nothing in his past conduct prevented that. He was and remained their father, the only relevant parent in terms of legal authority.

In thinking about Abigail Bailey's narrative of change, it is important to note that the change described in the memoirs is only in the relation of husband and wife. Nothing in her legal world told her that separation necessarily gave her any increased rights over her children. Nothing about his more or less public guilt as an incestuous and abusive parent apparently required him to give up parental authority.52

Much of Abigail Bailey's narrative is taken up with reflections over her love and concern for her children. As they moved through New York, every child she saw reminded her of her lost and abandoned children. She used her fears for her children, her belief that they needed her, as justifications for her return from the desolate land Asa had dragged her to. Yet, in taking action to complete her separation from her husband, nothing changed in her legal relationship to her children. Until he voluntarily transferred custody of some children to her, she remained, in Blackstone's famous (or infamous) phrase, "entitled to no power, but only to reverence and respect." While his actions had taught her that she had to act (and had the right to act) as an "uncovered" person, nothing in his actions gave her a sense that she ought to have legal rights over her children.

Taking seriously her sense of legal powerlessness over her children may help us to understand a mystery lurking in her narrative: her relative insensitivity towards her daughter, Phoebe. Abigail claimed that no one could "describe the anguish of my heart" in witnessing her husband's abusive behavior. Yet she sketched the abuse quickly and in relatively distant and abstract tones. She constantly reminded the reader of her own powerlessness in the situation:

It may appear surprising that such wickedness was not checked by legal restraints. But great difficulties attend in such a case. While I was fully convinced of the wickedness, yet I knew not that I could make legal proof. I could not prevail upon this daughter to make known to me her troubles; or to testify against the author of them.

"My soul," Abigail continued, "was moved with pity for her wretched case." Yet she also admitted feeling resentful that Phoebe would not act to "expose the wickedness of her father, that she might be relieved from him" (76).54

We, along with the editors of her memoirs, might expect more from her. But in expecting more from Abigail, we may be committing an anachronism, and not only because we underestimate the significance of her religious faith. Today, it is conventional to blame mothers for passivity in the face of their husbands' abuse of their children. In apportioning such blame we assume that mothers are responsible for their children's well-being, that they have moral and legal responsibility, the legal capacity as well as the legal duty to act. But what should we expect of a mother in a world where parental

52. In fact, courts did sometimes give mothers custody rights in the wake of a divorce à mensa et thoro. See Codd v. Codd, 2 Johns. Ch. 141 (1816), and Barrere v. Barrere, 4 Johns. Ch. 187 (1819).

53. Commentaries, 1:453. As with other Blackstonian aphorisms, this one was at least sometimes wrong.

54. Having admitted to resentment, Abigail quickly recalled that his power—"his intrigues, insinuations, commands, threats, and parental influence"—undoubtedly led Phoebe to feel that it was in vain to seek redress (76).
indeed, within the terms of Abigail Bailey’s narrative, Phoebe’s incest was an opportunity, as well as a disaster. In “allowing” her father to succumb to his passion, Phoebe ironically gave her mother the legal and moral right to seek a separation. Phoebe was their daughter, but she was also the passive object of her father’s adulterous lust. Because Phoebe was nearly destroyed as a result of her “habit of obedience,” Abigail could imagine breaking up her marriage. Asa had destroyed domestic peace, had violated his responsibilities as the head of the household and a parent. He had also committed a form of adultery that she would not condone. She, Abigail, was not responsible for the event, because she was only a wife and mother, a victim herself.

In a sense, Asa’s assault on Phoebe was simply a particularly aggravated form of adultery, different only in degree from his earlier adulteries. It gave Abigail the right to act to separate herself from him. And because of her legal powerlessness over her children, she could act without feeling complicit in her husband’s conduct.

Thus, to some extent the marital change detailed in the narrative rested on what Abigail Bailey implicitly took to be an unchanging structure of parental power.

**Conclusion**

In this chapter, I have tried to show how legal concepts and understandings played in and out of the negotiations of Asa and Abigail Bailey and how those concepts and understandings rested on and were intertwined with religious understandings. My goal throughout has been to paint a picture of a legal culture that both reinforced submission and, at the same time, provided justifications and support for acts of resistance and reconstruction.

More theoretically, I have used the dialogues and monologues of Abigail Bailey’s memoirs to illustrate a view of legal consciousness that is, I think, of broad relevance. Abigail Bailey’s thoughts, prayers, and arguments were filled with law; legal facts, remedies, strategies, and institutions were constantly present. Yet the nature of her consciousness was not determined by law. She bargained in the shadow of law. Yet the law in whose shadow she bargained was a complex and contradictory structure: experienced as an external control and constraint, reconstructed regularly in conversations and arguments, intertwined in significant tension with religious beliefs and norms. Law made a difference, gave her significant remedies. In that sense, her situation is distinguishable from that of the sixteenth-century women studied by Natalie Davis who probably lacked the legal remedies she had. Yet, one would be hard-pressed to turn her into the legally constituted individual posited in modern legal theory, who is imagined as (almost necessarily) exercising rights and remedies because of their availability. For Abigail Bailey, as for many others throughout American history, law was inescapably, at times overwhelmingly, present yet at the same time not the most important determinant of her moral situation.

Abigail Bailey’s memoirs provide a case study in the evolution of relative autonomy and relative individualism, along lines suggested by Natalie Davis. In emphasizing the story of change, I have told the story in ways that Abigail Bailey might have wanted me to: highlighting her religious motivations and her moral autonomy, even as I have also insisted on the constraining power of the constellation of commitments identified with coverture. The end of the story is the discovery of a less encumbered self, one capable of relatively greater agency.

And yet it may be a mistake to tell this story in terms of its apparent conclusion. The point is not that Abigail yearned for and achieved separation from her husband, that she changed, but that she found in her commonsensical understanding of law and morality support for the claim that she had a right to a separation. From Abigail Bailey’s own perspective, her story is less about change than it is about sustaining a moral identity in the face of moral danger. The right to separate existed not to permit its possessor to reconstruct a new life, as happy divorce manuals today proclaim, but rather because without it she would be publicly (and legally and morally) joined with her husband in sin and dissolution. Marital unity was serious business in early America, meaning that a wife risked assuming the moral colors of her husband. The right to separate offered an escape from that disaster. Separation offered the possibility of continuity and protection from the cruelty and the chaos of a disordered life.

Thus, to conclude with a familiar paradox of historical studies
of rights consciousness, Abigail Bailey claimed rights in order to undo the power and the legal rights of her husband. Her claim offered no challenge to his ordinary legal authority over her; indeed, it rested on the same normative assumptions that underlay his conventional assertions of authority. He had changed, he was now a legal rights; thus, she had to claim her right to separate, else she would be complicit in his abuse. She would separate, not in order to end her marriage, but so that she could remain a good wife.

56. Throughout her narrative, the political context of American independence and the nationhood is never mentioned, a fact social historians might cherish as revealing both the marginality of these events in the lives of many Americans and, more tellingly, the vast gulf that separated the male world of politics from the normative universe of even a relatively knowing woman like Abigail Bailey. And yet, it is important to note that Abigail Bailey’s way of constructing herself as a rights bearer bears important similarities in structure and form to the way of the American [male] revolutionary. As historians have learned, in particular from the recent writings of John Reid, to the Americans of 1776, independence was forced on them by the corruptions of the English. Americans, in separating, knew themselves to be true to the English constitution. And independence became a necessity so that they could remain, in all the important ways, good Englishmen. See generally, John P. Reid, Constitutional History of the American Revolution, vol. 3 (Madison: University of Wisconsin Press, 1986–92). Likewise, Abigail Bailey’s rebellion was forced on her by her husband’s corruption. In rebelling she remained true to the strictures of Christian marriage. And rebellion became a necessity so that she could still be a good wife.

55. See Hendrik Hartog, “The Constitution of Aspiration and ‘The Rights That Belong To Us All,’” Journal of American History, 74 (1987): 1013–34. Did Abigail Bailey have a rights consciousness? Not as it would be understood and theorized in recent legal histories. Rather, it might be better to pose her consciousness as being, in the first instance, a duty consciousness. She used (and was used by) the legal system. She asserted rights. But before asserting rights, she had to mediate her sense of rights through a whole range of other understandings and desires. Her aspirations were never tightly identified with her rights.