Prayers for Our Protection and Prosperity at Court: Shakers, Children, and the Law[1]

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INTRODUCTION

At the top of Prospect Hill in Harvard, Massachusetts, are the Fruitlands Museums, founded in 1914 by Clara Endicott Sears, a wealthy Bostonian who summered in Harvard. She befriended the last members of the Shaker communities of Harvard and Shirley that formed the Harvard Bishopric of the United Believers of Christ, and chronicled their histories.[2] Miss Sears structured the Museum around the farmhouse in which Bronson Alcott and his family lived in a communistic experiment from June 1843 to January 1844.[3] She later added a Shaker building, an art gallery of early American itinerant portraits and Hudson River School landscapes, and a gallery devoted to the American Indian. As Miss Sears intended,[4] the eclectic collection of the Museums forces the visitor to connect different aspects of the past, and the past with the present.

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1. This title is adapted from an entry found in the *Journal of Grove B. Blanchard*, July 30, 1843. Elder Grove's entry on the evening before the Shakers of Harvard, Massachusetts, appeared in court to defend against a writ of habeas corpus noted that the community engaged in "[p]rayers . . . at home for our protection and prosperity at Court." All of the journals referred to in this paper are held by the Fruitlands Museums.

2. *See* EDWARD HORGAN, THE SHAKER HOLY LAND 150-51, 157-58 (1987).

3. *See id.* at 80-93. Bronson Alcott was a New England Transcendentalist who started the Temple School in Boston in 1834. The school was designed to revolutionize the education of children by "teaching them how to examine themselves, and to discriminate their animal and spiritual natures, their outward and inward life; and also how the inward moulds the outward." Elizabeth Peabody, *Record of a School: Exemplifying the General Principles of Spiritual Culture*, *in* THE REFORM IMPULSE, 1825-1850 132 (W. Huggins ed., 1972); *see also* Priscilla Brewer, *Emerson, Lane, and the Shakers: A Case of Converging Ideologies*, 15 NEW ENG. Q. 254 (1982) (examining the relationship between the Transcendentalists of Concord and the Shakers of Harvard and Shirley) [hereinafter Brewer, *Emerson, Lane, and the Shakers*].

4. The Fruitlands Museums' descriptive brochure notes that Miss Sears "wished to preserve not only objects and artifacts, but an appreciation of the diverse spiritual forces that helped shape our country."

This paper is my modest effort to make the same sort of connections through an examination of one aspect of the Shakers' lives: the method by which they obtained and retained children who came to Shaker communities without their parents. Because Shaker theology required that community members subscribe to a creed of celibacy,[5] new members could only come from outside a community's boundaries. When adults joined a community, they signed a covenant and "consecrated themselves and their property to God."[6] When these relationships crumbled, courts were faced with the broken pieces. For example, could a man who had signed a community's covenant, in which he acknowledged that his work would be for the good of all, recover wages if he left?[7] When families, or only portions of them, joined the Shakers, different legal questions were posed. Did a woman have grounds for obtaining a divorce if her husband joined the Shakers?[8] The way that courts dealt with these issues has received some analysis by scholars of legal and Shaker history.[9]

Existing histories have not, however, undertaken a detailed analysis of the Shaker practice of recruiting followers by accepting and retaining custody of children, although most acknowledge that the practice was an important component of Shaker life.[10] Nor have they focused on the

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5. HENRI DESROCHE, THE AMERICAN SHAKERS: FROM NEO-CHRISTIANITY TO PRESOCIALISM 139 (J. Savacool trans., 1971).

6. EDWARD ANDREWS, THE COMMUNITY INDUSTRIES OF THE SHAKERS 12 (1932) [hereinafter ANDREWS, COMMUNITY INDUSTRIES].

7. *See, e.g.*, Waite v. Merrill, 4 Me. (4 Greenl.) 102 (1826) (upholding the validity of the covenant of the Shaker Society of Sabbathday Lake, Maine, against a claim by an apostate member for wages).

8. *See, e.g.*, Fitts v. Fitts, 46 N.H. 184 (1865) (granting a divorce to a man from his Shaker wife based on a statutory provision that created grounds for a divorce if one spouse joined a sect that did not believe in matrimonial cohabitation); Dyer v. Dyer, 5 N.H. 271 (1830) (granting a divorce to a woman from her Shaker husband based on an earlier version of the same statute).

9. The most notable book to date is by Professor Carol Weisbrod of the University of Connecticut Law School. Her book, *The Boundaries of Utopia*, focuses on the lawsuits brought by first- and second-generation apostates from Shaker and other nineteenth-century utopian communities to challenge the covenants through which they gave their property and bound themselves to work for the good of the community without wages. Professor Weisbrod uses these contracts to illustrate the operation of freedom of contract in the nineteenth century. *See* CAROL WEISBROD, THE BOUNDARIES OF UTOPIA xi-xxii (1980) [hereinafter WEISBROD, BOUNDARIES].

Other works have described the types of legal disputes that engaged the Shakers. *See, e.g.*, EDWARD ANDREWS, WORK AND WORSHIP: THE ECONOMIC ORDER OF THE SHAKERS 162-86 (1974) (describing cases and legislative enactments pertaining to military service, custody of children where one parent was a community member and the other was not, the validity of the Shaker covenant, and the extent of Shaker landholdings) [hereinafter ANDREWS, WORK AND WORSHIP]; 2 MARY RICHMOND, SHAKER LITERATURE: A BIBLIOGRAPHY 249-53 (listing a representative, but incomplete, sample of reported state and federal court decisions involving Shakers, but noting that Shakers were probably involved in many more disputes that were settled or unreported); Ralph Stein, *A Sect Apart: A History of the Legal Troubles of the Shakers*, 23 ARIZ. L. REV. 735, 751 (1981) (positing that "the Shakers' conflict with the legal system may not, in all likelihood, have made much difference to the Shakers themselves").

10. *See, e.g.*, ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 31; ANDREWS, WORK AND WORSHIP, *supra* note 9, at 30-31. For the Shakers' own account of the importance of children, see CALVIN GREEN & SETH WELLS, A SUMMARY VIEW OF THE MILLENNIAL CHURCH, OR UNITED SOCIETY OF BELIEVERS, COMMONLY CALLED SHAKERS 65, 71-75 (rev. ed. 1848).

legal relationships within a particular Shaker community.[11] When individual children "went to the Shakers," they did so in circumstances that were different from those of adults who went alone or with their families, which gave rise to unique legal issues when their status was in dispute. Some were indentured by parents who wanted their children to learn a trade[12] or by the local overseers of the poor with formal agreements for the same purpose.[13] Others were left informally with a community, either by parents for brief periods while family fortunes ebbed,[14] or by overseers who placed children to act as temporary servants.[15] Many young runaways and orphans came on their own.[16]

Children also left Shaker communities for a number of reasons and in different circumstances than did adults. Some were deemed unsuited for the simple rigors of daily life and were returned to their families or to the institutions from which they came.[17] Other children ran away.[18] In many cases, the Shakers seemed willing to allow the children to leave.[19]

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11. *See* WEISBROD, BOUNDARIES, *supra* note 9, at 35 n.2. This is not to say that there are no detailed histories of particular communities. *See, e.g.*, HORGAN, *supra* note 2 (focusing on Harvard and Shirley); Priscilla Brewer, *The Demographic Features of Shaker Decline, 1787-1900*, 15 J. INTERDISCIPLINARY HIST. 31 (1984) (focusing on the Church Family of Mount Lebanon, New York) [hereinafter Brewer, *Demographic Features*].

12. *See* JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 368 n.4 (5th ed. 1895); *see also* Indenture of Lydia Merriner, 1816 (signed by her father); Indenture of Nathanael Saunders, 1816 (signed by his mother) (on file at the archives of the Shaker Library in Sabbathday Lake, Maine). Parents also executed agreements to indenture their children when the entire family joined a Shaker community. *See* DAVID LAMSON, TWO YEARS' EXPERIENCE AMONG THE SHAKERS: BEING A DESCRIPTION OF THE MANNERS AND CUSTOMS OF THAT PEOPLE, THE NATURE AND POLICY OF THEIR GOVERNMENT, THEIR MARVELLOUS INTERCOURSE WITH THE SPIRITUAL WORLD, THE OBJECT AND USES OF CONFESSION, THEIR INQUISITION, IN SHORT, A CONDENSED VIEW OF SHAKERISM AS IT IS 177-84 (describing an indenture agreement that bound the children of a member of one family within the Hancock, Massachusetts community to another family).

13. *See, e.g.*, Dyer v. Hunt, 5 N.H. 401 (1831). Although the court recognized that overseers of the poor could bind a child to Shakers, the court in *Dyer* invalidated the indenture because the overseers of the poor in Norwich, Vermont could not legally bind a child to a Shaker in New Hampshire. *See id.* at 405.

14. *See* Brewer, *Demographic Features*, *supra* note 11, at 49.

15. *See* SUSAN GRIGG, THE DEPENDENT POOR OF NEWBURYPORT: STUDIES IN SOCIAL HISTORY, 1800-1830 59 (1984) (describing the informal practice of leaving children with Shakers who would not charge for board); REPORT OF THE EXAMINATION OF THE SHAKERS OF CANTERBURY AND ENFIELD, BEFORE THE NEW HAMPSHIRE LEGISLATURE, AT THE NOVEMBER SESSION, 1848, INCLUDING THE TESTIMONY AT LENGTH 70 (1849) (testimony of Caleb M. Dyer) (stating that the Enfield, New Hampshire, Shakers did not "charge . . . the town for supporting paupers").

16. LAMSON, *supra* note 12, at 200-01.

17. *See Journal of Grove B. Blanchard*, August 22, 1844 (mentioning that the Shakers of Harvard, Massachusetts decided to release a boy because there is "no believer in him").

18. *See Journal of Grove B. Blanchard*, June 11, 1845 (stating that a fifteen year-old boy ran away to return to his parents).

19. In reviewing the *Journal of Grove B. Blanchard* between 1836 and 1845, and the *Harvard Sisters Book* between 1840 and 1844, I found a number of entries indicating that children had left the Harvard and Shirley communities without incident. *See, e.g.*, *Journal of Grove B. Blanchard*, August 22, 1844; *Journal of Grove B. Blanchard*, June 11th, 1845.

The popular literature of the time, however, included numerous narratives describing the travails of parents and seemed to leave the impression that Shakers were always reluctant to allow children

But, when parents or legal guardians wanted the return of a child who wished to remain with the Shakers, the Shakers sometimes used the law, both offensively and defensively, as a means of keeping a child. Shakers would defend the right of the child to remain in the community by going to court to ask for or to answer a writ of habeas corpus. When difficulties with parents were anticipated, the Shakers would attempt to strengthen their claim to custody by going to court in a guardianship proceeding.[20]

An examination of these cases against the backdrop of Shaker culture is important for three interrelated reasons. First, the Shaker custody cases involved the possibility of giving custody of children to social units that differed from the conventional model of the nineteenth-century family. By examining these cases within the context of Shaker familial relationships, I hope to offer a more complete account of the development of nineteenth-century custody law. Second, when histories group Shaker communities together, each community's own unique characteristics are lost. Third, legal historians are recognizing the importance of "recovering" the untold stories of women, children, and other groups traditionally excluded from histories of the prevailing legal culture. Unless those stories are personalized or updated with new perspectives, our understanding of the past is likely to be incomplete or fostered by the groups that are dominant in contemporary culture.[21]

After Part I's brief summary of important components of Shaker theology and social practices that relate to the sect's conception of the family, Part II will provide a brief description of the development of the "best interests" standard in child custody litigation, highlight two cases decided in Massachusetts that recognized the rights of Shakers to keep children willing to stay with them, and contrast those cases to judicial decisions and legislative activities in other states. The Massachusetts cases fit squarely into one interpretation of the doctrinal development of family law, an interpretation that links respect for the rights of non-parents in custody disputes to the developing concept of the family as "conjugal, nuclear, highly differentiated and specialized, private, and child-centered."[22] At the same time, they pose theoretical questions that have

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to go. In one, a critic of the Shakers describes an incident in which a father who had indentured his children was denied the opportunity to get them back. The account does not indicate whether the children were kept because that was their preference or because the Shakers in that community made it a practice to keep children regardless of their preferences. The father eventually "kidnapped" his children and the Shakers did not pursue legal action. *See* LAMSON, *supra* note 12, at 177-84.

20. On February 8, 1842, for example, the Harvard Shakers initiated a hearing at the Worcester Probate court to obtain guardianship of a fourteen year-old boy whose mother wanted to take him back. *See Harvard Sisters' Book*, February 8, 1842.

21. *See* Martha Minow, *"Forming Underneath Everything That Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 820-21.

22. Jamil Zinaldin, *The Emergence of A Modern American Family Law: Child Custody, Adoption, and the Courts*, 73 NW. U.L. REV. 1038, 1047, 1047-52, 1075-84 (1979) (arguing that

been recognized, but not answered, by historians.[23] First, if doctrinal development in custody law was related to a changing conception of the family, why did the doctrine ultimately operate in favor of Shaker families? Second, why did Massachusetts courts not even question whether "the environment provided by the celibates was inherently unsuitable,"[24] when courts[25] and legislatures[26] in other states did?[27]

Part III offers a narrative of an unreported case, drawn from manuscripts within the collection of the Fruitlands Museums and from secondary histories of the Harvard and Shirley Shakers, that gives the Shakers' perspective on child custody litigation and provides a framework for Part IV's explanation of the courtroom successes of the Harvard and Shirley communities.

Finally, the paper concludes by describing an ironic paradox. Doctrinal development in the law of child custody, which reinforced society's increased concern for the protection and development of children and enabled the Shakers to retain children during the first half of the nineteenth century, eventually decreased the number of children coming into their communities during the second half of the century. By fostering an increased concern in the society at large for the "best interests" of children, the Shakers, through their legal battles, helped bring about the creation of social institutions that were also able to address the needs of children. The success of the Massachusetts Shakers in child custody cases also demonstrates that nineteenth-century courts were not singularly committed to the emerging concept of the nuclear family, and that a community whose values and practices differed markedly from mainstream values and practices can successfully defend its way of life.

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when courts awarded custody to third parties who were not parents, they legitimized the new child-centered family created by the voluntary transfer of custody).

23. *Cf.* GRIGG, *supra* note 15, at 59 (describing the placement of four children by the overseers of the poor of the town of Newburyport, Massachusetts, with the Shakers in Canterbury, New Hampshire as "curio[us]," given that the environment of Shaker communities was "heterodox").

24. WEISBROD, BOUNDARIES, *supra* note 9, at 37.

25. *See, e.g.*, People *ex rel.* Barbour v. Gates, 43 N.Y. 40 (1870), *rev'g* 57 Barb. 291 (N.Y. App. Div. 1869); Fowler v. Hollenbeck, 9 Barb. 309 (N.Y. App. Div. 1850); People *ex rel.* Fowler v. Pillow, 1 Sand. 672 (N.Y. Super. 1849); M'Dowle v. M'Dowle, 8 Johns. 328 (N.Y. Sup. Ct. 1811); State *ex rel.* Ball v. Hand, 5 WEST. L.J. 361 (Ohio Super. 1848).

26. WEISBROD, BOUNDARIES, *supra* note 9, at 37, 45-50 (examining legislative attempts to control Shaker practices in Ohio, New York, New Hampshire, and Kentucky); *see also infra*, notes 200-213 and accompanying text.

27. There is evidence that suggests that a Massachusetts court decided in favor of a father against the Shakers in a case involving the Hancock Community decided in 1852. *See* PRISCILLA BREWER, SHAKER COMMUNITIES, SHAKER LIVES (1986) 149-50 [hereinafter BREWER, SHAKER COMMUNITIES]. According to Professor Brewer, who read of the case in a journal kept at the Winterthur Museum in Delaware, the Shakers felt that the judge in the case was biased against them. Telephone interview with Priscilla J. Brewer, Assistant Professor of American Studies, University of South Florida, Tampa (April 18, 1990). No record of this case appears to have been printed in the case reporters for the year.

PART I: SHAKER THEOLOGY AND SOCIAL PRACTICES

In her study of a sample of nineteenth-century communities, Rosabeth Moss Kanter identifies 120 social practices that correlate with the degree to which a community resists forces that try to break it apart. These commitment mechanisms, argues Kanter, are concrete techniques for achieving the values of any Utopian community: perfectibility, order, brotherhood, unity of body and mind, experimentation, and coherence.[28] They are designed to promote sacrifice for the community, investment in the community, renunciation of relationships disruptive to the group, communion among members of the community, mortification of prior experiences, and transcendence.[29] For example, a commitment mechanism that fosters transcendence is the creation of a special form of address for community leaders.[30] Similarly, requiring celibacy of community members is a commitment mechanism that fosters sacrifice.[31] The Shakers owed their longevity to the fact that their daily lives reflected a number of commitment mechanisms, the most important of which radically altered the concept of the family.

Like many American utopian communities of the nineteenth-century, the Shakers traced their origin to a single charismatic figure, in this case Mother Ann Lee.[32] But unlike other communities that failed to survive for long without their leader, the Shakers prospered after the death of Mother Ann, who emigrated from England to this country with a small band of followers in 1774.[33]

Central to Shaker teachings was the belief that Mother Ann "embodied the second coming of the Christ spirit."[34] The presence of God's spirit in Mother Ann was possible because each individual had the capability of receiving His "indwelling presence."[35] Worship practices consisted of receiving that spirit through gifts that manifested themselves in ecstatic ways—dancing or shaking—or in subdued ones—meditations and revelations.[36] Also important was the notion that God had a female component called Holy Mother Wisdom.[37] This translated into a recog-

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28. *See* ROSABETH KANTER, COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE 32-57 (1972).

29. *See id.* at 76-125.

30. *See id.* at 124.

31. *See id.* at 80.

32. *See id.* at 116-20 (describing the personalities of some of the more well-known leaders of utopian communities, such as Father Rapp of the Harmony Society and John Noyes of Oneida).

33. *See id.* at 244-45 (describing the Shakers as one of 11 "successful" communities that existed in the United States between 1780 and 1860, and defining success as lasting for twenty-five years—a "sociological" generation).

34. BREWER, SHAKER COMMUNITIES, *supra* note 27, at 6.

35. Johnson, *Life in the Christ Spirit: Observations in Shaker Theology*, 8 SHAKER Q. 67, 67 (1988).

36. *See* DARYL CHASE, THE EARLY SHAKERS: AN EXPERIMENT IN RELIGIOUS COMMUNISM 14-18 (1938); Johnson, *supra* note 35, at 74.

37. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 6.

nition that individuals could best possess God's spirit by exhibiting masculine qualities of strength and power, and feminine qualities of compassion and mercy.[38] Shaker practices were simple: "confession was the door to the regenerate life, celibacy its rule and cross."[39] Early converts were won with "personalized" efforts directed around Niskeyuna, New York.[40] As a result of being driven out of New York by authorities who suspected them of being Tory sympathizers,[41] Mother Ann and a group of her followers began a two-year missionary tour of Massachusetts.[42]

Converts were not hard to find in New England during the end of the eighteenth century and the first quarter of the nineteenth; the revivalism of the Great Awakening splintered many Protestant sects. As Separate-Baptist dissenters in New England grew more successful in challenging the state-imposed tax support of the Congregational church in Massachusetts, they were less often stigmatized by the religious orthodoxy as "socially and religiously inferior."[43] And when Baptists lost their radical aura, individuals looking for a simple religion based on piety turned elsewhere.[44] Fearing the threat that the attraction of Shaker piety posed to their membership ranks, Baptist leaders mounted organized resistance against the Shakers.[45] In Pittsfield, a leading Baptist minister who had joined the Shakers in Niskeyuna with his entire congregation in 1780, wrote a scathing exposé of the community after he recanted. Eventually, he convinced the Pittsfield town meeting to investigate banning the Shakers from the town.[46] The Baptist resistance to Shakers, however, seems to have died out by 1795,[47] as Baptists focused their efforts on controlling inroads by other competitors—Universalists, Methodists, and Free-Will Baptists.[48]

The Shaker debt to the Baptists, however, endured. In the years after the death of Mother Ann, the sect's theology was consolidated by Father Joseph Meacham, a radical Baptist minister whose father had refused to

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38. *See* Johnson, *supra* note 35, at 71.

39. EDWARD ANDREWS, THE PEOPLE CALLED SHAKERS 12 (1953) [hereinafter ANDREWS, THE PEOPLE].

40. *Id.* at 27.

41. *See* 2 WILLIAM MCLOUGHLIN, NEW ENGLAND DISSENT: 1630-1833 712 (1971).

42. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 36-44.

43. 2 MCLOUGHLIN, *supra* note 41, at 1263 (1971); *see also id.* at 698 (describing the effects of "the growth in the size, wealth, learning, and respectability of their membership" on the Baptists); BREWER, SHAKER COMMUNITIES, *supra* note 27, at 2-6.

44. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 3.

45. *See* 2 MCLOUGHLIN, *supra* note 41, at 709-17.

46. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 7-8; 2 MCLOUGHLIN, *supra* note 41, at 714-15.

47. *See* 2 MCLOUGHLIN, *supra* note 41, at 717 ("although in 1783 'the Shakers were a large body . . . we seldom hear of them now, unless it is by way of observing that the power which then actuated them is gone; and their attention is much fixed upon worldly schemes of gain.' ") (quoting 2 ISAAC BACKUS, HISTORY OF NEW ENGLAND 404 (D. Weston ed. 1871)).

48. *See id.* at 717-49.

join the Warren Association that tried to unite radical Baptists with the more mainstream element of the sect in 1762,[49] and Mother Lucy Wright. Four crucial tenets emerged during their reign:

> Private property was surrendered to the group so that all members might partake equally of their heritage on earth. Marriage also had no place among them . . . . Celibacy solved forever the problem of competition between love of God and love of family . . . . [L]ove for biological relatives was superseded by love for all Christian Brothers and Sisters.[50]

In practice, Wright and Meacham focused their efforts on designing community practices that could be replicated wherever there were a sufficient number of Shakers to combine into a productive unit.[51] These practices balanced obedience to authority with autonomy through self-government.[52]

Their first step was to decree a separation from the world.[53] Building on the work of Father James Wright, who served as a transitional leader of the sect for the first three years after Mother Ann's death, Meacham and Wright temporarily ended missionary activities in order to allow the sect to focus on internal development.[54]

Next, they organized the ministerial hierarchy. To assist them in the Central Ministry, now located in New Lebanon, New York, Meacham and Wright appointed two additional elders to co-lead the sect.[55] Each bishopric would have its own male and female elders, directly accountable to the Central Ministry.[56] Meacham and Wright also structured an organizational hierarchy for each community that revolved around families of between thirty and one hundred members.[57] Meacham and Wright first envisioned a hierarchy of families. In each community there would be a first family, or church family, which would include the most spiritual members of the community, a second family, which would include young workers, and an office family, which would include the elderly.[58] "[T]his basic structure was expanded with the addition of further 'orders' or 'families,' such as the children's order, a backsliders' order, and . . . a 'gathering order' for people who wished to try Shaker-

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49. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 6-7.

50. *Id.* at 5.

51. *See id.* at 19.

52. *See* James Guimond, *The Leadership of Three Experimental Communities*, 11 SHAKER Q. 95, 108 (1971).

53. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 56; MARJORIE PROCTER-SMITH, WOMEN IN SHAKER COMMUNITY AND WORSHIP 40 (1985).

54. BREWER, SHAKER COMMUNITIES, *supra* note 27, at 16.

55. *See* ANDREWS, WORK AND WORSHIP, *supra* note 9, at 24.

56. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 25-28.

57. *See id.* at 68.

58. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 57.

ism."[59] Each family would have two elders and two eldresses. They would hear confession and oversee obedience to the standards dictated by the Central Ministry.[60] Each family would also have two deacons and two deaconesses to supervise the business, financial, and household operations of the family.[61] Eventually, the Central Ministry added trustees or office deacons to each family—men who represented the family in its legal capacity.[62] From 1790 to 1793, the Central Ministry implemented the plan, appointing the leaders of all the New England societies. Sisters and brothers from New Lebanon would travel to new communities to assist them in organizing.[63] Afterward, elders at each level would be appointed by their predecessors and confirmed by the elders at the level immediately above them.[64]

Each Shaker family was expected to be a self-contained socioeconomic unit. "[F]amilies were economically autonomous, buying from and selling to other families in the same community."[65] Children assisted in family chores; because work within the family was sex-specific,[66] children's tasks were, as well. "Most boys learned early to help with farm and garden chores like haying and hoeing, as well as chopping wood and cutting ice in winter. Girls were trained to assist Sisters in textile production and to devote themselves fully to whatever work was assigned."[67] Workspace and living arrangements segregated the sexes. "They sat at separate tables for meals, and worked in separate buildings."[68] Although contact between the sexes was discouraged, union meetings were held twice weekly to enable family members to interact under the supervision of elders in order to prevent illicit contact.[69] The children of a family were supervised by caretakers of both sexes. "In general, the care and education of children did not fall exclusively on women."[70] If there were enough children to warrant a children's order,

59. PROCTER-SMITH, *supra* note 53, at 45.

60. *See id.* at 45, 64.

61. *See id.* at 45-47, 64.

62. *See* ANDREWS, WORK AND WORSHIP, *supra* note 9, at 41; PROCTER-SMITH, *supra* note 53, at 47.

63. *See* ANDREWS, WORK AND WORSHIP, *supra* note 9, at 27.

64. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 44-45.

65. ANDREWS, WORK AND WORSHIP, *supra* note 9, at 45.

66. *See* PROCTER-SMITH, *supra* note 53, at 56-69. The work performed within Shaker families and Shaker communities varied. The agricultural products produced by a given community did not differ from the products produced by other farms; what they did not consume, they sold to the outside world. "From the outset, they bought from and sold freely to the world's markets." ANDREWS, WORK AND WORSHIP, *supra* note 9, at 84. The Shakers specialized in high quality seeds, medicinal herbs, brooms, brushes, and boxes. *See generally id.* at 40-159 (describing the products produced by the Shakers, both for their own use and for sale). For a more comprehensive assessment of the industries of the Shakers, see generally ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6.

67. BREWER, SHAKER COMMUNITIES, *supra* note 27, at 77.

68. PROCTER-SMITH, *supra* note 53, at 56.

69. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 21, 72-73.

70. PROCTER-SMITH, *supra* note 53, at 60.

it had separate quarters and its own elders and eldresses.[71]

Meacham and Wright's final step was related to their goal of achieving economic separation from the world. The communities needed their own property, both real and personal. "Although the communal idea had not originally entered into Ann Lee's social and religious doctrines," an oral agreement on basic principles of property rights was made soon after New Lebanon was organized in 1788.[72] The covenant was written down by Meacham in 1795 and promulgated to each family in each community.[73] The five articles of this covenant provided that its signers agree to commit their property to the church voluntarily, to abide by the deacons' discretion to use the property for the good of the community, and to support the community to the best of their abilities.[74] Although the Shakers' covenants were tested by apostates in the early years of the century,[75] the increasing number of children forced the Shakers to litigate in another arena—that of child custody.[76]

PART II: THE DEVELOPMENT OF THE "BEST INTERESTS" STANDARD

Child custody cases involving Shaker families pose a theoretical challenge to modern social and legal histories of the family. When courts in the second quarter of the nineteenth century awarded custody of children to Shakers, they reinforced a conception of the family that deviated significantly from the conceptual model of the family that had emerged by the 1850s.

This model envisions a family as having three important characteristics. The first characteristic of the nineteenth-century family is that it was an institution separate from the society in which it existed,[77] an institution designed to provide a haven from a world growing "crueler with . . . industrial development."[78] The colonial family, in contrast, is seen by historians as having been "an extension and reflection of the community at large."[79] Although a Shaker community shared some of the characteristics of the nineteenth-century family in providing respite from the

71. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 186-88; PROCTER-SMITH, *supra* note 53, at 60.

72. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 57; ANDREWS, WORK AND WORSHIP, *supra* note 9, at 21.

73. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 61; HORGAN, *supra* note 2, at 55.

74. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 62.

75. The first case described by Andrews was filed in the New York Supreme Court by Jonathan Walker in 1799 "for $3000 which he claimed represented wages that were not paid him while he was a member of the order." *Id.* at 68.

76. "Between 1800 and 1820, the proportion of members under sixteen in all the eastern communities had increased dramatically, from 2.8 percent to 19.8 percent." BREWER, SHAKER COMMUNITIES, *supra* note 27, at 39.

77. *See* Lee Teitelbaum, *The Legal History of the Family*, 85 MICH. L. REV. 1052, 1052-55 (1987) [hereinafter Teitelbaum, *The Legal History*].

78. Nancy Chodorow, *Mothering, Male Dominance, and Capitalism*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 83, 92 (Z. Eisenstein ed., 1979).

79. *See* Teitelbaum, *The Legal History*, *supra* note 77, at 1053.

outside world,[80] a Shaker family's role within a Shaker community was more similar to that of the colonial family within colonial society. Both Shaker and colonial families shared an organizational structure that was similar to that of the greater societies in which they existed.[81]

The model also views the nineteenth-century family as "consist[ing] of a worldly man, homebound woman, and their offspring."[82] In contrast, Shaker families were large and extended; children were reared collectively by unrelated and unmarried adults. In the words of John Noyes, the founder of the Oneida Community, another utopian group, "[t]he Shakers . . . exclude familism with religious horror."[83]

Finally, the nineteenth-century family was "a collection of individuals each with his or her own needs and rights."[84] Yet, in Shaker families, individual rights were subordinated to the good of the family and the larger community.[85]

Explaining the emergence of this model of the family, and its child-centered focus, is problematic. Martha Minow, for example, has criticized both the traditional explanation for the emergence of the model, which sees law as progressing along a path toward increasing protection of individual rights, and the feminist explanation for the emergence of the model, which sees the creation of the ideology of "separate spheres" for family life and community life as limiting the rights of women.[86] Even if developing a normative explanation for the model is difficult, a description of it emerges by tracing the doctrine related to child custody litigation. In these cases, judges were given the opportunity to reconceptualize the family; the choices that they made and the criteria upon which they decided reflected their and society's vision of what families should be.[87]

By the last quarter of the nineteenth century, treatise writers and commentators generally acknowledged that "[t]he determination of questions relating to the custody of infants, from the very nature of the issues involved, does not properly admit of the application of any artificial sys-

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80. The implications of this observation will be discussed in Part IV, *infra*.

81. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 193 (noting that "the government of the Believers resembled, in many respects the oligarchic Puritan state").

82. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 9 (1985).

83. JOHN NOYES, STRANGE CULTS AND UTOPIAS OF 19TH-CENTURY AMERICA 141 (rev. ed. 1966). Noyes, in fact, noted that the non-religious utopian communities of the nineteenth century, modeled on the theories of Robert Owen and Charles Fourier, although different in the approach to the holding of property, shared one main idea: "the enlargement of home—the extension of family union beyond the little man-and-wife circle to large corporations." *Id.* at 23 (emphasis in the original omitted).

84. *Id.* at 234.

85. *See* DESROCHE, *supra* note 5, at 174-78, 210-29; GREEN & WELLS, *supra* note 10, at 58-64 (describing the structure of Shaker families).

86. *See* Minow, *supra* note 21, at 827-39.

87. *See* Teitelbaum, *The Legal History*, *supra* note 77, at 1062.

tem of precedents or technical set of rules."[88] Instead, the welfare of the child would be the "paramount consideration in the determination of each case."[89] Hurd's treatise on habeas corpus lists the factors that were included in determining how best to enhance the welfare of the child:

> The welfare of the child . . . requires attention to many circumstances; such as its sex, age, health and social position as affected by that of its parents; its just expectations of property from them or either of them or from others; and the state of its morals and education, and the surest means, under the circumstances, of securing for it that discipline and instruction necessary to qualify it for that station in life which the parents, had no controversy arisen, it may be reasonably supposed, would have desired and been able by their fortune or industry to prepare it to occupy.
>
> The comparative qualifications also of the parents to provide for these various wants require consideration, such as their temper, morals, habits, judgment.[90]

Although this list is included in the section of the treatise pertaining to disputes between two parents, elsewhere Hurd indicates that the welfare of the child also guides courts in determining custody when there has been a voluntary transfer of custody, and so suggests that the same standards apply.[91]

Divorce gave courts the greatest opportunity to refine the doctrine,[92] but custody disputes also arose between parents in the non-divorce context, between parents and non-parents, or between competing non-parents. These disputes were often resolved through a habeas corpus action brought to challenge a voluntary or involuntary transfer of custody.[93] In addition, habeas corpus actions often challenged a faulty indenture agreement or a guardianship determination.[94] Although the writ was issued to insure that custody was not an existing state of illegal

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88. LEWIS HOCHHEIMER, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS 1 (1887); *see also* RANSOM TYLER, COMMENTARIES ON THE LAW OF INFANCY 273 (2d ed. 1882).

89. HOCHHEIMER, *supra* note 88, at 96.

90. FRANK HURD, A TREATISE ON THE WRIT OF PERSONAL LIBERTY, AND THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 462 (2d ed. 1876).

91. *Id.* at 540-48. It is not clear, however, that these are the standards that would apply in all cases of a voluntary transfer of custody—for example, when an indenture was the instrument that transferred custody.

92. *See* GROSSBERG, *supra* note 82, at 250-53.

93. The writ of habeas corpus gave courts jurisdiction to challenge an "alleged illegal restraint of personal liberty" imposed by a public or private authority. HURD, *supra* note 90, at v. In the sphere of domestic relations, the common law authorized a court to grant the writ "on the application of the husband, parent, guardian and master for the purpose of inquiring into any illegal restraint, respectively, of the wife, child, ward or apprentice." *Id.* at 449. The use of the writ of habeas corpus in cases in which the custody of a child was at issue was recognized as a modification and an extension of the original writ. In order to authorize the issuance of a writ, courts devised a legal fiction to equate "unauthorized absence from legal custody" with "imprisonment." *Id.* at 453.

94. *See* Zinaldin, *supra* note 22, at 1076-84.

restraint,[95] the court was bound to insure that its disposition did not create conditions that could be harmful to the child.[96] Consequently, the summary proceeding actually had long-term effects; the child would be permitted to remain with the individual to whom he or she was committed "while the circumstances shown in evidence remain[ed] unaltered."[97]

Hurd did not suggest rules to correlate with the general standards applied in divorce or habeas actions. Rather, he recognized that judges had significant discretion when considering the conflicting claims. For example, they sometimes found in favor of "the devoted mother's love,"[98] and at other times found in favor of "the loving father's correcting hand."[99] Other commentators were not without a sense of irony in trying to explain the doctrine. In comparing the outcome in *Pool v. Gott*,[100] a case in which Chief Justice Shaw granted custody of a thirteen-year-old girl to her grandparents, with whom she had been living since birth, in a habeas corpus action brought by her father, with the outcome in *Verser v. Ford*,[101] a case in which the court granted custody of a three-year-old child to her grandparents, one anonymous commentator noted that "[h]ere he applied too late; in *Verser v. Ford*, he applied too soon. He would be troubled to tell exactly when to apply, it seems."[102]

The facts of the two cases do suggest that some guidelines had developed to shape the inquiry of courts. For example, in *Pool*, the "best interests" of the child test was focused on the child's wishes because she was old enough to articulate them. The court determined that the child herself "was devotedly attached to her grandparents" and that the "termination of this relation would be, for a long time at least, the cause of great suffering to her and them."[103] In *Verser*, the "best interests" test focused on the child's "tender age," sex, delicate health, and the presence of a step-mother.[104] Yet, these standards could be narrowly or broadly defined by courts to award or deny custody to a father, a mother, or a third party.[105]

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95. *See* HURD, *supra* note 90, at 458.

96. *See id.* at 458; *see also* Gideon Bantz, *Habeas Corpus: Custody of Infant*, 15 CENT. L.J. 281, 283 (1882).

97. *See* HURD, *supra* note 90, at 458. Formally, the long-term effect was enhanced because the ruling in the habeas corpus case would have res judicata effect in a subsequent challenge brought under the same conditions. *Id.* at 462.

98. *Id.* at 462.

99. *Id.* at 463.

100. 14 L. REP. 269 (Mass. 1851).

101. 37 Ark. 27 (1881).

102. *Relinquishment of Parent's Right of Custody of Child to Third Person*, 6 VA. L.J. 470, 473 (1882).

103. *Pool*, 14 L. REP. at 270.

104. *See Verser*, 37 Ark. at 31.

105. *See* GROSSBERG, *supra* note 82, at 254, 259-68. Other trends in the judicial exercise of discretion have been noted. First, that a child below 12 would be best cared for by the mother. Second, that older boys should be raised by fathers. Third, that courts should respect the ties that a child had already developed. Fourth, that the child's opinion should be respected. *See* Zinaldin,

The "best interests" standard summarized by the nineteenth-century treatise writers and their modern counterparts can be traced to the rhetoric of child welfare that entered into judicial opinions during the first half of the century. Tracing the origin of that rhetoric, however, remains a more difficult task. Although the concept of judicial discretion to award custody was probably first announced most clearly by Lord Mansfield in *Rex v. Deleval*,[106] other factors encouraged courts to look at the welfare of children. The modern ideal of childhood, which was created by and fostered modern family life, suggested to nineteenth-century judges that children had to be protected.[107] Children were "the future of the young republic,"[108] and parents, primarily mothers, were expected to focus on the education and moral training of children to prepare them for entry into the larger world, but not until they were ready to overcome its corrupting influences.[109] In the second quarter of the century, this rhetoric was enhanced by its political appeal, which provided support for the competing ideologies of Jacksonians and Whigs.[110] For Whigs, fostering the welfare of children meant fostering their moral development. For Jacksonians, fostering the welfare of children meant providing them with the resources necessary to become successful property owners. As a result, it was a recognized fact of child custody adjudication[111] that judges could exercise discretion to abrogate the old common law rule that only a father (or a mother, in the event of the death of the father[112]) was entitled to his child's "labor and services."[113]

The emergence of this "best interests" standard is demonstrated in two child custody cases involving the Shakers in Massachusetts. *Commonwealth v. Hammond*[114] put at issue the legitimacy of both a guardianship and an indenture. Margaret Holst's mother, a widow, executed a verbal contract with Joseph Hammond, a member of the Shaker community in Harvard,[115] that required him to provide her daughter with "support and education" until she turned twenty-one.[116] At some time after the agree-

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supra note 22, at 1072-75; *see also* GROSSBERG, *supra* note 82, at 248-50 (adding that when the custody dispute arose during divorce, a child would be given to the innocent party).

106. 3 Burr. 1434, 97 Eng. Rep. 913 (1763).

107. *See* Zinaldin, *supra* note 22, at 1047-52.

108. *Id.*

109. *See* Lee Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1142-44 [hereinafter Teitelbaum, *Family History*].

110. *See* ROBERT DELONE, SMALL FUTURES: CHILDREN, INEQUALITY, AND THE LIMITS OF LIBERAL REFORM 35-48 (1979).

111. *See* GROSSBERG, *supra* note 82, at 253; Zinaldin, *supra* note 22, at 1068-74.

112. *See* HURD, *supra* note 90, at 42 (stating that a woman becomes the head of her family upon the death of her husband). For an interesting analysis of the way that the legal status of widowhood gave women the opportunity to experiment with social roles, see Minow, *supra* note 21, at 851-60.

113. TYLER, *supra* note 88, at 35.

114. 27 Mass. (10 Pick) 274 (1830).

115. Hammond was originally a member of Harvard's Church family, but became an elder in his own family, the South Family, in 1822. *See Journal of the South and East Families*, May 5, 1822. He left the South Family for a post in the Bishopric Ministry in 1830. *See id.*, June 6, 1830.

116. *Id.* at 274. Massachusetts law allowed a father, a mother in the event of his death, or a

ment had been made, the probate court of Suffolk County appointed Ephraim Tufts as Margaret's guardian.[117] Tufts applied for a writ of habeas corpus which was issued to Hammond.[118] Both Tufts and Hammond agreed that the child had not been ill-treated and that she wanted to remain with Hammond.[119] The court, indicating that there was some dispute between the guardian and the mother, refused to rule on the question of custody.[120] In addition, although the court's opinion does not specifically state that the verbal agreement was faulty, it presumably believed that it was; had the indenture been valid, there would not have been any need for the exercise of discretion in Hammond's favor.[121] The court affirmed that it had "discretion" to refrain from interfering "where the liberty of the party is not injuriously or unwarrantably infringed," and allowed Margaret to choose whether to remain with Hammond or to leave.[122]

The court's consideration of what was in Margaret's best interest was limited to asking whether she was well cared-for and whether she wanted to stay where she was. The case illustrates both that courts were willing to exercise their discretion so as not to award custody to the legal guardian—in this case either Margaret's mother or Ephraim Tufts—and that children's interests were to be assessed in part by determining what they wanted.

Whether the court considered other factors in determining that Margaret's welfare would not be harmed if she were to remain with Hammond is unclear.[123] By the time of the decision in *Curtis v. Curtis*,[124] however, the court's inquiry during the habeas corpus action had expanded. On October 8, 1851, Mrs. Jane Curtis, a widow, sent her three children "up to the Shakers" in Enfield, Connecticut.[125] The indenture agreement that she executed with Joseph Fairbank, a trustee of

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legal guardian to bind a minor under the age of 14 as an apprentice. The consent of the minor was required if the minor was more than 14 years old. The statute also required that the indenture be in writing. *See* 1794 Mass. Acts, ch. 64 (1896); MASS. REV. STAT, ch. 80, §§ 1, 5 (1836).

117. *Hammond*, 27 Mass. (10 Pick.) at 274. A guardian could be appointed for a minor under the age of fourteen at the discretion of the probate court judge. MASS. REV. STAT., ch. 79, §§ 1, 2 (1836) (codifying 1783 Mass. Acts, ch. 38, §§ 1 and 2). If a minor was over the age of fourteen, he or she could elect his or her own guardian, subject to the approval of the probate court judge. *Id.* at § 2. If a father or his widow was alive, the judge would have had to determine that the parent duly entitled to custody was incompetent prior to granting guardianship to a third party. *Id.* at § 4. Although it is unclear how old Margaret was at the time that her mother contracted with Hammond or at the time that Tufts was appointed her guardian, she was 11 and one-half years old when the writ of habeas corpus was issued. *See Hammond*, 27 Mass (10 Pick.) at 274.

118. *See* 27 Mass. (10 Pick.) at 274.

119. *See id.*

120. *See id.* at 274-75 ("We do not think proper to decide upon the relative rights of the mother and the guardian in respect to the custody of the child.").

121. *See* Zinaldin, *supra* note 22, at 1078.

122. *Hammond*, 27 Mass. (10 Pick.) at 275.

123. *See supra* note 90, and accompanying text.

124. 71 Mass. (5 Gray) 535 (1855).

125. *See id.*

the Enfield Society, specified that her children would be educated in accordance with Shaker principles, and would be required to work for Fairbank until their majority in exchange for "comfortable food, clothing and lodging."[126] The agreement prevented Jane Curtis from interfering with her children's indentures, either by directly or indirectly inducing them to leave Fairbank's service.[127] After less than a year, Emily, the oldest child, had become a believer. On April 27, 1852, when she was twelve, she chose Fairbank as her guardian in the Probate Court for the District of Enfield.[128]

On January 22, 1856, she accompanied three members of her Shaker family to Springfield, Massachusetts. While in Springfield, at a store on Main Street, she was taken by her mother and brother, "against her wishes, protestations, and resistance," and was "carried . . . across [Main] [S]treet and placed on board the express train of cars, then starting for Boston."[129] Joseph Fairbank had a writ of habeas corpus issued to Jane Curtis on January 25, 1856.[130]

Jane Curtis' argument, which Chief Justice Shaw rejected, was that the indenture did not relinquish her control over her daughter because it had been invalidly executed under the laws of Connecticut. Shaw held instead that regardless of the validity of the agreement, it operated to estop her from claiming her right to custody.[131] His holding was, however, dependent upon his finding that Emily wanted to return to the Shakers. After interviewing Emily, Chief Justice Shaw concluded:

> We are satisfied, by an examination, that this girl is capable of judging what will best promote her own welfare . . . ; that she is strongly inclined to remain with the society of Shakers.[132]

Shaw reasoned that Emily was well cared-for, well-educated, and that she was attached to the "friends and associates" with whom she came to Massachusetts.[133] He also seemed swayed by the fact that Jane Curtis "clandestinely and forcibly" took her daughter.[134] He released Emily from her mother's restraint and allowed her to return to her guardian, "if she pleases."[135]

Neither in *Hammond* nor in *Curtis* did the court examine the Shakers' suitability as care-givers. Although in form, each court only released the child to whomever the child elected to return and each court only issued

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126. *Id.*
127. *See id.*
128. *See id.* at 536.
129. Petition filed in the County of Hampden, Curtis v. Curtis, No. 1317, 1856 (on file at the Massachusetts State Archives, Boston, Massachusetts).
130. *See Curtis*, 71 Mass. (5 Gray) at 536.
131. *See id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

a summary ruling and not a custody determination, the substantive effect of each ruling was to approve of the Shakers as child custodians. Such was not the case in New York and Ohio, other states that had Shaker cases important to the doctrinal development of custody law. In New York, for example, the judicial opinions in a series of cases involving three custody disputes addressed arguments made by opposing counsel that Shaker practices argued against their suitability as custodians.

In the first New York case, *In re M'Dowle*,[136] Matthew M'Dowle executed indenture agreements to bind his sons, Hugh and John, to members of the Shaker community in Watervliet, New York. Although the agreements were invalid under New York law because they had not been signed by the children, the court refused to award custody to the father at the hearing on his writ of habeas corpus; it limited its inquiry to examining whether the children were held against their will. The court determined that the children, ages eight and eleven, were "at liberty to go where they please."[137] The court reporter added the following to a note at the end of the opinion:

> Afterwards, the counsel for the father suggested to the court, that improper means and constraint had been used by the masters and others, belonging to the Shakers, to induce the children to declare their election to return, and that the answers were not freely given by them to the court.[138]

The court appointed three attorneys to conduct an independent examination of the boys.[139] Although the court did not change its ruling, the passage suggests that the father's counsel thought that an argument based on the "deviance" of the Shakers was a viable one. Indeed, the argument was persuasive enough to convince the judge to act upon it.[140]

The next reported cases in New York involved the family of William Pillow.[141] On December 15, 1846, Pillow signed indentures to bind his three sons to Edward Fowler,[142] trustee of the New Lebanon, New York community.[143] Pillow's wife Ann had joined the Society, and was living with the North Family.[144] By July 1847, however, Pillow had changed his mind. He came to the community to get his wife and his children back. His initial efforts were unsuccessful. He tried again in September, this time accompanied by a sheriff.[145] Although Priscilla Brewer's

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136. 8 Johns. 328 (N.Y. Sup. Ct. 1811).
137. *Id.* at 332.
138. *Id.*
139. *See id.*
140. *See id.*
141. Fowler v. Hollenbeck, 9 Barb. 309 (N.Y. App. Div. 1850); People *ex rel.* Fowler v. Pillow, 1 Sand. 672 (N.Y. Super. 1849).
142. *See Pillow*, 1 Sand. at 673.
143. *See id.* at 677.
144. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 148.
145. *See id.* at 149.

account, derived from community records, indicates that the Shakers surrendered Pillow's two youngest children in September when served with a writ of habeas corpus,[146] the court report suggests that Pillow did not get any of his children until he secured a writ de homine replegiando in December.[147]

Fowler immediately petitioned for a writ of habeas corpus, alleging that the children's indentures were legal, that they had been taken without the petitioners' consent and against their own wishes, and that they were restrained in New York City.[148] Pillow directed his arguments along three separate lines. The first was procedural; the writ de homine replegiando should have barred Fowler from bringing a habeas action.[149] The second series of arguments was directed at the validity of the indentures. The indentures were illegal, Pillow argued, because they did not specify that the boys would be taught a specific trade[150] and because they actually bound the children to the trustee of a community, thereby binding them to the community itself.[151] The third series of arguments invoked religion. Pillow argued that if the court did not allow him to change his mind about his children's religious futures, their "rights of conscience" and "freedom of religious belief" would be violated.[152] Moreover, the Shakers sought indentured children only because they did not produce children on their own, "contrary to good morals."[153] To these arguments, the Shakers not only responded that their practices were no different than some of those of the Roman Catholic Church, but they also responded that nothing in the indentures required that the children be reared in Shakerism.[154]

Judge Sandford dealt with the first two arguments rather quickly. Precedent did not exist for holding that a writ de homine replegiando barred a proceeding by habeas corpus. The two forms of actions were distinct.[155] He also rejected Pillow's arguments on the validity of the indentures; both required exceedingly narrow interpretations of the indenture and the statute. The designation of Fowler as a trustee was merely a "description."[156] Fowler was the boys' master in his individual capacity, and would have been liable as an individual for the performance of his

146. *See id.*

147. *See Pillow*, 1 Sand. at 674-75. A writ de homine replegiando was used to replevy someone out of prison or the custody of a private person. The individual seeking the writ was required to give security to the sheriff that the person replevied would appear to answer charges. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

148. *See Pillow*, 1 Sand. at 673.

149. *See id.* at 676.

150. *See id.* at 675.

151. *See id.*

152. *Id.*

153. *Id.* at 676.

154. *Id.* at 677.

155. *See id.* at 678.

156. *Id.* at 677.

covenants in the agreement.[157] Judge Sandford also found that the statute governing indentures only required that employment be taught. The specific type of employment could be determined by the master after he had assessed the apprentice's skills.[158]

The judge decided not to decide the religious practices issue. Even if there had been sufficient proof that the Shakers engaged in "superstitions and mummeries," he wrote, which there was not, the court's inquiry was limited to whether the Shakers had violated the law.[159] Judge Sandford also referred to, without citing, legislation that had passed in New York to protect Shakers' property rights,[160] which indicated legislative approbation of the Shakers.[161] The judge examined the children, determined that only the eldest wished to return to the Shakers, and ordered a court officer to escort him back to the community.[162] The case did not end there. Fowler filed suit in an action for trespass on the case against the sheriff who had issued the original writ and Pillow.[163] The trial court judge decreed a nonsuit on the grounds that Fowler had no action in trespass because he was entitled to the children's services as their master.[164]

The last reported cases in New York involved the indenture of Maria Barbour entered into by her widowed mother, who had once been a member of a Shaker community.[165] In addition to addressing the family structure of Shaker communities, the rhetoric of the opinion provides an interesting contrast to the *Hammond* case in Massachusetts by focusing on the appropriate role that a mother should play in the upbringing of her child.

In 1866, when Maria Barbour was six, her mother indentured Maria and another minor child to Benjamin Gates of the New Lebanon community.[166] According to the terms of the agreement, Gates was to teach Maria to be a seamstress.[167] In the habeas action, Mrs. Barbour alleged that the agreement was faulty because it had not been endorsed by a

157. *See id.* at 677-78.

158. *See id.* at 678.

159. *Id.*

160. *See id.* Judge Sanford was probably referring to legislation passed in 1839 that allowed Shaker communities to hold property in trust up to the amount of $5,000. *See* Act of April 15, 1839, 1839 N.Y. Laws, ch. 174, at 146. The Act was amended in 1849 to simplify the provisions relating to the descent of the trusts to new officeholders, *see* Act of April 11, 1849, 1849 N.Y. Laws, ch. 373, at 527, and in 1852 to increase the amount of property that a society could hold to $10,000, *see* Act of April 10, 1852, 1852 N.Y. Laws, ch 203, at 275. The Shakers began lobbying for these laws in 1829. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 217-18.

161. *See Pillow*, 1 Sand. at 678.

162. *See id.* at 679.

163. *See* Fowler v. Hollenbeck, 9 Barb. 309, 312 (N.Y. Sup. Ct. 1850).

164. *See id.* at 312-15.

165. *See* People *ex rel.* Barbour v. Gates, 57 Barb. 291 (N.Y. App. Div. 1869), *aff'd* 43 N.Y. 40 (1870).

166. *See id.* at 292.

167. *See id.*

justice of the peace from the town of New Lebanon; instead, a separate document was attached to the indenture, and that document was certified by a judge from Canaan.[168] She read New York's statute to require judicial approval of an indenture entered into by a mother, whether the father was dead or whether he had abandoned his family.[169]

The supreme court judge sitting in the special term agreed.[170] The statute, he wrote, requires judicial approval of a mother's consent and must be construed narrowly to protect the interests of the minor. He acknowledged that the statute's requirement that a minor consent to the indenture in order to be bound by it was a fiction because a minor cannot consent to be bound. Consequently, the endorsement by the justice was the only protection of the minor's rights.[171] If the endorsement did not conform to standards, the child would not be bound.

The judge next considered whether the agreement bound the mother independently of its effect on the child. Relying upon *M'Dowle*, he held that the mother was prevented from asserting the right to custody of her daughter.[172] But that holding did not end the court's inquiry. Although Maria did not have to remain with Gates, she needed a lawful protector.[173] The judge considered Barbour's argument that the religious beliefs of the Shakers disqualified them from obtaining custody, but concluded, as Judge Stanford had, that the argument was misplaced.[174] Instead, the judge based his decision to grant custody to Barbour on other grounds. Because Maria was only nine—too young to make her own decision and younger than Margaret Hammond—Judge Miller invoked the court's equitable powers to conclude that Maria belonged with her mother.[175] The judge assumed that Maria, if given the choice, would have elected to remain with the Shakers. He concluded, however, that "[t]he feeling of attachment to those with whom she has most recently been intimately connected" would necessarily "yield to that affection regard and love which none but a mother can feel and manifest towards her offspring."[176]

Judge Miller's opinion was affirmed at the general term of the court.[177] On appeal, however, it was reversed.[178] Judge Allen concluded that both lower courts had misread the statute; a justice of the peace's approval is only required of an indenture entered into by a mother of a child whose

168. *See id.* at 292, 293.
169. *See id.* at 293.
170. *See id.*
171. *See id.* at 294.
172. *See id.* at 295-96.
173. *See id.* at 296.
174. *See id.* at 297.
175. *See id.*
176. *Id.* at 299.
177. *See id.*
178. *See* People *ex. rel* Barbour v. Gates, 43 N.Y. 40, 48 (1870).

father had abandoned her. "The authority of the mother to act [in the event of the death of the father] was not first given by the Revised Statutes. Before that time, the mother could give the required consent, if the father was dead."[179] The judge acknowledged, however, that the trial court judge might have removed Maria from the Shakers even if the indenture had been valid if he had found that the Shakers were unfit custodians.[180] The opposite was true, however: "The judge, at Special Term, expressly [said] 'that the child had been well taken care of.' "[181] Moreover, the general term court had not based its decision on actual examples of the unfitness of the Shakers.[182] Instead, the general term judge granted custody to Barbour "because of his belief that the welfare of individuals, of families and of society depend upon cherishing and preserving the family relation, and that the influence and tendency of the Shaker institutions was to alienate the affections of the child from its parents."[183] That belief, concluded the appellate court, was not grounded in the record's examination of Shaker practices,[184] which was summarized in question-and-answer format in three pages with the reporter's notes.[185]

In contrast to the cases in Massachusetts and New York, a more thorough report of an examination into Shaker practices for the purpose of deciding custody is found in a case from Ohio, *State ex rel. Ball v. Hand*.[186] In *Ball*, a Shaker father petitioned for habeas corpus for the return of his two daughters, aged eight and six. The reporter's notes indicate that Mr. Ball, a widower, along with his father abandoned the girls and their paternal grandmother while "under the influence of Millerite excitement."[187] Mrs. Ball, no longer able to care for the girls, entrusted them to their maternal grandmother, Mrs. Hand. Although Mr. Ball seemed satisfied with this arrangement initially, he petitioned to gain custody of the girls after he joined a Shaker community.

The arguments made by counsel for both sides provide a doctrinal summary of the status of American custody law. The father's attorneys

179. *Id.* at 45.
180. *See id.* at 46.
181. *Id.* at 47 (quoting People *ex rel.* Barbour v. Gates, 57 Barb. 291, 296 (N.Y. App. Div. 1869)).
182. *See id.* at 47.
183. *Id.*
184. *See id.*
185. *See id.* at 41-44.
186. 5 WEST. L.J. 361 (Ohio Super. 1848).
187. The Millerite excitement, which began in the 1830s in northeastern New York, Vermont, and western Massachusetts, was an enthusiastic movement of Christians who believed that Christ's second coming would precede the end of the world in 1843 or 1844. *See* WHITNEY CROSS, THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGIONS IN WESTERN NEW YORK, 1800-1850 287-316 (1950). When the end of the world did not transpire, the disappointed flocked to Shaker communities in New York and New England, "a final resort for the most pious victims of every religious excitement since the Great Revival of 1800." *Id.* at 310.

recognized that English precedent had eroded the paternal presumption of custody, and enabled a judge to exercise discretion to award custody to someone other than a father in a given case.[188] Yet they asserted that a court was not permitted to divest a father of custody unless he is proven "absolutely unfit to take charge of his child."[189] "Shakerism," they argued, "is no ground for denying this man the custody of his children."[190]

The attorneys for Mrs. Hand argued that the superior discretion of the judge trumped the father's argument in favor of custody.[191] Among the cases cited in support of this proposition was *Commonwealth v. Hammond*.[192] Without recognizing the irony of appealing to a case where Shakers won custody, counsel for Mrs. Hand argued that judicial discretion had to be exercised to protect against Shaker religious practices. Although "our Legislature has no right to make any religious principle a ground for the loss of any civil privilege,"[193] religious belief is respected only "provided it works no injury to the state."[194] The Shakers, they reasoned, not only interfered with the state's duty to "foster and protect the increase in population" by forbidding marriage and procreation, they perpetuated their beliefs by teaching young children that procreation is a sin.[195]

In deciding to allow the children to remain where they were, Judge Johnson articulated a standard for determining when a child could be removed from a father's custody. "[W]hen the father is grossly immoral, intemperate, imbecile insane, or other-wise disqualified to discharge the obligation of providing, the law will not enforce the right of custody." In this case, the judge found Mr. Ball insane because he was not interested in pursuing the " 'bonds of natural affection' ":

> Stephen Ball . . . does not seek these children that he may rekindle the fire on his desolate hearth, and relink them around it in the family circle. He does not seek them that he may rebuild his family altar and unite with them in consecrating it with the prayers and songs of family devotion. He seeks them that he may sever them from the bosom of their grandmother, and from his own bosom, and plant them in the cold ascetic bosoms of the "female care-takers," and transfer all his right, title and interest in the children which God has given him, to total strangers.[196]

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188. *Hand*, 5 WEST. L.J. at 363 (citing Lord Mansfield's dicta in *Rex v. Deleval*, 3 Burr 1434, 97 Eng. Rep. 913 (1763)).
189. *Id.* at 363.
190. *Id.* at 364.
191. *Id.* at 365.
192. *Id.*
193. *Id.*
194. *Id.* at 366.
195. *Id.*
196. *Id.* at 369.

Neither Stephen Ball nor the Shakers satisfied the judge's notion of an adequate parent. After questioning a member of the Shaker community and, perhaps, reading Shaker writings,[197] the judge observed that, because the community would care for the girls, "the community of Shakers is plaintiff to this suit."[198] Yet, the community was no more suitable than Mr. Ball because it required its members to dissolve the natural bond of parent and child.[199]

The difference between the Massachusetts cases on the one hand, and the New York and Ohio cases on the other, in their examination of Shaker practices, is more pointed when the legislative backdrop is added. While the Massachusetts General Court made no effort to limit Shakers' rights to custody, the legislatures in New York and Ohio did. In the second edition of his treatise,[200] Chancellor Kent reported that New York had legislation that enabled a judge "upon *habeas corpus* [to] recover and dispose of any child detained by the society of shakers [sic]."[201] The statute, passed on March 14, 1818,[202] over the protests of Thomas Jefferson and the Council of Revision, which included, among others, Governor De Witt Clinton, Chancellor Kent, and Attorney General Martin Van Buren. They denounced it on the grounds that it interfered with marriage and with the free exercise of religion.[203] The statute had both a private and public component. It operated retroactively on behalf of Eunice Chapman, a New York woman who had joined the Watervliet community in 1811 with her husband and three children, and was prevented from access to the children after she left.[204] The first section of the statute granted Eunice Chapman a divorce.[205] The second more general section operated as a remedy for women and for men. It provided that a judge could issue a writ of habeas corpus to get children "on application of the husband or wife not having joined the . . . Shakers," authorized a sheriff's search of "the dwelling houses and other buildings of the . . . society" if the children were not produced, enabled the judge to "award the charge and custody" to the non-Shaker parent,[206] and criminalized the secreting of children by the Shakers.[207]

The legal effect of the statute in custody cases, however, might not

197. *Id.* at 361-62.
198. *Id.* at 369.
199. *Id.* at 368.
200. JAMES KENT, COMMENTARIES ON AMERICAN LAW (2d ed. 1832).
201. *Id.* at 194 n.c (quoting N.Y. REV. STAT. OF 1828, vol ii., part ii, ch. viii, title ii, at 148-49).
202. An Act for the Relief of Eunice Chapman, and for Other Purposes, 1818 N.Y. Laws, ch. 47, at 38.
203. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 210-11.
204. *See id.* at 210 (noting that Mrs. Chapman had spent some time with the Shakers). *But see* 1818 N.Y. Laws, ch. 47, preamble, at 38 (implying that Mrs. Chapman had never joined the community).
205. *See* 1818 New York Laws, ch. 47, § 1, at 38.
206. 1818 N.Y. Laws, ch. 47, § 2, at 38.
207. *Id.* at 39.

have been significant. As the *M'Dowle* case indicates, habeas corpus remedies were available at common law without the statute. The statute did, however, formalize the process whereby a judge could use the habeas proceeding to make a custody award. More important, however, was the rhetorical effect of the statute and the debate that its passage generated. The affect of the statute might have been to give more widespread credence to the notion that Shakers were justifiably subject to scrutiny for their child-rearing practices. The New York statute, by virtue of having been cited by Kent, is cited by other treatise writers. For example, William Forsyth's 1850 British treatise on custody disputes includes a four-page summary of custody law in the United States. Forsyth quotes directly from Kent's treatise for the proposition that fathers were not always entitled to prevail over a third party in a custody dispute.[208] Forsyth also notes that Kent "mentions also that by the *New York Revised Statutes* . . . the Chancellor or a Judge may, upon *habeas corpus*, recover and dispose of any child detained by the society of *Shakers*."[209] Although the statute is cited to support the notion that custody was increasingly granted to wives like Eunice Chapman in favor of their husbands, the passage also implies that Shakers were not suitable custodians for children.

The Ohio legislature enacted a statute on January 11, 1811, designed to prevent Shakers from keeping children.[210] The preamble to the statute gives some indication of the disposition of the legislature:

> [I]t is represented to the general assembly, that a sect of people in this state, called and known by the name of *Shakers*, inculcate and enjoin upon all who become attached to them, that they must lead a life of *celibacy*, in consequence of which women have been abandoned by their husbands, robbed of their children, and left destitute of the means of support.[211]

The statute, directed specifically against men who had left their wives to join the Shakers, allowed a woman to petition the court for a share of "the property real and personal of [her] husband . . . as shall appear just and equitable.[212] The court could also deprive a father of "all the authority he could have otherwise exercised over his children," give his property to them, grant the mother the duty and right to care for the children, appoint a guardian for them, or bind them as apprentices.[213]

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208. WILLIAM FORSYTH, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS, IN CASES OF DIFFERENCE BETWEEN PARENTS OR GUARDIANS 8 (1850) (quoting KENT, *supra* note 200, at 194).

209. *Id.*

210. *See* ANDREWS, THE PEOPLE, *supra* note 39, at 207.

211. *Id.* at 13.

212. 1811 Ohio Laws, ch. 8, § 2, at 15.

213. 1811 Ohio Laws, ch. 8, § 4, at 15. The authority to bind children seems to have been a remedy designed to take care of children whose father had no property to divide. *See id.* at 15 ("[I]f

The cases that I have discussed in this section are considered important to the development of the doctrine discussed in the beginning of Part II because they demonstrate increasing judicial regard for the "best interests" of children.[214] Yet, the "best interests" analysis within them often operated in favor of the Shakers. Indeed, except for *Ball v. Hand*, the Shaker cases appear to counter the argument that judicial emphasis on child nurture and development can be linked to judges' desires to foster families that were "bound together by a new egalitarianism and affection"[215]—two terms that had different meanings for Shakers than for other families.

If Shakers had families that did not resemble the emerging nineteenth-century ideal, why was it that they still satisfied the "best interests" test and why, especially, did only Massachusetts courts not examine their religious practices? In the next section, I look closely at the Harvard and Shirley Shakers for the answer to those questions.

PART III: THE CASE OF LIONEL HOPKINS

The Shaker communities in Harvard and Shirley had a total of approximately 250 members during the period between 1830 and 1860.[216] Although the reliability of any statistics on Shaker population varies,[217] it is probably safe to say that in the 1840s, the two communities represented at least 10 percent of the combined population of both towns.[218] In the 1840s, the two communities had approximately forty-five children under the age of sixteen.[219]

In the two journals that I examined—one kept by Grove B. Blanchard,

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the court shall deem it necessary, they may direct such child or children to be bound to apprenticeship, agreeably to the sixth section of the act, entitled 'an act for the relief of the poor . . .' "). In his treatise, Edward Mansfield interpreted the statute as one which considered the children of Shakers to be orphans. *See* EDWARD MANSFIELD, THE LEGAL RIGHTS, LIABILITIES AND DUTIES OF WOMEN 344 (1845).

214. *See, e.g.*, GROSSBERG, *supra* note 82, at 256 (discussing *Hand* to show that the rights of natural parents were diluted once courts focused on child nurture); *id.* at 262 n.61 (citing *M'Dowle*, *Hammond* and *Curtis* to support the assertion that the "best interests" of the child doctrine could constrain masters and natural parents); Peter Bardaglio, *Challenging Parental Custody Rights: The Legal Reconstruction of Parenthood in the Nineteenth-Century American South*, 4 CONTINUITY & CHANGE 259, 263 n.17 (1989) (citing *M'Dowle*, *Hammond*, and *Ball*); Zinaldin, *supra* note 22, at 1057 n.67 (referring to *M'Dowle* as having laid the groundwork for New York's common law of child custody); *id.* at 1059 n.73 (referring to *Hammond* as a "doctrinally significant" case); *id.* at 1077-78 (discussing *Hammond* and *M'Dowle* in depth).

215. GROSSBERG, *supra* note 82, at 8. *See id.* at 234-42 (noting custody law premised on theories that children needed nurture reflected judge's notions that the family's purpose was to enhance each individual's needs).

216. *See* BREWER, SHAKER COMMUNITIES, *Eastern Demographic Characteristics*, *supra* note 27, at 217; DESROCHE, *supra* note 5, at 135 (citing an unpublished doctoral thesis).

217. *See* DESROCHE, AMERICAN SHAKERS, *supra* note 5, at 38 (discussing the reliability of a variety of estimates of the populations of Shaker communities).

218. Massachusetts House Report No. 40, Statement of the Population of Each Town and City in Mass., According to the United States Census of 1840, at 3, 4.

219. *See* BREWER, SHAKER COMMUNITIES, *Census Data for Eastern Communities*, *supra* note 27, at 233, 234; *Harvard Sisters' Book*, July 12, 1843 (indicating that there were 31 children in the children's order); *Journal of Grove B. Blanchard*, February 29, 1844 (indicating that the Harvard

the head of the Bishopric, and one kept by the office sisters of Harvard—one child custody case occupied the most pages and a good deal of time and attention. Although a number of entries in both journals during the period between 1830 and 1845 mention custody disputes and court appearances,[220] the case of Lionel Hopkins is described in the greatest detail.

On Monday, July 24, 1843, the Shirley Deacon, Jonas Nutting,[221] brought Lionel to the Harvard community to "evade his mother."[222] Lionel had been living with the Shirley community since the age of three, and was "15 years and some odd months" when his mother tried to get him back.[223] Although the journals do not reveal Lionel's mother's marital status or her name, she was probably a widow, remarried to someone other than Lionel's father. Although most of the journal entries indicate that she was acting on her own,[224] one entry does mention that Lionel was unwilling to live with his mother and stepfather.[225]

On Wednesday, July 26, a Harvard Brother named John Orsment brought Lionel back to the Shirley community.[226] During the two days that Lionel spent in Harvard, "his mother made quite an uproar" in Shirley." She convinced Shirley's Mayor Longley to go with her to the offices of the Shirley community to look into the matter. According to Grove Blanchard, "the Mayor decide[d] in our favor, admonishe[d] the old woman for lying & she [went] away home."[227]

Lionel's mother was not to be discouraged that easily. On Saturday,

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community had 15 boys under the age of 14); *id.*, December 24, 1844 (indicating that the Harvard community had 11 girls between the ages of five and 14).

220. *See, e.g.*, *Journal of Grove B. Blanchard*, February 7, 1842 (describing a writ of attachment issued for a note allegedly drawn by the Shakers); *Harvard Sisters' Book*, April 14, 1842 (mentioning a court appearance in Lowell in the *Lawrence* case); *Journal of Grove B. Blanchard* April 14, 1842 (same); *id.*, April 28, 1842 (mentioning a court appearance in Worcester by Shirley Shakers in a custody case involving Lucretia Brown); *Harvard Sisters' Book*, February 8, 1843 (mentioning a court appearance in Worcester so that a 14 year-old boy named Samuel could chose a guardian); *Journal of Grove B. Blanchard*, September 25, 1843 (describing a complaint sworn by the Shirley Shakers against two kidnappers of a nine-year-old boy); *Harvard Sisters' Book*, September 28, 1843, (indicating that the grand jury refused to return an indictment against the kidnappers); *Journal of Grove B. Blanchard*, February 27, 1845 (describing depositions taken in the *Lawrence* case); *id.*, December 20, 1845 (describing a letter received from a Lowell attorney on behalf of Abial Crosby that alerted the Harvard Shakers of a suit to be filed for services Abial performed for the community as a minor).

221. *See* HORGAN, *supra* note 2, at 101.

222. *Journal of Grove B. Blanchard*, July 24, 1843.

223. *Harvard Sisters' Book*, July 30, 1843.

224. *See, e.g.*, *Journal of Grove B. Blanchard*, July 26, 1843 ("his mother made quite an uproar at Shirley Village"); *Harvard Sisters' Book*, July 30, 1843 (noting that the summons required the Shakers to "show cause why Lionel should not be given up to his mother").

225. *See Journal of Grove B. Blanchard*, July 26, 1843. The journal entry actually states that Lionel was unwilling to live with his "mother and Father-in-Law." The gentleman referred to was probably Lionel's stepfather. *See* OXFORD ENGLISH DICTIONARY 761 (J. Simpson & E. Weiner, eds. 2d ed. 1989) (defining father-in-law as stepfather, and noting uses of that term by Charles Dickens in 1838 and by George Eliot in 1876).

226. *See Journal of Grove B. Blanchard*, July 26, 1843; *Harvard Sisters' Book*, July 26, 1843.

227. *Journal of Grove B. Blanchard*, July 26, 1843.

July 29, Deacon Nutting went to Harvard to let the community there know that the Shirley Shakers had been served with a writ of habeas corpus.[228] Sheriff Coburn from Boston served the writ, took Lionel, but agreed to release him in the custody of Nutting in return for a bond.[229] The summons required Elder Grove, Deacon Nutting, Samuel Barret, and William Clark[230] to appear before Justice Wilde of the Supreme Judicial Court, "on Monday noon next precisely, . . . to answer to the alleged restraining of Lionel P. Hopkins."[231] That afternoon, Nutting went to see the community's lawyer in Groton, Esquire Farley.[232]

The next day, at 4 p.m., the group left Harvard for Boston. Although the Shakers usually traveled to Boston by oxcart, a trip taking two days,[233] this matter was particularly urgent and the travelers arrived in Cambridgeport at midnight.[234] The next morning, they went into Boston in time to meet with George Bancroft on Monday morning, July 31. Bancroft, who practiced in Boston, was Farley's son-in-law.[235] Blanchard's account of the day in court is quite descriptive:

> [We] appeared before Judge Wilde at 12 o'clock, and except for an intermission we were in close combat until sunset, when we were discharged by the Court, and Lionel had his liberty to go with the party he chose, but said the Judge, the *ward* said to me that it was his mind to return and live with the Shakers in preference to going with his mother and Father-in-Law . . . . [S]o a day of much labor and toil has passed away, and probably others more serious await us.

The next morning, the group went to the Middlesex Probate Court in Cambridge. Lionel chose Deacon Nutting as his guardian, while Barret and Clark put up the bond.[236] They left Cambridgeport at 4:00 p.m. and returned to Harvard by 10:00 p.m. that evening.[237] On the 2nd of August, Nutting and Blanchard held a meeting with the elders of the Harvard community to relate the results of the proceedings. When the meeting ended, Nutting and Hopkins returned to Shirley.[238]

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228. *See Harvard Sisters' Book*, July 29, 1843.
229. *See Journal of Grove B. Blanchard*, July 29, 1843.
230. *See id.*, July 30, 1843.
231. *Id.*, July 29, 1843.
232. *See id.* Although the entry does not mention the lawyer's first name, it probably was Benjamin Mark Farley. Farley graduated from Harvard in 1804, studied law with an attorney in Leominster, and entered the bar in Hollis, New Hampshire. He practiced there and in Groton, Massachusetts until 1855. He served as a state representative in New Hampshire for ten years during the period between 1814-1829. *See* 1 WILLIAM DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS 234 (1895 & photo. reprint 1974.).
233. *See* HORGAN, *supra* note 2, at 100.
234. *See Journal of Grove B. Blanchard*, July 30, 1843.
235. *See id.*, July 31, 1843. George Bancroft studied with Benjamin Mark Farley and at the Harvard Law School. *See* 2 DAVIS, *supra* note 232, at 341.
236. *See Journal of Grove B. Blanchard*, August 1, 1843.
237. *See Harvard Sisters' Book*, August 2, 1843.
238. *See Journal of Grove B. Blanchard*, August 2, 1843.

Although Blanchard's account is incomplete, Justice Wilde's decision appears to have been made along the same lines as Justice Shaw's in *Curtis*. Because Lionel was over fourteen, his preferences were determined and respected. And while it is possible that his inquiry addressed the Shakers' practices, it is likely that it did not; Blanchard's entries indicate no remorse or frustration with the "world's" treatment of the Shakers during the trial. On other occasions, his remarks about those who mistrusted the Shakers were quite candid. For example, he freely lamented "the spirit of apostasy" that depressed the community in 1844.[239] Two things are clear from the account, however. First, the Shakers were able to use informal legal processes to advance their case. The mayor who turned away Lionel's mother and the sheriff who allowed them to post bond were allies of the Shakers in this story. Second, the Shakers were able to call upon a network of attorneys familiar with their practices. Farley and his son-in-law were accessible at a moment's notice. What the account does not demonstrate, however, is why Justice Wilde decided the case the way that he did. The next part of this paper will address that issue.

PART IV: EXPLAINING THE SUCCESSES OF THE HARVARD AND SHIRLEY SHAKERS

To explain the reason for the particular successes of a nineteenth-century Shaker community, one must begin by confronting a methodological problem inherent in examining any group. Should the historical examination begin with the premise that the group was part of mainstream culture or separate from it?[240] The answer to that question is especially important if one is trying to assess the impact of Shakers on legal doctrine or the impact of legal doctrine on the Shakers. For, if the Shakers were, indeed, no different than other religious groups of the period, one might be tempted to conclude that the relationship between Shakers and the law was no different than the relationship of other groups to the law.[241] If on the other hand, Shakers were a deviant religious group by nineteenth-century standards, then their influence on the law or the law's

239. *Id.*, June 5, 1844.

240. *See* R. Laurence Moore, *Insiders and Outsiders in American Historical Narrative and American History*, 87 AM. HIST. REV. 390, 391 (1982) (arguing that the historian's decision to classify a group as outside the mainstream, unless conscious of the ambiguities inherent in such a classification, perpetuates narratives that variously focus on the outsider as victim or as an agent of social change); Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 744-45 & n.7 (1987-1988) [hereinafter Weisbrod, *Family, Church and State*].

241. This is especially true if one subscribes to the view that the law most readily reflects the interests of those with the ability to manipulate it. *See* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 71-75 (1984) (describing two common approaches in contemporary legal history, which posit that the law evolves to reflect the needs of interest groups with power).

influence on them could be easily dismissed as negligible,[242] or as operating through channels not necessarily associated with traditional legal institutions.[243]

Labeling the Shakers as either deviant or as mainstream seems simplistic, but happens often. Put in other words, no one claims kinship with the Shakers *and* everyone does. In the afterword to *A Maggot*, his 1985 fictionalized account of the origins of Shaker theology, British author John Fowles describes the first phenomenon, which has led to a dismissal of Shaker contributions:

> Orthodox theologians have always despised the sect's doctrinal naivety; orthodox priests, its fanaticism; orthodox capitalists, its communism; orthodox communists, its superstition; orthodox sensualists, its abhorrence of the carnal; and orthodox males, its striking feminism.[244]

In contrast to the marginalization of Shaker contributions, other approaches romanticize their role in the nineteenth century and focus on their importance in creating a unique American architectural, craft, and lifestyle idiom.[245] The fact that Shakers appear to straddle the mainstream and the periphery of nineteenth-century society and historical inquiry is part of their appeal.[246]

It should be of no surprise, then, that the law could also render the Shakers simultaneously mainstream and peripheral. As shown above, courts could focus on or ignore those aspects of Shaker practice that were peculiar even in the nineteenth century. Massachusetts courts in the custody cases ignored them, applying doctrine without regard to Shaker practices or theology. In this Part of the paper, I will offer and examine four hypotheses to explain why courts in Massachusetts were willing to grant Shakers custody of children without conducting an overt inquiry into the practices of the sect. Those hypotheses rely on 1) the principle of "freedom of contract," 2) the belief in the separation of Church and

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242. *See* Stein, *supra* note 9, at 750 (indicating that the Shakers' involvement with courts and legislatures had "no significant" impact on their doctrine or practice).

243. *See* Minow, *supra* note 21, at 885-90 (suggesting that despite barriers imposed by a dominant legal culture, a group can assert its own social norm, ultimately restructuring the legal universe).

244. JOHN FOWLES, A MAGGOT 450 (1985).

245. *See, e.g.*, DORIS FABER, THE PERFECT LIFE: THE SHAKERS IN AMERICA 61 (1974) ("The Shaker emphasis on a simple rural life style as the ideal defense against worldly evil could appeal equally to Thomas Jefferson and to readers of the WHOLE EARTH CATALOGUE"); *Serene Style*, ELLE, March 1989, at 307 (featuring Shaker furniture photographed with contemporary models wearing clothing "as comfortable and classic as a well-wrought piece of Shaker furniture"); *Simple Gifts*, Boston Globe (special section on travel), March 12, 1989, at 18 (describing the Shaker Community in Canterbury, New Hampshire).

246. Edward Andrews's comments are typical of those intrigued by the contradictions that a twentieth century mind perceives in the Shaker world: "The more one dwells upon the subject, the more surprising it seems that a people who had segregated themselves from the world and who held spiritual blessedness as the *summum bonum* should have developed such an amazingly progressive economic system." ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 37.

State, 3) the recognized need for social institutions to care for homeless children, and 4) the way the Shakers interacted with the legal infrastructure.

A. The Shakers and "Freedom of Contract"

The first hypothesis suggests that Shakers were successful in retaining custody of children in Massachusetts because courts, respecting the contractual underpinnings of indenture agreements, were loathe to interfere with contractual freedom when economic interests were at stake. If judges viewed indenture agreements as variations of employer and employee contracts,[247] then by upholding indenture agreements, even when they may have been improperly executed, courts were protecting the interests of masters over the interests of either their apprentices or their parents.[248]

This interpretation depends upon accepting a number of other premises, however, which may be impossible to verify or may be too strained to be credible. First, the judges would have had to view the commercial interests of the Harvard and Shirley Shakers as deserving this degree of accommodation.[249] Second, the "best interest" inquiry of the entire court in *Hammond*, of Justice Wilde in Lionel Hopkins' case, and of Justice Shaw in *Curtis* would have to be viewed as an attempt to "hide the ball." The analysis would require accepting that each judge went only as far into the background of the Shakers as was necessary to justify the award of custody, but no further. But, because the reported opinions do not mention that the issue was brought up by opposing counsel, attributing the lack of inquiry to the judges may be inappropriate; the real question is why the lawyers on the opposing side did not raise the issue, as they did in other states.[250]

Finally, this interpretation would require ascribing an importance to indenture agreements that is contrary to the prevailing view that by the mid-1850s the apprentice system was declining in importance and usefulness in a society in which children were offered opportunities for employment in factories as unskilled laborers.[251] Even a second explanation for

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247. *See* GROSSBERG, *supra* note 82, at 262-63 (discussing the nineteenth-century shift in the character of apprenticeships from a domestic-centered institution to a wage-labor institution).

248. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 186-88 (1977).

249. The Harvard Shakers certainly believed that their economic interests were deserving of special consideration from at least the state legislature. Simon Atherton, a trustee of the Harvard community for 50 years before his death in 1883 "spent two days a week at the state capitol during the decades of his trusteeship looking after the community's business interests." HORGAN, *supra* note 2, at 105.

250. *See supra*, Part II.

251. *See* Michael Katz, *The Origins of Public Education: A Reassessment*, *in* THE SOCIAL HISTORY OF AMERICAN EDUCATION 91, 106 (B. Edward McClellan & William Reese eds., 1988) [hereinafter Katz, *Public Education*]; Ken Libertoff, *The Runaway in America*, 1 J. FAM. ISSUES 151, 156 (1980).

the decrease in the popularity of indentures counters this hypothesis. If indentures became less popular because courts, increasingly concerned with the welfare of children, bound masters to care for and nurture the best interests of their charges,[252] courts would also be free to use the "best interests" of the child standard to strip a master of his control of an apprentice. Not only could a court refuse to issue the writ to the master, forcing him to rely on contract or tort actions, but a court could also refuse to grant custody even if it did issue the writ, electing instead to allow the apprentice to choose.[253]

B. Separation of Church and State

Although the three Massachusetts cases did not raise issues related to the Shakers' religious practices, the religious backdrop of antebellum society may have influenced the way cases were resolved. This second hypothesis suggests that Massachusetts judges had no need to inquire into the child-rearing practices of the Shakers because they recognized the Shakers as a bona fide Protestant sect.

Until 1833, Massachusetts had "a system that has often been described as an 'establishment.' "[254] Under this system, churches existed in a parish, which was a municipal unit of the town. In the years prior to the enactment of the Massachusetts Constitution, a series of statutes entitled a parish's Congregational church to the tax dollars of every resident within the parish.[255] The statutory scheme made some provisions for the formation of new parishes that would be approved by town officials,[256] authorized parish tax collectors to refund the taxes collected from Anglicans,[257] and allowed Quakers and Baptists to petition for exemptions.[258]

The Massachusetts Constitution of 1780 attempted "to minimize any possible opposition to the *entire* constitution, [and] attempted to satisfy the conservatives who sought security for the *status quo*, as well as the increasingly vocal advocates of a voluntary religious system."[259] Article II of the constitution gave the inhabitants of the Commonwealth "the right . . . to worship the Supreme Being" in a manner "most agreeable to the dictates of his own conscience."[260] In seeming contradiction, the constitution also authorized the legislature to require towns "to make suitable provision . . . for the support and maintenance of public Protes-

252. *See* GROSSBERG, *supra* note 82, at 261-62.
253. *See* HURD, *supra* note 90, at 549-54, 557 (citing People *ex rel.* Fowler v. Pillow, 1 Sand. 672 (N.Y. Super. Ct. 1849)).
254. John Cushing, *Notes on Disestablishment in Massachusetts*, 26 WM. & MARY Q. 169, 169 (1969).
255. *See id.* at 169-70.
256. *See id.* at 170 n.4.
257. *See id.* at 171.
258. *See id.*
259. *Id.* at 172 (emphasis in the original).
260. MASS. CONST. of 1780, art. II.

tant teachers of piety, religion, and morality."[261] For dissenters, the constitution allowed an individual's tax dollars to be used for the support of ministers of his own sect.[262]

The effect of the constitutional provisions on dissenting churches was in some respects worse than the prior regime. "Baptists and Quakers, who previously enjoyed an exemption from religious taxes, came within the revised system, against their conscientious objections. They were forced to pay taxes for the support of their own worship."[263] And if they wanted to receive their share of taxes, the Supreme Judicial Court's decision in *Barnes v. Town of Falmouth* forced them to incorporate,[264] an act that was contrary to the dissenters' beliefs that the state could not control a religion[265] and that a ministerial hierarchy was not necessary for each individual to achieve salvation.[266]

A statute was passed in 1811 to provide relief from the requirement of incorporation.[267] It also allowed an individual to pay for the support of a minister to an unincorporated religious society and authorized the society to hold the funds.[268] The 1811 statute was important to the Shakers because it allowed the Supreme Judicial Court to recognize their capacity to hold property by deed. Although Levy notes that "Shaker . . . churches received the advantage of incorporation by the state legislature,"[269] the Harvard and Shirley Shakers were not incorporated. Consequently, the statute was crucial to their success in two property cases, both titled *Lawrence v. Fletcher*.[270]

In 1826, George Lawrence, a Littleton landowner, conveyed property to Pliny Blanchard with a mortgage deed to secure payment of a note.[271] Blanchard, a member of the Harvard community, deeded his interests in the property to two trustees of the Society in 1830.[272] In 1834, Lawrence gave possession of the land to Jonathan Chandler and Hosea Winchester, trustees of the Society, for the purposes of foreclosing.[273] During the next two years, however, Lawrence made payments on the note.[274] In March 1840, the Society sold the property to John Fletcher.[275] At trial,

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261. MASS. CONST. of 1780, art. III.
262. *See id.*
263. LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 28 (1986) [hereinafter LEVY, THE ESTABLISHMENT CLAUSE].
264. 6 Mass. 401 (1810).
265. *See* LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 263, at 31.
266. *See* WILLIAM MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 255 (1986).
267. *See* Act of June 18, 1811, 1811 Mass. Acts, ch. 6, at 388.
268. *See id.*
269. LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 263, at 32.
270. 49 Mass. (8 Met.) 153 (1844); 51 Mass. (10 Met.) 344 (1845).
271. *See* Lawrence v. Fletcher, 49 Mass. (8 Met.) at 158.
272. *See id.*
273. *See id.*
274. *See id.* at 159.
275. *See id.* at 159-60.

Lawrence claimed that the foreclosure had been invalid.

In the first decision on the case, Justice Hubbard remanded in order to determine whether facts would support the conclusion that the foreclosure by Chandler and Winchester had been effective or whether the payments by Lawrence to them "opened" the mortgage.[276] In the second opinion, he concluded that the payments were merely interest, and that Fletcher had taken the property free from any claim by Lawrence.[277] More importantly, however, the first opinion solidified the status of the Shakers.

Justice Hubbard noted that the first question was whether Blanchard's deed to the Society was a valid one.[278] Lawrence claimed that the conveyance had not been specifically made to individuals who were deacons of a church,[279] and that the Shakers were "merely a voluntary association, not constituted into a religious society according to any known laws or usages of the Commonwealth."[280] The justice rejected the argument. After examining the Shaker's covenants of 1791, 1801, and 1814, he concluded that the Society was constituted as "a sect or denomination of [C]hristians,"[281] entitled by the statute of 1811, "if not legally empowered before,"[282] to "elect deacons or trustees to take and hold and manage the property of the community."[283]

The opinion, in effect, treated the Shakers as just another church engaged in a property dispute, and Massachusetts courts were quite familiar with such cases. Church property disputes involved a great deal of the courts' attention during the period between 1820 and 1840. The schism in the Congregational church between Unitarians and Trinitarians was the occasion for many cases in which the Supreme Judicial Court was forced to decide whether members of a seceding orthodox church was entitled to take church property when it left the existing parish to form a new one.[284] One effect of the schism was to realign political alliances within Massachusetts; Trinitarians, who regularly lost church property in these cases to Unitarians, joined with Baptists to rally for disestablishment of religion.[285] By 1833, they had succeeded in securing an amendment to the state constitution to disestablish churches.[286]

Whether the *Lawrence* cases had more than symbolic effect is hard to assess. The argument that state law implicitly recognized the Shakers as

276. *See* Lawrence v. Fletcher, 49 Mass. (8 Met.) at 164.
277. *See* Lawrence v. Fletcher, 51 Mass. (10 Met.) at 348.
278. *See* Lawrence v. Fletcher, 49 Mass. (8 Met.) at 161.
279. *See id.* at 161-62.
280. *Id.*
281. *Id.* at 162.
282. *Id.* at 163.
283. *Id.*
284. *See* LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 263, at 33-37.
285. *Id.* at 36-37.
286. Act of April 1, 1834, 1834 Mass. Acts, ch. 183, at 34.

a legitimate group, like the explanation related to indentures described above, does not account for the absence of argument made by the Shakers' opponents that the Shakers were not the best caregivers for children. Opponents could have argued that Shakers were not a legitimate group for the purposes of receiving children even if they were legitimate for the purposes of taking property. Second, at least until 1833, the Supreme Judicial Court inquired into religious belief, at least to determine if an individual should be convicted of blasphemy. In that year the court affirmed the conviction for blasphemy of Abner Kneeland, a freethinking heretic writer who denounced prayer, God, the Bible, and the immaculate conception, in his publication, the *Investigator*.[287] During the first of his four trials, the prosecutor argued that "[b]lasphemy . . . was but one part of the system introduced by the disciples of Owen and Wright. Not only was atheism to be enthroned, but moral restraints removed, illicit sexual relations encouraged, the laws of property repealed, and the horrible experiments of New Harmony and Nashoba introduced in Boston itself."[288]

In his opinion affirming Kneeland's conviction at his last trial, Justice Shaw specifically found no contradiction between the crime of blasphemy and the state's constitution. Not only was blasphemy a common law crime that existed apart from the constitution, it was a crime that was designed to punish acts that would incite the public.[289] Although from this brief description of Kneeland's views it is somewhat clear that Shaker beliefs were slightly more mainstream than Kneeland's, there might have been ways for courts to construe the religious freedoms that were narrowly guaranteed in the Commonwealth.

The *Kneeland* case also demonstrates something else. The opinion was highly criticized by Boston intellectuals who were concerned with the case's implications for freedom of expression. "Almost all who were given to heterodox ideas—utopians, abolitionists, transcendentalists—balked at using the strong arm of the state to silence Kneeland."[290] The dissatisfaction with the opinion led to an unsuccessful petition for Kneeland's pardon, which was signed by reformers like Alcott, Emerson, Garrison, and Ripley.[291] Although it is impossible to tell whether Justice Shaw took the criticism to heart, and whether it had any effect on his opinion in *Curtis*, the convergence of intellectual opinion on the case demonstrates the degree to which alternative social and religious arrangements captured the attention of intellectuals. This idea will be

287. *See* LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 43-45 (1970).

288. *Id.* at 47.

289. *See id.* at 53-54.

290. *Id.* at 51.

291. *See id.* at 57.

explored more fully in the discussion of the Shakers' interactions with the legal infrastructure.

C. The Social Service Role Played by the Shakers

During the early years of the nineteenth century, cities and towns in Massachusetts were faced with a dilemma posed by the numbers of truants and runaways who roamed the state unsupervised.[292] Many children came to the communities outside Boston from the rural parts of western Massachusetts, attracted to the factory jobs in the newly industrialized cities.[293] Often, however, the labor force had no use for these children.[294] Consequently, children were found "on almost every street corner."[295] Although social commentators counseled that the futures of these children were directly dependent upon the quality of care and attention that they received,[296] the solution to the problem of itinerant children was less than obvious.

Indentures secured by towns, a traditional solution, were no longer effective substitutes for parental control. Not only were indentures with artisans less available,[297] but those that were available required placement in "industrial settings that were neither educational nor, indeed, safe."[298] Almshouses seemed unacceptable because they forced children to live in close proximity to the basest elements of society. Because town selectmen and overseers of the poor used almshouses to hide from the rest of society "the most degraded tramps, drunkards, prostitutes, petty criminals, and the victims of venereal disease,"[299] "[i]t was impossible to remove begging and thieving children from the streets because there was no receptacle, other than the almshouses, in which to put them."[300]

The state gradually began to intervene and provide for unattached

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292. *See* Katz, *Public Education*, *supra* note 251, at 96; Libertoff, *supra* note 251, at 155-56.

293. *See* Libertoff, *supra* note 251, at 156.

294. *See* Katz, *Public Education*, *supra* note 251, at 106; Libertoff, *supra* note 251, at 156-57.

295. Libertoff, *supra* note 251, at 156.

296. *See, e.g.*, HOUSE DOC. NO. 46 of 1820 (noting that the ultimate direction of a child's life "may be happy or miserable, honorable or disgraceful, according to the specific nature of the provision made for their support and education"); GRIGG, *supra* note 15, at 53 (arguing that the overseers of the poor of Newburyport, Massachusetts, placed children outside of almshouses because "children growing up there would not receive the vocational or moral and religious instruction necessary to make them productive and contented adults").

297. *See supra* notes 251-253, and accompanying text.

298. Teitelbaum, *Family History*, *supra* note 109, at 1150.

299. ROBERT KELSO, THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS: 1620-1920 173 (1969 ed.); *see also* GRIGG, *supra* note 15, at 13-14, 51 (describing an analysis of the demographic data on admission rates showing how the overseers of the poor of the town of Newburyport, Massachusetts, used the town almshouse to discipline men in the first quarter of the nineteenth century).

300. KELSO *supra* note 299, at 172. This is not an uncontested conclusion. In his book, Michael Katz argues that the movement of children out of poorhouses did not occur until the last quarter of the century. *See* MICHAEL KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 103-04 [hereinafter KATZ, IN THE SHADOW]. Katz also suggests that the Quincy report of 1821, which Kelso relied upon for his conclusion that Massachusetts policymakers recognized the need for keeping children out of poorhouses, actually fostered the notion that

children by controlling child labor and requiring education.[301] Social commentators during the second quarter of the century believed that schooling "would provide the lower-class child with an alternative environment and a superior set of adult models."[302] Schooling would also alleviate the harms that both wage labor and factory work would have on children during the early period of industrialization.[303] In a system based on wage labor, children would suffer indirectly as "chronic underemployment became a permanent institution,"[304] creating mobile families with few ties to neighbors and communities.[305] By working in factories, children would be directly impaired by unsanitary and unsafe working conditions.[306]

Yet, although Massachusetts enacted the country's first compulsory school attendance law in 1852 in response to the educational reform movement that had begun in the 1830s,[307] only a small number of poor and immigrant youths participated.[308] Moreover, Massachusetts did not pass laws that regulated the hours during which a child could work in a factory until the second half of the century.[309]

The Shaker lifestyle might have been viewed as a "private sector" alternative for displaced children that had none of the drawbacks of almshouses and that had added economic benefits from the perspective of town officials.[310] This possibility also fits with the prescriptive vision of the nineteenth-century family that was fostered by contemporary sociologists in the last quarter of the nineteenth century. The reformists who bemoaned the egalitarian family produced by companionate marriages,

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children belonged there. *See id.* at 23. Reconciling Kelso and Katz is not easy, but both can be correct.

The Quincy report may have implied that children did not belong in almshouses, but in specialized institutions. This seems in keeping with the trends in other states during the 1820s and 1830s. *See* DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 190, 206-07, 209 (1971). If a town did not have a large population of poor with differing needs, however, it would not have had a number of specialized institutions. *See id.* at 183. Consequently, there may have been reluctance to put children with adults in the existing poorhouse. Katz provides another way of rationalizing the two explanations by suggesting that "it is difficult to believe that even in these early years the picture was quite as cheery as poor law reformers would have had their contemporaries believe." KATZ, IN THE SHADOW, *supra* at 24.

301. *See* Libertoff, *supra* note 251, at 156.

302. Katz, *Public Education*, *supra* note 251, at 103.

303. *See* RELIGION AND EDUCATION IN AMERICA: A DOCUMENTARY HISTORY 5 (H. Kliebard ed. 1969) (describing Horace Mann's theory that common schools would be a "basis for an effective attack on poverty, crime and social conflict.") [hereinafter referred to as RELIGION AND EDUCATION IN AMERICA].

304. Katz, *Public Education*, *supra* note 251, at 102.

305. *See id.*

306. *See* KATZ, IN THE SHADOW, *supra* note 300, at 130-31.

307. *See id.* at 130.

308. *See id.*

309. *See id.* at 133 (describing a Massachusetts law of 1867 that required factory inspections and a law of 1888 that prohibited night work by children).

310. *See* GRIGG, *supra* note 15, at 59-66 (suggesting that the overseers of the poor in Newburyport, Massachusetts, attempted to place children with families at no cost to the town, and that placements with Shakers were of this sort).

where husbands and wives formed loving relationships rather than economic units, suggested that the family would be healthiest in a rural environment that remained "patriarchical, organized under the authority of the father."[311] The "wholesome" nature of the work in Shaker communities would prepare children for adulthood and protect them from the ill effects of industrialization.[312] When they were not in school, Shaker children were expected to contribute to the family welfare by learning crafts skills or by assisting with agricultural chores.[313] As the apostasy rates in communities increased after the 1840s despite the fact that more and more children were entering them,[314] Massachusetts may have looked even more favorably on the training that Shakers offered because those who would eventually leave the sect might be expected to become more productive members of the greater society by virtue of their training.

The Shakers' schools, which were administered by a superintendent from the Central Ministry, also emphasized usefulness.[315] As a result, the educational level throughout the Society was probably only "proficient, perhaps above the average for its time and place."[316] But both the towns of Harvard and Shirley seem to have respected the Shaker schools. By 1811, Shirley gave the Shaker community a share of the town's school money for the operation of the Shakers' school,[317] District 7.[318] Indeed, one elder from each community served on their respective School Committee during the middle years of the century.[319]

When there was conflict with secular authorities in Massachusetts over Shaker schools, the dispute did not center on their quality, but on the extent to which the state could support a sectarian education or interfere with a religious group's schools. The move to purge sectarian influences from Massachusetts' common schools was spearheaded by Horace Mann, the state's first secretary of education.[320] Because Mann strongly supported moral education, however, he was not in favor of removing all religious instruction from the schools.[321] Consequently, he developed a

311. Ronald Howard, *Conceptions and Attitudes About the Family in Nineteenth-Century America*, *in* A SOCIAL HISTORY OF AMERICAN FAMILY SOCIOLOGY, 1865-1940 18 (John Mogey ed., 1981).

312. *Cf.* HOWARD SEGAL, TECHNOLOGICAL UTOPIANISM IN AMERICAN CULTURE 94-97 & n.77 (1985) (suggesting that the crafts, light industry, and manufacturing enterprises of nineteenth-century utopian communities mediated between technological and pastoral visions of society).

313. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 77.

314. *See id.* at 147-48 (noting that although the New Lebanon Church family admitted more children during the years between 1841 and 1860 than during the years between 1787 and 1839, there was little success in keeping most children).

315. *See id.* at 75.

316. ANDREWS, THE PEOPLE, *supra* note 39, at 194.

317. *See id.* at 66.

318. HORGAN, *supra* note 2, at 69.

319. *See id.* at 105, 119.

320. *See* RELIGION AND EDUCATION IN AMERICA, *supra* note 303, at 6.

321. *See* WILLIAM DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? 138 (1958 & photo. reprint 1983); NEIL MCCLUSKEY, PUBLIC SCHOOLS AND MORAL EDUCATION 42-43 (1958)

theory of "common core" education that took the major elements of Christianity as the basis for a program of religious instruction in the schools.[322] In 1841, Mann warned the Harvard and Shirley Shakers, who refused to have their teachers examined or to permit the local committee to visit, that they would have to accept secular supervision of their schools.[323] The nature of Mann's warning was to point out the slippery slope which would be trodden if "the example of these little homogeneous communities followed in towns where there were divisions in creeds."[324] Evidence suggests, however, that at least the Harvard Shakers were successful in deflecting too much inquiry. A series of entries in the Harvard Sisters' Book gives some sense of the Shakers' attitude toward the dispute. In November 1840, the community included sixteen boys and eight girls. On December 21, 1840, the boys' school began with a class of twenty-two students.[325] A member of the Town of Harvard's school committee visited the community in January, and told the Shakers that if they did not conform their classes to state requirements, "he was authorized to employ a master to teach it."[326] The school committee member returned to the community in February with a teacher, but the Shaker leaders politely rejected assistance,[327] and continued with their educational plan for the year. The girls' school began, as scheduled, on July 5, 1841, under the supervision of a community member.[328] It also began again in the following year on June 27.[329]

To understand why the historical record does not include an account of Shaker acquiescence to state mandates or of state enforcement of them, I turn to the final hypothesis.

D. The Legal Sophistication of the Shakers

The final hypothesis, and the one that appears most plausible, suggests a way to integrate the explanations offered above: Massachusetts courts did not inquire into the child rearing practices of the Shakers because the Shakers of Harvard and Shirley, through their contacts with mainstream legal culture, insulated those practices from judicial scrutiny. The courts, although familiar with the unconventional customs of the

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(describing Mann's belief that moral education was needed to teach duties to fellow men and that religious education was needed to teach duties to God).

322. *See* MCCLUSKEY, *supra* note 321, at 35-46.

323. *See* RAYMOND CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS 162 (1929).

324. *Id.*

325. *See Harvard Sisters' Book*, December 21, 1840. Shaker communities usually had one schoolhouse that was used by the girls in the summer and by the boys in the winter. *See* BREWER, SHAKER COMMUNITIES, *supra* note 27, at 75.

326. *Harvard Sisters' Book*, January 26, 1841.

327. *See id.*, February 1, 1841 ("[T]hey were informed that we did not wish for any of their assistance, so they returned home.").

328. *See id.*, July 5, 1841.

329. *See id.*, June 27, 1842.

Shakers, presumed that they would be suitable guardians for children in need of care.

The Shakers, in general, recognized the constraints and demands of the legal system, and modified their practices to respond to doctrinal changes.[330] Changes to community covenants occurred regularly, and "were designed to meet a specific legal objection to Shaker practices that had been encountered in various states."[331] Evidence of this is apparent by comparing the Harvard community's first covenant with its fourth covenant. The provision relating to children in the first covenant, signed in 1797, provided that

> youth and children under age are not to be received under the immediate care and government of the Church, but by the request or free consent of both their Parents if living; except they were left by one of their Parents to the care of the other. Then by the request or free consent of that parent; and if the child have no parents, then by the request or free consent of such person or persons as may have just and lawful right, in care of the child, together with the child's own desire.[332]

The covenant signed in 1831 contained two provisions relating to children. In the first, children were absolutely forbidden from membership in the community—a provision not found in the first covenant.[333] The section which amended the one reproduced above included specific directives "Concerning Youth and Children":

> Youth and children, being minors, cannot be received as members of the Church professing a consecrated interest, in a united capacity; yet it is agreed that they may be received under the immediate care and government of the Church, at the desire or consent of such person, or persons, as have a lawful right to, or control of such minors, together with their own desire or consent. But, no minor under the care of the Church can be employed therein for wages of any kind.[334]

Although there were interim changes between the 1790 covenant and the 1831 covenant,[335] it is worth comparing the two covenants in three

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330. *See* WEISBROD, BOUNDARIES, *supra* note 9, at 118 (suggesting that Shakers tried to structure their internal relations so as to "not invoke the civil law if it could be avoided").

331. Stein, *supra* note 9, at 748.

332. First Covenant of the Harvard Community Covenant art. iv (1797).

333. *See* Fourth Covenant of the Harvard Community art. II, § 2 (1831).

334. *Id.* at § 5.

335. An undated addendum, signed between 1797 and 1814, specified that deacons would "secure the rights, privileges and property of the Church, before all Courts and jurors of men." Second Covenant of the Harvard Community (undated). The reporter's notes in *Lawrence v. Fletcher*, 49 Mass. (8 Met.) 153 (1844), suggest that this covenant was signed in 1801. *See id.* at 157 ("At a meeting of the church on the 2d of March 1801, they chose deacons and a clerk, and all members, by a writing under their hands and seals, agreed among other things, that the deacons and their successors in office should hold the property of said church and have the management of all its temporal concerns."). An 1814 covenant added a provision authorizing probationary families and

respects. First, while the earlier one embodies a hierarchical notion of who can give consent to leaving a child in the care of Shakers—first both parents, then one parent if that parent has custody, then finally, a third party—the later covenant evidences a broader notion of who can give consent—anyone who has de jure or de facto control over the child. Second, the later covenant forbids employing children—a provision that might make the Shakers appear charitable rather than mercenary in the eyes of someone reading the covenant. Finally, the later covenant requires that a child express his or her preference or give consent. The consent provision implies agreement after disclosure, which mirrors the provision added to the covenant that required that it be read out loud for the new convert to insure full comprehension of its terms.[336]

As one commentator who examined the Hancock community's covenant provision that required its signer to release private claims to property upon departure from a community has noted, "[a] more complete release of all claims could be imagined only by a contracts specialist or a law professor."[337] The effect of similarly particularized and legalistic language in the sections relating to children may have forestalled inquiry into their suitability as child rearers. By embracing the rhetoric of child welfare and including a provision for the determination of the child's own will, the Shakers gave credibility to their claims when the covenant was reviewed by a court.[338]

But because the covenant was the same for all communities, something else must differentiate the Harvard and Shirley Shakers from those in New York and Ohio. One explanation is suggested by a model offered by Professor Weisbrod for explaining a religious group's decision to invoke the law, which divides such cases into two categories. The goal of litigation in the first category of cases is to persuade the state to adopt a religious practice as the societal one. The goal of litigation in the second category of cases is to establish a realm in which the religious group can act without state interference. Professor Weisbrod points out that the two categories reinforce one another. By allowing a religious group to assert its influence without interference, the practices of that religious group are elevated by secular authorities. Similarly, when a religious group attempts to exert its influence to control prevailing societal prac-

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requiring a community member to provide for a departing spouse. *See* Third Covenant of the Harvard Community (1814).

336. *See* Fourth Covenant of the Harvard Community art. i., § 4 (1831).

337. Stein, *supra* note 9, at 748.

338. Although Shaker covenants were not specifically addressed in either *Hammond* or *Curtis*, the contents of the 1797, 1801, 1814, and 1831 covenants were stipulated to by the parties in *Lawrence v. Fletcher*, 49 Mass. (8 Met.) 153, 157 (1844). The covenant of 1831 was reprinted in the case of *Grosvenor v. United Society of Believers*, 118 Mass. 78 (1875), a case in which the Supreme Judicial Court refused to intervene in the affairs of the Society to prevent it from excommunicating a member.

tices, it may be doing so in order to protect its own practices.[339]

Seen in this light, successful interaction with the legal system, though appearing to be driven by the Shakers' desire to protect themselves and their separateness, had the effect of elevating the group's stature within the larger society. Continued success in all types of litigation meant continued deference from courts in child custody cases. Constant failure would undermine the community's position with respect to the world. One example of the operative effect of this principle is suggested by the fact that in the states where Shaker practices were subject to judicial scrutiny, they were also subject to legislative scrutiny. In Massachusetts, they were subject to neither; in fact, they were successful in a custody suit at the very start of the century. In addition, they had succeeded in convincing the Supreme Judicial Court that they were a bona fide religious sect and that they performed a needed social service function. Combined with their legal acumen, these factors operated in favor of the Shakers.

Even when they had no cases pending, the Shaker leaders of Harvard and Shirley spent time with their lawyers to develop strategies concerning the legal effects of their covenant and about the law in general.[340] The lawyers that the Shakers retained were well-respected and well-known members of the bar. For example, Samuel Hoar, a Concord lawyer who represented the Harvard Shakers in *Commonwealth v. Hammond*,[341] appeared in 92 of the 299 cases argued in front of the Supreme Judicial Court's Middlesex Sessions from 1820 to 1829. Fifty-eight other lawyers appeared in the remaining cases.[342] Hoar was also involved in Massachusetts politics as a member of the Whig party. He served in the Massachusetts Senate in 1826, 1832, and 1833, and in Congress in 1835 and 1836.[343]

Shakers elsewhere also chose their counsel well. For example, to respond to charges brought in 1848 before the New Hampshire legislature that they abused children, "[t]he Shakers, with their customary wisdom when dealing with the outside world, chose as their counsel three of

339. Weisbrod, *Family, Church and State*, *supra* note 240, at 746-50.

340. *See Journal of Grove B. Blanchard*, February 31, 1844 (describing a visit to attorney Samuel Hoar and Ex-Judge Samuel Putnam to "learn something about Law"); *id.* February 27, 1845 (describing conference with attorney Benjamin Farley on whether or not to test the Harvard covenant in court).

341. 27 Mass. (10 Pick.) 274 (1830). Although it was not possible to find a definitive reference to Samuel Hoar's representation of the Harvard Shakers in this matter, the reporter's notes in the syllabus support the inference that the attorney for the Shakers was Hoar. Curiously, while the attorney for the defendant is identified with his last name and with the initials of his first name, no initials are needed to identify Hoar. Although Hoar's son also practiced law, he was not admitted to the bar until 1849. *See* 2 DAVIS, *supra* note 232, at 257.

342. *See* GERARD GAWALT, THE PROMISE OF POWER 58-59 (1979); *see also* WILLIAM MINOT, MEMOIR OF THE HON. SAMUEL HOAR 5 (1862) (describing how Samuel Hoar succeeded in breaking into the "monopolized . . . business" of older Middlesex lawyers, so that by 1831, he "was usually retained in every case of importance in his own county").

343. *See* 2 DAVIS, *supra* note 232, at 187.

the ablest lawyers (all with legislative experience) then available," including Brigadier General Franklin Pierce who had just returned from the Mexican War.[344] Yet the differences between the positions of the Harvard and Shirley Shakers and the New Hampshire Shakers is worth noting. The latter employed well-known counsel when in the reactive position of defending against attacks that put their religious and child-rearing practices at issue. The former were able to use counsel prophylactically to prevent such inquiries.

A second factor also distinguished the Harvard and Shirley Shakers' choice of counsel from the choice made by the New Hampshire communities; although there is no direct evidence of Hoar's relationship with the transcendentalist writers of Concord, the Harvard Shakers at least once met with Emerson in Concord after a visit to Hoar,[345] and Emerson visited the Harvard community often after 1842.[346] His journals and notebooks reflect that he "found more and more in Shakerism that impressed him."[347] This was especially true after one of his first cousins joined the Harvard Shakers with her child in the early 1840s.[348] There were also visits between the Shakers and their neighbor, Alcott,[349] and articles about the Harvard Shakers in the transcendentalist periodical, *Dial*.[350]

The ties between the Shakers and the transcendentalists were personal, but the roots of those ties trace to the expression of millennialism in the second and third quarters of the century that had widespread appeal and cultural implications.[351] Emerson's writings reflected his own belief in perfectibility, idealism, and mysticism—a belief that was shared by millennial religious groups like the Shakers[352]—although he would not have agreed that the communal lifestyle of the Shakers was the best way to achieve it.[353] "Emerson's well-known 'optimism' is an excellent example of a transcendentalist millennial awareness which was directed toward living an ideal life in nineteenth-century America."[354]

The fact that Shakers built a religious lifestyle around values that were also reflected in Emerson's writings may have had some significance for

344. Richard Upton, *Franklin Pierce and the Shakers—A Subchapter in a Struggle for Religious Liberty*, 23 HIST. N.H. 3, 5 (1968).

345. *See Journal of Grove B. Blanchard*, February 27, 1845.

346. *See* Brewer, *Emerson, Lane, and the Shakers*, *supra* note 3, at 256.

347. *See id.* at 258.

348. *See id.* at 260.

349. *See Journal of Grove B. Blanchard*, August 14, 1843.

350. *See* Brewer, *Emerson, Lane, and the Shakers*, *supra* note 3, at 270.

351. *See id.* at 258.

352. *See id.* at 261 ("Much as Emerson believed that every man embodied the oversoul or creative spirit within himself, the Shakers believed that individuals converted to the gospel of Christ's second appearance experienced their own personal second comings.").

353. *See id.* at 257; John Flanagan, *Emerson and Communism*, 10 NEW ENG. Q. 243, 248-49, 253, 260 (1937) (noting that Emerson's theory of the individual will was the root of his pessimistic opinions of Alcott's Fruitlands experiment and Ripley's Brook Farm community).

354. *See* James Guimond, *Nineteenth Century American Millennial Experience, Part II*, 13 SHAKER Q. 42, 49 (1973).

their legal affairs. Given the role that members of the legal and literary elite played in shaping cultural values of order, balance, and acceptable behavior in antebellum Boston,[355] Shakers could only benefit by associations that may have elevated their status or given them an aura of respectability.

CONCLUSION

The traditional narrative of Shaker historians marks the beginning of their decline with the drop in the populations of communities at the midpoint of the century.[356] Although that narrative is not unchallenged,[357] explaining the decline of the Shakers is as difficult as explaining their rise.[358] A number of factors were certainly at work.

Industrialization and the growth of commercial enterprise in the cities provided economic opportunities to those in the substratum of society who otherwise would have found a haven with the Shakers. As market economies replaced subsistence economies, the opportunity to make money "in an age apathetic in religion and negligent of the golden rule in industry,"[359] reinforced values that were antithetical to the communitarian values embodied by the Shakers.

The market success of the Shakers and the extensive landholdings that they acquired also contributed indirectly to their decline. As fewer members were available to farm and care for orchards, hired help was required to tend to Shaker holdings. This brought "the world into the sanctum"[360] and diluted the separateness that formed an important theological underpinning of the sect—the very attribute that differentiated the Shakers from the many other utopian communities that failed to achieve even the Shakers' degree of permanence.[361]

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355. *See* Alfred Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV 1119, 1134, 1149 (1988).

356. *See* ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 261; DESROCHE, *supra* note 5, at 96-97; HORGAN, *supra* note 2, at 110-37.

357. *See* Brewer, *Demographic Features*, *supra* note 11, at 33 (arguing that Shaker membership was unstable as early as the 1820s).

358. *Compare* ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 261 (noting that the causes of Shaker decline were "economic and social as well as purely religious") *with* Brewer, *Demographic Features*, *supra* note 11, at 33 (noting that a "complex interaction of internal and external ideological, social, economic, and demographic" change was at work).

For an interesting discussion of the role that the law played in speeding the decline of the Oneida Community in New York, see Carol Weisbrod, *On the Breakup of Oneida*, 14 CONN. L. REV. 717 (1982).

359. ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 262. Industrialization also decreased the demand for Shaker goods because products made outside the community could be produced much more cheaply. *See* HORGAN, *supra* note 2, at 124. Because the quality of life was often what attracted people to Shaker communities, *see* Brewer, *Demographic Factors*, *supra* note 11, at 42, any real or perceived decrease in the economic viability of Shaker communities would deter new members. *See* DESROCHE, *supra* note 5, at 113.

360. DESROCHE, *supra* note 5, at 113.

361. *See generally* NOYES, *supra* note 83, at 655 (noting that "earnest religion" countered the tendency of communities to attract and become havens for those less likely to help them succeed).

The final and common factor mentioned by all those who have considered the issue is that, by the end of the third quarter of the century, Shakers were no longer able to fill their communities with children because children were increasingly protected by other societal institutions.[362] As one commentator has noted, although the nineteenth-century family was considered a private refuge, "changes in the law of child custody, in intent and result, expressed a strong public interest in child rearing."[363]

By their decisions in child custody cases, judges reinforced the notion that American society would progress and improve only if American children were reared well. Although parents were initially charged with that responsibility, "[a]fter an initial burst of optimism that people would themselves do what reason and political principle showed to be desirable, political and legal leaders formed the view that official intervention and direction was necessary."[364] In Massachusetts, therefore, state government, reflecting the concern for child welfare that was fostered in part by judicial decisions, assumed a greater role in caring for the state's dependent children.[365]

In the early part of the century, that concern was manifested in the transformation of the local poorhouse, which had always been a refuge for any and all types of outcasts, into a variety of specialized institutions geared to meet the needs of specific populations, such as the deaf, the blind, the mentally ill, and children.[366] As the century progressed, the Commonwealth centralized the administration of these institutions.[367]

As children were valued more and more for their "distinctive attributes—impressionability, vulnerability, innocence—that required a warm, protected, and prolonged period of nurture,"[368] and less and less for their potential for making immediate economic contributions to society,[369] state mechanisms shifted toward providing suitable family environments for children. Although the state established a school in 1867 that would

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362. *See, e.g.*, ANDREWS, COMMUNITY INDUSTRIES, *supra* note 6, at 261 (attributing the isolation of Shakers to "the institutional care of children by the state"); ANDREWS, WORK AND WORSHIP, *supra* note 9, at 208 (stating that although Shakers were able to maintain their numbers by the adoption of orphans, "the establishment of orphanages and good schools" decreased the numbers available to them); HORGAN, *supra* note 2, at xx ("One of the great sources of recruitment to the Shaker ranks withered on the vine as town and county orphan asylums removed a pool of youngsters which had once filled the believers' Children's Orders.").

A slightly different explanation is offered by Desroche. He indicates that Shakers were no longer able to attract young people to communities because economic competition forced them to curtail their social services. *See* DESROCHE, *supra* note 5, at 99, 113.

363. Teitelbaum, *Family History*, *supra* note 109, at 1156.

364. *Id.* at 1168.

365. *See* 2 GRACE ABBOTT, THE CHILD AND THE STATE 9 (1938).

366. *See* KATZ, IN THE SHADOW, *supra* note 300, at 85, 109.

367. *See id.* at 86.

368. CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 5 (1977).

369. *See* KATZ, IN THE SHADOW, *supra* note 300, at 115-21.

educate a poor child, the school was thought of as a temporary home until "a good Massachusetts family" could be found to serve as a foster family.[370] Next, in 1879 and in 1887, the state passed legislation that forbade cities and towns from keeping children in almshouses, and required that the overseers of the poor take affirmative steps to place children in "respectable famil[ies]" in the state.[371] "Between 1876 and 1900, the proportion of all Massachusetts's juvenile state charges in institutions had dropped from 51 percent to 15 percent."[372]

The goals of child care reforms did not necessarily conflict with the practices of Shakers; on the contrary, some states tried to establish their own versions of "utopian" rural communities to remove dependent children from the influence of urban poverty and industry.[373] Nor were Shakers necessarily disqualified from gaining temporary access to children as foster parents.[374] The cumulative effect, however, of an increased level of state involvement in child care and protection undermined the ability of Shakers to continue to attract children.

These developments suggest some observations about social structures that are hidden by histories of doctrinal changes that ignore the context in which the doctrine is applied. First, the Shakers' occasional success in meeting judicially-imposed tests in child custody cases implies that the law did not reflect or promote a uniform vision of the family. Nineteenth-century judges tolerated some measure of pluralism in the family structures they indirectly supported by their custody decisions. Second, because the Shaker cases require us to acknowledge that nineteenth-century families took a variety of different forms, we can separate concern for child welfare from the model of the modern family that arose in the nineteenth century and has remained forceful in this era. Any number of family models, and not just the one that emerged at the end of the nineteenth century, should satisfy a court's "best interests" analysis.

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370. *See* Fifth Annual Report of the Board of State Charities of Massachusetts, January, 1869, Pub. Doc. No. 17, *in* ABBOTT, *supra* note 365, at 58.

371. An Act Forbidding the Detention of Poor Children in Almshouses, 1879 Mass. Acts, ch. 103, in ABBOTT, *supra* note 365, at 42; *see also* An Act Extending to Towns the Provisions of the Law Requiring Cities to Place Their Pauper Children in Families or Asylums, 1893 Mass. Acts, ch. 197, in *id.* at 43. Both acts allowed children to be placed either in asylums or with families, but the former was the more widespread practice. *Id.* at 9.

372. KATZ, IN THE SHADOW, *supra* note 300, at 120 (citation omitted).

373. *See* DELONE, *supra* note 110, at 54-55 (1979); Katz, *Public Education*, *supra* note 251, at 96 (describing a proposal to transport New York's "street urchins to the West as an alternative to their institutionalization").

374. *But cf.* Weisbrod, *Family Church and State*, *supra* note 240, at 760-62 (describing the persuasiveness of the arguments made by nineteenth-century religious leaders to encourage the matching of children to institutions or families of their religion); *see also* Lee Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 498 (describing Massachusetts laws of 1904 and 1905 which limited the indiscriminate placing of children in religious surroundings that differed from their own); 1904 Mass. Acts, ch. 363 (requiring that trustees of state schools "bind out children in families or homes of the religious belief of such children" unless doing so would be impracticable); 1905 Mass. Acts, ch. 464 (granting a minor child in the care of the state the right to "the free exercise of the religion of his parents").

The history of the Shakers' interaction with family law also demonstrates the unpredictability of legal doctrine. The Shaker example shows that the pluralism initially fostered by the "best interests" analysis in child custody litigation disappeared with them. Would the Shakers have been better off if they had not been successful in courts? Perhaps if they had not retained custody under a doctrine that enhanced children's welfare, they would still be a viable religious group; or, perhaps they would have died a slower death.