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Gail L. Savage

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Résumé de l'article

Curieusement, la procédure de divorce en Angleterre attribuait un rôle à un procureur du roi. Celui-ci avait droit de regard sur toutes les causes, aussi bien celles où il y avait accord entre les conjoints que celles que lui soumettaient les époux qui avaient perdu leur droit au divorce par suite de mauvaise conduite. A la suite d'une intervention du procureur, la Cour de divorce pouvait annuler un divorce improprement obtenu.

L'article présente les origines de cette institution juridique et mesure son impact sur le divorce pendant la période victorienne. Il montre aussi l'opposition croissante que suscitaient les pouvoirs du roi pendant les quarante premières années du XXe siècle.

La loi du divorce en Angleterre avait été conçue pour renforcer à la fois le pouvoir du mari au sein du couple et celui de l'Etat sur la famille.

L'évolution de la pensée des procureurs révèle les tensions qui existaient dans les rapports hommes-femmes à l'époque victorienne et une conception nouvelle de la nature du mariage qui s'est faite.

The Divorce Court and the Queen's/King's Proctor: Legal Patriarchy and the Sanctity of Marriage in England, 1861-1937

GAIL L. SAVAGE

Résumé

The office of HM Proctor, a curious aspect of English divorce procedure, investigated divorce cases based on collusion between the spouses and divorce cases brought by spouses whose own misconduct disqualified them from the right to divorce. On the basis of evidence provided by the proctor's intervention into divorce suits, the divorce court had the power to rescind divorce decrees improperly obtained. This essay describes the origins of this legal institution and delineates its impact on divorce during the Victorian period. The analysis considers the growing criticism of the proctor's powers during the first four decades of the twentieth century. English divorce law was originally intended to buttress both the power of the husband within the marital relationship and the power of the state over the family. The changing view of the proctor over seventy-five years reveals the tensions inherent in Victorian gender ideology and reflects changing attitudes towards the nature of marriage.

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The 1857 Divorce Act, which set up a civil procedure for divorce, was a legal reform narrowly construed and grudgingly conceded. The law embodied a determination to protect both the sanctity of the English family and the privileged position of English husbands. Such sentiments manifested themselves most obviously in the way the statute encoded the double standard.[1] The new law recognized only adultery as grounds for divorce. Husbands, however, could sue for divorce on the basis of even one act of adultery committed by a wife. In contrast, a wife had to demonstrate that her husband had compounded adultery with some other marital offence (i.e. cruelty, desertion, incest, bigamy, and/or sodomy) in order to obtain a divorce.

The law thus blatantly served the interests of husbands at the expense of their wives. Such inequity led Lord Lyndhurst to comment tartly that the bill lent force to "the trite, but not altogether unjust, observation, that men made the laws and women were the victims."[2] The most energetic opposition of those who, like Lyndhurst in the Lords and Gladstone in the Commons, argued for the equality of husbands and wives with respect to the grounds for divorce, could not muster enough support to alter this central aspect of the bill's provisions.

The new law provided for a divorce court intended to reinforce the power and authority of husbands. Lawmakers manifested a similar intent when they created the office of HM Proctor.[3] Legislation passed in 1861 empowered the treasury solicitor, acting in the capacity of proctor, to investigate divorce cases based on collusion between the spouses or those brought by spouses whose own misconduct debarred them from the relief provided by divorce. In this way, the proctor's office asserted the state's interest in, and authority over, the marital relationship.

That the law, made by men and administered by men, should thus give advantage to men over women did not surprise even Lord Lyndhurst.[4] But pointing to the obvious self-interested assertion of power does not exhaust the complexities of the situation. The law in practice upheld the *proper* authority of the husband, not just any authority. The courtroom became one place to contest what forms that authority might take. Furthermore, the judgements handed down imposed the weight of legal sanctions on both husbands and wives.[5] The institution of the proctor's office provides a convenient

1. In his classic analysis of the double standard, Keith Thomas draws upon the divorce debates as an important source; see "The Double Standard," *The Journal of the History of Ideas* 20 (1959): 195-216.
2. *Hansard Parliamentary Debates*, 3rd ser., Vol. 145 (1857), col. 501 (hereafter *Hansard*).
3. The office was called either the Queen's or the King's Proctor, depending on the gender of the reigning monarch.
4. Drawing upon the work of Lacan and Foucault, Susan Edwards regards the law and legal institutions as a means by which men could control women. *Female Sexuality and the Law* (Oxford, 1981), 1-18.
5. Carol Smart outlines the dangers of an over-simple identification of the power of men over women with the law in her *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London, 1984), 3-23. Mary Poovey stresses the internal contradictions of nineteenth-century gender ideology, describes some of the contests over it, and points to the authority of ideology over men as well as women in her *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Chicago, 1988).

window through which to view this process at work during the nineteenth and early-twentieth centuries.

The analysis below falls into three parts. It begins with an outline of the steps by which Parliament found it necessary to establish the proctor's office so soon after creating the facility for civil divorce. Next, an examination of the disaffection with the King's proctor that paved the way for the first major reform of English divorce law in 1937 shows how the effectiveness of the proctor undermined its authority given somewhat altered premises about the nature of marriage. Finally, an assessment of the impact of the proctor's office on the couples who sought the relief the divorce court could provide them during the Victorian period defines the extent to which attitudes towards the proctor's office had roots in the material experience of the divorve court. The double focus on gender ideology and material circumstances will illuminate the interactive relationship between the two.

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The enactment of civil divorce in 1857 did not, as Samuel Wilberforce had predicted, open "the floodgates of licence upon the hitherto blessed purity of English life."[6] Nevertheless, the early experimental days of the new court's life did see the emergence of several problems serious enough to command the attention of Parliament in 1859 and 1860. The delay in litigation, occasioned by the original requirement that three judges sit together to decide divorces, led to pressure to allow the judge-ordinary of the divorce court to sit alone. The detailed accounts of divorce cases that appeared in newspapers led to demands that such reports be suppressed in the interests of public morality.[7] In addition, the apprehension that collusive cases — those where husbands and wives acted in concert rather than adversarily, as the law required — had been passing through the court undetected led to demands for empowering an officer of the Crown to investigate and expose such cases.

In 1859 Lord Brougham, who had been a strong advocate of the 1857 Divorce Act, pointed out that, in most instances, divorce suits did not meet opposition from the accused spouse. Brougham believed that this constituted "the greatest opportunity for collusion between the parties." Since "no facility of inquiry into the nature of that collusion" existed, Brougham recommended that "there ought to be in every case the presence of the Attorney General or someone representing him on the part of the Crown and the public...."[8] Lord Cranworth suggested that the addition of a waiting period, a decree nisi followed by a lapse of time before the decree absolute, would allow any person who might have evidence of collusion time to communicate that information to an officer of the court.[9] The government subsequently introduced a bill intended

6. *Hansard*, 3rd ser., Vol. 142 (1856), cols. 1981-82.
7. The House of Commons resisted such demands, relying instead on the Benthamite maxim paraphrased by Mr. Edwin James, "that publicity was vital to the administration of English justice and to the confidence which the people of England reposed in it." (*Hansard*, 3rd ser., Vol. 156 [7 Feb. 1860], col. 630.) Not until 1926 were reports of divorce cases prohibited.
8. *Hansard*, 3rd ser., Vol. 154 (1859), cols. 561-62.
9. Ibid., col. 783.

primarily to combat delays in litigation by lengthening the list of judges authorized to sit in the divorce court, but the bill also mandated the notification of the attorney general of divorce petitions in order that he might initiate inquiries about the possibility of collusion.[10] That such a procedure might prove effective to prevent collusion met with some skepticism,[11] but the House of Lords concurred with this part of the bill.[12] When the bill reached the Commons, this provision confronted more stringent criticism. Described as "insufficient for the objects desired" and as "perfectly useless," the clause was struck out of the bill.[13]

The increase in the number of judges eligible to service the divorce court failed to alleviate the backlog of litigation. Consequently, one year later the government had to introduce another bill to give the judge-ordinary of the divorce court the authority to reach judgements alone. Those concerned about collusion took this opportunity to raise that issue again. One indignant member of Parliament, a long-time opponent of divorce, taxed the government about "the system of gross collusion" that operated in the divorce court. He warned that "Unless some remedy were applied the Court would become in a short time a sort of Encumbered Estates Court for the transfer of women."[14] More constructively, Lord Cranworth, acting with Lord Wensleydale, proposed an amendment to effect the recommendation he had made the previous year. That provided for a waiting period of three months between a decree nisi and decree absolute and empowered Her Majesty's proctor to intervene in divorce suits when a decree nisi had been obtained by collusion or by the suppression of material facts. The attorney general accepted this amendment,[15] and it became part of the bill as passed. The Queen's proctor thus took up the task of restricting the privilege of divorce to those who, under the law, merited it. In 1866 the waiting period was lengthened to six months, to allow the Queen's proctor more time in which to carry out his duty.[16] In 1873 his powers were extended to include nullity suits as well as divorce suits.

The fear of collusion articulated by lawmakers had two sources. The increase in the number of divorces after the creation of the court caused alarm and consternation among both proponents and opponents of the 1857 act. Brougham thought it "a startling fact that the new court should have granted in one day as many [divorces] as, under the old system, had been granted by Parliament in three or four years."[17] One member of Parliament described the increased volume of divorce petitions awaiting adjudication as "an appalling state of facts, and one which made it of the highest importance to take every precaution against an abuse of the law."[18]

10. Ibid., col. 143.
11. Ibid., cols. 145-46.
12. Ibid., cols. 516-18.
13. Ibid., 3rd ser., Vol. 155 (1859), cols. 1377-78.
14. Ibid., 3rd ser., Vol. 156 (1860), col. 233.
15. Ibid., 3rd ser., Vol. 158 (1860), cols. 133-34.
16. Ibid., 3rd ser., Vol. 181 (1866), cols. 1493-94.
17. Ibid., 3rd ser., Vol. 154 (1859), col. 563.
18. Ibid., 3rd ser., Vol. 160 (1860), col. 1744.

Despite the legal handicaps expressly aimed at them, the number of divorce petitions filed by wives also provoked deep-seated fears. Lord Redesdale, who had strenuously opposed the 1857 act, called attention to what he viewed as an especially pernicious consequence of its passage, "the immense number of applications for divorce by wives against husbands." These cases posed the greatest danger for collusion, he explained, because "where the woman comes as the injured person, and obtains a divorce on showing that her husband has been guilty of adultery coupled with two years' desertion without reasonable cause, both of which facts he may admit without altogether forfeiting his position in Society, there is a great chance of collusion when both are mutually tired of each other, and desirous of forming new engagements."[19] Redesdale's sentiments found an echo during the Commons debate in 1860 when one speaker warned that "the danger of collusion was in cases where the wife had the doubtful boon given to her of obtaining a divorce...."[20] Presumably the Queen's proctor might stem this tide of litigious wives.

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The office of HM proctor thus formed part of the panoply of restrictions with which Parliament hedged the provision of divorce. In particular, lawmakers endeavoured to enable men to rid themselves of erring spouses without allowing wives the same measure of freedom to act against merely adulterous husbands. This effort enjoyed a measure of success in so far as the law itself served to restrain the demand for divorce in England. Despite the fears expressed in Parliament, England distinguished itself among those nations that had legalized divorce by its extremely low divorce rate. Indeed, the stringency of the divorce law provoked a movement for divorce law reform by the end of the nineteenth century. This led to the 1909 appointment of a royal commission on divorce and matrimonial causes that conducted an exhaustive study of divorce.[21]

Headed by Lord Gorell,[22] who had himself served as president of the divorce court, the royal commission published a majority report in 1912 recommending a comprehensive agenda of reform. This included the equalization of grounds for divorce between husband and wife; the extension of grounds beyond adultery to include cruelty, desertion, and incurable insanity; and a decentralization of the court to bring its services within the reach of the poor. None of these recommendations became law until after the First World War. By that time the office of HM proctor emerged as a symbol of the anomalies, inequities, and irrationality of English divorce law.

Outright ridicule of the role of the proctor's office in the English divorce process became an important feature of the post-World War I movement for divorce law reform. Only a few hints of such a dramatic transformation of opinion appear in the

19. Ibid., 3rd ser., Vol. 154 (1859), col. 568.
20. Ibid., 3rd ser., Vol. 160 (1860), col. 1753.
21. See Ann Sumner Holmes, "Hard Cases and Bad Laws: Divorce Reform in England, 1909-1937," Ph.D. diss., Vanderbilt University, 1986, for a survey of these developments.
22. For Lord Gorell's contribution to divorce law reform see E. S. P. Haynes, "The Late Lord Gorell and Divorce Law Reform," in *Divorce As It Might Be* (Cambridge, 1915), 59-70 and J. E. G. De Montmorency, *John Gorell Barnes, First Lord Gorell: A Memoir* (London, 1920).

comprehensive study of divorce conducted by the 1909 royal commission. Although it recognized the futility of refusing divorce to couples when both spouses desired it or were at fault, its majority report nevertheless maintained that misconduct on the part of the petitioner should continue to be a discretionary bar to divorce. "The object of the legislature should be to discourage immorality," the report declared, warning that "it does not fulfil this object, where it places no difficulty in the way of a petitioner, who has been guilty of immorality, being entitled to sue on account of the immorality of the other spouse."[23]

Testimony before the commission on the question of the King's proctor came only from members of the legal profession. W. R. Fairfax, president of the Divorce Law Reform Union, and Sir George Lewis, a retired solicitor who had entered practice in 1856 and had vast experience with divorce practice since the creation of the divorce court in 1857, argued for abolition of the office. They believed that mutual misconduct ought not to be a bar to divorce.[24] Frederick Palmer, another London solicitor with much experience in the divorce court, made the strongest statement against the King's proctor, calling the office "an extremely mischievous one" that "accomplishes no good object." Palmer argued that the King's proctor promoted immorality by "his attempts to preserve the matrimonial tie between two persons whose differences are wholly irreconcilable. . . . The sum total of his success is the propagation of irregular unions, adultery and prostitution." Palmer recommended the abolition of the King's proctor, both in collusion cases and in cases of recrimination, where marital misconduct disqualified the petitioner from meriting a divorce. Palmer, however, testified that he was prepared to accept divorce by mutual consent, a much more radical position than that espoused by the bulk of the witnesses before the commission.[25]

The views of Lord Alverstone, who, as lord chief justice, supervised the office of the King's proctor, provide a marked contrast. He expressed great concern that divorce not be made too easy, arguing that there was "the strongest necessity for the office" of the King's proctor in order to "prevent improper divorces," by which he meant both those brought to the court collusively and those brought by petitioners debarred from divorce by their own misconduct.[26] The president of the divorce court, Sir J. Bigham, took a more moderate line. He thought that collusion, strictly construed, did not often occur but that the doctrine of recrimination produced the bulk of the cases that went to the King's proctor. Bigham suggested that the court ought to be able to exercise its discretion on behalf of petitioners whose own misconduct had been "either of excusable or of a slight character."[27]

The Earl of Desart, who had held the office of treasury solicitor from 1895 until 1909 and therefore had acted as HM proctor during that time, defended his office as

23. *Royal Commission on Divorce and Matrimonial Causes, Majority Report,* Cd. 6478, 121-22.
24. *Royal Commission on Divorce and Matrimonial Causes, Minutes of Evidence,* Vol. 1, Cd. 6479, 211, and 84.
25. Ibid., Vol. 2, 98-99.
26. Ibid., 124 and 121.
27. Ibid., Vol. 1, 40.

consonant with public opinion. In his judgement, the time had not yet come "when the law ought to say that a guilty person is entitled to the relief of divorce...." Desart, however, found that the law as enforced produced numerous cases of hardship, and he admitted that "as King's Proctor I have felt over and over again . . . that my intervention has done more harm than good."[28] Desart nevertheless remained unwilling to change the principle of requiring the petitioning spouse to be innocent of marital misconduct upheld by the law. He suggested, however, that allowing the judge greater discretion to grant divorces in recrimination cases should mitigate the harm caused by rigidly adhering to this principle.

The discussion of the proctor's office soon commanded an audience that reached beyond the legal community, but it also lost its moderate tone. During the interwar period the King's proctor became a contemptible and pathetic figure, a lightning rod for pointed satire directed at the divorce law. The proctor's intervention in the Bamberger divorce case in 1920 marks the beginning of the public attacks on the proctor's office. This case, which occupied the divorce court for six days and cost the proctor's office £989, provoked indignant questions in Parliament. The case inspired Horatio Bottomley to denounce the King's proctor as a "constant menace . . . to the domestic peace of the country" and to call for its abolition.[29]

E. S. P. Haynes, an indefatigable campaigner for divorce law reform, characterized the proctor's official activities as "degrading, un-English, and anti-social."[30] It was an institution "conceived by men with dirty minds who revelled in the discovery of secret scandals and were opposed to divorce in principle." Haynes argued for abolishing the office on the grounds that "there is nothing whatever to be said for wasting public funds on prurient espionage and scandalmongering by State officials or for invoking the sanctions of so-called 'morality' to perpetuate the separation of miserable spouses who have every reason to demand the legal confirmation of a divorce which already exists in every other sense."[31]

A. P. Herbert, a lawyer, a humorist, and a member of Parliament, characterized the King's proctor as an official Peeping Tom. Herbert pointed out the outrage of "Anonymous Letters, back-door espionage, the cross-examination of cooks, the bribery of maids and porters, the searching of hotel registers, the watching of windows, the tracking of taxi-cabs, the exploitation of malicious gossip and interested malignity — and all this done in the King's name to preserve the sanctity of the home."[32] In 1934 A. P. Herbert's satiric novel, *Holy Deadlock,* attracted the attention of Parliament at question time because "His Majesty's judges and courts, and the legal code which they administer

28. Ibid., Vol. 2, 141.
29. *Times* (London), 11-13 and 18-20 March 1920; *Parliamentary Debates* (Commons), 5th ser., Vol. 127 (1920), col. 912; vol. 133 (1920), col. 32.
30. E. S. P. Haynes, "Lord Gorell's Matrimonial Causes Bill," *The English Review* 32 (January-June 1921): 462-63.
31. E. S. P. Haynes, "Abolish the King's Proctor," *Spectator* , 24 February 1933.
32. A. P. Herbert, "Pale, M. R., v. Pale, J. J., and Hume (The King's Proctor Showing Cause)," in *Uncommon Law* (London, n.d.), 449. In this collection of satiric essays on English law Herbert also treated the divorce court in "Pratt, G. E. v. Pratt, P. and Mugg," pp. 36-41; "Marrowfat v. Marrowfat," pp. 95-99; and "Tyke v. Tyke," pp. 144-52.

in matrimonial causes, are held up to public ridicule and contempt...."[33] The King's proctor played a central role in the tragi-comedy recounted by Hebert.

Herbert's novel lampooned English divorce law by telling the story of the thwarted efforts of John and Mary Adam, two likeable but hopelessly incompatible people, to obtain a divorce. Since the law recognized only adultery as grounds for divorce, John had "to behave like a gentleman" and take on the role of adulterer in order to protect the reputations of Mary, Mary's lover (whose job at the BBC would be jeopardized if he were named in a divorce suit), and the woman John wished to marry once he was free. John accordingly met a young lady, provided by an agency, at a seaside hotel in Brighton. No actual adultery took place, of course. The agency merely arranged for the appearance of an "other woman" to give the illusion of adultery in order to satisfy the requirements of the law. This scenario, known as a "hotel-bill" divorce, became notorious after the 1923 Matrimonial Causes Act, one small monument to sexual equality, made adultery committed by either spouse grounds for divorce.

After many legal tribulations, Mary finally received a divorce decree nisi, which under English law could become a decree absolute after a six-month waiting period. This gave the court the opportunity to consider any evidence that the couple had colluded with one another (which John and Mary certainly had) or any evidence that the petitioning spouse had been guilty of some marital transgression. Unfortunately for the future happiness of John and Mary, an anonymous letter alerted the King's proctor to the existence of Mary's lover, with whom she had spent only one night. The subsequent suit brought by the King's proctor ended John and Mary's hopes for divorce, leaving them tied to one another, unable to marry more suitable partners. John Adam's lawyer summed up the impact of the law on the lives of those involved in the case:

> Three people have been compelled to behave indecently.... One chaste woman has been compelled to commit adultery. Four people have been prevented from marrying the person of their choice, and one man has lost his job. But remunerative employment has been provided for two judges, one attorney-general, one king's proctor, the registrar and his staff, two solicitors and their staffs, two king's counsel and three juniors, two or three detectives, one or two policemen, Miss Myrtle, Miss Tott, and sundry servants of the law, not to mention the court servants and the domestic staffs of the various hotels.[34]

Although increasingly the target of "coarse and unfeeling ribaldry," the King's proctor still exercised real power over the lives of those who came before the divorce court. The vigilance of the proctor's office during the six-month waiting period meant that the petitioning spouse must, in the words of one cynical critic, "remain chaste, or, if that is too difficult, go for a nice holiday in the West Indies, where the King's Proctor, whose funds are limited, will be unable to follow...."[35] In real life, the threat of the King's proctor had a less comic aspect, as Dora Russell's well-grounded fears of his interference in her divorce from Bertrand Russell illustrate. The proctor's intervention impeded the

33. *Parliamentary Debates* (Commons), 5th ser., Vol. 290 (1934), cols. 566 and 1690.
34. A. P. Herbert, *Holy Deadlock* (New York, 1934), 366.
35. Ambrose Hoopington, *A Letter to a Young Lady on Her Approaching Marriage* (London, 1934), 22 and 20.

progress of their divorce action, greatly adding to the trauma and stress of an already difficult situation.[36]

Despite this effusion of ridicule, hatred, and fear directed at the proctor's office, it continued to have defenders. The bill to reform English divorce law, introduced into the House of Commons by A. P. Herbert in 1936, eliminated the waiting period between the decree nisi and the decree absolute, thus indirectly abolishing the King's proctor by removing the opportunity for intervention. Herbert's bill achieved a remarkable success, passing into law as the 1937 Matrimonial Causes Act with most of its original clauses intact. It thus effected the first major overhaul of English divorce law since the 1857 Matrimonial Causes Act set up the divorce court.[37] The provision abolishing the decree nisi, however, was deleted from the bill during the committee stage.

The intervention of the government deflected this threat to the life of the King's proctor. Herbert had to face the incontrovertible political reality that he could not get his bill through Parliament without some government assistance and such assistance came at a price. The lord chancellor, Lord Halisham, and the president of the divorce court, Lord Merriman, both had grave reservations about Hebert's bill.[38] Lord Merriman in particular held deeply felt views about collusive divorce cases. He believed that, although they accounted for only "a comparatively small percentage of cases," these unfortunately included "the most talked about in general society and there are definite signs that the example they set is spreading."

Merriman thought that divorce law had enormous significance for the respect accorded the law by society and that the popular belief that divorce could be easily obtained by means of collusion undermined that respect. He argued that divorce law had a greater impact on people's lives than "the laws relating to motoring or drink, and things may easily reach the stage where they have the same effect on the public attitude to the law generally as had Bootlegging in the United States." Holding such views, it is not surprising that Merriman adamantly opposed abolishing the King's proctor.[39]

The attorney general and the home secretary, Sir John Simon, were more inclined to take a favourable view of Herbert's bill because, as Sir Claude Schuster, the permanent secretary of the lord chancellor's office, explained: "They think that some amendment of the existing law is inevitable in the near future and that it would be less embarrassing if that amendment should be effected by a Bill introduced by a Private Member than if the Government were themselves forced to introduce legislation."[40] Nevertheless, they agreed with the King's proctor, Thomas Barnes, who took the view that, as long as collusion was

36. Dora Russell, *The Tamerisk Tree* (New York, 1975), 263 and 284-85.
37. See A. P. Herbert, *The Ayes Have It: The Story of the Marriage Bill* (London, 1937) for his version of this success.
38. Lord Merriman wrote a long letter to the lord chancellor detailing his criticisms of the bill when Herbert first introduced it in the spring of 1936. Public Record Office (PRO), LCO 2/1195, Lord Merriman to lord chancellor, "Observations on A. P. Herbert's Marriage Bill," 21 April 1936.
39. PRO, LCO 2/1195, Lord Merriman to Sir Claude Schuster, 16 November 1936.
40. PRO, LCO 2/1195, Claude Schuster to the lord chancellor, 24 November 1936.

prohibited by law, the office was necessary to enforce that prohibition.[41] The attorney general, after consulting with Herbert and his supporters, thought he would have no difficulty in eliminating the provision of the bill that abolished the decree nisi.[42] His assessment of the situation proved accurate; Herbert agreed to the deletion of that clause, frankly explaining that he had not changed his views about the decree nisi and the King's proctor but that government opposition necessitated such a compromise to ensure the bill's passage.[43]

Altering the bill to meet government requirements received some criticism in subsequent debate. Lord Reading, for instance, voiced regret that the original clause had not been retained and so have "the effect of abolishing that invidious and anomalous office, the King's Proctor, once and for all."[44] The archbishop of Canterbury, however, more likely spoke for a majority opinion when he declared that "the law exists to maintain that the dissolution of marriage is no mere private arrangement and for this end to prevent collusion."[45] The King's proctor consequently continued to keep watch for collusive couples and undeserving petitioners, remaining a part of English divorce law until the 1970s.

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Doubts about the value and efficacy of the role played by the proctor's office in divorce proceedings derived in part from changes in attitudes towards the relationship between the state and marriage. The growing conviction that the proctor's office had a deleterious impact on the lives of those who brought their marital grievances to the divorce court also raised questions about the legitimacy of the proctor's power to intervene in divorce litigation. Courtroom experience of the practical effect of the proctor's intervention on the lives of estranged spouses thus first engendered the doubts, tentatively voiced before the royal commission, that later led to a challenge of the fundamental principles that formed the basis for the proctor's authority.

The Queen's proctor began work in 1861. The early judgements, which set precedents for subsequent cases, tended to increase the power and authority of the office. In Gray v. Gray the court refused to allow a petitioner to withdraw her suit after the Queen's proctor intervened. The judge declared that "a sham case founded on collusion must be fully exposed" and that one of the parties must bear the court costs.[46] In the case of Drummond v. Drummond, a wife sued for divorce on the grounds of adultery and cruelty. The Queen's proctor intervened and proved collusion between the spouses and adultery on the part of the petitioner. The petitioner's counsel contended that this did not constitute an answer to the wife's charge of cruelty against her husband, but the judge ruled that "a wife guilty of adultery cannot be a petitioner in this court on the grounds of

41. PRO, LCO 2/1195, T. J. B., "Memorandum on Marriage Bill," n.d.
42. PRO, LCO 2/1195, Schuster to the lord chancellor, 24 November 1936.
43. *Parliamentary Debates*, House of Commons Standing Committee A, Official Report Marriage Bill (2 February 1937), cols. 261-62.
44. *Parliamentary Debates* (Lords), 5th ser., Vol. 105 (1937), col. 781.
45. Ibid., col. 746.
46. 2 SW. & TR., 996-97.

any matrimonial offenses of the husband."[47] These decisions, in the Queen's proctor's first year, seemed to lend credence to both the fears (that wives' petitions were more likely to be collusive) and the hopes (that an official watchdog for collusion could thwart such cases) expressed by lawmakers.

In subsequent decisions, however, the court also held husbands who petitioned for divorce to the same high standards of behaviour. In Hulse v. Hulse and Tavernor, for example, the court decided that a petitioner's adultery after the decree nisi formed grounds for an intervention by the Queen's proctor. In his explanation of his decision, the judge commented that "it can hardly be conceived that the legislature intended that a man or woman living in open adultery should be entitled to claim at the hands of the court a decree absolute dissolving their marriage...." This case produced another precedent when the judge ruled that, since there was no danger of collusion between the petitioner and the Queen's proctor, the latter did not have to adhere to as strict a standard of proof of identity as that required in divorce suits.[48]

Although the statute allowed the court to exercise discretion in granting or withholding a divorce decree when the petitioner had been guilty of misconduct, the court proved reluctant to exercise that discretion. In Boulton v. Boulton, for instance, the court determined that a wife's open and long-standing adultery did not excuse the husband's subsequent bigamy. "I have nothing to do with the conduct of the wife," the judge decided, "it is the conduct of the husband I have to deal with."[49] In Noble v. Noble and Goodman, the judge explained that "the exercise of such discretion could not depend merely on the more or less pardonable or excusable character of the adultery proved." The court, however, could extend its discretion in favor of the petitioner when "the party was innocent of an intention to commit adultery at all." If, for instance, a man remarried, thinking his wife dead, he would not therefore be denied a divorce decree.[50]

This strict standard proved troubling to those practising in the divorce court because it sometimes prohibited leniency to one group that appeared eminently deserving of the court's mercy — wives driven to adultery by the husband's mistreatment. Frederick Palmer, the most energetic critic of the King's proctor before the Royal Commission on Divorce, called upon this image when he indignantly described a case in which the King's proctor's intervention had "prevented a woman tied to an unmitigated scoundrel from forming an honourable union with a man of good birth, her husband against whom she had obtained a decree nisi, being a most worthless blackguard, and to this rascal this woman is tied for life by the action of the King's Proctor."[51] In this way that officer did more harm than good, as the Earl of Desart had put it to the royal commission.

The court itself moved to rectify this injustice in 1910, when it awarded a divorce to a woman who had not only committed adultery but who had also lied about it to the

47. 2 SW. & TR., 1000-01.
48. Law Rep. 2 (P & M), 259 and 337.
49. 2 SW. & TR., 1146.
50. Noble v. Noble and Goodman, 8 June 1869, Law Rep., Vol. 1, 693.
51. *Royal Commission on Divorce and Matrimonial Causes, Minutes of Evidence,* Vol. 2, Cd. 6480, 99.

court. The judge based his decision on his vision of the essentially different natures of men and women:

> in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man: and that what may perhaps be excusable in the case of the woman would not be excusable in the case of the man. Where you find that the woman has been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this Court does and I hope always will, make allowances and treat her with leniency.[52]

The assumptions implicit in this line of argument contrast with the fears of women expressed in the parliamentary debates about divorce in 1857,[53] 1859, and 1860. The apparent contradiction, however, masks an overarching unity. The earlier determination to safeguard husbands from legal action by their wives and the later indulgence towards wives' petitions manifest different aspects of the same vision of gender difference that underlay the statutory double standard. The divorce law, as enacted, privileged husbands and restrained wives in order to protect the power and authority of the former. The divorce law, as interpreted here by the court, held men more strictly accountable for their behaviour than their wives, by virtue of the greater weakness imputed to women.[54]

The practical consequences of the law and its administration applied only to those couples who brought their marital grievances into the public arena. The Queen's proctor actually intervened in comparatively few cases, fewer than 10 per cent (see Table 1). The prospect of intervention would have nevertheless loomed large in the minds of litigants for two reasons. First, many more cases than this underwent some investigation or scrutiny by the Queen's proctor.[55] The attorney general authorized intervention only when certain that action by the Queen's proctor would achieve sucess.[56] This policy is

52. Pretty v. Pretty, 13, 14, 15, and 20 December 1910, Law Rep. (P.), 87.

53. On this point see Gail L. Savage, "'Intended Only for the Husband': Gender and Class and the Provision for Divorce in England, 1858-1868," unpublished paper. Discussions of the 1857 Divorce Act include Mary Poovey, "Covered But Not Bound: Caroline Norton and the 1857 Matrimonial Causes Act," *Feminist Studies* 14 (Fall 1988): 467-85; Margaret K. Woodhouse, "The Marriage and Divorce Bill of 1857," *The American Journal of Legal History* 3 (1959): 260-75; Mary Lyndon Shanley, " 'One Must Ride Behind': Married Women's Rights and the Divorce Act of 1857," *Victorian Studies* 25 (Spring 1982): 355-76; Dorothy Stetson, *A Woman's Issue: The Politics of Family Law Reform in England* (London, 1982), 28-50; Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto and Buffalo, 1983), 88-110; and Allen Horstman, *Victorian Divorce* (New York, 1985), 46-84.

54. The comparative leniency accorded to wives in the divorce court recalls the treatment granted middle-class murderesses. In both cases, whatever leniency enjoyed by women paradoxically derived from the same ideological assumptions that disadvantaged them socially and legally. Mary S. Hartman, *Victorian Murderesses* (London, 1985), 1 and 8.

55. The Earl of Desart told the royal commission that the proctor's office looked at 306 to 631 cases a year when the number of actual interventions ranged from eleven to thirty-four; *Royal Commission on Divorce and Matrimonial Causes, Minutes of Evidence*, Vol. 2, Cd. 6480, 145.

56. Lord Alverstone explained this policy in his testimony to the royal commission; ibid., 120.

Table 1
Number of Decrees Nisi Granted

Annual Average				Intervention by Queen's (and since 1901 King's) Proctor	Decrees reversed
1858-61	Husbands' petitions	86.25	141.25	1.25	.75
	Wives' "	55.00			
1862-66	Husbands' "	95.2	154.4	4.0	3.2
	Wives' "	59.2			
1867-71	Husbands' "	101.0	179.0	8.4	5.6
	Wives' "	78.0			
1872-76	Husbands' "	152.4	261.8	10.8	8.4
	Wives' "	109.4			
1877-81	Husbands' "	188.0	328.8	7.6	6.8
	Wives' "	140.8			
1882-86	Husbands' "	201.2	349.2	22.6	18.2
	Wives' "	148.0			
1884-88*	Husbands' "	208.2	364.4	24.4	19.0
	Wives' "	156.2			
1889-93	Husbands' "	210.6	365.6	24.0	21.6
	Wives' "	155.0			
1894-98	Husbands' "	—	472.8	17.4	14.2
	Wives' "	—			
1899-1903	Husbands' "	351.0	568.4	21.0	17.2
	Wives' "	217.4			
1904-08	Husbands' "	354.6	635.4	27.6	24.2
	Wives' "	280.8			
1905-09	Husbands' "	360.6	645.6	27.4	24.4
	Wives' "	285.0			
1906-10	Husbands' "	349.6	688.6	25.9	23.4
	Wives' "	289.0			

*The want of sequence in the figures arises from the comparative tables in the statistics having been prepared at different times.
Note: The highest was in 1903, viz., 36.
Source: United Kingdom. Parliament. *Royal Commission on Divorce and Matrimonial Causes, Majority Report*, Cd. 6478, 54.

reflected by the success rate which remained consistently high, averaging 85.48 per cent throughout the nineteenth century. The rate of success fell below 60 per cent only once and, in some years (for example, in 1889, 1900, 1906, and 1907), the proctor's office won every case it entered.[57]

57. Gail L. Savage, "Divorce and the Law in England and France Prior to the First World War," *Journal of Social History* (March 1988): 506.

A systematic sample[58] of petitions filed before the divorce court between 1858 and 1901 included only thirty-three cases in which the Queen's proctor intervened. Of these, the Queen's proctor won twenty-five — sixteen against husbands and nine against wives — a success rate of about 75 per cent. This rate did not vary much whether the proctor challenged a petition filed by a husband or by a wife, but husbands' petitions appear to have been somewhat more vulnerable to the Queen's proctor's scrutiny. Only one-third, or eleven, of the interventions challenged a wife's petition for divorce, although wives filed, on average, approximately 40 per cent of all divorce petitions.[59]

The couples singled out by the Queen's proctor came from the full social range served by the divorce court. Seven were clearly at least of the upper-middle class, the husband identified as a gentleman by the petition. This group included the infamous Crawford case, where Sir Charles Dilke, who had been named as a corespondent, tried to clear his name by calling upon the Queen's proctor procedure. Another ten couples were middle or lower-middle class, including a master mariner, two merchants, a maltster, a bookkeeper, a shorthand writer, a solicitor's clerk, two travellers, and a corn salesman. The shopkeeper/artisan class produced another nine of the cases. This group included a draper, a tailor, a brass finisher, a jeweller, a hair-dresser, a bookbinder, a ship's engineer, a tobacconist, and a cabinet maker. Six working-class couples also fell afoul of the Queen's proctor—a ship's mate, a ship's steward, two miners, a bricklayer, and a farm labourer. Only once did the surviving records fail to identify the work or social position of the husband. These numbers are small, but this pattern reflects the social distribution of the couples appearing before the court,[60] and does not point to any class bias on the part of the proctor's office.

The sample cases show that the criticisms of HM proctor's office articulated by witnesses before the royal commission had roots in the actual experiences of those couples who brought their cases to court. The case of Williams v. Williams gives substance to the image of the wronged wife invoked by Palmer's testimony. Here, the action of the divorce court left a wife tied to a man who had, by his misconduct, forfeited the rightful authority of the husband. Catherine Williams had married William Williams, a coal miner, in 1875, and they had five children together. In her 1891 divorce petition Mrs. Williams accused her husband of deserting her in 1886 and of committing adultery. The court granted her a divorce decree nisi and custody of the children, but before the decree could be made absolute the Queen's proctor intervened, alleging that she had in 1887 bigamously married and committed adultery with one John Lewis, who had been "killed in an explosion at the National Colliery, Wattstown, on the 18th day of February 1887." The death of Lewis did not wipe out the legal stigma of her transgression four years previous to her petition. The court accordingly rescinded the divorce decree and cited the petitioner for the proctor's costs, which amounted to

58. A sampling ratio of one in ten from 1858 to 1877 and one in twenty from 1878 to 1901 produced a total of 1,622 cases of which 1,173 were divorces. Divorce files are deposited in the Public Record Office and are open to researchers subject to a seventy-five year rule.

59. Savage, "Divorce and the Law," 507.

60. Savage, " 'Intended Only for the Husband', " 15.

£24.0.2.[61] Thus Catherine Williams had to remain the wife of William Williams, a husband demonstrably unwilling to support his family.

The reversal of a husband's petition could have a similar effect. In 1882 Edwin Wilson, a solicitor's clerk, filed for divorce from his wife on the grounds that she had been living as a prostitute since 1877. The court granted Wilson a decree nisi, but the Queen's proctor intervened, arguing that it had been at the instigation of Wilson himself that his wife had become a prostitute, and that he had taken her earnings. Wilson had thus been guilty of cruelty to his wife and had condoned and connived her adultery. The Queen's proctor also found that he had been guilty of adultery himself. Consequently, Wilson did not merit the divorce he petitioned for. The court duly rescinded the decree nisi and charged Wilson with the Queen's proctor's costs of £25.14.4. This condemned Sarah Wilson to life-long marriage with the man who had pressured her into a life of prostitution.[62]

These cases give substance to the "wronged wife" singled out by judges and highlighted in testimony before the royal commission. In most instances, however, the divorce records do not identify such clear-cut villains and victims. More commonly the charges and countercharges of the spouses make such a value judgement all but impossible, indicating instead the domestic tragedy of a relationship irretrievably broken down. If both spouses had subsequently formed new relationships, they became vulnerable to the Queen's proctor's action. In the case of Naylor v. Naylor and Baynes, the Queen's proctor intervening, the husband filed a petition for divorce in 1884 charging his wife with adultery. James Naylor had married Mary Jane Hatton in Manchester in 1861. They had three children. Mrs. Naylor left her husband in 1880 and, since that time, had lived with Joseph Baynes, who had fathered her illegitimate child. Mrs. Naylor charged that her husband had actually deserted her in 1874 and had not been in touch with her until he had filed his petition for divorce. Information provided by a resident of Manchester, the Naylors' home, led the Queen's proctor to intervene and establish that Naylor had himself been living with another woman.[63] This negated his right to a divorce on the grounds of his wife's proven adultery, and the court rescinded the decree nisi it had granted him. This left the Naylors married to one another even though they had each established new, extramarital, households.[64] This case illustrates what Frederick Palmer meant by the "irregular unions" formed by those whose divorces the Queen's proctor prevented. Although common, these cases did not command the special sympathy of the court or the public that the wronged wife cases did until the years after the First World War saw their great proliferation.

The behaviour of the individual who took the trouble to alert the Queen's proctor to Naylor's adultery raises the question of the motivation of those who provided information to that officer. The surviving records of the divorce court are not full enough to provide a satisfactory answer to this question, although they do contain some suggestive hints. A

61. PRO, J77/473/4394, Williams v. Williams, the Queen's proctor showing cause, 3 June 1891.
62. PRO, J77/277/8663, Wilson v. Wilson, the Queen's proctor intervening, 22 May 1882.
63. PRO, TS29/2, 28.
64. PRO, J77/322/9643, Naylor v. Naylor and Baynes, the Queen's proctor intervening, 8 July 1884.

listing of 217 Queen's proctor interventions between January of 1876 and December of 1889 shows that the court or the Queen's proctor's office itself directed ninety-nine of these.[65] This substantiates the seriousness with which the court took this aspect of its duties, further indicated by the opinions of divorce court judges and by the testimony of the court officials before the 1909 royal commission. The others were instituted on the basis of information from outside informants.

Most often a solicitor provided the information upon which the Queen's proctor acted, but the records do not consistently indicate who the solicitor represented. In some cases the corespondent, or one of his relatives, is identified as the informant. The most famous example of this is the case of Crawford v. Crawford and Dilke.[66] As a matter of course, the corespondent would wish to distance himself from the scandal associated with divorce. As Dilke discovered, however, the office of the Queen's proctor was not intended to establish the innocence of the corespondent but rather to block an unmerited divorce decree.[67] A wife who found herself the respondent in a divorce suit could conceivably have a similar desire to protect her reputation. These two factors might help to explain why a husband's petition appears to be somewhat more vulnerable to the Queen's proctor's attentions than a wife's. A divorced husband presumably would be somewhat less subject to social disapprobation than a divorced wife but might be interested in retaining control over a wife's person or property. Although reasonable surmises, any such explanations must remain in the realm of speculation because of the lack of direct evidence to support them.

In a number of instances, the Queen's proctor instituted proceedings based on information provided by members of the community where the divorcing couple resided (as in the case of the Naylors) or by anonymous letters. Here the Queen's proctor acted in its intended capacity as an embodiment of public sentiment enforcing standards of marital behavior by punishing those who had openly violated those standards. Ironically, the punishment condemned the transgressor to continued marriage.

The various avenues available to trigger proceedings by HM proctor and the readiness of legal officials, litigants, and the general public to avail themselves of these avenues manifest two aspects of the proctor's character. On the one hand, he served to enforce the high standards of respectable behaviour that became a hallmark of Victorian morality.[68] This enjoined self-restraint in sexual activity on husbands as well as wives. On the other hand, the Queen's proctor's procedure further enhanced the adversarial nature of divorce proceedings, giving spouses locked in marital and legal combat yet another opportunity to have at one another.[69]

65. PRO, TS 29/2.
66. PRO, J77/342/0296, Crawford v. Crawford and Dilke, 5 August 1885.
67. Law Rep. (Probate), Vol. 11, 150-58.
68. See Peter T. Cominos, "Late-Victorian Sexual Respectability and the Social System," *International Review of Social History* 8 (1963): 18-48 and 216-50 for a thorough discussion. See also Allen Horstman, *Victorian Divorce*, 80-84 on the 1857 Divorce Act as an embodiment of respectable opinion.
69. Dora Russell believed that the necessity for adversarial proceedings needlessly exacerbated the estrangement between she and Bertrand Russell: *The Tamerisk Tree*, 253.

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Because so few people divorced, and only a few of these actually fell victim to the proctor's scrutiny, the importance of this legal institution rests more on what it signified than on what it actually did. That significance, subject to continuing interpretation and reinterpretation, resonated with the contending demands of power and protection implicit in the Victorian ideology of gender difference. The proctor's office was conceived as a key component of English divorce law, which Parliament originally intended as both an extension of the state's power over marriage and as a protection for the husband's marital authority. Over time jurists interpreted and applied the law so that the proctor's office became a means to enforce the sanctity of marriage upon husbands as well as wives. That enforcement, which entailed withholding divorce from the undeserving, confronted the legal community with the spectre of wronged wives irremediably tied to erring, irresponsible, or abusive husbands.

Such a result raised questions about the social efficacy of the legal apparatus. The law as written and the law as applied manifested different, potentially contradictory, elements of patriarchal authority. Patriarchal marriage privileged the power of men, but it also offered to protect weaker wives. In practice, it proved quite impossible for the divorce court to achieve both these goals simultaneously. The consequent tension provided one impetus to legal reform.

The hardship produced by the rigour with which the law operated acquired a different meaning after the First World War. Divorce itself, as the writings of Haynes and Herbert show, became for many the state's legal recognition of a relationship already ended rather than a mechanism whereby the state upheld the marital relationship at all costs by punishing the guilty and defending the innocent. At the same time, the enactment of a single standard of marital morality by the 1923 Matrimonial Causes Act gave free rein to husbands willing to engage in "gentlemanly" adultery — a concept implicit in the double standard manifested in the 1857 Divorce Act and central to the plot of *Holy Deadlock* — in order to give their wives a basis for a divorce action. In the view of those who advocated divorce law reform, the King's proctor's efforts to curb this evasion of the requirements of the law represented an unconscionable obstacle to the future marital happiness and fulfillment of those unfortunates who found themselves trapped in unhappy marriages.

These transformations of opinion suggest the emergence of a new measure by which to judge the sanctification of the marital relationship. The relegation of marital happiness to the private concern of the individuals involved called into question the state's interest in enforcing the continuance of the marital relationship. Within this context, the double standard of sexual morality did not disappear, but manifested itself in collusive challenges to the authority of law.[70]

70. For another example of how attitudes towards marital happiness changed during the interwar period without challenging the ideologies of separate spheres and domesticity, see Ellen M. Holtzman, "The Pursuit of Married Love: Women's Attitudes Toward Sexuality and Marriage in Great Britain, 1918-1939," *Journal of Social History* 16 (1982): 39-51.

In the wake of these developments, the 1937 Herbert Act accomplished an important but limited reform. Although it significantly broadened the grounds for divorce, the proposition espoused by many of its supporters, that the state ought to facilitate the pursuit of marital happiness rather than punish those guilty of marital transgressions, had not gained sufficient strength in the 1930s to alter the basic premises of English divorce law laid down during Victoria's reign. According to these, the mutual desire of both spouses to end an unhappy marriage, thwarted by a divorce law intended to protect the state as well as the husband, would inevitably express itself collusively if the state did not assiduously guard against that likelihood.