

# A SECT APART: A HISTORY OF THE LEGAL TROUBLES OF THE SHAKERS

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## INTRODUCTION

I will add here an item further in regard to that ocean voyage of Ann Lee and her people. As I wrote you in a former letter, the ship which brought them came very near sinking in mid-ocean with all on board, and was saved by a miracle. At that time the people of America were commencing the struggle for independence. The Angel of the Lord was seen by our Mother, passing on in advance of the ship, singing with a mighty voice:

"From the Heaven of Heavens  
O'er sea and land I fly,  
Crying sweet, sweet liberty!  
Peace, peace upon earth,  
The hand of the Lord  
Has freed America.  
O bless this blessed day,  
Your freedom, freedom claim;  
And prepare ye, all people,  
Salvation to gain."<sup>1</sup>

This 1884 account of the voyage of a small religious sect, the original Shakers, from their native England to the British-North American colonies in 1774 may be taken to indicate their acceptance of the ideology of freedom of religion which they felt prevailed in the New World. If so, it is striking evidence of the tenacity of this ideology in the harsh light of social and legal reality. For of all the numerous small religious sects that existed in the United States in the nineteenth century, the Shakers, now a virtually extinct and moribund group, were among the

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1. A. MACE, THE ALETHEIA: SPIRIT OF TRUTH 60-61 (1889).

most frequent targets of law suits, legislative investigations, and restrictive statutes. While never threatened with the deadly violence demonstrated against the Mormons, the Shakers nonetheless frequently experienced officially sanctioned discrimination. Remarkable it is that after more than half a century of such pressures and such negative experiences with the apparatus of government, the Shakers persisted in associating America with "freedom" and "sweet liberty."

This article explores the Shaker experience in nineteenth century America, particularly their relationship to legislative bodies and courts and analyzes the reasons underlying the persistent, selective, official persecution of this group.

### *The Shaker Sect*

Persecution of religious minorities, through the rule of law as well as the rule of mobs, is unfortunately a part of the American past. Although issues concerning religious freedom are in modern times often raised to first amendment dimensions, the pattern of interaction and conflict between religious groups and government in the nineteenth century was generally devoid of significant constitutional theorizing. In the nineteenth century, judges, legislators, and government executives often perceived their roles in regulating religious sects not as persecutors or religious bigots but as standard-bearers for the community who sought only to regulate what was viewed as deviant behavior threatening fundamental values and institutions. The Shaker sect is particularly appropriate for an examination of nineteenth century legal persecutory phenomena because this group was unconventional enough in its beliefs and practices to attract rather frequent legislative and legal attention but yet was small enough for the effects of such unwelcome attention to be closely observable.

The Shaker sect has existed since the mid-eighteenth century and, in fact, still exists. Today it apparently numbers less than a dozen surviving members, all of them elderly women living in New England.<sup>2</sup> Even at its zenith, in the first half of the nineteenth century, it numbered less than 6,000 members scattered throughout the states of Maine, Massachusetts, Connecticut, New Hampshire, New York, Kentucky, and Ohio in nineteen communities and a few "out-families."<sup>3</sup> Obviously, the widespread notoriety of this sect was not based on its

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2. F. MORSE, THE SHAKERS AND THE WORLD'S PEOPLE 237 *et seq.* (1980).

3. See generally E. ANDREWS, THE PEOPLE CALLED SHAKERS (1953); H. DESROCHE, THE AMERICAN SHAKERS (J. Savocool trans. 1971). Population statistics on the Shakers are incomplete and inconsistent, not least of all because so much of the controversy surrounding the sect centered on the impact and success of their proselytizing activities. Among the best sources of Shaker statistics are the two books cited above.

vast numbers and pervasive presence. It attracted attention because of the peculiarity of the Shakers' doctrines and practices and the unwillingness or inability of their neighbors to accept their physical, moral, and social presence in the community.

In the theological cosmology of the Shakers, their religion was viewed as the final step, at least for sect adherents, in the evolution of humankind toward the millenium.<sup>4</sup> Their stated intent and believed destiny was to establish the kingdom of God on earth.<sup>5</sup> In this context, and with this purpose, beliefs and practices became very much intermingled and are not susceptible of complete disassociation. Selectively, the Shaker beliefs which most characterize the sect are the following.

God is seen as having a dual character, both male and female.<sup>6</sup> The male character of God was revealed by God to Jesus who was not himself a deity.<sup>7</sup> The female character was revealed by Christ to Ann Lee, the founder of the sect. This duality in God led to a recognition of the equality of women and men, and, thus, Shaker communities were governed by both sexes who had equal authority.<sup>8</sup> The role of women as equals was fundamental to the Shaker theology.<sup>9</sup>

The Shakers required full oral confessions of sins by members of the sect to the elders of the community.<sup>10</sup> One could not remain a full member of the sect without making such oral confession.<sup>11</sup>

In Shaker theology, a true Christian must be celibate.<sup>12</sup> This concept, translated into practice, involved not only abstinence from sexual relationships but the formal renunciation of marriages and all family relations as a prerequisite to the member's full dedication to God's

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4. F. MORSE, *supra* note 2, at 104-05, 126, 131.

5. *Id.* For a contemporary account of Shaker religious philosophy, see W. HINDS, AMERICAN COMMUNITIES 86-90 (1878).

6. F. MORSE, *supra* note 2, at 89.

7. *Id.* at 88-89.

8. A. WHITE & L. TAYLOR, SHAKERISM: ITS MEANING AND MESSAGE 253-61 (1904). This fundamental concept was honored more in the breach than in the observance; Shaker spokespersons were often men. Perhaps this simply reflected the greater likelihood of pre-sect membership training and experience for men.

9. This is not to suggest that the Shakers believed in role interchangeability, but rather that a fundamental religious principle held men and women to be equal before God. "Woman appears in her rightful place, at once the equal of man in creation and office at the hand of God. . . . To Ann Lee many women look for the first touch that struck off her chains and gave her absolute right to her own reason." A. WHITE & L. TAYLOR, *supra* note 8, at 256.

10. W. HINDS, *supra*-note 5, at 86-87.

11. It is infinitely more mortifying for a man to confess his sins in faith and honesty, in the hearing and presence of God's witnesses, than to confess to God, as they say, abstractedly from men; which conclusively proves that to confess to God in men, is the deepest work, and the nearest possible approach to God.

J. DUNLAVY, THE MANIFESTO 228 (1908).

12. See F. MORSE, *supra* 2, *passim*. Pre-sect membership sexual history was largely irrelevant.

work.<sup>13</sup> This practice, obviously at variance with the majoritarian social and sexual practices of the nineteenth century, found seminal emphasis in Shaker works.<sup>14</sup>

Shaker members were to live together in harmony and brotherly love and were required to forsake ownership of all private property.<sup>15</sup> Members were to live apart from the world and were to take no part in the administration of civil government, wars or military service, or physical violence.<sup>16</sup>

The form of worship of the Shakers was enthusiastic and demonstrated a marked lack of restraint in comparison with the practices of larger and more conventional religious groups. Thus, music, dancing, glossalia, and enthusiastic group prayer meetings were not only acceptable forms of worship, they were mandated forms of demonstrating faith.<sup>17</sup> The religious doctrine placed no limitations on how a member of the sect could respond to internal feelings dictating an expression of religious belief.<sup>18</sup>

The doctrines and practices highlighted above, which appeared bizarre and fanatical to contemporary observers, were logical and predictable results of the general economic and social conditions of eighteenth century England from which the sect arose. They were also a product of the particular circumstances of the sect's founder, Ann

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13. Although sexual relationships were viewed in Shaker theory as being evil in *se*, the Shakers stressed the distractive rather than immoral aspects of sex. *See* F. MORSE, *supra* note 2, *passim*, for Shaker beliefs about sex.

14. I saw in vision the Lord Jesus in his kingdom and glory. He revealed to me the depth of man's loss, what it was, and the way of redemption therefrom. Then I was able to bear an open testimony against the sin that is the root of all evil; and I felt the power of God flow into my soul like a fountain of living water. From that day I have been able to take up a full cross against all the doleful works of the flesh.

F. EVANS, *COMPENDIUM OF THE ORIGIN, HISTORY, PRINCIPLES, RULES AND REGULATIONS, GOVERNMENT AND DOCTRINES OF THE UNITED SOCIETIES OF BELIEVERS IN CHRIST'S SECOND COMING* 23 (1859). Evans was a leading Shaker theorist of the mid-nineteenth century. The common Shaker euphemism for pledging to abstain from sex was "taking up the cross," a phrase conveying a double meaning that perhaps reflects subconscious Shaker turmoil.

15. The *absence* of true fraternal love amongst men has produced the present evil condition of human society, in all its relations, internal and external. . . . If a man really loves his neighbor, it will first as the outward and inferior be *visible* to 'all men,' by their equal participation between them of all earthly goods and substances; yet this is but the fruit and evidence of their equal participation in spiritual treasures pertaining to salvation.

F. EVANS, *supra* note 14, at 73-74.

16. F. EVANS, *supra* note 14, at 62. For the Shakers, "There can be no such thing as a *Christian* warrior. With [the Shakers] the time has come to beat the sword into a plowshare, and the spear into the pruninghook, and they will not practice or learn war any more." *Id.*

17. F. MORSE, *supra* note 2, *passim*.

18. F. EVANS, *supra* note 14, at 90-91.

And when sin is fully removed, by confessing and forsaking it, the *cause* of heaviness, gloom, and sorrow is gone; and joy and rejoicing, and thanksgiving and praise, are then the spontaneous effects of a true spirit of devotion. And whatever *manner* the Spirit may dictate, or whatever the *form* into which the Spirit may lead, it is acceptable to Him from whom the Spirit proceeds.

Lee, especially her childhood and adolescence.<sup>19</sup> These influences profoundly affected the direction the sect would take.<sup>20</sup> Two of the basic tenets of Shaker doctrine, communism and celibacy, were direct responses to the widespread and seemingly unending economic suffering of the lower classes in an England on the verge of industrialization and to the acute and often fatal physical suffering of women who were in no way protected from perpetual child bearing.<sup>21</sup> The Shaker doctrines presented a direct, if unarticulated, challenge to traditional family-based social and economic structures that in many instances were morally, spiritually, and physically lethal.

Because of the pattern of religious repression in England, the Shaker doctrines were not fully divulged, and its members, perhaps a few dozen, were too few to excite hostility and persecution on doctrinal grounds.<sup>22</sup> Rather, it appears that the legal prosecutions and occasional mob violence encountered by this small sect while it dwelled in England were a response to its noisy and strange religious meetings and the unwelcome habit of its members of interrupting the services of staid Anglicans with violent denunciations.<sup>23</sup> After leaving England, presumably in part to escape the public hostility the sect had brought on itself, the eight sect members who voyaged forth initially purchased wilderness land near Albany, New York and spent the next few years clearing their land and establishing a settlement.<sup>24</sup> The Shaker sect in New York received little attention until 1779 when a minor religious revival began in the area and the Shakers proved successful in attracting their first recruits in the New Land.<sup>25</sup> This period of expansion, unfortunately, also produced the first official reaction to the sect, and members were jailed for several months as alleged Tory sympathizers.<sup>26</sup> No trials or convictions actually resulted, and eventually all the detained members were released on bail.<sup>27</sup> Although this initial

19. F. MORSE, note 2 *supra*. Like many men and women attracted to asexual lifestyles, Ann Lee's early life was marked by cold and dominating parents and a repressive family atmosphere. *Id.*

20. H. DESROCHE, *supra* note 3, at 40-47.

21. Thus, the Shaker rejection of sex and sexuality was rooted in a realistic appraisal of attendant risks to women, a concept largely ignored by the major religious denominations.

22. This period of English history encompassed waning but still occasionally virulent outbursts of anti-Catholic violence as well as general persecutions of militant and outspoken dissenters. The Shakers were, by and large, too small to attract much attention.

23. C. SEARS, *GLEANINGS FROM OLD SHAKER JOURNALS* 9-15 (1916).

24. F. MORSE, *supra* note 2, at 21-23. Perhaps because of the residual effects of the Dutch philosophy of religious toleration, a philosophy hardly absolute to be sure but one nonetheless far more gentle than what was generally found, the Shakers in New York encountered little initial opposition. They seemed to adhere to their creed against civil or political involvement and, in any event, many other events distracted attention from the new sect in New York.

25. *Id.*

26. *Id.* at 24-26.

27. See E. ANDREWS, note 3 *supra*, for a scholarly and comprehensive history of the early Shaker presence in New York.

prosecution was triggered by the sect's pacifism, a concept alien to a new nation in the process of fighting a war for independence, its broader result was to make the peculiar new sect the object of public scrutiny and interference which would continue unabated for many decades.

To be sure, not all of the interference with the Shakers was legal, or even official. The Shakers were subjected to adverse publicity, occasional violent mobs, and apparent arson at the same time that they defended their beliefs in various courts and legislatures.<sup>28</sup> There are reports on mob attacks on Ann Lee and her followers at Harvard in Massachusetts in 1781 and 1782.<sup>29</sup> The Shaker community at Union Village, Ohio was assailed by mobs in the years 1810, 1813, 1817, 1819 and 1824.<sup>30</sup> These pogrom-like invasions were generally based on incidents that led Shaker neighbors to believe that the Shakers were imprisoning unwilling women and children in their communities.<sup>31</sup> Clearly, these mobs were the product of general public suspicion of the Shakers and, in particular, of the threat they were believed to present to traditional family relationships.

The Shakers, in their own writings, report numerous losses to their land and building from fire.<sup>32</sup> These losses are almost invariably attributed to arson, but there are no reports that arson was ever actually proved.<sup>33</sup> The most that can be speculated is that so many serious fires were suffered that some, at least, were probably indeed caused by arson. On the other hand, the fact that the Shakers attributed every fire to arson indicates their hostility to and concomitant fear of the world.

By far the most striking evidence of public response to the Shakers is provided by the numerous books and pamphlets published by disgruntled and vengeful former members. Their charges of cruelty, greed, and licentiousness reach a level of invectiveness that more than equals the self-assured smugness and piety that pervades Shaker texts. Perhaps the best known of these exposés was a work by Mary Dyer,<sup>34</sup> a woman who left the community and her husband in 1815 and obtained a divorce by act of the New Hampshire legislature in 1829. Her book

28. F. MORSE, *supra* note 2, at 27-29, 37-39. Morse, in a comprehensive study, provides many contemporary accounts of violence against the Shakers.

29. C. SEARS, *supra* note 23, at 62, 72-91, 105-48.

30. J. MACLEAN, *SHAKERS OF OHIO* 362-87 (1907).

31. J. MACLEAN, *supra* note 30, at 362-87. In every instance, the mobs formed to "rescue" the women and children who were believed to be held against their will by the Shakers. MacLean reports that in only one instance was the object of mob attention a person who wished to leave the Shakers, and this was an adolescent boy already intent on running off. *Id.*

32. See, e.g., A. WHITE & L. TAYLOR, *supra* note 8, *passim*; J. MACLEAN, *supra* note 30, *passim*.

33. See authorities cited note 32 *supra*.

34. M. DYER MARSHALL, *THE RISE AND PROGRESS OF THE SERPENT FROM THE GARDEN OF EDEN* (1847).

contains an account of her experiences with the Shakers as well as numerous affidavits and letters from other apostates, enemies, and opponents of the Shaker sect.<sup>35</sup> The tone of the volume is that of pure sensationalism. Anti-Shaker tracts penned by hostile former members are certainly no more deserving of uncritical acceptance and belief than are the various romantic histories of the group written during the same period.<sup>36</sup> They do indicate, however, the sources of popular resentment toward the Shakers, most notably the alleged frequent breaking up of families and the distribution of property in so radical a manner as to suggest lawless plundering.<sup>37</sup>

### *The Shakers, The Law, and The Nineteenth Century*

From the legal perspective, the Shakers were most vulnerable in precisely those areas of doctrine that already excited the greatest controversy: their family relationships and fundamental concept of the nature of the family property ownership arrangements. Accordingly, legal attacks centered on these issues rather than on the Shakers' beliefs.<sup>38</sup>

The problem of family relationships centered on the issues of divorce, property rights for nonmember spouses, and custody of children.<sup>39</sup> There was no serious problem for men whose wives joined the sect, at least not from the viewpoint of the sect elders; such men were allowed to retain their property and pursue their livelihood.<sup>40</sup> Women such as Mary Dyer, however, whose husbands joined the sect and donated their property to the community, suffered what may be perceived as a real injustice.<sup>41</sup> There are eight such cases reported in Mary Dyer's book, in affidavits from the women themselves, and from their

35. *Id.* Shaker foes were quick to seize on this as well as other apostate writings as evidence of the danger the Shakers posed to society. Dyer made herself quite available to buttress her printed accusations with personal testimony which, in the telling, became more vitriolic and lurid. See text & notes 41-47 *infra*.

36. See notes 1 & 8 *supra*.

37. The Shakers were not the only religious sect in nineteenth century America to profess alternative family and property theories. Because the Shakers were so fundamentally nonviolent, opponents often seemed at a loss as to how to effectively proceed against them. While their theories and practices excited hostility and occasional mob outbursts, they were spared extreme violence.

38. The first amendment, although not subjected in the nineteenth century to extensive doctrinal interpretation, served as a brake on blatant governmental attacks on religion. Hostility to unusual sects such as the Shakers had to be articulated in arguments which veiled enmity to a religious group itself.

39. See F. MORSE, *supra* note 2, at 111-16, 106-07.

40. *Id.*

41. This presents a rather different face of the Shaker conception of the equality of women. A non-Shaker wife of a sect adherent was placed in an often precarious and ever penurious position. A nonadhering husband, by contrast, faced no problem regarding his property when his wife joined the sect, although he remained obligated under state law to provide maintenance for her. Thus, the Shakers avoided losing female converts who presumably would still be supported by their husbands while showing scant regard for the welfare of nonbelieving wives.

children, husbands, and parents.<sup>42</sup> Although the details of these reports may well be exaggerated, perhaps out of bitterness and anger, it is nonetheless clear that sect membership of one spouse only, particularly if that spouse was the husband, had extremely harsh consequences for the other spouse.

Given the general unavailability of divorce in the early nineteenth century, the only remedy theoretically available to these women was to petition the various state legislatures for relief.<sup>43</sup> Mary Dyer's appeal to the New Hampshire legislature led to the passage of a statute in 1824 providing for divorce, property settlements, and alimony when one spouse left the other to join "him or herself with any religious sect or society that believes or professes to believe the relation between husband and wife to be void or unlawful".<sup>44</sup> Dyer obtained her own divorce on the basis of this statute in 1829.<sup>45</sup> The lower court decision for Dyer was upheld against the Shakers' contention that they did not consider marriage *per se* unlawful but only that aspect of marriage known as cohabitation.<sup>46</sup> The court, presumably influenced by many centuries of Christian doctrine, to say nothing of actual practice, held that cohabitation was an essential element of the marital relation, and, therefore, Shaker beliefs and practices fell within the terms of the statute.<sup>47</sup>

In New York state, the efforts of Eunice Chapman, another woman who had lost her husband, children, and means of support to the Shakers, led to the passage of a private divorce bill coupled with a general statute allowing a non-Shaker wife to secure the custody of children retained by the Shakers by writ of habeas corpus.<sup>48</sup> This statute was enacted over the veto of Governor DeWitt Clinton and the objections of the Council on Revision, who argued that it invaded the constitutional right to freedom of religion.<sup>49</sup> Theirs, however, was the liberal opinion at the time and it did not prevail over the growing public hostility against the Shakers. Public opinion convinced legislators of the necessity for some relief for oppressed, involuntary inhabitants of sect communities.<sup>50</sup>

In the early nineteenth century, the common law rule still prevailed that the custody of children was a right belonging to the hus-

42. M. MARSHALL, *supra* note 34, at 62, 67, 76, 84, 108, 110, 119, 141.

43. Availability of legislative dissolution of marriage often, as a practical matter, was limited to men and, less frequently, to women of means.

44. 1821-1828 N.H. Laws, ch. 45.

45. Dyer v. Dyer, 5 N.H. 271 (1830).

46. *Id.*

47. *Id.*

48. N.Y. REV. STAT., pt. II, ch. VIII, tit. 2 (1829).

49. 11 MESSAGES FROM THE GOVERNOR 920, 921, 946, 950 (C. Lincoln ed. 1818).

50. That most of the sect inhabitants were voluntary members of the various Shaker communities does not appear to have occurred to the legislators.

band. In conjunction with the understandable desire of the Shakers to perpetuate themselves by attracting as many young converts as possible, it is not surprising that attention focused on the means by which the Shakers obtained and retained custody of children. In addition to the New York statute, the state of Ohio passed a law in 1811 authorizing the courts to deprive Shaker fathers of the custody of their children and to order necessary property settlements for the support of their families.<sup>51</sup>

The most often cited case of child custody also arose in Ohio.<sup>52</sup> Stephen Ball, a Shaker father, petitioned for a writ of habeas corpus for the custody of his two daughters, aged 8 and 6, who were in the custody of their maternal grandmother.<sup>53</sup> He had previously abandoned the children to join the Shakers but now desired to reclaim them in order to raise them as Shakers.<sup>54</sup> The children's mother was dead and so the dispute was solely between grandmother and father. From the facts stated in the case, it appears that the children were well cared for by the grandmother and, indeed, wished to remain with her.<sup>55</sup>

The appellate court upheld a lower court order dismissing the petition, holding, in effect, that by joining the Shakers the father had abandoned his parental duty and was therefore disqualified from his right to custody:

He does not seek [the children] that he may rebuild his family altar and unite with them in consecrating it with 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.<sup>56</sup>

This case is cited by Shaker writers as an outrageous invasion of parental rights for the purpose of persecuting the Shaker sect.<sup>57</sup> While the court's opinion clearly manifests some restrained but nonetheless real anti-Shaker sentiment, the case probably represents more than anything else an attempt by the court to achieve an equitable resolution and prevent further disruption of the childrens' lives.<sup>58</sup>

The Shakers did not always lose these custody disputes, however.

51. This statute is cited in E. ANDREWS, *supra* note 3, at 208 and J. MACLEAN, *supra* note 31, at 15.

52. *State ex rel. Ball v. Hand*, 5 W.L.J. 238 (Super. Ct., Cincinnati, Ohio 1848).

53. *Id.* at 238.

54. *Id.* at 238-39.

55. *Id.* at 239.

56. *Id.* at 244.

57. J. MACLEAN, *supra* note 30, at 256.

58. The reasoning of the court is obscure, often indirect, and the unnecessary use of cautious language renders this case typical of that type where a court is unsure of itself.

At least in New York, they appeared to have some success in obtaining custody of children through indenture agreements.<sup>59</sup> Several New York cases upheld the practice of indenturing children to a Shaker against arguments that the Shaker doctrines were so contrary to public policy as to render such contracts unenforceable.<sup>60</sup> The courts considered only the technical propriety of the indenture agreements and the welfare of the children, choosing to simply ignore the public policy issues. These cases all involve attempts by parents to regain custody of their children and thus present the courts with the same problems of equity and emotion as more conventional custody cases not involving religious sects.

Consistent, perhaps, with nineteenth century legal theory, courts and legislatures were somewhat willing to modify family law concepts to affect and restrain Shaker practices; but they would not interfere in the law of contracts and the law of property unless absolutely unavoidable. This conclusion is supported by an examination of attempts to interfere with Shaker property arrangements. In 1782, in Connecticut, the leaders of the village of Hartford caused overseers of the Shaker property to be appointed on the grounds that the members were "squandering" their property.<sup>61</sup> Their decision was overturned by the Connecticut Supreme Court in 1785.<sup>62</sup> Although Shaker communism was apparently vindicated, or at least not invalidated, the case may well have been an important stimulus to the development of a formal written covenant.

In any event, by 1795 the sect had devised a written covenant that was signed by all newly admitted full members.<sup>63</sup> The covenant was essentially a statement of the conditions of membership in the sect, an agreement as to the joint ownership and use of property, and an agreement not to make future claims against the sect for the property or services donated by the member.<sup>64</sup>

Several Shaker writers mention law suits brought by members against the sect despite their having signed the covenant. These law-suits were usually attempts to set aside conveyances of property on grounds of fraud or insanity<sup>65</sup> and attempts to recover for the value of

59. *People v. Pillow*, 1 Sandf. R. 672 (1848). *Fowler v. Hollenbeck & Pillos*, 9 Barb. Ch. 309 (1950); *People ex rel. Harbour v. Gates*, 43 N.Y. 40 (1870).

60. See authorities cited note 59 *supra*.

61. This case is discussed in A. WHITE & L. TAYLOR, *supra* note 8, at 87.

62. *Id.*

63. There is no evidence of resistance to the signing of the covenant by new members. The covenants served to ensure "informed consent" on the part of new members.

64. One cannot help but conclude that the Shaker drafters of the covenant recognized that litigiousness was becoming a national characteristic which, indeed, it was.

65. J. MACLEAN, *supra* note 30, at 97.

services rendered to the society.<sup>66</sup> The aggrieved parties tended to rely on public policy arguments for refusing to enforce otherwise valid contracts.

A few of these cases have been reported and are useful guideposts illuminating the milieu in which the Shakers attempted to control property. In 1800, an apostate brought an action of assumpsit for the value of services performed at Albany, New York.<sup>67</sup> The Shakers raised as a defense the plaintiff's signed release in consideration of a payment of 40 pounds.<sup>68</sup> This release was admitted into evidence over unproven allegations that it was obtained by duress.<sup>69</sup> On appeal, the admission of the release into evidence and the subsequent jury verdict for the defendants were upheld with no discussion of the merits of Shaker doctrine.<sup>70</sup>

An action brought by seceding members, for partition of Shaker properties went to the Kentucky Court of Appeals in 1834,<sup>71</sup> which upheld dismissal of the action. The court discussed the Shaker covenant at length and held that it should be accorded the same legal force as covenants formulated by other religions.<sup>72</sup> Although the court mentioned freedom of religion, its opinion was based mainly on the common-law doctrine of charitable and religious trusts.<sup>73</sup>

In another action brought in Maine in 1826, for the value of services,<sup>74</sup> a jury verdict in favor of the Shaker defendants was upheld on appeal. The court expressly held that the Shaker covenant was valid and binding upon those who voluntarily signed it.<sup>75</sup> Although the court considered some of the Shaker doctrines absurd, it viewed the covenant as any other contract.<sup>76</sup> As such, the covenant did not contravene rights to acquire property, to liberty, or to freedom of conscience:

[T]he very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. . . . [W]ith us modes of faith and worship must always be numerous and variant; and it is not the province of either branch of the government to control or restrain them, *when they appear sincere and harmless.*<sup>77</sup>

The only substantial interference with property encountered by the

66. *Id.* at 149, 241.

67. *Goodrick v. Walker*, 1 Johns. Cas. 250 (N.Y. Sup. Ct. 1800).

68. As late as 1800, English denominations were often the source of measurement of money owed and damages incurred in several of the former colonies.

69. *Goodrick v. Walker*, 1 Johns. Cas. 250 (N.Y. Sup. Ct. 1800).

70. *Id.* at 252.

71. *Gass & Bonta v. Wilhite*, 32 Ky. (2 Dana) 170 (1934).

72. *Id.* at 176.

73. *Id.* at 177-85.

74. *Waite v. Merrill*, 4 Me. 102 (1826).

75. *Id.* at 124.

76. *Id.* at 118-24.

77. *Id.* at 120 (emphasis added).

Shakers was in New York, which in 1839 passed an act expressly validating Shaker deeds of trust but also limiting the annual income of each Shaker society to \$5,000.<sup>78</sup> This limitation was imposed in response to public opinion that the Shakers were amassing huge fortunes and property holdings for their own often suspect purposes. Charges of this nature were frequent in Dyer's account.<sup>79</sup> In 1849, the trustees of the Watervliet Shaker community reported to the New York state senate that their average annual net income since the date of the statute had been \$1,217.53.<sup>80</sup> While the Shakers' accounting can be questioned, their wealth certainly does not seem excessive for a community of 280 persons.

Employing the gift of hindsight, it seems apparent that the size of Shaker property holdings was simply not substantial enough to warrant sustained interference from the state government. Furthermore, communistic property arrangements and the particular legal devices employed by the Shakers to achieve them were not unknown to our legal system.<sup>81</sup> The Shakers did not advocate revolutionary overthrow of the private property system but only voluntary donation of private property to a trust for religious uses. This may have seemed peculiar, but it did not pose any greater threat to state authority than a monastery.<sup>82</sup>

There can be no doubt, however, that the Shakers were perceived as a real threat to the existence of cherished and legally protected family relationships. Their numbers alone were never alarmingly great since they depended on obtaining converts and refrained from sexual intercourse. In New York in 1800, there were approximately 400 members out of a state population of almost 600,000.<sup>83</sup> By 1830, the Shakers had increased to only 650 while the state population was close to two million.<sup>84</sup> In Ohio in the same year, 600 Shakers lived among a population of well over 900,000 persons.<sup>85</sup> In spite of their small population, however, the Shakers disrupted enough families, or at least appeared to threaten families, and aroused sufficient public indignation and opposi-

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78. 1839 N.Y. Laws, ch. 174.

79. M. MARSHALL, *supra* note 34, at 67, 76, 90.

80. N.Y. S. Doc. No. 89 (1850).

81. See C. NORDHUFF, THE COMMUNISTIC SOCIETIES OF THE UNITED STATES (1875). This classic, still in print, describes the values and structures of a number of 19th century societies whose property concepts were similar to those of the Shakers.

82. Of course, what is a threat to the state and what is perceived as a threat are two different concepts. Under no analysis, however, could the Shaker communities be likened, even by their worst enemies, to the monasteries of Henry VIII's reign whose dissolution was accomplished so brutally.

83. J.D.B. DEBOW, STATISTICAL VIEW OF THE UNITED STATES 40 (1854).

84. H. DESROCHE, *supra* note 3, at 126-38.

85. State population statistics are from J. D. B. DEBOW, *supra* note 83, at 40. The Shaker population statistics are from H. DESROCHE, *supra* note 3, at 126-38.

tion to bring down upon themselves harsh and supposedly corrective measures.

One clear basis for this aggressive public reaction is that the Shakers made many of their converts during relatively short periods of religious revivals. Some 1,000 new members were recruited in the revival of the 1780's in New York and New England, and 1,000 to 2,000 were recruited during the Kentucky revival of 1800-1810.<sup>86</sup> Sudden expansion during such periods of intense and irrational religious fervor would necessarily attract more attention than regular and sustained religious growth, even if, in point of fact, slow growth brought larger numbers who stayed with the group a greater period of time.

Challenges to the inherently emotional and subjective values of family life and family relationships naturally produced equally strong counterreactions. Courts and legislatures, very often, reflect the popular religious and social belief that the family is the foundation of American civilization and the moral cornerstone of government itself. Although alternatives to conventional private property arrangements existed and were tolerated during the early 1800's, there were at that time absolutely no acceptable alternatives to the family structure.<sup>87</sup> The Shakers disturbed strongly held assumptions about the role and purpose of the family and thus could not be accepted by the majority of people.

From the perspective of the Shakers themselves, legislative and judicial interference was viewed as persecution. Suits against them were condemned as, and indeed often were, the work of vengeful and ungrateful apostates.<sup>88</sup> Legislative and judicial challenges were violations of what seemed to the Shakers to be clear constitutional rights.<sup>89</sup> The state's interest in protecting the family and property rights of litigants was never recognized or acknowledged by the Shakers.

Although the Shakers' interpretation of legal challenges was self-righteous and usually inaccurate, their practical response was often remarkably sensible and relevant to achieving their various purposes. The covenant, first written in 1795, was revised at least five times during the first half of the nineteenth century.<sup>90</sup> By 1830, the covenant to bring no claims against the society had been expanded to the following:

Therefore, we do hereby solemnly, and conscientiously, unitedly and

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86. J. WHITWORTH, GOD'S BLUEPRINTS 37.

87. Not only were there no alternatives, but the Victorian era was to establish the family as the apotheosis of national strength and power. The nineteenth century fostered many hypocritical and contradictory practices concerning sexuality and the sanctity of the family, but the central belief in the supremacy of the family never materially wavered.

88. J. MACLEAN, *supra* note 30, at 256.

89. *Id.* at 149, 247.

90. J. WHITWORTH, *supra* note 86, at 40.

individually, for ourselves, our heirs and assigns, release and quit-claim to the Deacons, or those who, for the time being, are the acting Trustees of the Church, for the uses and purposes aforesaid, All our private personal right, title, interest, claim and demand, of, in and to the estate, interest, property and appurtenances so consecrated, devoted, and given up: And we hereby jointly and severally promise and declare, in the presence of God and before witnesses that we will never hereafter, neither directly or indirectly, under any circumstances whatever, contrary to the stipulations of this Covenant, make nor require any account of any interest, property, labor or service, nor any division thereof, which is, has been or may be devoted by us, or any of us, to the uses and purposes aforesaid, nor bring any charge of debt or damage, nor hold any claim, nor demand whatever, against the said Deacons or Trustees, nor against the Church or Society, nor against any member thereof, on account of any property or service given, rendered, devoted or consecrated to the aforesaid sacred charitable purpose.<sup>91</sup>

Although the author of the revised covenant is not known, the fact that male adherents to the sect were often trained in various secular professions suggests that the Shakers benefited from obtaining as a convert one trained in the law. A more complete release of all claims could be imagined only by a contracts specialist or a law professor. This revised covenant spelled out more clearly the requirement that new members must settle with creditors and heirs before donating property and the requirement of consent before accepting custody of minors. The covenant contained a stipulation that the covenant had been read to or by the person signing and more clearly defined the arrangement for owning property. Each of these changes were designed to meet a specific legal objection to Shaker practices that had been encountered in various states. None, however, reflect any significant change in or retreat from Shaker belief and doctrine.

The Shakers engaged in lobbying to defeat the passage of bills unfavorable to Shaker beliefs or to obtain the repeal of various anti-Shaker bills already enacted into law. This was particularly evident in New York, where in 1816, the Shakers sent a memorial to the New York State Senate articulating an argument for exempting Shakers from military service, a form of participation in civil government prohibited by Shaker doctrine. This effort apparently was successful as the New York Legislature did enact a statute in 1816 exempting the Shakers from military service.<sup>92</sup>

Again in 1830, the Shakers sent a remonstrance to the New York

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91. *Reprinted in* J. MACLEAN, *supra* note 30, at 89.

92. E. ANDREWS, *supra* note 3, at 213-14.

Assembly<sup>93</sup> protesting the introduction of a bill that would have subjected Shaker property to judgments against individual members, prohibited fathers from donating all of their property to the Shaker society, and removed their vitally needed military service exemption. The substance of the Shaker argument was that the bill violated constitutional rights of freedom of contract and religion, and that the society's own rules already adequately protected creditors and nonbelieving wives and children.<sup>94</sup> The bill was characterized by the Shakers as a vicious and underhanded attempt at persecution by the sect's numerous enemies, and the legislature was specifically invited to make its own impartial investigation of the facts.<sup>95</sup>

Such an investigation did occur in 1849. A select committee of the New York Assembly, after an investigation that included both testimony and submission of records by the Shakers and testimony from Shaker opponents, issued a report which more or less exonerated the sect from the more extreme charges levied against them.<sup>96</sup> The committee concluded that while Shaker doctrine was indeed peculiar and at odds with prevailing social, economic, and religious mores, the Shakers themselves led morally upright and industrious lives.<sup>97</sup> The committee found that the Shakers adequately protected the rights of non-Shaker family members and creditors and, furthermore, that the group appeared to be on the road to extinction.<sup>98</sup> It is questionable whether the other conclusions as to the nature of the Shaker community would have been so favorable to the Shakers had not this last finding also been made.

By the time the committee report was issued, all that was stated about the Shakers was largely true. The Shakers had established prosperous and exemplary agricultural communities. They had formulated clear and objectively reasonable policies concerning the rights of non-Shaker family members and creditors. They had clarified the legality of their property arrangements and had publicized their numerous charitable functions. And they had accomplished all of this while making no fundamental internal changes in either their doctrines or practices. Indeed, the only significant doctrinal change was a rather slight and ineffective amelioration of the stand against marriage so that by 1859, Frederick W. Evans, one of the society's major spokespersons, could say:

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93. N.Y. ASSEMB. DOC. NO. 300 (1830).

94. *Id.*

95. *Id.*

96. N.Y. ASSEMB. DOC. NO. 198 (1849).

97. *Id.*

98. *Id.*

Yet the Shakers do not condemn marriage as an institution of 'the world', to whom only it belongs; but they say that the procreative powers should be used by them exclusively for offspring, and that all beyond that, however perfectly it may be covered by the mantle of *human law*, they call 'the unfruitful works of darkness'.<sup>99</sup>

Evans' statement is a rather far cry from the tone of a letter written by James Whittaker, a successor of Ann Lee, to his own parents in 1785.<sup>100</sup> The letter was a lengthy and hateful repudiation of his parents for their refusal to take up the joy of celibacy.<sup>101</sup> In spite of the relatively subdued tone of Evans' later statement, written perhaps more for public than for sect consumption, the superiority of celibacy and its necessity to sect membership remained unchallenged. The Shaker's adherence to celibacy was, unfortunately but inevitably, responsible for their eventual extinction.

### CONCLUSION

The Shakers' long history of involvement with the courts and the legislatures caused no significant alteration of Shaker doctrine or practice. Indeed, governmental and societal impact on the sect was de minimis. By about 1850, the various state governments appear to have realized that their authority was hardly jeopardized by the sect. Legislators and courts recognized that Shaker doctrine and practice, however extreme, did not threaten family and property arrangements to any great degree. Thus, the legal conflict evaporated without the need to resolve fundamental questions of constitutional rights. Still, the history of the Shakers' legal struggles is useful for analysis.

First, it is notable that the outcome of the fairly considerable governmental efforts to regulate the Shakers was adoption by the Shakers of generally effective evasive tactics. The Shakers revised the formalities of sect membership and engaged in unsophisticated but nonetheless productive lobbying while refusing to surrender any of the major tenets of their doctrine, to geographically relocate, or to go underground. Certainly, the Shakers exhibited a high degree of tenacity and fortitude

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99. F. EVANS, *supra* note 14, at 59-60.

100. J. MEACHAM, A CONCISE STATEMENT OF THE PRINCIPLES OF THE ONLY TRUE CHURCH ACCORDING TO THE GOSPEL OF THE PRESENT APPEARANCE OF CHRIST 13 (1790).

101. Whittaker's sentiments were rather strong:

Away! with your looking towards me for help, since you are sunk in my soul for your disobedience to God, and your lying hopes that you are in favor with Him; while you corrupt the law and trample the gospel under foot. Were it so indeed that you had it in your hearts to turn to God, and obey the gospel, I would look towards you with charity and compassion, and would take care of you, soul and body. But that is far from you, and it is in your hearts to enlarge your liberty after the flesh, and to provide livings for yourselves and posterity. Therefore you are but a stink in my nostrils . . . .

in their religious beliefs in the face of potentially overwhelming governmental power and adverse public reaction. The Shakers were few and generally ineffectual in that their ideas impressed but a small minority of listeners. Nonetheless, their ability to resist encroachments by courts and legislatures suggests that religious power was and still is a factor to be reckoned with seriously by government.

The legal biography of the Shakers demonstrates that their problems with state and local governments did not stem entirely from fundamental conflicts over the right to religious liberty or from widespread religious intolerance. Rather, the conflict centered on the narrower but perhaps more critical issue of which authority, legal or religious, should have the power to regulate family relationships and property ownership. The fact that the Shakers' major protection derived from the Constitution set a certain tone for the conflict, but the constitutional right to religious freedom was at all times only a defense: it was never the activating issue underlying the Shakers' conflict with society.

A more accurate understanding of the Shakers' conflict with the legal system may not, in all likelihood, have made much difference to the Shakers themselves. The historical perspective of their conflict is altered, however, if it is perceived not as a romantic struggle for religious freedom but as a power struggle within a society attempting to protect those institutions—family structure and property ownership—most often the business of legislators and courts of the time.

