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## The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton and the Legal Emancipation of Women

Charles J. Reid Jr.  
cjreid@stthomas.edu

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ARTICLE

**THE JOURNEY TO SENECA FALLS: MARY  
WOLLSTONECRAFT, ELIZABETH CADY  
STANTON AND THE LEGAL  
EMANCIPATION OF WOMEN**

DR. CHARLES J. REID, JR.\*

ABSTRACT

*“[T]he star that guides us all,” President Barack Obama declared in his Second Inaugural, is our commitment to “human dignity and justice.”<sup>1</sup> This commitment has led us “through Seneca Falls and Selma and Stonewall”<sup>2</sup> towards the equality that we enjoy today. This Article concerns the pre-history to the Seneca Falls Convention of Women’s Rights, alluded to by President Obama. It is a journey that began during the infancy of the common law in medieval England. It leads through the construction, by generations of English lawyers and religious figures, of a strong and imposing monolith of patriarchal rule. By marriage women lost their independent legal personality and were, for purposes of law, incorporated into their husband in accord with the legal doctrine known as coverture. The husband represented the family in civic affairs, was exclusively empowered to make all legally effective decisions for the family, and generally governed his wife and household.*

*This Article is a history of the early phases of the challenge brought against this mode of organizing domestic life. Mary Wollstonecraft, a self-made woman of the eighteenth century, objected to male domination in her books, essays, and works of fiction. She coined the expression “rights of*

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\* Dr. Charles J. Reid, Jr. is Professor at the University of St. Thomas School of Law in Minneapolis. I would like to thank Ann Bateson and the library staff of the University of St. Thomas for the wonderful support they invariably demonstrate. I would like also to thank the staffs of the Seneca Falls Historical Society and the Seneca Falls National Historic Site for their patience in answering my innumerable questions. Finally, I would like to thank my diligent and thoughtful research assistants—Natalie Hochhausen, Vaughn Frazher, and Lauren Anthone.

1. President Barack Obama, Second Inaugural Address (Jan. 21, 2013), in *THE WASH. POST*, [http://www.washingtonpost.com/politics/president-obamas-second-inaugural-address-transcript/2013/01/21/f148d234-63d6-11e2-85f5-a8a9228e55e7\\_story.html](http://www.washingtonpost.com/politics/president-obamas-second-inaugural-address-transcript/2013/01/21/f148d234-63d6-11e2-85f5-a8a9228e55e7_story.html).

2. *Id.*

women” and made a powerful case for the equality of the sexes. In America, her cause was taken up by several generations of campaigners. This Article focuses on three leading nineteenth-century figures—Sarah Grimké, Lucretia Mott, and Elizabeth Cady Stanton. The Article closes with the 1848 Seneca Falls Convention and its call for women’s suffrage and the abolition of the restrictions of coverture.

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#### I. INTRODUCTION

Septicemia, once commonly known as “blood-poisoning,” is an especially gruesome way to die.<sup>3</sup> The patient’s circulatory system is infected by bacteria.<sup>4</sup> Since the bacteria is in the blood itself, it can traverse the entire

3. CHRISTOPHER GILBERT MORRIS, ACADEMIC PRESS DICTIONARY OF SCIENCE AND TECHNOLOGY 280 (1992).

4. JEFFREY POMMERVILLE, ALCAMO’S FUNDAMENTALS OF MICROBIOLOGY 618 (2010).

body, causing individual organs to become diseased and shut down.<sup>5</sup> If treatment is ineffective, the patient grows delirious and dies.<sup>6</sup>

Thirty-eight year old feminist writer Mary Wollstonecraft suffered this very sort of cruel death in September 1797, after giving birth to a daughter, the future Mary Shelley,<sup>7</sup> eleven days earlier.<sup>8</sup> Her placenta was never properly expelled during labor and the medical care she received was competent but unhygienic, as was typical of the day.<sup>9</sup> Not surprisingly, the surviving records of her final illness inform us that she died in agony—alternately feverish and chilled, soaked in her own urine and blood, slipping into and out of consciousness, her body gradually turning toxic and gangrenous.<sup>10</sup>

As Mary Wollstonecraft fought this final struggle, she could not have appreciated the future fate of her life's work. Her legacy was as yet uncertain and probably very far from her mind. But the dramatic story of her life and death and the heritage of her writings truthfully form the hinge upon which the history of the emancipation of women turns.<sup>11</sup> She confronted a system that had grown ever more comprehensively dedicated to the proposition that women, especially married women, were dependent creatures, entirely beholden to their husbands for their support, comfort, and even their legal personality.

Surely, she would have had great difficulty imagining that this monolith might ever be brought down. But within fifty years, in the new nation of the United States, her principles and ideals were adopted as foundations to a new movement—championed by Sarah Grimké, Elizabeth Cady Stanton, Lucretia Mott, Susan B. Anthony, and other early campaigners for feminine equality. This new movement for women's rights (the term itself borrowed

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5. ARTHUR E. BAUE, EUGEN FAIST & DONALD E. FRYE, MULTIPLE ORGAN FAILURE: PATHOPHYSIOLOGY, PREVENTION, AND THERAPY 487 (2000).

6. S. HOSSEIN FATEMI & PAULA J. CLAYTON, THE MEDICAL BASIS OF PSYCHIATRY 18 (2008).

7. The wife of poet Percy Bysshe Shelley, Mary Shelley was a formidable essayist, novelist, and poet in her right. Most famously, she is the author of *FRANKENSTEIN: OR, THE MODERN PROMETHEUS*, which she wrote between the ages of nineteen and twenty-one and published in 1818. On Mary Shelley's life, see generally, among many good biographies, MIRANDA SEYMOUR, *MARY SHELLEY* (2000); EMILY W. SUNSTEIN, *MARY SHELLEY: ROMANCE AND REALITY* (1989).

8. Joanna Goldsworthy & Marie Mulvey-Roberts, *Revolutionary Mothers and Revolting Daughters: Mary Wollstonecraft and Mary Shelley, Anna Wheeler and Rosina Bulwer Lytton, in WOMAN TO WOMAN: FEMALE NEGOTIATIONS DURING THE LONG EIGHTEENTH CENTURY* 63, 73 (Carolyn D. Williams, et al. eds., 2010).

9. BEATRICE GOTTLIEB, *THE FAMILY IN THE WESTERN WORLD FROM THE BLACK DEATH TO THE INDUSTRIAL AGE* 127–28 (1994).

10. JANET TODD, *MARY WOLLSTONECRAFT: A REVOLUTIONARY LIFE* 450–57 (2000); LYNDALL GORDON, *VINDICATION: A LIFE OF MARY WOLLSTONECRAFT* 357–62 (2005); KENNETH NEILL CAMERON, *SHELLEY AND HIS CIRCLE, 1773–1822* 185–95 (1961) (collecting the notes concerning Mary Wollstonecraft's final illness made by her husband William Godwin).

11. See Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIF. L. REV. 381–82 & n.1 (2012) (describing the various approaches to recounting the feminist legal movement).

from Mary Wollstonecraft) would influence the path of the law from the 1840s to today and become the story of women's emancipation.

This Article cannot hope to tell the story of the emancipation of women. More modestly, it proposes to develop the thesis that Mary Wollstonecraft represents the great turning point in this much larger historical movement.

The Article is divided into three sections. The first section sketches the outline of the legal regime that confronted Mary Wollstonecraft in the 1780s and 1790s, at the time she wrote her most famous essays on the cause of women's rights. The section begins with the medieval origins of the legal dependency of women and ends by analyzing William Blackstone's systematic restatement of the law—a restatement that effectively diminished women's sphere of legal independence and autonomy severely. The middle section then examines the main points of Mary Wollstonecraft's challenge to the prevailing legal order. Since her work bears the strong marks of autobiography, this section commences with a review of her life. It then considers her works on both politics and women's rights, in order to identify her signal contributions. The final section, set in Seneca Falls, New York, provides an account of the first American convention of women's rights and the role Mary Wollstonecraft's thought played in it. This convention aimed at nothing less than the emancipation of women from the entire panoply of laws that reduced them to a secondary position vis-à-vis their male counterparts.

## II. A MONOLITH MADE OF BASALT: THE LEGAL DEPENDENCY OF WOMEN IN EARLY ENGLISH LAW

### A. *Coverture and Dependency: Medieval English Origins*

When legal historians think about the institution of coverture today, they tend to consider it in straightforward and fairly confined terms. It is the merger of the wife's legal personality into that of her husband, with the result that the wife is disabled from freely and independently engaging in most legal acts—signing a contract, suing in court under her own name, the owning and disposing of property.<sup>12</sup>

Such an arrangement, it goes without saying, is odious, insulting, and misogynistic, whatever its reach.<sup>13</sup> But coverture was a legal institution whose scope was more expansive than the imposition of certain legal disabilities, which with sufficient cleverness, might be gotten around.<sup>14</sup> It was a

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12. Ayelet Schachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 408 n. 77 (2000).

13. WILKIE COLLINS, *BLIND LOVE* 24 (Maria K. Bachman & Don Richard Cox eds., 2003).

14. See *infra* notes 117–31 and accompanying text.

tool of ideology at least as much as law.<sup>15</sup> The vocabulary of coverture was intended to express and enforce a total and complete subordination of married women to men at common law.<sup>16</sup> It was a teaching device and its lessons were profound and unambiguous. It told women that they were inferior, it sanctified their inferiority through religious faith, and then made their subordination complete through legal disability.<sup>17</sup>

Coverture's medieval origins are somewhat shrouded. It was not a legal device known either to medieval Roman law or medieval canon law. Under each of these systems, married women were permitted to enter contracts, own and dispose of property, and even exercise certain limited civil rights.<sup>18</sup>

Even so, by the thirteenth century, one can identify in English legal texts some of the elements that would later congeal to form the developed doctrine of coverture.<sup>19</sup> Thus, Bracton spoke of the subjection of the wife to the husband<sup>20</sup> and asserted that the husband acted as the wife's guardian in legal matters.<sup>21</sup> Glanville similarly described the husband as the head of his wife and declared that she was obliged to obey him in all matters "not contrary to the Law of God."<sup>22</sup> Pollock and Maitland, however, cautioned readers not to conclude that statements such as these constituted a developed understanding of coverture.<sup>23</sup> They were medieval truisms—maxims and adages routinely cited by theologians and canonists—but "a consistently operative principle [these] cannot be."<sup>24</sup>

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15. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 116 (2001).

16. BARBARA JEAN HARRIS, *ENGLISH ARISTOCRATIC WOMEN, 1450–1550: MARRIAGE AND FAMILY, PROPERTY AND CAREERS* 18 (2002).

17. Barbara Kreps, *The Paradox of Women: The Legal Position of Early Modern Wives and Thomas Dekker's 'The Honest Whore'*, 69 *ENG. LITERARY HIST.* 83, 86 (2002).

18. Kathryn Reyerson & Thomas Kuehn, *Women and Law in France and Italy*, in *WOMEN IN MEDIEVAL WESTERN EUROPEAN CULTURE* 131, 131–41 (LINDA E. MITCHELL ed., 1999) (describing the status of women under the Romanist legal regimes of medieval France and Italy); Linda E. Mitchell, *Women and Medieval Canon Law*, in *WOMEN IN MEDIEVAL WESTERN EUROPEAN CULTURE* at 143, 146–50 (describing the numerous conflicts between the status of women at medieval canon law and various secular regimes). Cf. CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW* (2004) (dedicated generally to exploring the rights and disabilities of married partners in medieval canon law).

19. 2 *FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW* 405–06 (1911).

20. Christopher Cannon notes that Bracton asserted that as a legal matter a woman's rights were derivative and dependent on her husband. See Christopher Cannon, *The Rights of Medieval English Women: Crime and the Issues of Representation*, in *MEDIEVAL CRIME AND SOCIAL CONTROL* 156, 157–58 (Barbara A. Hanawalt & David Wallace eds., 1999).

21. POLLOCK AND MAITLAND, *supra* note 19, at 406.

22. RANULF DE GLANVILLE, *A TRANSLATION OF GLANVILLE* 97 (Joseph Henry Beale trans., 1900).

23. POLLOCK AND MAITLAND, *supra* note 19, at 406.

24. *Id.*

A hundred years later, in the fourteenth century, the English common lawyers began to speak of a married woman as *feme covert*<sup>25</sup>—this term meaning the absorption of the wife’s legal personality into that of her husband’s.<sup>26</sup> The early sixteenth-century jurist Christopher Saint German (c. 1460–1540)<sup>27</sup> mentioned *feme covert* at several points in connection with civil disabilities the law imposed on women.<sup>28</sup> Even so, thanks probably to the continuing vitality of independent ecclesiastical courts, some slight flexibility in the treatment of married women’s property remained detectable throughout the fifteenth century.<sup>29</sup> It was in the early modern period, however, which was dramatically ushered in by King Henry VIII’s rupture with the Church of Rome and his consequent Act of Supremacy (1534) declaring him supreme in affairs of both state and church, that the legal doctrine of wifely subordination took on finished form.<sup>30</sup>

### B. *Early Modern Writers Contemplate the Bible*

Religion drove the development of coverture in early modern England. And that religion, Protestant Christianity, was formed by and focused on the Bible as the ultimate source of knowledge about the true and the right. Indeed, as we transition from the medieval world to the sixteenth and seventeenth centuries, we discover that the Bible saturated early modern English

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25. Sue Sheridan Walker, *Feme Covert*, in *WOMEN AND GENDER IN MEDIEVAL EUROPE: AN ENCYCLOPEDIA* 282 (Margaret Schaus ed., 2006).

26. *Id.*

27. On Saint German, see T.F.T. PLUCKNETT, *A CONCISE HISTORY OF ENGLISH LAW* 279 (5th ed. 1956). Saint German’s work appeared in Latin around 1523 and a final, revised English translation in 1532. Saint German was a strong early proponent of a robust role for equity in the administration of English justice. *Id.*

28. CHRISTOPHER SAINT GERMAN, *THE DOCTOR AND STUDENT: OR, DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND* 47–48 (Cincinnati, Robert Clarke & Co. 1874) (excuses a wife from the doctrine of waste in leasehold thanks to her subordinate position); *Id.* at 205 (a husband may accept a gift even over his wife’s objections); *Id.* at 244 (a wife may not distribute gifts).

29. See, e.g., Monique Vleeschouwers-Van Melkebeek, *Separation and Marital Property in Late Medieval England and the Franco-Belgian Region*, in *REGIONAL VARIATIONS IN MATRIMONIAL LAW AND CUSTOM IN EUROPE, 1150–1600* 77, 79–83 (Mia Korpiola ed., 2011) (individual ecclesiastical judges occasionally softened rigors of coverture in particular cases); Richard H. Helmholz, *Married Women’s Wills in Later Medieval England*, in *WIFE AND WIDOW IN MEDIEVAL ENGLAND* 165–82 (Sue Sheridan Walker ed., 1993).

30. 1 WILLIAM J. DUIKER & JACKSON J. SPIELVOGEL, *THE ESSENTIAL WORLD HISTORY* 367 (6th ed. 2011).

thought,<sup>31</sup> shaping English values,<sup>32</sup> literature,<sup>33</sup> and even the rhythms and cadences of the English tongue.<sup>34</sup>

Early modern English religious thinkers, furthermore, believed the Bible to have some very plain and obvious teachings about the position of wives within marriage. For the sources of this teaching, they looked classically to the Book of Genesis and Jesus' commands about marriage as found in the New Testament.<sup>35</sup> In the Book of Genesis, after explaining that God created woman out of man's rib, the biblical author went on to state: "Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh."<sup>36</sup> The author of the Gospel of Matthew had Jesus repeat this verse of Genesis and had him append to its close: "What therefore God has joined together, let not man put asunder."<sup>37</sup> The synoptic Gospels of Luke and Mark repeated variations on this teaching,<sup>38</sup> while the Gospel of John represented a different source-tradition in the way it looked instead to the wedding feast at Cana as paradigmatic of God's endorsement of marriage.<sup>39</sup>

If one probes the historical record, one soon realizes that these texts were susceptible to widely varying interpretations. They were not as one-dimensional as the early modern English writers assumed them to be. The ancient Jewish writer Philo (20 B.C.–50 A.D.) saw in the language of Genesis the idea that marriage must be an intense emotional partnership in which the parties "may rejoice in, and be pained by, and feel the same things, and much more, may think the same things."<sup>40</sup> The fifth-century theologian St. Augustine placed a figurative interpretation on Genesis and the New Testa-

31. NAOMI TADMOR, *THE SOCIAL UNIVERSE OF THE ENGLISH BIBLE: SCRIPTURE, SOCIETY, AND CULTURE IN EARLY MODERN ENGLAND* 79 (2010).

32. The Bible's influence was so comprehensive that the Marxist historian Christopher Hill described early-modern England as a "biblical culture." See CHRISTOPHER HILL, *THE ENGLISH BIBLE AND THE SEVENTEENTH-CENTURY REVOLUTION* 3 (1993).

33. Jo Carruthers, *Literature*, in *THE BLACKWELL COMPANION TO THE BIBLE* 253, 254 (John F.A. Sawyer ed., 2006).

34. On the role of the Bible in shaping English literature and language, consider the very different examples of John Donne, John Milton, and John Bunyan. See *MERCER DICTIONARY OF THE BIBLE* 108 (Watson E. Mills ed., 1990); cf. ROBERT ALTER, *PEN OF IRON: AMERICAN PROSE AND THE KING JAMES BIBLE* (2010) (demonstrating the continuing influence of this Bible culture on generations of American authors).

35. *Infra* notes 37–43 and accompanying text.

36. *Genesis* 2:24.

37. *Matthew* 19:5 (repeating *Genesis*); *Id.* at 19:6 ("put asunder"). St. Paul makes much the same statement in his letter to the Ephesians: "For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall become one flesh." *Ephesians* 5:31.

38. *Mark* 10:2–9; *Luke* 16:18. Cf. *Luke* 20:27–39 (marriage is part of this world). I use the word "synoptic" in the common sense of that word to signify that the Gospels of *Matthew*, *Mark*, and *Luke* shared significant amounts of source material. On the meaning of "synoptic" Gospels, see PHEME PERKINS, *INTRODUCTION TO THE SYNOPTIC GOSPELS* 16–22 (2007).

39. *John* 2:1–11.

40. J. PAUL SAMPLEY, 'AND THE TWO SHALL BECOME ONE FLESH': A STUDY OF TRADITIONS IN *EPHESIANS* 5:21–33 54 (1971) (translating and quoting Philo).



ment marriage texts, understanding them to foreshadow Jesus' unbreakable union with the Church.<sup>41</sup> The third-century biblical exegete Origen was even more densely figurative in his explanation of the passages: what Matthew intended, when he had Jesus repeat the language of the Book of Genesis, was to describe not God's one marriage but his two marriages—first with the Jewish Synagogue, which rejected him, and then with the Christian Church.<sup>42</sup> Irenaeus (died, c. 202) and Clement of Alexandria (c. 150–215) each saw in these texts a divine blessing conferred on marriage and a celebration of its natural fecundity.<sup>43</sup>

As these examples suggest, there was no need for the English divines to choose the interpretive path they selected for themselves. The texts allowed for creativity, and they had many options within the tradition they might have chosen from. The English theologians, however, eschewed flights of fancy, preferring to see in these passages the seeds of a religious doctrine that would have a profound influence on the law and the position of woman under it—the essential unity of married partners, governed benevolently but unilaterally by the male. Thus William Gouge, preacher and theologian<sup>44</sup> (1575–1653), wrote:

Things well glued together are as fast, firm, and close as if they were one entire piece . . . . They which were two before marriage, by the bond of marriage, are brought into one flesh, to be even as one flesh: as nearly united, as the parts of the same body, and the same flesh. This unity is not in regard of carnal copulation . . . but in regard of God's institution, who hath set it down for a Law, and as another nature, that man and wife should be so near one to another.<sup>45</sup>

The royalist churchman Richard Allestree (1619–1681)<sup>46</sup> made much the same point, only more succinctly: “There is so strict a union between a Man and his Wife, that the Law counts them one person, and consequently

41. THE WORKS OF ST. AUGUSTINE: ST. AUGUSTINE'S HOMILIES ON THE GOSPEL OF JOHN, HOMILIES ON THE FIRST EPISTLE OF JOHN, AND SOLILOQUIES 66 (Philip Schaff ed., 2004). St. Augustine similarly interpreted the Wedding Feast at Cana figuratively, seeing it symbolically as representing Christ's redemption of humankind through the blood he shed on the cross at Calvary. See ROSEMARY WOOLF, ART AND DOCTRINE: ESSAYS ON MEDIEVAL LITERATURE 102 (1986).

42. IB MANLIO SIMONETTI, ANCIENT CHRISTIAN COMMENTARY ON SCRIPTURE: NEW TESTAMENT (MATTHEW 14–28) 92 (2002) (translating and quoting Origen). Origen's reading was fanciful, of course, but still had a plausible grounding in Matthew's Gospel, since Matthew permitted a man to put away his wife where she had committed *porneia*—“sexual sin.” *Matthew* 19:9. That even Origen was able to justify his reading of the tradition demonstrates just how many different and varied interpretations were possible.

43. RONALD LAWLER, JOSEPH M. BOYLE, JR. & WILLIAM E. MAY, CATHOLIC SEXUAL ETHICS: A SUMMARY, EXPLANATION, AND DEFENSE 48 (1998).

44. Gouge was a fixture on the London religious scene, preaching at Blackfriars for some thirty-five years. See BENJAMIN BROOK, THE LIVES OF THE PURITANS III 165–70 (1813).

45. WILLIAM GOUGE, OF DOMESTICAL DUTIES 81 (2006).

46. John Fell, Bishop of Oxford, wrote the standard biography of Allestree. See generally JOHN FELL, THE LIFE OF RICHARD ALLESTREE (London, Joseph Masters 1848).

they can have no divided interest.”<sup>47</sup> Joseph Hall (1574–1656),<sup>48</sup> the Anglican Bishop successively of Exeter and Norwich, similarly wrote: “[I]t is the everlasting will of God that there shall be an entire and loving conjunction betwixt the man and wife.”<sup>49</sup>

This oneness, this union, however, had to have a head. It had to receive direction and guidance from somewhere, and that was supposed to come from the husband. Thomas Gataker (1574–1654) summarized the matter about as bluntly as possible: “Is the Wife given unto her Husband by God? Then must she resolve to give her self wholly to him as her Owner, on whom God hath bestowed to her, to whom he hath assigned her.”<sup>50</sup>

William Bridge (1600–1670)<sup>51</sup> was under no illusions that husbands might abuse their authority, that they might sinfully maltreat and oppress their wives, and behave arrogantly in their power. For men, he acknowledged, might put on a good show for the world—like a log in a great forest, a man might look green and robust on the topside, but if you lift the log and peer beneath, you will find nothing but “worms and vermin.”<sup>52</sup> Still, it is the wife’s solemn duty, even in these extreme circumstances, to remember the admonition of St. Peter—that they must “‘be in subjection to [their] husbands.’”<sup>53</sup>

William Gouge, commenting on the dilemma of the good wife trapped in marriage with an unworthy husband, phrased his response only slightly more subtly, reminding such women that a wife must show “reverence” and practice “obedience” toward her husband, recalling always that the first wife Eve failed in her obligation and so brought ruination down upon all humankind.<sup>54</sup> A wife who dared to oppose her husband’s will, Gouge in-

47. RICHARD ALLESTREE, *THE LADIES’ CALLING: IN TWO PARTS* 193 (Oxford, 1705).

48. The standard biography of Hall is GEORGE LEWIS, *A LIFE OF JOSEPH HALL, D.D., BISHOP OF EXETER AND NORWICH* (London, Hodder & Stoughton 1886).

49. 3 JOSEPH HALL, *THE WORKS OF THE RIGHT REVEREND FATHER IN GOD JOSEPH HALL, D.D.* 15 (London, C. Whittingham 1808).

50. THOMAS GATAKER, *A GOOD WIFE GOD’S GIFT: A MARRIAGE SERMON ON PROVERBS 19:14 5* (London, 1620). Gataker softened the bluntness of this statement a few pages later when he reminded his listeners that a wife is a fine gift given by God that must never be “evill-used.” *Id.* at 22. Where a wife is abused, God himself has reserved special punishment for the wicked husband. *Id.* Around the time of this sermon, Gataker served as chaplain to Lincoln’s Inn, one of London’s Inns of Court, where the realm’s common lawyers were trained. See Paul Seaver, *Puritan Preachers and Their Patrons, in RELIGIOUS POLITICS IN POST-REFORMATION ENGLAND: ESSAYS IN HONOR OF NICHOLAS TYACKE* 128, 129 (Kenneth Fincham & Peter Lake eds., 2006).

51. Bridge was a Congregationalist, an opponent of Archbishop William Laud, and a supporter, generally, of Puritan extremist causes, who went into self-exile at Rotterdam after launching an attack on King Charles I. Bridge is the subject of a useful biography. See generally H. RONDEL RUMBURG, *WILLIAM BRIDGE: THE PURITAN OF THE CONGREGATIONAL WAY* (2003).

52. William Bridge, *Sermon III: How To Walk With God in Our Callings, in THE WORKS OF WILLIAM BRIDGE* 74, 88 (London, Thomas Tegg 1845).

53. *Id.* at 89 (quoting 1 Peter 3:1).

54. GOUGE, *supra* note 45, at 202. Eve, according to the biblical account, offered Adam fruit from the Tree of Knowledge of Good and Evil, which caused God to expel them both from Paradise and to curse them. *Genesis* 3:1–23 (giving the biblical account).

sisted, “pervert[s] the order of nature [and] defaces the image of Christ” as assuredly as did a husband who played the “milk-sop,” quailing timidly before womanly assaults on his dignity and office.<sup>55</sup> Other theologians gravely nodded their assent.<sup>56</sup>

Given a range of interpretive choices, from Philo’s emotivism, to Augustine’s and Origen’s figurative ideals, to Irenaeus’s and Clement’s warm celebratory embrace of marriage’s providential good, the English writers adopted a rather narrow, literal, and highly formalistic reading of the texts. Two people marry and they become absorbed into one another, forming an unbreakable bond, the husband governing, the wife submitting.

These sayings and teachings were not in themselves legal, but it seemed only natural to the English mind of the time that this form of theological reasoning should be extended to the political and legal realms. Thus Robert Filmer (1588–1653), with whom John Locke so famously jostled,<sup>57</sup> used these Bible passages to refute Hugo Grotius’s contention that kings served at the pleasure of the peoples they governed and were removable at any time. Kings with respect to their kingdoms occupied precisely the same position as husbands did in a marriage.<sup>58</sup> Like husbands, kings enjoyed indissoluble relationships with their subjects, ruling and guiding their subjects as a husband does his wife.<sup>59</sup> This much was decreed by Holy Writ and was sufficient, in Filmer’s mind at least, to refute Grotius’s contentions concerning voluntary, terminable-at-will kingship.<sup>60</sup> Patriarchy, to Filmer, was self-evident truth and easily extended from the private domestic realm to public affairs of state.<sup>61</sup>

Thus, as in the theological, so also in the public sphere, marriage created a hierarchy with the man ruling and the wife submissively obeying. So is it now, and so shall it remain, now and forevermore, was the undoubted expectation of these self-satisfied English writers.

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55. GOUGE, *supra* note 45, at 202.

56. Thus Allestree wrote concerning wifely obedience: “Another duty to the person of the Husband, a word of a very harsh sound in the ears of some Wives, but is certainly the duty of all.” ALLESTREE, *LADIES’ CALLING*, *supra* note 47, at 191. Bishop Hall was even more forceful: “THE HUSBAND HATH POWER OVER THE WIFE,” Hall capitalized every letter for emphasis, “is so clear, both in nature and reason, that I shall willingly save the labour of a proof.” 5 HALL, *supra* note 49, at 486.

57. Robert Filmer understood all political authority to be derived from the patriarchal authority of husbands and fathers over their wives and households. See LEE WARD, *JOHN LOCKE AND MODERN LIFE* 136 (2010). Locke challenged this connection between the political and the familial, and thereby, according to Ward, helped to set in motion some of the transformations that later generations would work in the domestic sphere. *Id.* at 136–46.

58. WENDY S. JONES, *CONSENSUAL FICTIONS: WOMEN, LIBERALISM, AND THE ENGLISH NOVEL* 44 (2005).

59. ROBERT FILMER, *THE FREE-HOLDERS GRAND INQUEST* 221 (London, 1680).

60. *Id.*

61. TIMOTHY FITZGERALD, *DISCOURSE ON CIVILITY AND BARBARITY: A CRITICAL HISTORY OF RELIGION AND RELATED CATEGORIES* 20 (2010).

C. *The Legal Fictions of Sir Edward Coke*

It was Sir Edward Coke (1552–1634) who would organize this way of thinking about marriage with rigorous logic, formality, and precision. Much can be said about Coke. One prominent historian called him not only a conservative but a “radical conservative,” who harbored hopes of creating a renewed and reinvigorated England, a bright utopian England that had never actually been but might yet come to be, grounding it on a nostalgic, romanticized view of the English past.<sup>62</sup>

But Coke was much, much more than some fanciful, fanatical, philosophical dreamer. He was an intense, unyielding opponent of absolute monarchy.<sup>63</sup> He was a principal founder of the school of “historical jurisprudence,” which exalted the common law as a uniquely significant repository of juristic wisdom and viewed with suspicion other “foreign” legal systems.<sup>64</sup> He gave decisive shape to the modern system of case reporting and the way in which precedent has been understood in the common-law system.<sup>65</sup> Economic historians still consider Coke a founder of economic liberalism, someone who opposed artificial barriers to trade and commerce and used the instruments of the common law to remove them where he could.<sup>66</sup> Coke could be ruthless, vindictive, even bloody-minded in his dealings with others,<sup>67</sup> but his significance to the future of the path of the law cannot be gainsaid.<sup>68</sup>

Coke’s contribution to the development of the legal doctrine of coverture was just as decisive as these other accomplishments. He strongly en-

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62. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1688 (1994).

63. GLENN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 165–208* (1996).

64. See Berman, *supra* note 62, at 1673–94; Charles M. Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke*, in *CULTURE AND POLITICS: FROM PURITANISM TO ENLIGHTENMENT* 25, 25–66 (Perez Zagorin ed., 1980).

65. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 33–34 (2008); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 *EMORY L.J.* 437, 446–47 (1996).

66. See Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30–44 (1935) (stating the case for Coke’s economic liberalism); Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 *EMORY L.J.* 1261–1328 (1996) (demonstrating Coke’s manipulation of legal categories to further economic liberalism); Barbara Malament, *The Economic Liberalism of Sir Edward Coke*, 76 *YALE L.J.* 1321–58 (1967) (situating Coke’s economic thought in Tudor-Stuart context); CHRISTOPHER W. BROOKS, *LAWYERS, LITIGATION, AND ENGLISH SOCIETY SINCE 1450* 190–91 (1998) (proposing new avenues of investigation in the history of early modern law and economics).

67. For an example of Coke’s ruthlessness, consider his conduct of Sir Walter Raleigh’s treason trial. See Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Trial of Treason and the Confrontation Clause* 74 *MISS. L.J.* 869, 869–901 (2005); JOHN M. ZANE, *THE STORY OF LAW* 321–25 (Liberty Fund 2d ed. 1998).

68. See William S. Holdsworth, *The Influence of Coke on the Development of English Law*, in *ESSAYS IN LEGAL HISTORY READ BEFORE THE INTERNATIONAL CONGRESS OF HISTORICAL STUDIES* 296, 298 (Paul Vinogradoff ed., 1913).

dorsed the biblical origin of the concept. “They twain are one flesh,” he wrote about married couples, echoing neatly the language of the King James Bible.<sup>69</sup>

Without doubt, there were points at which Coke dogmatically asserted the legal subordination of wives to their husbands. Thus he wrote that married women suffered from the same legal incapacity as “idiots, madmen, [and] a man deaf, dumb, and blind” with respect to the enfeoffment of landed estates.<sup>70</sup> All alike were entirely barred by the common law from engaging in such transactions.<sup>71</sup>

But Coke simultaneously appreciated that coverture, the idea that the husband entirely absorbed his wife’s legal personality, was a legal fiction. And Coke had a very sophisticated understanding of fictions. He realized that they never fit exactly the social reality they purported to describe. Indeed, they ought not to. Coke explained his understanding of the flexibility of legal fictions with a pithy Latin quotation: “No simile,” he wrote, by which he meant legal fiction, “holds in everything, according to the ancient saying, *Nullum simile quatuor pedibus currit*.”<sup>72</sup> “No simile runs on four feet.”<sup>73</sup>

In thus regarding legal fictions instrumentally, as tools that lawyers might employ to achieve particular results, Coke was expressing what would become the modern understanding of the concept.<sup>74</sup> Legal fictions are propositions acknowledged by all of the participants in the process to be untrue, in the sense that they do not exactly mirror observed factual reality,<sup>75</sup> but it is because all the participants accept their unreality that they can be put to valuable service.<sup>76</sup> Thus, corporations are not really persons, but they can be assumed to be such for certain legal purposes. Similarly, wives are not really made part of their husband’s body. But both expressions were put to use by lawyers to accomplish certain social purposes. It is precisely

69. Peregrine Bingham, *The Law of Infamy and Coverture*, N. AM. REV. 316, 346 (1828) (quoting 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND* 6.b. (Lawbook Exch. 6th prtg. 2010)).

70. John Henry Thomas, *A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE OF THE LAWS OF ENGLAND* 177 (Philadelphia, Alexander Towar 1836).

71. *FIRST PART OF THE INSTITUTES*, *supra* note 69, at 42.a.–43.b.

72. *FIRST PART OF THE INSTITUTES*, *supra* note 69, at 2.b.

73. The English is my translation of *nullum simile quatuor pedibus currit*. *Simile* is one of those words that conveys multiple meanings. I have chosen the most literal translation—“simile.” But it carries the sense as well of “point of comparison” or “metaphor.” See the many definitions of *similis* in *OXFORD LATIN DICTIONARY* 1763–64 (P.G.W. Glare ed., 1982). It should be added that although Coke recites this maxim as seeming to stand for the received ancient wisdom of the law, I cannot identify an earlier usage.

74. On Coke’s widespread reliance on legal fictions, see ALLEN D. BOYER, *SIR EDWARD COKE AND THE ELIZABETHAN AGE* 105 (2003); Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 *MICH. L. REV.* 1622, 1636 (1994).

75. GUNTHER TEUBNER, *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 317 (1987); STEVEN WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 179–81 (2001).

76. LON FULLER, *LEGAL FICTIONS* 7 (1967).

when participants mistake a counter-factual fiction for factual reality that mischief occurs—historically with coverture and more recently with Supreme Court jurisprudence on the political rights of the corporate personality.<sup>77</sup>

Only if we appreciate Coke's understanding of legal fictions can we truly make sense of what he says about the position of wives at the common law. For while he offers a global statement of wifely inferiority, his *Institutes* does not develop this theory so much as offer numerous narrowly-drawn instances where the fiction might or might not apply depending on the circumstances of the case, the needs of utility, or actual social reality.

On the one hand, there were instances where Coke found the legal capacity of women restricted or non-existent. Thus he denied a wife the capacity to devise property by will to her husband, since she was under his power and so was conclusively presumed to be acting under coercion.<sup>78</sup> So also, if an office fell to a wife by inheritance (the example Coke gave was parkershippe, i.e., management responsibility for deerparks on a landed estate) she could not exercise it and lost all claim over it.<sup>79</sup> So also a wife, just like a monk or any other individual lacking legal personality, could not recover damages under the Statute of Westminster II (an important medieval statute regulating real estate transfers).<sup>80</sup> Given the wife's general surrender of control over her property, furthermore, it followed that a husband was liable for taxes imposed on his wife's property held by him under coverture.<sup>81</sup>

On the other hand, there were instances where a wife retained some significant legal powers despite her loss of legal personality. Thus a widow could make use of the writ *cui in vita* to seek recovery of estates of hers wasted by her husband during his lifetime.<sup>82</sup> So also a wife retained the right of remitter to preserve superior title to her property where her husband put that at risk.<sup>83</sup> While generally disabled from appearing in court, a wife might nevertheless “cast a protection” (that is, enter an excuse) to explain a

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77. See generally JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2012).

78. FIRST PART OF THE INSTITUTES, *supra* note 69, at 112.b.–113.a.

79. *Id.* at 232.b.–234.a.

80. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 177–79 (Lawbook Exch. 2012) [hereinafter SECOND PART OF THE INSTITUTES].

81. *Id.*; Bridges Act, 1530, 22 Hen. 8, C.5 (Eng.).

82. FIRST PART OF THE INSTITUTES, *supra* note 69, at 354.b.–56.a. On the writ *cui in vita*, see SIR ANTHONY FITZHERBERT, THE NEW NATURA BREVIVM OF THE MOST REVERENDE JUDGE ANTHONY FITZHERBERT 430 (London, Elizabeth Nutt & R. Gosling 1718).

83. FIRST PART OF THE INSTITUTES, *supra* note 69, at 357.a.–57.b. The right of remitter is defined at 1 R.S. DONNISON ROPER, A TREATISE ON THE LAW OF PROPERTY 71, 73–74 (London, Henry Butterworth 1820); JOSIAH WILLIAM SMITH, A MANUAL OF COMMON LAW: FUNDAMENTAL PRINCIPLES AND THE POINTS MOST USUALLY OCCURRING IN DAILY LIFE AND PRACTICE 376–77 (London, Stevens, Sons, and Haynes 1864).

tenant's absence from judicial proceedings.<sup>84</sup> Also, a wife might finally purchase goods freely at a fair, provided she acts "in a place that is overt and open, not in a backe roome."<sup>85</sup>

At times, Coke entirely disregarded the legal fiction and cut straight to the underlying social reality. Thus he declared that a queen might never be *feme covert* and so might "grant and . . . take, . . . sue and be sued as a *feme sole* by the common law."<sup>86</sup> Coke frankly acknowledged that there were political reasons for so concluding: the king's "continual care and study" must be devoted to the welfare of the entire realm, and he should not "be troubled and disquieted" by needing to attend to his wife's estates.<sup>87</sup> That queens were powerful personages, who would normally have little tolerance for such interference, went unmentioned but doubtless was the main reason Coke acknowledged their legal independence from their husbands.

So also, there was the matter of a wife's liability under the criminal law. Did her dependent status ever exonerate her from wrongdoing? Coke considered her innocent of larceny where she acted at the prompting of her husband.<sup>88</sup> Neither could she be found guilty as an accessory,<sup>89</sup> although if she acted on her own initiative, she might be found guilty of felony.<sup>90</sup> This subtle, two-tiered analysis neatly blended an appreciation of the actual power structure prevalent in most households of the age with traditional standards of culpability.

As he did with so many other areas of law, Coke lent strength to the development of coverture and the consequent legal subordination of wives to their husbands. But he was not indiscriminate in his teaching. He recognized that coverture was a legal fiction and that legal fictions were socially useful creations of the intellect, not our masters at law. Women were not "ideots," or "madmen," or "monks," but might be productively analogized to them for certain discrete legal purposes. Coke set boundaries, drew dividing lines, laid down markers between what was practical and what was impracticable, between areas where coverture convincingly applied and areas where no amount of mental gymnastics could ever make coverture work. No queen would accede to the status of *feme covert*. A wife actually guilty of felony should not be allowed to escape punishment on the strength of a legal fiction. Coke wisely recognized these realities even as he saw cover-

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84. FIRST PART OF THE INSTITUTES, *supra* note 69, at 129.b.–31.b. On "casting a protection" see WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, CYCLOPEDIA OF LAW DICTIONARY 143 (1922).

85. SECOND PART OF THE INSTITUTES, *supra* note 80, at 713.

86. FIRST PART OF THE INSTITUTES, *supra* note 69, at 131.b.–33.b. *See also id.* at 1.a–10.b (establishing the independence of the queen as a general principle).

87. *Id.* at 131.b.–33.b.

88. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 106–09 (Lawbook Exch. 2012) (Larceny or Theft).

89. *Id.*

90. *Id.*

ture as a useful means of allocating power within households and assigning responsibility for the management of large, landed estates.<sup>91</sup>

#### D. Early Eighteenth-Century Developments

Decisions of the English courts in the latter seventeenth and early eighteenth centuries repeated and embellished the legal fiction that male and female were made one flesh at marriage. The large and imposing monolith that had begun to appear at the end of the middle ages was now growing more formidable, more all-encompassing.

Scripture became the foundation-stone upon which the cases built. Thus, the Court of King's Bench in *Manby v. Scott* connected the whole of the law of marriage to the Book of Genesis, man's fall from grace in the Garden, and the divine decree that through marriage man and woman become "one flesh."<sup>92</sup> The tendency to rely on scripture to justify and explain marriage only grew in force in the early eighteenth century. In a case involving land given in trust, King's Bench noted "that husband and wife are but one flesh."<sup>93</sup> Sir Edward Coke was even cited for the biblical basis of the English law of marriage. Thus we find: "[t]hat in law they were considered one flesh, though with two souls, according to . . . Lord Coke."<sup>94</sup>

These broad statements of principle by the cases then opened the door to efforts by early eighteenth-century lawyers to explain and elucidate coverture for the benefit of the bench and bar and lay readers alike. The year 1700 thus saw the publication of *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives*.<sup>95</sup> This work was meant as a distillation of Sir Edward Coke's ideas synthesized with the case law of the intervening century.<sup>96</sup>

*Baron and Feme* was overtly theological in its premises. According to the text, a wife, by the "Law of God"<sup>97</sup> and the "Law of Nature"<sup>98</sup> was subjected to the power of her husband and was legally incapable of resisting this subjugation.<sup>99</sup> To indicate how total the absorption of the wife's juridic personality into her husband's was, the anonymous treatise writer compared

91. Within his own family, Coke must have been familiar with how a wife might act forcefully and independently. Anne Coke Stubbes, Edward Coke's sister, was educated according to the terms of their father's will, and became a visible and public Puritan activist. See BOYER, EDWARD COKE AND THE ELIZABETHAN AGE, *supra* note 74, at 156–75.

92. *Manby v. Scott*, (1662) 86 ENG. REP. 781, 782 (K.B.).

93. *Evelyn v. Evelyn*, (1731) 94 ENG. REP. 686, 691 (K.B.).

94. *Rex v. Reading*, (1735) 93 ENG. REP. 208, 209 (K.B.).

95. *BARON & FEME: A TREATISE OF THE COMMON LAW CONCERNING HUSBANDS AND WIVES* (1700) [hereinafter *BARON & FEME*].

96. SUSAN GLOVER, *ENGENDERING LEGITIMACY: LAW, PROPERTY, AND EARLY EIGHTEENTH-CENTURY FICTION* 75 (2006).

97. *BARON & FEME*, *supra* note 95, at 9.

98. *Id.* at 7.

99. *Id.* at 7, 9. The treatise writer uses the Latin phrase *sub potestate viri* to express this idea, which I have rendered as "subjugation."



the wife's position at law to an infant—by which the author meant not a newborn, but any person who had not yet attained the age of majority. An infant, so defined, may act to his own advantage.<sup>100</sup> If he signs a lease, it is voidable, not void as a matter of law.<sup>101</sup> He may negotiate for and purchase the necessities of daily life.<sup>102</sup> He may marry and supervise and direct his family.<sup>103</sup>

To be sure, a “Feme covert is a Favourite of the Law.”<sup>104</sup> Yet, the treatise-writer continued, the legal restrictions on her freedom of action are more complete than those placed on the infant. She may not contract for the purchase even of necessities without her husband's express, or at least strongly implied, consent.<sup>105</sup> By marriage, the husband gained a freehold interest in any real property held by his wife, an interest that endured until the time of his death or the dissolution of the marriage.<sup>106</sup> The husband may thus lease out lands of which the wife was seized prior to the marriage or place other encumbrances upon them<sup>107</sup> with the effect that these encumbrances survived the husband's death.<sup>108</sup>

The restrictions placed on the wife extended well beyond the law of property, stretching even to such legal categories as the law of actions. Thus the wife might not act alone to prosecute suits at law or in equity to recover land or obtain damages.<sup>109</sup> The husband was the head of household, after all, and was uniquely equipped to determine the impact litigation might have on the family's financial well-being.<sup>110</sup> Similarly, a husband might take possession of obligations owed the wife and transfer or alienate them and the wife had no recourse at law.<sup>111</sup> These rules were one-sided enough that the author felt the need to explain at some length that the husband did not own the wife, that he had the continuing obligation to love her, and that he should not therefore beat or abuse her.<sup>112</sup>

What existed in theory, however, did not exactly correspond with intricate legal reality. As in Coke's day, lawyers and judges in the early and

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100. *Id.* at 8.

101. *Id.*

102. *Id.*

103. *BARON & FEME*, *supra* note 95, at 8.

104. *Id.*

105. *Id.*

106. *Id.* at 58.

107. *Id.* at 65.

108. *Id.* at 54.

109. *BARON & FEME*, *supra* note 95, at 61.

110. *Id.* This rule was so comprehensive that even where the wife was slandered, it belonged to the husband alone to decide whether to vindicate her reputation by bringing suit. *Id.* at 270.

111. *Id.* at 61.

112. *Id.* at 9 (stating “Though our Law makes the Woman subject to the Husband, yet he may not kill her, but it is Murder; he may not beat her, but she may pray the Peace . . . . So he may not starve her, but must provide Maintenance for her.”). Of course, if husband and wife really were one person, these acts would be literally unthinkable since the husband would be killing, or beating, or starving a part of his very being.

middle eighteenth century created a variety of narrowly-tailored exceptions to these broad statements of principle. Judges, after all, unlike theorists, were forced to consider the circumstances of particular cases and developed a body of case law that was at least somewhat sensitive to the tug and pull of social reality.

Parents of a bride, or her male relatives, might create a trust that could then be administered by an independent trustee to the wife's benefit.<sup>113</sup> A husband might also create a separate estate for his wife based on produce from his agricultural enterprises and the courts protected this arrangement from collateral challenge.<sup>114</sup> Similarly, a wife was empowered to execute a valid will with her husband's consent.<sup>115</sup> Also a wife who acquired jewels from her separate pin-money, given to her by her husband, would not subsequently forfeit these jewels should her husband die insolvent.<sup>116</sup> While cases like these illustrate exceptions courts were willing to enforce, it must also be borne in mind that they depended for their efficacy on the foresight of the bride's family, or on the husband's willingness to grant his wife independent financial resources or a free scope for legally effective action. These results were, in the final analysis, matters of grace, not right.

Not surprisingly, therefore, three decades after the appearance of *Baron and Feme*, another book appeared that tried to restore some balance and perspective to the earlier work's uncritical endorsement of female subordination. Entitled *A Treatise of Feme Coverts: Or, the Lady's Law*,<sup>117</sup> this volume reworked the source material of *Baron and Feme* with the purpose of reminding lawyers, judges, and wives themselves that women did, in fact, enjoy rights at law and were not entirely subject to their husbands in all things.<sup>118</sup>

The treatise opened with a restatement of biblical teaching as understood by the common lawyers: the wife is subject to her husband because it is the husband who "Shall forsake [his] Father and Mother to stick to his Wife."<sup>119</sup> Not exactly the King James English, but close enough to the biblical phrasing that the intent was unmistakable. But the book's author intended to move beyond biblical truism and address wealthy, propertied women, their guardians, and their legal advisors on a most pressingly im-

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113. *Infra* note 131–132, 154–56 and accompanying text.

114. *Slanning v. Style*, (1734) 3 P. WMS. 334, 337, 24 ENG. REP. 1089, 1090 (K.B.).

115. *Richardson v. Seise*, (1699) 88 ENG. REP. 1338 (K.B.); *See* Prue Vines & Rosalind F. Croucher, *Law and Religion: Death in the Common Law*, in *LAW AND RELIGION: THE STATE AND THE COMMON LAW* 295, 298 (Peter Radan, et al. eds., 2005) (Where the wife predeceases her husband, the husband might revoke his permission *post mortem* and thereby invalidate his late wife's will.).

116. *Willson v. Pack*, (1710) PREC. CHAN. 296, 24 ENG. REP. 141, 141 (K.B.).

117. LANCE DICKSON, *A TREATISE OF FEME COVERTS: OR, THE LADY'S LAW* (photo. reprint 1974) (1732).

118. NICOLA JANE PHILLIPS, *WOMEN IN BUSINESS: 1700–1850* 34 (2006).

119. DICKSON, *supra* note 117, at v.

portant topic: “The fair Sex are here inform’d, how to preserve their Lands, Goods, and most valuable Effects, from the Incroachments of any one.”<sup>120</sup> The treatise was not a revolutionary manifesto. It repeated, practically word-for-word, the obnoxious comparison of women to infants found in *Baron and Feme*.<sup>121</sup> It was not about to overturn the settled and comfortable world of the English upper classes.

But the author did work, within the confines of the legal system he knew, to elucidate the ways in which a woman’s interest might be protected and preserved. The author insisted that women should not be the victims of violence within or outside of marriage and reminded readers that heavy legal consequences could follow.<sup>122</sup> Consider the case in the days of Queen Anne of the heiress who was falsely imprisoned by a man seeking her hand in marriage and only released upon her (coerced) consent to marry.<sup>123</sup> That man was quite properly hanged.<sup>124</sup> Indeed, the author reminded readers, abduction for such purposes followed by copulation constituted felony without benefit of clergy (in other words, a felony for which the death penalty should automatically apply).<sup>125</sup> Thus “[a] Woman may justify the killing [of] a Person, attempting to ravish her.”<sup>126</sup>

The main point of the book, however, was to highlight the various legal devices and property rights the wife might still retain even after marriage.<sup>127</sup> Thus, where a husband had alienated the wife’s lands, she might recover these following his death.<sup>128</sup> Such an admonition carried some teeth—it sent the signal to potential purchasers that if you bargained with a husband concerning his wife’s estates, you needed to be extremely careful, because your title was insecure.

The *Lady’s Law* also reiterated a point made by Sir Edward Coke: even though a husband might devise his property to his wife by will, the wife could in no way do the same.<sup>129</sup> Being under her husband’s control, after all, meant that she was presumed to be coerced.<sup>130</sup> Though the legal doctrine was well-known, the force with which the treatise’s author defended the woman’s position was significant for its emphasis on the wife’s special vulnerability to an overbearing husband. Through rhetorical empha-

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120. *Id.* at vii.

121. *Id.* at 81.

122. *Id.* at 43–52.

123. *Id.* at 45.

124. *Id.*

125. DICKSON, *supra* note 117, at 43.

126. *Id.* at 52. Lest one think that the TREATISE was counseling resistance in all cases, the author saw fit to add: “Some Authors mention that a Husband may give his Wife reasonable Correction and Chastisement, and by the Common Law she can have no Action.” *Id.* at 81.

127. Amy Louise Erickson, *Common Law Versus Common Practice: The Use of Marriage Settlements in Early Modern England*, 43 *ECON. HIST. REV.* (n.s.) 21, 26–27 (1990).

128. DICKSON, *supra* note 117, at 134.

129. *Id.* at 161–62; *cf. supra* notes 78–79 and accompanying text.

130. *Id.* at 161–62.

sis, the work's author reminded women that they really did possess the power to say "no" in certain circumstances and that they could count on the full backing of the common law.

Most importantly, the treatise recommended that third parties—most often, the wife's father—should create a trust out of her separate property and name friends or relatives to act as trustees for the use and benefit of the wife.<sup>131</sup> As the eighteenth century progressed, the use of trust instruments became a favorite device by which benevolent fathers enhanced the independence and security of their daughters following marriage.<sup>132</sup>

The law as it stood around the year 1760 thus conferred overwhelming advantage on the husband and taught married women that their legal inferiority was part of God's cosmic plan. And yet, lawyers and judges were forced to confront social reality; they acknowledged that they operated in a world of legal fictions and that such fictions had inherent limits; and they had created subterfuges by which the law might be avoided, relying on the law of trusts to do the heavy lifting.<sup>133</sup> In short, they had created a system where some married women, at least, might find a range and scope of independent action. These intricate, carefully-crafted compromises, however, would soon themselves be under threat from a new rage for systematization, represented by the jurist William Blackstone.

### E. *William Blackstone*

Looming over the latter half of the eighteenth century, casting his shadow forward into the opening decades of the twenty-first,<sup>134</sup> William Blackstone (1723–1780) today is recalled as a kind of monumental figure.<sup>135</sup> To say this is not necessarily to praise him. It is merely to acknowledge the central role he played in the consolidation of legal thought in the

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131. *Id.* at 137, 147.

132. AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* 102–51 (1995); SUSAN STAVES, *MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660–1833* 95–195 (1990).

133. Where a woman could count on the cooperation of her father, or other male relatives, or a compliant trustee, she might retain significant control over her independent property or other resources. Prior to marriage, the law permitted, provided such cooperation could be secured, the creation of a trust to the benefit of the wife of property that her husband could not reach. Prenuptial agreements sometimes served the same purpose. *See* BARBARA JEAN HARRIS, *ENGLISH ARISTOCRATIC WOMEN, 1450–1550: MARRIAGE AND FAMILY, PROPERTY AND CAREERS* 18–20 (2002); FRANCES E. DOLAN, *MARRIAGE AND VIOLENCE: THE EARLY MODERN LEGACY* 77 (2009).

134. Citations to Blackstone remain recurrent in Supreme Court jurisprudence. *See, e.g.*, *Filarsky v. Delia*, 132 S. Ct. 1657, 1664, 182 L. Ed. 2d 662, 671 (2012); *Delling v. Idaho*, 133 S. Ct. 504, 504 (2012) (Breyer, J., dissenting from denial of cert.).

135. As one biographer noted in 2008: "Wherever the founding influence of English common law is acknowledged, Blackstone's name appears on the walls of courthouses, legislatures, and university buildings." WILFRED PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 1 (2008).

Great Britain of his era,<sup>136</sup> and to recognize that his influence succeeded in spreading to the American continent where it remains a significant presence today.<sup>137</sup>

Blackstone the man, not the monument, hailed from affluent circumstances. He was the posthumous son of a London silk merchant who had moved in consequential circles and whose fortune was sufficient to send his promising young son at the age of eight to Charterhouse, perhaps the most prestigious academy of its kind in England.<sup>138</sup> Young William distinguished himself as a precocious student able to compose sophisticated Latin verse by the age of twelve, for which he won the prestigious John Milton Medal.<sup>139</sup> He made a passable attempt at practicing law, but his real vocation was university life.<sup>140</sup> He spent much of the middle part of his life at Oxford University where he taught, served in the administration, and wrote tracts and treatises—most especially his *Commentaries on the Laws of England*.<sup>141</sup> He concluded this impressive *cursus honorum* with ten years of service on the Court of King's Bench, from 1770 to 1780.<sup>142</sup>

Many have seen Blackstone as a conservative, distilling and refining the collective wisdom of the common law. Kunal Parker has called attention to these aspects of Blackstone's thought in his recently published *Common Law, History, and Democracy in America*.<sup>143</sup> Russell Kirk struck a variation on this theme in asserting that the conservatism of the American founding was explicable in terms of Blackstone's own veneration of the rights of property and contract and his worshipful regard for tradition and precedent.<sup>144</sup> Duncan Kennedy, writing from a critical legal studies perspective, denounced rather than praised Blackstone for the self-same reasons—finding in his *Commentaries* an apology for a repressive legal system that held its subjects in unyielding bondage.<sup>145</sup> At the same time,

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136. "[Blackstone] produced really an elementary work—but one written with so much system and completeness and in a style and language so pure and elegant that it at once assumed and has ever since maintained the place of *First Institute of Legal Education* to all who make the *Common Law* of England their special study." LEWIS C. WARDEN, *THE LIFE OF BLACKSTONE* 402 (1938) (emphasis in original).

137. DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE 169–70* (Peter Smith ed. 1938).

138. *Id.* at 1–11. Following his father's death, Blackstone's mother assumed the operations of the silk-trading firm, although she eventually struggled. She was, however, able to call upon significant family wealth to see herself through difficult times. IAN DOOLITTLE, *WILLIAM BLACKSTONE: A BIOGRAPHY* 3–4 (2001).

139. LOCKMILLER, *supra* note 137, at 8.

140. *Id.* at 52–71.

141. WARDEN, *supra* note 136, at 252–312. See J.E.G. Montmorency, *Sir William Blackstone*, 17 J. SOC. COMP. LEGIS. (n.s.) 45, 48–49 (1917), for a summary of Blackstone's other treatises.

142. Harold G. Hanbury, *Blackstone as a Judge*, 3 AM. J. LEGAL HIST. 1, 1–27 (1958).

143. KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900* 57–66 (2011).

144. RUSSELL KIRK, *AMERICA'S BRITISH CULTURE* 36–40 (1993).

145. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210 (1979). "[Blackstone's Commentaries are] an instrument of apology—an attempt to mystify

others have seen in Blackstone the influence of enlightenment rationalism. Both Randall MacGowan and Brian Tamanaha thus praise Blackstone's effort to elucidate the law in simple, accessible prose as an outgrowth of his enlightenment sympathies,<sup>146</sup> while Paul Carrese has identified Blackstone's reform impulses as central to his systematic analysis of English law.<sup>147</sup>

But however you categorize Blackstone's larger vision, whether you see it as reflective of the innate conservatism of the common law or as a set of practically-oriented and incrementally-designed reforms of a hidebound and tired system, you must come to terms with his teaching on coverture, which did not embark in anything like a new direction.

A modern historian has written, concerning Blackstone and coverture: "Blackstone appears to have captured in this principle of coverture . . . an attitude that in fact was widespread in the culture: a woman relinquishes all independent existence in marriage and is completely dependent upon her husband. Only he has subjectivity; she has none."<sup>148</sup>

A review of Blackstone's treatment of coverture comes close to concurring with this grim assessment. Citing Sir Edward Coke, Blackstone began: "By marriage, the husband and wife are one person in law."<sup>149</sup> This absorption, legally speaking at least, was whole, entire, and comprehensive:

[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme covert*. . . . Upon this principle, of a [sic] union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.<sup>150</sup>

Blackstone went on to identify the many ways in which the rights of the woman were left in suspended animation for the lifetime of the marriage. It would be absurd, Blackstone supposed, for a man to grant a wife anything or to make a contract with her, since he would merely be dealing

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both dominators and dominated by convincing them of the 'naturalness,' the 'freedom,' and the 'rationality' of a condition of bondage."

146. Randall MacGowan, *Law and Enlightenment*, in *THE ENLIGHTENMENT WORLD* 502, 514 (Martin Fitzpatrick et al. eds., 2004); BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 21 (2006).

147. PAUL CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* 167–77 (2003).

148. MARIANNE NOBLE, *THE MASOCHISTIC PLEASURES OF SENTIMENTAL LITERATURE* 30 (2000).

149. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 430 (photo. reprint 1979) (1765).

150. *Id.*

with himself.<sup>151</sup> The husband alone may choose to bring (or refuse to bring) a cause of action to vindicate his wife's rights.<sup>152</sup> The husband is responsible for any debts the wife has incurred prior to marriage since marriage is like the adoption of a child in the totality of the legal dependency that is thereby created.<sup>153</sup>

Lawrence Friedman, in his important work on the history of inheritance law, has called attention to a glaring omission at the heart of Blackstone's analysis. Even though English courts of equity continued to permit the wife's family to create trusts for her exclusive use and benefit during the marriage, Blackstone is silent on this matter.<sup>154</sup> What mattered to Blackstone, the rational systematizer, was the purity and encompassing scope of the legal fiction of coverture, not the many, messy exceptions to the rule.<sup>155</sup> In this obsession with crystalline summary, Blackstone was very much unlike Edward Coke, the keenly practical, detail-oriented common lawyer. And the great difference between these two men would have the profoundest effects on the status of women.<sup>156</sup>

Mary Ritter Beard (1876–1958), an early and powerfully significant feminist historian,<sup>157</sup> dwelt on Blackstone's failure to discuss this large and central exception to the harshness of the coverture doctrine. She wished to be charitable to the old common lawyer. She realized that Blackstone's con-

151. *Id.* Blackstone does concede that the husband may confer his estate on his wife by will, since the will does not operate until after the oneness of the bond has been severed by the husband's death. *Id.*

152. *Id.* at 430–31.

153. *Id.* at 430.

154. LAWRENCE MEIR FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 23 (2009). Amy Erickson similarly notes the proliferation in the seventeenth and eighteenth centuries of technical treatises on conveyancing that contained long sections addressing the special needs of fathers providing by trust for their affianced daughters. *See* Erickson, *supra* note 127, at 27. *Cf.* GILBERT HORSEMAN, *PRECEDENTS IN CONVEYANCING* (1744) (a three-volume work, a third of whose pages were devoted to protection of "the wife's property rights.").

155. In making the case for Blackstone as an enlightenment thinker, Holly Brewer sees his theory of total womanly subjection in marriage connected to Blackstone's larger theory of representation and consent. Marriage was a representative institution, the wife consenting once to enter it and thereafter represented in all of her affairs by her husband. *See* HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 361 (2005).

156. *See infra* notes 158–66 and accompanying text.

157. Mary Ritter Beard, together with her husband, the progressive historian Charles Beard, played an important role in the movement for social justice in the early twentieth century, campaigning for workers' rights and economic fairness. Mary Beard's book, *WOMAN AS A FORCE IN HISTORY: A STUDY IN TRADITIONS AND REALITIES* (1946) [hereinafter *WOMAN AS A FORCE IN HISTORY*], was a landmark in women's history for the way in which it insisted that women should not be seen as history's victims but as independent actors who played historically significant roles in shaping and moving events in every historical epoch. On Beard's career and accomplishments, see, among other titles, NANCY COTT, *A WOMAN MAKING HISTORY: MARY RITTER BEARD THROUGH HER LETTERS* 1–62 (1991); MARY RITTER BEARD, *MAKING WOMEN'S HISTORY: THE ESSENTIAL MARY RITTER BEARD* 1–72 (ANN J. LANE ed., 2000); and Suzanne Lebsack, *In Retrospect: Reading Mary Beard*, 17 *REVS. IN AM. HIST.* 324, 324–39 (1989) (a grudgingly admirable reading of Beard's book, *WOMAN AS A FORCE IN HISTORY*, *supra*).

cern was with the common law, that he believed the common law was “a magnificent system of human justice,”<sup>158</sup> and that he harbored a deep and abiding aversion to the law of equity.<sup>159</sup> Trusts, being a branch of the law of equity, were therefore simply omitted as irrelevant to his larger purpose.<sup>160</sup> Perhaps, then, it was the drawing of professional and jurisdictional boundaries that kept Blackstone from recognizing what every lawyer of his day clearly knew—that married women might, and often were, the beneficiaries of trusts established for their use and that this subterfuge was a commonly-employed means of protecting their economic independence.<sup>161</sup> But whatever his motives, and Beard was prepared to be kind, the results were dreadful: “In effect . . . Blackstone deceived generations of lawyers and laymen of both sexes by the manner in which he treated the disabilities of married women.”<sup>162</sup>

Beard is actually among the more generous of Blackstone’s numerous modern detractors. Sheryl Grana criticizes Blackstone for popularizing a doctrine whose odious legacy remains with us still in a legal system “built on custom, religion, and tradition.”<sup>163</sup> In her casebook on women and the law, Ashlyn Kuersten defines “coverture” as “chattel” and supports her definition by referencing Blackstone.<sup>164</sup> Tiffany Wayne blames Blackstone for the spread of coverture to the American colonies in the years before the Revolution.<sup>165</sup> Hendrick Hartog has made the same point much more emphatically. Thanks to Blackstone’s simplification of a complex set of rules and understandings, American lawyers “took [his] lapidary paragraphs as a complete description of the received law of husband and wife.”<sup>166</sup>

### III. MARY WOLLSTONECRAFT, RADICAL CRITIC

#### A. *Mary Wollstonecraft’s Life*

Spitalfields, located in London’s East End, remained a largely rural district adjacent to the city until the later seventeenth century when it was built up by French Huguenots seeking religious freedom following the Revocation of the Edict of Nantes in 1685.<sup>167</sup> It was an area where, in the

158. WOMAN AS A FORCE IN HISTORY, *supra* note 157, at 95.

159. *Id.* at 91.

160. *Id.* at 91–93.

161. *Id.* at 94.

162. *Id.* at 97. Beard lamented the fact that “[Blackstone] did not immediately follow up his disquisition on husband and wife with a section showing how the disabilities of married women, in respect of their property, could be and were frequently nullified by uses, trusts, and other arrangements which were valid and enforced in equity.” *Id.*

163. SHERYL GRANA, WOMEN AND JUSTICE 34 (2d ed. 2010).

164. ASHLYN K. KUERSTEN, WOMEN AND THE LAW: LEADERS, CASES, AND DOCUMENTS 4 (2003).

165. TIFFANY WAYNE, WOMEN’S ROLES IN NINETEENTH-CENTURY AMERICA 17 (2007).

166. HENDRICK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 118 (2000).

167. ANNE J. KERSHEN, STRANGERS, ALIENS, AND ASIANS: HUGUENOTS, JEWS, AND BAN-GLADESHIS IN SPITALFIELDS, 1660–2000 34 (2005).



middle eighteenth century, great poverty and great wealth co-existed in jarringly close proximity,<sup>168</sup> for it was home to both London's emerging silk trade and to many immense and creaking tenement houses crowded with new arrivals in the city.<sup>169</sup> Spitalfields, furthermore, was a place where robust religious dissent and subversive thought could flourish and where fierce working-class riots might break out from time to time.<sup>170</sup>

Mary Wollstonecraft was born into a silk weaving family in Spitalfields in 1759. Her grandfather had been a prosperous merchant and he had groomed and trained his son Edward to take his rightful place in the family firm.<sup>171</sup> Edward, however, and his wife Elizabeth, the daughter of a successful London wine merchant, thought to exchange the chaos and the jostling, the sounds and smells of London's East End for the life of country estate-holders a few years after Mary's birth.<sup>172</sup>

Life as a country squire did not treat Edward well. A restless man, he moved frequently, buying and selling estates, inevitably losing money on the transactions.<sup>173</sup> He turned steadily to drink as his one sure solace in his ruinously unstable world.<sup>174</sup> And he was abusive—to his wife Elizabeth, to Mary, and to her brothers and sisters.<sup>175</sup> Mary resented the maltreatment and resented even more powerfully her mother's tolerance of it.<sup>176</sup>

Mary likely would have amounted to little had it not been for her own native resourcefulness. Her parents provided poorly for her education, giving her only the rudiments expected of women destined for "housewifery."<sup>177</sup> What Mary did not receive from her apathetic and demoralized parents, she actively and aggressively pursued outside the home.<sup>178</sup> She eagerly sought knowledge, she ardently desired the sharpening of her mind that books and debates and discourses provided her.<sup>179</sup>

168. LINDSEY GERMAN AND JOHN REES, *A PEOPLES' HISTORY OF LONDON* 71 (2012).

169. ROBIN D. GWYNN, *HUGUENOT HERITAGE: THE HISTORY AND CONTRIBUTIONS OF THE HUGUENOTS IN BRITAIN* 83 (2d rev. ed. 2003) (describing the wealth of some of the inhabitants); Anne J. Kershen, *The Migrant at Home in Spitalfields: Memory, Myth, and Reality*, in *HISTORIES AND MEMORIES: MIGRANTS AND THEIR BRITAIN* 96, 97 (Kathy Burrell & Panikos Panayi eds., 2006) (describing overcrowded tenement life).

170. See ROBERT SHOEMAKER, *THE LONDON MOB: VIOLENCE AND DISORDER IN EIGHTEENTH-CENTURY ENGLAND* 264 (2007); ALAN WARWICK PALMER, *THE EAST END: FOUR CENTURIES OF LONDON LIFE* 19–20 (2000); ROY PORTER, *LONDON: A SOCIAL HISTORY* 140–41 (1998).

171. MIRIAM BRODY, *MARY WOLLSTONECRAFT: MOTHER OF WOMEN'S RIGHTS* 11 (2000).

172. BARBARA TAYLOR, *MARY WOLLSTONECRAFT AND THE FEMINIST IMAGINATION* 5 (2003).

173. MARY WOLLSTONECRAFT, *LETTERS ON SWEDEN, NORWAY, AND DENMARK* 3 (2005).

174. ELIZABETH CAMPBELL DENLINGER, *BEFORE VICTORIA: EXTRAORDINARY WOMEN OF THE BRITISH ROMANTIC ERA* 25–26 (2005).

175. *Id.*

176. RALPH M. WARDLE, *MARY WOLLSTONECRAFT: A CRITICAL BIOGRAPHY* 6–7 (1951).

177. JANET TODD, *MARY WOLLSTONECRAFT: A REVOLUTIONARY LIFE* 12 (2000).

178. CLAIRE TOMALIN, *THE LIFE AND DEATH OF MARY WOLLSTONECRAFT* 8–11 (1974).

179. WARDLE, *supra* note 176, at 9. By the time she was ten or twelve, Wollstonecraft had acquired enough self-taught knowledge that she was able to participate in local debates on public affairs. See BHASKAR A. SHUKLA, *FEMINISM FROM MARY WOLLSTONECRAFT TO BETTY FRIEDAN* 9 (2007).

She was lucky in her friends and neighbors and actually benefited from her father's final culminating misfortune. It seems his pretensions at country leisure collapsed under the weight of unpaid bills when Mary was fifteen and the family returned to London, settling in Hoxton. At Hoxton, Mary fell under the spell of a neighbor, a retired clergyman, the reclusive and physically disabled Reverend Mr. Clare and his supportive and patient wife.<sup>180</sup> The Clares were childless and they opened their home to Mary, introducing her to a world of poetry and philosophy, books and learning, which she enthusiastically embraced. And then there was Fanny Blood, two years older than Mary, whom she met through the Clares, and who was yet another resource for an emotionally-starved adolescent seeking to find her place in the world.<sup>181</sup> By the age of eighteen she had moved out of the family home, living for a while at the home of Fanny's parents, then taking a position as a companion to a wealthy, elderly lady in Bath.<sup>182</sup>

After a brief interlude tending to her ailing mother, Mary was permanently on her own by the early 1780s, making her way in the world by her wits and obvious talents. She and Fanny, and Mary's younger sisters, founded a school for young children that handled both day students and boarders.<sup>183</sup> Her pupils were drawn mostly from the sons and daughters of religious dissenters, free-thinkers, and various and sundry radicals.<sup>184</sup> Mary and her collaborators promised to educate their charges in a supportive, nurturing, maternal environment.<sup>185</sup> This venture succeeded for a while, but failed when Fanny died and Mary lost heart.<sup>186</sup>

After a period of intense grieving at Fanny's death, during which time she was employed as a nanny,<sup>187</sup> Mary recovered her emotional bearings and resolved to make a career at something few Englishwomen had previously attempted—she would become a professional writer.<sup>188</sup> She had es-

180. WARDLE, *supra* note 176, at 10.

181. Fanny had polish and sophistication—she could “paint fine water colors, play the piano, and converse fluently on a number of subjects.” Mary self-consciously chose to make Fanny her “mentor.” MOIRA FERGUSON & JANET TODD, *MARY WOLLSTONECRAFT* 2 (1984).

182. WARDLE, *supra* note 176, at 12–13.

183. LYNDALL GORDON, *VINDICATION: A LIFE OF MARY WOLLSTONECRAFT* 40–42 (2005).

184. Mary's mentor in this enterprise was also the leading radical of the age—Richard Price, the Unitarian clergyman and free-thinker who stressed the radical equality of the sexes and the special urgency to abolish the restrictive code of coverture. See Pam Hirsch, *Mary Wollstonecraft: A Problematic Legacy*, in *WOLLSTONECRAFT'S DAUGHTERS: WOMANHOOD IN ENGLAND AND FRANCE, 1780–1820* 43, 44 (Clarissa Campbell Orr ed., 1996). Cf. Barbara Taylor, *The Religious Foundations of Mary Wollstonecraft's Feminism*, in *THE CAMBRIDGE COMPANION TO MARY WOLLSTONECRAFT* 99, 107 (Claudia L. Johnson ed., 2002).

185. *Id.*

186. See TODD, *supra* note 177, at 58–67.

187. In an act of geographic escape, Mary traveled to Ireland, where she worked briefly as a governess, from which position she was terminated, “charged with corrupting the children and unladylike behavior.” AINTZANE LEGARRETA MENTXAKA, KATE O'BRIEN AND THE FICTION OF IDENTITY: SEX, ART, AND POLITICS IN MARY LAVELLE AND OTHER WRITINGS 30 (2011).

188. Grandiloquently, she boasted that in this choice of endeavors, she would become “‘the first of a new genus.’” Mary A. Waters, *'The First of a New Genus: Mary Wollstonecraft as a*

established some contacts among radical publishers, and soon found herself working with Joseph Johnson, whose firm was at the center of a rising, loosely organized collection of radical writers, thinkers, and agitators.<sup>189</sup>

Mary did some of her best work in collaboration with Johnson. According to Mary Waters:

Wollstonecraft's work for Johnson came to include not only her well-known political works, *A Vindication of the Rights of Men* (1790) and *A Vindication of the Rights of Woman* (1792), but editing, translation, authoring stories for children, and voluminous contributions to the soon to-be-launched literary periodical, the *Analytical Review*. Men had long held similar positions, especially with publishers of the increasingly popular literary magazines that began to proliferate in the second half of the eighteenth century. But Wollstonecraft was, it so appears, the first woman to be relied on in just this manner.<sup>190</sup>

Mary's later years consisted of a whirlwind of activities and interests. She traveled to France in 1792 at the height of the Reign of Terror and developed a passionate romantic interest with an American in Paris—the man of letters Gilbert Imlay.<sup>191</sup> Imlay was hard at work on a novel—*THE EMIGRANTS*—and it is possible that Mary ghost-authored at least a portion of the work.<sup>192</sup> She also had a daughter by Imlay, whom she called Fanny, after her old friend. Imlay himself took no interest in the child.<sup>193</sup>

Upon returning to England, Mary soon found herself moving within elite literary circles.<sup>194</sup> She developed a friendship with the philosopher William Godwin that quickly led to marriage. An enemy of aristocracy and a critic of the conservative establishment,<sup>195</sup> Godwin was an ideal partner

*Literary Critic and Mentor to Mary Hays*, 37 *EIGHTEENTH-CENTURY STUD.* 415, 415 (2004) (quoting Mary Wollstonecraft).

189. MARY HILTON, *WOMEN AND THE SHAPING OF THE YOUNG: EDUCATION AND PUBLIC DOCTRINE IN BRITAIN, 1750–1850* 75 (2007).

190. Waters, *supra* note 188, at 416.

191. Imlay was also a self-promoter of monumental proportions who presented himself to French authorities as a son of the Kentucky frontier (he was actually from New Jersey) and played a role in the Citizen Genet plot to involve the new American government in a proposed French war against the old colonial powers of Spain and Great Britain. See ELEANOR FLEXNER, *MARY WOLLSTONECRAFT* 181–86 (1973).

192. CHRISTOPHER FLYNN, *AMERICANS IN BRITISH LITERATURE, 1770–1832: A BREED APART* 55 (2008).

193. FLEXNER, *supra* note 191, at 189.

194. EMMA RAUSCHENBUSCH CLOUGH, *A STUDY OF MARY WOLLSTONECRAFT AND THE RIGHTS OF WOMAN* 9 (London, Longmans, Green, & Co., 1898).

195. See PETER H. MARSHALL, *WILLIAM GODWIN* 77–143 (1984) (summarizing Godwin's political thought during the tumultuous 1790s); Ian Ward, *A Man of Feelings: William Godwin's Romantic Embrace*, 17 *L. & LITERATURE* 21, 23 (2005) (“William Godwin was perhaps the most famous of all the English radical dissenters.”).

for Mary.<sup>196</sup> He adopted Mary's daughter Fanny<sup>197</sup> and soon Mary was pregnant once again—which led to the calamity of her early death.<sup>198</sup>

### B. *Mary Wollstonecraft's Works*

The detailed biography provided above is essential to a proper understanding of Mary Wollstonecraft's writing because so much of her work is transparently autobiographical. Even where she is not referencing the events of her own life, it is obvious that Mary's formative years had a decisive influence on the subjects she addressed and on her literary style.

#### 1. *Vindication of the Rights of Man*

Wollstonecraft understood herself quite self-consciously as a radical and a revolutionary, as well as a leader in a movement dedicated to breaking the fetters of an irrational, hierarchical past and to ushering in an age of equality and liberation under the gentle stewardship of sweet reason. This commitment shone through in her writing on the French Revolution, especially her *Vindication of the Rights of Man*.<sup>199</sup>

In the fall of 1789 Richard Price, one of Mary's principal patrons, published a pamphlet entitled *A Discourse on the Love of Our Country*, which praised the deposition of the French King Louis XVI and expressed solidarity with the revolutionaries across the Channel.<sup>200</sup> A year later, Edmond Burke responded with his famous *Reflections on the Revolution in France*.<sup>201</sup> In a mere four weeks, Wollstonecraft authored her response to Burke, in a work that vaulted her to the uppermost ranks of the British literary scene.<sup>202</sup>

196. Susan Laird, *Wollstonecraft, Mary (1759–1797)*, in 3 *EARLY CHILDHOOD EDUCATION: AN INTERNATIONAL ENCYCLOPEDIA* 847, 848 (Rebecca Staples New & Moncrieff Cochran, eds., 2008).

197. *Id.*

198. See *supra* notes 1–10 and accompanying text. Ruth Perry has summarized the significance of Mary Wollstonecraft's life: "Wollstonecraft has become an important influence for 20th-century feminists. Her independent and unconventional life—supporting herself, traveling alone, choosing her sexual partners—as well as her passionate, women-centered texts, make her an exemplary cultural figure." Ruth Perry, *Wollstonecraft, Mary (1759–1797)*, in *BRITAIN IN THE HANOVERIAN AGE, 1714–1837: AN ENCYCLOPEDIA*, 777, 780 (Gerald Newman & Leslie Ellen Brown eds., 1997).

199. Mary Wollstonecraft, *A Vindication of the Rights of Men*, in *THE WORKS OF MARY WOLLSTONECRAFT* 7–60 (1989) [hereinafter *Rights of Men*].

200. JACOB BRONOWSKI & BRUCE MAZLISH, *THE WESTERN INTELLECTUAL TRADITION: FROM LEONARDO TO HEGEL* 424–25 (1962).

201. On the circumstances leading up to this response, see J.G.A. Pocock, *Political Thought in the English-Speaking Atlantic, 1760–1790 Part 2: Empire, Revolution, and an End of Early Modernity*, in *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500–1800* 283, 302–04 (J.G.A. Pocock et al. eds., 1996).

202. Summarizing the impact of this work, and its sequel, *A Vindication of the Rights of Woman*, Barbara Taylor states: "Her name was bracketed with Tom Paine's, whose own *Rights of Man* appeared in 1791; she was commended in France and America, and feted by fellow radicals in England. Conservatives blustered; professional wits sneered. . . . It was a marvelous time for a

*A Vindication of the Rights of Man*, then, amounted to a sustained attack on the first premises of the *Reflections*.<sup>203</sup> Wollstonecraft began by pointing out that Burke was partial to custom and had made ancestral practices into the cornerstone of the British Constitution.<sup>204</sup> This suggestion was deeply flawed, she continued, because in making it Burke implicitly announced his opposition to all human progress and made the circumstance of birth decisive to who we were and how we were regarded as persons.<sup>205</sup> If Burke had been alive at the time of Christ, Wollstonecraft remarked, he would have favored the Crucifixion;<sup>206</sup> if he had been born in Arab lands he would have been a devoted follower of Muhammed.<sup>207</sup> His very premise, which favored the static over the transformative, would have blocked all consideration of what was inventive and new in society.<sup>208</sup>

Wollstonecraft heaped scorn on Burke's respect for the past as a treasure house of norms and values that we must blindly consult and adhere to today. She stressed that civility, politeness, and standards of decency are evolving, not static.<sup>209</sup> If humanity relies on the dead weight of tradition alone, it is plunged back into the age of barbarism.<sup>210</sup> Barbarism, after all, is the most traditional of human practices. Inherited sentiments, without more, can justify all and every act of organized plunder.<sup>211</sup> Indeed, she continued, you can even say this much about the elements comprising the British Constitution.<sup>212</sup> This unwritten code, binding on the hearts and minds of British subjects was not really created time out of mind by generations of all-know-

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feminist polemicist and Wollstonecraft reveled in it." TAYLOR, MARY WOLLSTONECRAFT AND THE FEMINIST IMAGINATION, *supra* note 172, at 7.

203. Both works, it must be stressed, were written prior to the Reign of Terror.

204. The British Constitution, Wollstonecraft claimed, was a "heterogeneous mass" of old and irrational practices, the product of the "dark days of ignorance" distilled from "the grossest prejudices and most immoral superstition." Wollstonecraft, *Rights of Men*, *supra* note 199, at 13. Cf. JANET M. TODD, SIGN OF ANGELICA: WOMEN, WRITING, AND FICTION, 1660–1800 198 (1989) (further comparing Burke and Wollstonecraft on tradition).

205. Burke, Wollstonecraft conceded, wished people to be virtuous, but he neglected to acknowledge that the virtues depend not on tradition and past practice, but on "the more extensive cultivation of reason." Wollstonecraft, *Rights of Men*, *supra* note 199, at 33. Only through the exercise of reason can we enjoy "the slow progress of civilization." *Id.*

206. *Id.* at 14. Jesus would have appeared to Burke as a "dangerous innovator," and, had Burke been alive in first-century Judaea, he would have joined in the cry, "crucify him! crucify him!" *Id.*

207. "[W]e should not forget how much we owe to chance that our inheritance was not Mahometism." *Id.* at 20.

208. "[W]e are to reverence the rust of antiquity, and term the unnatural customs, which ignorance and mistaken self-interest have consolidated, the sage fruit of experience." *Id.* at 10. Wollstonecraft continued her attack: According to Burke, "we ought cautiously remain forever in frozen inactivity." *Id.*

209. JENNY DAVIDSON, HYPOCRISY AND THE POLITICS OF POLITENESS: MANNERS AND MORALS FROM LOCKE TO AUSTEN 87 (2004).

210. Wollstonecraft, *supra* note 199, at 32.

211. *Id.* Cf. DANIEL I. O'NEILL, THE BURKE-WOLLSTONECRAFT DEBATE: SAVAGERY, CIVILIZATION, AND DEMOCRACY 165 (2007) (further developing this point).

212. Wollstonecraft, *Rights of Men*, *supra* note 199, at 12.

ing rulers heaping wisdom upon perceiving insight.<sup>213</sup> Rather the constitution was the final product of the uneasy counterpoise of faction, friction, brutality, and strife, the double distilled essence of power, force, subjugation, and violence.<sup>214</sup>

Although her main purpose in writing was to challenge Burke's dependence on tradition, Wollstonecraft succumbed to inevitable temptation and offered any number of observations about how a proper reliance on reason might reform the British family. She decried the family of her day. It was not about love, it was not concerned with nurturance, but was instead obsessed with property and status.<sup>215</sup> Primogeniture meant that fathers had to direct offspring into positions that conferred some degree of honor, such as the clergy, but removed them from the line of succession.<sup>216</sup> Women were married to men not for love, but to satisfy paternal dynastic needs, whether it be to join bloodlines or to cement business partnerships.<sup>217</sup> It was only natural that men and women, forced into loveless unions, would behave immorally.<sup>218</sup> Further it should be expected that young men and women whose futures were assured by their aristocratic birth would be ignorant, uncurious, and condescending since they regarded the lesser born, even those with greater natural talents and better-trained minds, their social inferiors.<sup>219</sup> A society ruled by families such as these should soon fail, Wollstonecraft predicted, yet Burke defended these sorry, blighted arrangements as worthy of veneration.<sup>220</sup>

In a flash of insight, she appreciated that the key to reform was to make property ownership contingent on ability;<sup>221</sup> this would unlock the talents of the aristocracy by forcing them to compete on an equal playing field with the sons and daughters of humbler birth.<sup>222</sup> Such a system would also better serve women's interest since they would no longer be playthings in the hands of parents, suitors, and unworthy spouses, but free and responsible actors in their own right.<sup>223</sup>

It is impossible not to see much that was personal in all of this: Mary Wollstonecraft the young firebrand whose family fortunes were destroyed by the drunken dissoluteness of her father; the teacher of non-conformists

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213. Tom Furniss, *Mary Wollstonecraft's French Revolution*, in *THE CAMBRIDGE COMPANION TO MARY WOLLSTONECRAFT* 59, 61–62 (Claudia L. Johnson ed., 2002).

214. *Id.*

215. Wollstonecraft, *supra* note 199, at 22.

216. *Id.* at 22, 35.

217. *Id.* at 22–23.

218. *Id.* at 23.

219. *Id.* at 42.

220. *Id.* at 22–24.

221. Wollstonecraft, *supra* note 199, at 24 (“The only security of property that nature authorizes and reason sanctions is, the right a man has to enjoy the acquisitions which his talents and industry have acquired . . .”).

222. *Id.*

223. *Id.* at 24–25.

and dissenters who prized reason over custom and faith; the intelligent governess to an ignorant family of aristocrats born to status and station; the self-made woman who succeeded by her wits in making her way against a hostile world of rank and privilege; and the zealousness of one who knew that the old aristocracy of birth had no room for the likes of her and who therefore wished to supplant that corrupt order with a world made and fashioned by talent. Having little invested in defending a society of hierarchy and inheritance, Mary exposed its pretenses as a fraud and its practices as destructive to all who fell under its withering spell.

## 2. *Vindication of the Rights of Women*

Mary's other works struck broadly similar themes. Thus *Mary, A Fiction* dealt with the intellectual progress of a young woman named Mary.<sup>224</sup> We follow her from her childhood, as the neglected daughter of loveless, indifferent parents, to an inquisitive self-taught adolescent, to an independent young woman whose best friend Ann was slightly older, but much more world-wise.<sup>225</sup> The book closes with Ann's death and Mary's reluctant, highly conditional decision to return to a marriage arranged for her by her mother.<sup>226</sup> The autobiographical detail and the foreshadowing of Mary Wollstonecraft's own death are remarkable.<sup>227</sup> So too is the theme—women, in the final analysis, must not look to marriage or to husbands, but must fall back on their resources, native abilities, and wit and wisdom to survive in a hostile world.<sup>228</sup> Her *Thoughts on the Education of Daughters*,<sup>229</sup> meanwhile, embedded similar advice within the familiar framework of what was known as a “conduct” book—a manual of etiquette addressed to young ladies of proper breeding on the dos and don'ts of polite society.<sup>230</sup>

But it is Wollstonecraft's *Vindication of the Rights of Women* where we see her commitment to the emancipation of women assume its mature

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224. Mary Wollstonecraft, *Mary, A Fiction*, in 1 WORKS OF MARY WOLLSTONECRAFT 7–73 (Janet Todd & Marilyn Butler eds., 1989).

225. *Id.* at 7–39.

226. *Id.* at 72–73. Disgusted with life, ill herself, Mary's thoughts turn to heaven, that place, according to the Gospel, where “they neither marry, nor are given in marriage.” *Matthew* 22:30.

227. MARY VIRGINIA BRACKETT & VICTORIA GAYDOSIK, *Mary Wollstonecraft*, in 1 THE FACTS ON FILE COMPANION TO THE BRITISH NOVEL 482–83 (2006).

228. MARY POOVEY, THE PROPER LADY AND THE WOMAN WRITER: IDEOLOGY AS STYLE IN THE WORKS OF MARY WOLLSTONECRAFT 55 (1985).

229. 4 MARY WOLLSTONECRAFT, *Thoughts on the Education of Daughters*, in THE WORKS OF MARY WOLLSTONECRAFT 7–49 (Janet Todd & Marilyn Butler eds., 1989).

230. Thus Wollstonecraft cautioned women that should their parents educate them but then leave them without resources, they can look forward to a life of terrible dissatisfaction, working as a governess, or teaching school, or serving as a traveling companion to some older woman, all of the servile experiences of Wollstonecraft's own youth. *Id.* at 25. See Vivien Jones, *Mary Wollstonecraft and the Literature of Advice and Instruction*, in THE CAMBRIDGE COMPANION TO MARY WOLLSTONECRAFT 119, 121–29 (Claudia L. Johnson ed. 2002) (discussing Wollstonecraft's *Thoughts on the Education of Daughters* and its relationship to “conduct books”).

and finished dimensions. In its own way this work was as radical as its precursor, *Vindication of the Rights of Man*. In that earlier work, Wollstonecraft sought to subvert the premises of British political thought by attacking the ancient constitution in the name of natural reason and democratic egalitarianism. In *Rights of Women*, published in 1792, Wollstonecraft attempted to overturn the basic premise upon which rested the legal inequality of male and female: the natural physical superiority of the man.

For too long, Wollstonecraft argued, it has been thoughtlessly conceded that men, because of their physical strength, should also enjoy leadership positions in society.<sup>231</sup> For sure, “[a] degree of physical superiority cannot, therefore, be denied . . . .”<sup>232</sup> Men have exploited their brute strength to subdue the world, to bend it to their wishes, to re-make it in their image and likeness.<sup>233</sup> But “not content with this natural pre-eminence, [they] endeavor to sink [women] still lower.”<sup>234</sup> Men wish to turn women into sex objects, into toys and baubles for their prurient gratification, into sweet coquettish ladies who might flirt and ornament themselves in their finery and their jewels, but who could never be trusted to use their minds seriously or productively.<sup>235</sup>

Over and over again, Wollstonecraft reverted to the language of animals or of childhood to describe the subjugation men have imposed upon women. Men wish to strip women of their “souls” by animalizing them.<sup>236</sup> “[T]hey insult us who thus advise us only to render ourselves gentle domestic brutes.”<sup>237</sup> Women are told and taught to practice “spaniel-like affection.”<sup>238</sup> A wife submissive to her husband is “scarcely raised . . . above the animal kingdom.”<sup>239</sup> Furthermore, women are counseled to lead lives “always in a state of childhood.”<sup>240</sup> They are instructed to practice perfect,

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231. MARY WOLLSTONECRAFT, *A Vindication of the Rights of Woman*, in *A VINDICATION OF THE RIGHTS OF MEN AND A VINDICATION OF THE RIGHTS OF WOMAN* 65, 74–75 (Sylvana Tomaselli ed. 1995) [hereinafter *Rights of Woman*].

232. *Id.* at 75.

233. *Id.* Cf. *id.* at 108 (“Brutal force has hitherto governed the world.”).

234. *Id.* at 75.

235. *Id.* at 75–77. (“[Women] are still reckoned a frivolous sex, and ridiculed or pitied by the writers who endeavour by satire or instruction to improve them.”).

236. *Id.* at 77 (“[M]en have a ‘desire [to] mak[e] mere animals of [women].’”).

237. *Rights of Woman*, *supra* note 231, at 87. “Brutes,” in eighteenth-century speech did not necessarily convey a sense of violence but did carry a strong sense of being an unreasoning animal. One thus finds this sense of “brute” in a poem attributed to Alexander Selkirk: “I am the lord of the fowl and the brute. . . . I am out of humanity’s reach. . . .” Alexander Selkirk, *Verses Supposed to be Written By Alexander Selkirk During His Solitary Abode in the Island of Juan Fernandez*, in *NEW OXFORD BOOK OF EIGHTEENTH-CENTURY VERSE* 591, 591–92 (Roger Lonsdale ed., 2009) (reissue with corrections of 1987 edition).

238. *Rights of Woman*, *supra* note 231, at 103.

239. *Id.* at 102.

240. *Id.* at 88.



unquestioning obedience by arguments fit to use with “children.”<sup>241</sup> Confronted with all of these derogatory lessons and stereotypes, “women are almost sunk below the standard of rational creatures.”<sup>242</sup>

Worse still, women have been fully complicit partners in this bargain with the devil. “[T]heir sole ambition is to be fair, to raise emotion instead of inspiring respect; and this ignoble desire, like the servility in absolute monarchies, destroys all strength of character.”<sup>243</sup> Women are taught from infancy by other women—their mothers and their nurses—to practice “*outward* obedience,” reserving to themselves the right to engage in cunning, sullen passive resistance.<sup>244</sup> Women wholly agree when they are told that they must “cultivate a fondness for dress,”<sup>245</sup> that they have an inborn “fondness for dolls, dressing, and talking,” and that they must focus on the superficial and the trivial.<sup>246</sup> It is women who thus immure themselves within the prisonhouse of male expectations.

Wollstonecraft, in short, demolished the traditional hierarchy prevailing between men and women. Male bodily strength is an insufficient basis on which to ground the legal and social superiority of men.<sup>247</sup> Women must learn to shed the submissiveness that they have been taught to show towards male authority and challenge “[t]he *divine right* of husbands.”<sup>248</sup> And if women were to revolt against the men who controlled and dominated their lives, they would find that they might premise their rebellion on the capacity that men and women shared in common to cultivate their reason and lead lives of independent virtue.<sup>249</sup> For in truth, women are men’s equals, fully formed humans as capable as men of “acting like rational creatures.”<sup>250</sup> “The stamen of immortality,” Wollstonecraft claimed, “is the perfectibility of human reason”—and male and female alike partook of this immortality.<sup>251</sup> Reason allowed both male and female to engage in self-

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241. *Id.*

242. *Id.* at 105.

243. *Id.* at 107.

244. *Rights of Woman*, *supra* note 231, at 87 (emphasis in original).

245. *Id.* at 97.

246. *Id.* at 98, 103–04. It is an “absurdity,” Wollstonecraft wrote, “[to] suppos[e] that a girl is naturally a coquette.” *Id.* at 114.

247. “Bodily strength, from being the distinction of heroes, is now sunk into . . . contempt.” *Id.* at 109.

248. *Id.* at 112 (emphasis in original).

249. *Rights of Women*, *supra* note 231, at 79.

250. *Id.* at 106. In arguing for the equality of male and female reason, Wollstonecraft was developing an argument that had been current since at least the late seventeenth century, when the French writer François Poulain de la Barre argued that “women’s physical traits did not impair their mental faculties. Men’s and women’s minds were essentially the same. . . .” See ROSEMARIE ZAGARRI, REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC 12 (2007).

251. *Rights of Woman*, *supra* note 231, at 126.

improvement, to practice ethics, to gain an awareness of the truth and to apply it to the practicalities of the here and now.<sup>252</sup>

These common human attributes imposed on both men and women the affirmative duty to “endeavor to acquire human virtues (or perfections).”<sup>253</sup> If women wished to escape their present lot in life as household slaves and drudges, they must strive to achieve the status of “moral beings.”<sup>254</sup> And with moral personhood, attained through “reason, virtue, and knowledge,” women, like men, become empowered to assume and exercise responsible freedom and independence.<sup>255</sup> Independence, however, did not mean hostility towards men, but reciprocity and equality. Like men, women should have an equal share in the government of the realm.<sup>256</sup> Men who would deny women of their “civil and political rights” are “tyrants.”<sup>257</sup> The present political order, in which women were excluded from power, amounted to “slavery.”<sup>258</sup>

And if Wollstonecraft opposed male tyranny in the public sphere, she was equally opposed to the tyrannical husband. When women marry men, they should expect not some cruel lord and master commanding them hither and yon, but a true companion, capable of relating equally and non-hierarchically with wives who were their friendly equals.<sup>259</sup> Indeed, “by managing her family and practising various virtues, [the wife] become[s] the friend, and not the humble dependent of her husband.”<sup>260</sup>

In making these claims, Wollstonecraft was breaking new ground. Thirteen hundred years before she wrote, St. Augustine had described marriage as a friendship between the sexes, but it was a friendship that remained hierarchical, with the man sweetly guiding and superintending his helpmeet.<sup>261</sup> Wollstonecraft, however, proposed a new grounding for this friendship. Woman was no longer Creation’s afterthought, formed by God

252. *Id.* at 127. (“Reason is, consequentially, the simple power of improvement; or, more properly speaking, of discerning truth. Every individual is, in this respect, a world in itself. More or less may be conspicuous in one being than another; but the nature of reason must be the same in all, if it be an emanation of divinity. . . .”).

253. *Id.* at 110.

254. *Id.* at 94.

255. *Id.* at 79.

256. *Id.* at 69.

257. *Rights of Woman*, *supra* note 231, at 69.

258. *Id.*

259. *Id.* at 107. (“I love man as my fellow, but his scepter, real or usurped, extends not to me . . .”). Cf. Ruth Abbey, *Marriage as Friendship in the Thought of Mary Wollstonecraft*, 14 *HYPATIA* 78, 83–85 (1999) (developing Wollstonecraft’s ideal of marriage as friendship).

260. *Rights of Woman*, *supra* note 231, at 99.

261. See St. Augustine, *De bono coniugali*, in *AUGUSTINE: DE BONO CONIUGALI, DE SANCTA VIRGINITATE* 2–3 (P.G. Walsh ed. & trans., 2001) (human beings are social creatures who are bonded together by the “force of friendship,” (“*vim . . . amicitiae*”). I explore this friendship between the sexes more thoroughly in Charles J. Reid, Jr., *Toward an Understanding of Medieval Universal Rights: The Marital Rights of Non-Christians in Early Scholastic and Canonistic Writings*, 3 *AVE MARIA L. REV.* 95, 97 (2005).

from Adam's rib to suit Adam's pleasure,<sup>262</sup> but a true equal in reason, knowledge, wisdom, and virtue.<sup>263</sup>

### 3. *The Wrongs of Women*

The ideology of coverture, as a logical matter, could not withstand such reasoning. And while Wollstonecraft did not address this English legal institution in her *Vindication*, she made sure to target it in a subsequent work of fiction. Left unfinished at her death and published by her husband at the demand of the reading public, *The Wrongs of Woman: Or, Maria, A Fragment*, had its structural weaknesses.<sup>264</sup> Mary's husband, William Godwin, conceded in his introduction to the work that had she lived, Wollstonecraft would have transposed sections and polished the work considerably.<sup>265</sup> Still, despite these blemishes, the book reads as a continuation of the arguments made in *A Vindication of the Rights of Women*.<sup>266</sup> This much is suggested by the title—if *Vindication* focused on the creation of a new world in which women might take their place as rights-bearing equals, then *Wrongs* dramatically told the story of brutality and oppression in the world of the here-and-now.<sup>267</sup>

The novel is an extended attack on male headship, especially as it was buttressed and supported by coverture. The story opens with Maria confined to a madhouse modeled on the infamous Bedlam,<sup>268</sup> where she had been civilly committed by her wastrel of a husband, George Venables.<sup>269</sup> After a poignant opening scene, in which Maria gradually gains her balance in what has become her new home, the novel consists of a series of digressions and

262. St. Augustine, for instance, remained convinced of woman's derivative relationship to man because of this Creation account. See REID, POWER OVER THE BODY, *supra* note 18, at 75.

263. Wollstonecraft thought it impossible that anyone should take the biblical story literally in her day: "Probably the prevailing opinion, that woman was created for man, may have taken its rise from Moses' poetical story [the book of Genesis], yet as very few, it is presumed, who have bestowed any serious thought on the subject, ever supposed that Eve was, literally speaking, one of Adam's ribs, the deduction must be allowed to fall to the ground. . . ." *Rights of Woman*, *supra* note 231, at 95.

264. Mary Wollstonecraft, *The Wrongs of Woman: Or, Maria, a Fragment*, in MARY, A FICTION, and THE WRONGS OF WOMAN 69, 73–199 (Gary Kelly ed., 1976) [hereinafter *Wrongs of Woman*].

265. *Id.* at 71–72.

266. MIRIAM WALLRAVEN, A WRITING HALFWAY BETWEEN THEORY AND FICTION: MEDIATING FEMINISM FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 22 (2007). ("Wollstonecraft's intention was to consider her novel as a sequel to *Vindication*.").

267. CHRISTINE L. KRUEGER, READING FOR THE LAW: BRITISH LITERARY HISTORY AND GENDER ADVOCACY 116 (2010).

268. "Bedlam," the Bethlem Royal Hospital, was an eighteenth-century insane asylum and had notoriously dreadful conditions. Mary Wollstonecraft visited Bedlam while researching her novel, in order to provide a more accurate setting for her story. See S. Leigh Matthews, (Un)confinements: The Madness of Motherhood in Mary Wollstonecraft's *The Wrongs of Women*, in MARY WOLLSTONECRAFT AND MARY SHELLEY: WRITING LIVES 85, 96 n. 2 (Helen M. Buss et al. eds., 2001).

269. *Wrongs of Woman*, *supra* note 264, at 75–76.

flashbacks. Maria meets new friends in the dungeon of the damned and the disturbed. There is Jemima, the floor superintendent, who had been victimized by one man after another.<sup>270</sup> Born out of wedlock,<sup>271</sup> she was mistreated by her father,<sup>272</sup> beaten and raped by a master to whom she had been apprenticed,<sup>273</sup> and finally forced into a life of prostitution.<sup>274</sup> There was also Harry Darnford, a chronic alcoholic confined to Bedlam because of his uncontrollable benders.<sup>275</sup> His parents had been addicted to drink and gambling and richly and devoutly hated and loathed one another and their children.<sup>276</sup> Harry did not know affection until as a young man he fell in with a company of actresses and prostitutes, who gave him sincere, genuine affection for the first time.<sup>277</sup>

The message was unrelievedly bleak—the system of marriage laws prevailing in England was destructive of all that is good in humanity. It withers and kills the vulnerable—women and men like Jemima and Harry. Refuge lay outside the system with the deranged, the desperate, the outcasts and the misfits, for the system itself had gone barking mad.<sup>278</sup>

All of this, however, was merely prelude to Maria's own sorry plight, put in the form of a memoir she composed for her daughter, fearing she might never see her again. Maria confided that she once had a sunny, optimistic view of the world, expecting her future marriage would lead to real friendship with a man she could love and admire all her days and who would reciprocate in kind.<sup>279</sup> She had every hope that this might come to pass. Her uncle, a truly warm and avuncular man, a life-long bachelor returned from making his fortune in India, introduced her to George Venables and his son, also named George.<sup>280</sup> The elder George had been a success in business and had accumulated great wealth and the son, it was hoped, bore in his bloodlines the same anticipation of prosperity.<sup>281</sup>

When the elder Venables passed away, Maria's solicitous uncle thought it was the perfect time for the match to be announced. George, Jr. had now come into his father's vast estate.<sup>282</sup> Alas, the younger George was the very opposite of his prudent, thrifty father. An incorrigible "liber-

270. *Id.* at 102–20.

271. *Id.* at 102–04.

272. *Id.* at 104–06.

273. *Id.* at 106–08.

274. *Id.* at 108–11.

275. *Wrongs of Woman*, *supra* note 264, at 145.

276. *Id.* at 94.

277. *Id.* at 94–95.

278. ELIZABETH A. BOHLS, *WOMEN TRAVEL WRITERS AND THE LANGUAGE OF AESTHETICS, 1716–1818* 212 (1995).

279. *Wrongs of Woman*, *supra* note 264, at 145.

280. *Id.* at 137–38.

281. *Id.* at 129.

282. *Id.* at 138.

tin[e],”<sup>283</sup> he would soon prove himself “a heartless, unprincipled wretch.”<sup>284</sup> The younger George was a scoundrel, wasting the inheritance his father had so carefully built for him.<sup>285</sup> George gambled and lost large sums,<sup>286</sup> he lavished money on other women,<sup>287</sup> he dined away from home,<sup>288</sup> and he drank to stupefaction.<sup>289</sup> He fathered a child out of wedlock, a child whom Maria felt compelled to assist financially.<sup>290</sup> After exhausting his own resources, George began to borrow extravagantly.<sup>291</sup> Several times Maria, to save George from humiliation, had to go begging to her uncle for more money, requests Maria’s loving relative was always quick to accommodate.<sup>292</sup>

At last, after the passage of five or six years, Maria’s uncle took ill. He thought he might restore his health if he moved to Lisbon,<sup>293</sup> but before departing he gave Maria a large gift.<sup>294</sup> George promptly squandered that sum also.<sup>295</sup> After all, he was Maria’s husband and was legally entitled to all of her wealth.<sup>296</sup> A few months later, the uncle passed away but not before realizing that he should no longer subsidize George’s continued dissolution. He left the remainder of his estate to Maria’s infant daughter, naming Maria as guardian, thinking that this might keep his fortune secure from George’s hoggish grasp.<sup>297</sup>

George, however, only sank deeper into self-abasement and self-loathing. On pre-arrangement, he had a male friend visit their home, thinking that it would be jolly entertaining if he could induce the friend to have sex with Maria.<sup>298</sup> When Maria discovered the letter in which the terms of the deal had been set out, she informed George that this was the final indignity, the last insult, and that she was leaving at once and would file for divorce.<sup>299</sup> George cautioned her that this was not so easily done. He had not been physically abusive, he had not struck her, and he had not created conditions injurious to her health or safety.<sup>300</sup> These were the legally required

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283. *Id.* at 130.

284. *Id.* at 138.

285. *Wrongs of Woman*, *supra* note 264, at 145–46.

286. *Id.* at 144.

287. *Id.* at 146–47.

288. *Id.* at 46.

289. *Id.* at 146–47.

290. *Id.* at 149–50.

291. *Wrongs of Woman*, *supra* note 264, at 146.

292. *Id.*

293. *Id.* at 157.

294. *Id.* at 158.

295. *Id.*

296. *Id.* at 139, 158–59 (“[A] wife, being as much a man’s property as his horse or his ass, she has nothing she can call her own. He may use any means to get at what the law considers as his.”).

297. *Wrongs of Woman*, *supra* note 264, at 180.

298. *Id.* at 160–62.

299. *Id.* at 162.

300. *Id.* at 163–64.

grounds for divorce and Maria did not satisfy them.<sup>301</sup> Marriage was for life, he smirked.<sup>302</sup>

When George made it clear that he intended to enforce his marital rights, Maria informed him that she would leave England for the “cheerfulness” of Italy.<sup>303</sup> George accused her of insanity, had her arrested,<sup>304</sup> and proceeded to civil commitment. He then severed Maria’s custody rights over their daughter,<sup>305</sup> ensuring that he would become the girl’s guardian with access to the wealth that had been left in her name. And so Maria found herself confined to Bedlam, very nearly the pit of hell, while George wasted away yet one more fortune he did not earn and could not keep.

This tragic fall from beauty and affluence to a life of smothering hopelessness was made possible, Wollstonecraft insisted, by a legal regime that denied in every possible way the equality of male and female. The restrictive divorce laws created “the most insufferable bondage.”<sup>306</sup> The law reposed all power in the husband under the judicially enforceable, non-rebuttable presumption that “the husband should always be wiser and more virtuous than his wife,”<sup>307</sup> while the woman occupied the position of “idiot or perpetual minor.”<sup>308</sup> Coverture made it impossible for a woman in Maria’s position to protect her independent wealth or even the freedom of her own person:

The tender mother cannot *lawfully* snatch from the gripe [sic] of the gambling spendthrift, or beastly drunkard, unmindful of his offspring, the fortune which falls to her by chance; or (so flagrant is the injustice) what she earns by her own exertions. No; he can rob her with impunity, even to waste publicly on a courtesan; and the laws of her country—if women have a country—afford her no protection or redress from the oppressor . . . .<sup>309</sup>

Thus through fiction of her own, Mary Wollstonecraft made the case against the legal fiction of coverture.

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301. *Id.* at 163. Divorce, Maria realized, could only be had if “she had the plea of bodily fear.” *Id.* at 159.

302. *Id.* at 165. Or, as Maria put it, she was “everlastingly united to vice and folly!”

303. *Wrongs of Woman*, *supra* note 264, at 181.

304. *Id.* at 183.

305. *Id.* at 182.

306. *Id.* at 187.

307. *Id.* at 159.

308. *Id.*

309. *Wrongs of Woman*, *supra* note 264, at 159.

#### IV. WOLLSTONECRAFT IN AMERICA: THE SENECA FALLS CONVENTION OF 1848

##### A. Introduction

Mary Wollstonecraft was not the first person to make the case against the legal disabilities English law imposed on women. In 1735, there was published *The Hardships of the English Laws in Relation to Wives*.<sup>310</sup> Authored anonymously by a woman,<sup>311</sup> this tract was directed to Parliament and pleaded the case that coverture had led to a long train of abuses. Wives were placed in a comparatively worse position than slaves, toiling under a life sentence from which, unlike slaves, they could never be emancipated.<sup>312</sup>

Four years later, another anonymous tract authored by “Sophia” (Greek for “Wisdom”) and entitled *Woman Not Inferior to Man*, challenged male authority. Mockingly and tauntingly, the author ridiculed male claims to superior political insight. These men, the anonymous woman author sighed, they blindly follow habit, they are led astray by custom, and they never develop their reason sufficiently so as to question first principles.<sup>313</sup> Sophia’s exasperation was palpable.<sup>314</sup>

In this context, Wollstonecraft’s great accomplishment was to develop these nascent claims of right into a powerful, multi-faceted narrative using a variety of platforms—political manifesto, didactic work of instruction, and highly popular fiction.<sup>315</sup> What had been percolating in the subterranean

310. THE HARDSHIPS OF THE ENGLISH LAWS IN RELATION TO WIVES (1735). This text has been analyzed by Barbara J. Todd, “To Be Some Body:” *Married Women and The Hardships of the English Laws*, in WOMEN WRITERS AND THE EARLY MODERN BRITISH POLITICAL TRADITION 343, 343–361 (Hilda L. Smith ed., 1998) [hereinafter HARDSHIPS].

311. NICOLA JANE PHILLIPS, WOMEN IN BUSINESS: 1700–1850 26 (2006).

312. HARDSHIPS, *supra* note 310, at 4.

313. The author is unsparing in her attack, stating that men are incapable of using their reason as effectively as women. The proof for this assertion? Their common belief, based on self-interest, prejudice, and customary practice, that women are inferior to men. See SOPHIA, WOMAN NOT INFERIOR TO MAN 1–4 (London, John Hawkins 1739). Just look, the author notes with irony, how well men control their appetites and base desires, their passions and their impulses. *Id.* at 1. A fair observer would be led to conclude that women actually have “superiority over them.” *Id.* at 4. Cf. AUDREY BILGER, LAUGHING FEMINISM: SUBVERSIVE COMEDY IN FRANCES BURNEY, MARIA EDGEWORTH, AND JANE AUSTEN 41–42 (1998) (analyzing this text).

314. Later that same year, an anonymous tract, written by “Gentleman,” attacked Sophia in the name of men. See GENTLEMAN, MAN SUPERIOR TO WOMAN: A VINDICATION OF MAN’S NATURAL RIGHT OF SOVEREIGN AUTHORITY OVER THE WOMAN (London, T. Cooper 1739). This work was as hyperventilatingly histrionic as the one it answered. Men, the author asserted, can be proven superior by reference to the Bible: Men were made directly by God, while women were formed from mere scraps and leftovers—a rib Adam didn’t really need. *Id.* at 13.

315. An important summary of Wollstonecraft’s impact can be found in Cora Kaplan, *Mary Wollstonecraft’s Reception and Legacies*, in CAMBRIDGE COMPANION, *supra* note 184, at 246, 246–270. Cf. Beth Waggenspack, *Prelude to the Platform: Woman’s Transition to the Public Sphere*, in THE RHETORIC OF WESTERN THOUGHT: FROM THE MEDITERRANEAN WORLD TO THE GLOBAL SETTING 137, 144 (James L. Golden et al. eds., 2003) (summarizing Wollstonecraft’s reasoning and arguments for challenging social and cultural norms).

passageways of English society now took solid and visible form. Wollstonecraft was a gifted writer and a popular one, whose careful crafting and wide appeal held the possibility of shaping future public debate.<sup>316</sup> And certainly Wollstonecraft's work did not die with her. Indeed, two aspects of her comprehensive call for the liberation of women came to exert a profound effect on developments in nineteenth-century America—her summons to enact full civil and political equality between the sexes and her hope that coverture would be abolished in favor of free and equal marriage.<sup>317</sup>

### B. *The Still-Imposing Monolith*

Mary Wollstonecraft and other like-minded feminist writers succeeded in striking blows against the monolith of male supremacy that William Blackstone and generations of common lawyers had constructed. But the monolith remained forbidding. That much became clear in the early years of the nineteenth century with the opening of debates on the questions of women's political rights and the place and status of coverture.

#### 1. *Women's Right to Vote: England*

About the time Wollstonecraft was taking her public stand on civil and political equality, Jeremy Bentham (1748–1832), a newly-minted British common lawyer, whose reputation as a social reformer still fills the highest firmament, began to explore in private writings the possibility of women's suffrage.<sup>318</sup> Women, he wrote in an essay published only posthumously, like blacks, were prevented from voting by mere prejudice.<sup>319</sup> There was, however, no reason in truth why either group should not share equal suffrage with men or whites.<sup>320</sup>

Publicly, Bentham was more circumspect. In 1817, he called for reform of the franchise, asserting that women should share the right to vote with men, even though he acknowledged that politically this was “prema-

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316. THE NORTON DICTIONARY OF MODERN THOUGHT 323 (Allan Bullock & Stephen Trombley eds., 1999); G.J. Barker-Benfield, *Mary Wollstonecraft: Eighteenth-Century Commonwealthwoman*, 50 J. HIST. IDEAS 95, 113 (1989) (Wollstonecraft issued an “unmistakable call for a standard of political virtue common to both sexes” that was defeated in her own lifetime but that would have profound effects on later generations).

317. Eileen Hunt Botting & Christine Carey, *Wollstonecraft's Philosophical Impact on Nineteenth-Century American Women's Rights Advocates*, 48 AM. J. POL. SCI. 707, 707 (2004).

318. LEA CAMPOS BORALEVI, BENTHAM AND THE OPPRESSED 15–16 (1984).

319. Lea Campos Boralevi, *In Defence of a Myth*, in JEREMY BENTHAM: CRITICAL ASSESSMENTS 239, 240 (Bhikhu C. Parekh ed., 1993).

320. *Id.*



ture.”<sup>321</sup> He feared men would find themselves threatened and never accede to this challenge to their place atop the political order.<sup>322</sup>

In his fear, Bentham proved prescient. Bentham’s proposal stimulated immediate opposition and the opponents of women’s suffrage were soon to have their way when Parliament took up reform of the voting laws at the advent of the 1830s.<sup>323</sup> The right to vote for Parliament was not widely held in the early nineteenth century and there was increasing agitation to open voting to a larger part of the British public.<sup>324</sup> Under pressure to reform itself, Parliament responded with the Reform Act of 1832. It expanded male suffrage a bit but the general consensus of historians today is that the Act represented nothing more than a conservative attempt to preserve the status quo by tinkering slightly with the rules governing suffrage and thereby relieving some of the pressure for more sweeping changes.<sup>325</sup>

But if the overall effect of the Reform Act was a conservative and grudging nod in the direction of middle-class representation, where women were concerned the Bill was harshly reactionary. Although women did not have the right to vote in the early nineteenth century, this exclusion was a customary one and was not the mandate of any positive law of the land.<sup>326</sup> The 1832 Act changed this feature of English law by explicitly and affirmatively excluding women from the franchise.<sup>327</sup>

This exclusion sparked a vigorous and sustained campaign to grant to women the right to vote.<sup>328</sup> Success was some generations away (women in England only received the franchise in the early twentieth century),<sup>329</sup> but this long delay only led to the proliferation of a large and growing body of

321. *Id.*

322. SUBRATA MUKHERJEE & SUSHILA RAMASWAMY, *A HISTORY OF POLITICAL THOUGHT: PLATO TO MARX* 283 (2006).

323. Michael S. Smith, *Parliamentary Reform and the Electorate*, in *A COMPANION TO NINETEENTH-CENTURY BRITAIN*, 156, 157 (Chris Williams ed., 2008).

324. The sorry state of England’s system of suffrage, and the many impulses for reform, are deftly reviewed in SEAN LANG, *PARLIAMENTARY REFORM, 1785–1928* 6–18 (1999).

325. BOB WHITFIELD, *THE EXTENSION OF THE FRANCHISE, 1832–1931* 201–02 (2001).

326. In the typical, fanciful historiography of the time, nineteenth-century reformers tried to impute to this customary exclusion an implicit ideal of women’s suffrage, voluntarily refrained from, that could be traced to a shining golden age of Anglo-Saxon primitive liberty. See JUNE PURVIS & SANDRA STANLEY HOLTON, *VOTES FOR WOMEN* 14 (2000).

327. LAURA E. NYM MAYHALL, *THE MILITANT SUFFRAGE MOVEMENT: CITIZENSHIP AND RESISTANCE IN BRITAIN, 1860–1930* 14 (2003). Nym Mayhall adds that women’s affirmative exclusion from the franchise “made women’s demand for inclusion inevitable.” *Id.*

328. I hope soon to return to this theme in a second article on the influence of Mary Wollstonecraft on English legal reform.

329. In 1918, most women over the age of thirty were granted the right to vote by the Representation of the People Act. In 1928, the law was amended to provide women identical voting rights with men. See CHERYL LAW, *SUFFRAGE AND POWER: THE WOMEN’S MOVEMENT, 1918–1928* 30 (2000); COLUMBIA UNIVERSITY PRESS, *THE COLUMBIA COMPANION TO BRITISH HISTORY* 645 (Juliet Gardiner & Neil Wenborn eds., 1995).

literature on the subject of women's rights.<sup>330</sup> And the impact of this movement ignited by Mary Wollstonecraft's clarion call for justice would be felt soon enough in America.

## 2. *Women's Right to Vote: America*

The revolutionary New Jersey constitution of 1776 permitted women who satisfied a property requirement an equal vote with men.<sup>331</sup> In 1807, however, the New Jersey legislature voted to exclude women from the franchise, an exclusion that was made a part of state constitutional law in 1847.<sup>332</sup> Women only gradually began to regain the franchise once more in the late nineteenth century.

Much of the opposition to women's suffrage took the form of religious argument. And no one was more significant in making this case than Horace Bushnell (1802–1876). He was quite probably the greatest of the nineteenth-century Congregationalist ministers. He drifted aimlessly through most of his twenties—teaching school for a while, enrolling at Yale University at the age of twenty-one, working as a magazine editor, then returning to Yale at the age of twenty-seven to pursue legal training at that University's new law school.<sup>333</sup> It was during the course of his legal studies that a religious spirit was aroused in him and he thereafter pursued a career in the ministry, graduating from Yale Divinity School in 1833.<sup>334</sup>

Bushnell today is regarded as a principal founder of modern liberal theology.<sup>335</sup> Defining liberal theology as “the effort to marry, or at least, adjust Christian faith to progressive thought,”<sup>336</sup> British religious historian Henry William Clark went on to include Bushnell among its principal representatives.<sup>337</sup> Instead of emphasizing rigid, divisive points of doctrine, Bushnell stressed the need for individual believers to form their consciences and to seek out moral development.<sup>338</sup> He welcomed the proliferation of competing Christian creeds in early America as a sign of strength, not weakness.<sup>339</sup>

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330. Among the most important contributors to this literature was Harriet Taylor Mill, John Stuart Mill's wife. See, for instance, the writings collected in JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY* (Alice S. Rossi ed., 1970).

331. PAMELA PAXTON & MELANIE M. HUGHES, *WOMEN, POLITICS, AND POWER: A GLOBAL PERSPECTIVE* 32 (2007).

332. *ENCYCLOPEDIA OF NEW JERSEY* 882 (Maxine N. Lurie & Marc Mappen eds., 2004).

333. TIMOTHY L. HALL, *AMERICAN RELIGIOUS LEADERS* 45 (2003).

334. *Id.*

335. Mark A. Noll, *Bushnell, Horace*, in *EVANGELICAL DICTIONARY OF THEOLOGY* 181 (Walter Elwell ed., 2d ed. 2001) (Bushnell is “[k]nown as the father of American theological liberalism.”).

336. HENRY WILLIAM CLARK, *LIBERAL ORTHODOXY: A HISTORICAL SURVEY* 1 (1914).

337. *Id.* at 215–18.

338. *Id.*

339. GARY DORRIEN, *THE MAKING OF AMERICAN LIBERAL THEOLOGY: IMAGINING PROGRESSIVE RELIGION, 1805–1900* 147 (2001).

But if Bushnell was a progressive in many ways, about marriage and sexual relations he remained extremely conservative. In his sermon, *The Age of Homespun*,<sup>340</sup> for instance, he expatiated on the glorious days of his youth, when his hometown was small, all production was local, and simplicity and humility were qualities not to be despised but rather prized as reflecting virtuous and honorable craft.<sup>341</sup> A deeply nostalgic and conservative work for a man otherwise given to liberal tendencies, this extended homily celebrated a patriarchal vision of marriage, in which a wife sublimated her interests and her personality into her husband's ambitions and projects:

What more beautiful embodiment is there on this earth, of true sentiment, than the young wife who has given herself to a man in his weakness, to make him strong, to enter into the hard battle of his life and bear the brunt of it with him; to go down with him in disaster, if he fails, and cling to him for what he is; to rise with him if he rises, and share a twofold joy with him in the competence achieved . . . .<sup>342</sup>

One would be hard-pressed to identify a clearer appeal to the ideology undergirding coverture and patriarchal marriage than this glowing testament to the ever-sacrificing wife. Five years earlier, Bushnell preached another series of sermons, collected and published as *Christian Nurture*,<sup>343</sup> which laid down the basic premise both of *Age of Homespun* and his case against women's suffrage. He argued on behalf of the "organic unity of the family,"<sup>344</sup> with the husband gently guiding and the wife joyously and obediently submitting.<sup>345</sup> Bushnell feared that American politics and even American church life were becoming contaminated with individualism.<sup>346</sup>

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340. HORACE BUSHNELL, *The Age of Homespun*, in WORK AND PLAY 39 (London, Alexander Strahn & Co. 1888). *The Age of Homespun* was preached as a sermon in 1851.

341. *Id.* at 48–52.

342. *Id.* at 56.

343. *Christian Nurture* was originally published in 1847, a year before the Seneca Falls Convention. It was republished in revised form in 1861, and has been reprinted by Yale University Press. See HORACE BUSHNELL, *CHRISTIAN NURTURE* (Yale Univ. Press 1960).

344. *Id.* at 74–101. This is the title of Part IV of *Christian Nurture*.

345. An organic understanding of human society was at the core of Bushnell's conception of the world. See DAVID W. HADDORFF, *DEPENDENCE AND FREEDOM: THE MORAL THOUGHT OF HORACE BUSHNELL* 3 (1994) ("At the basis of Bushnell's moral thought is his organic view of human interdependence and the transforming power of moral character. Individuals are social beings, dependent upon God and interdependent in the human community . . . ."). Cf. Conrad Cherry, *The Structure of Organic Thinking: Horace Bushnell's Approach to Language, Nature, and Nation*, 40 J. AM. ACAD. RELIGION, Mar. 1972, at 3 (explaining that "an organic mode of thought pervaded the whole of [Bushnell's] reflective life.").

346. In the state, Bushnell worried, "the civil rights of the individual" had been exalted as against the development of a national consciousness. BUSHNELL, *CHRISTIAN NURTURE*, *supra* note 343, at 75. "In matters of religion," he continued, "we have burst the bonds of church authority, and erected the individual mind into a tribunal of judgment within itself." *Id.* Daniel Walker Howe has noted that *Christian Nurture* might in many respects be read as a small treatise of political

Arguing that organicity was the true and authentic form of matrimonial life, he asserted that husbands and wives each had a role to play, the male figure exercising a “stouter,” more “masculine” and worldly form of authority over the household,<sup>347</sup> the wife and mother meanwhile serving as a kind of “nursing Providence.”<sup>348</sup> The family was not to be a despotism.<sup>349</sup> Parents must be sacrificial in their love and thereby make themselves “Christ-like.”<sup>350</sup> But in the final analysis, this was still a family very much like the homespun recollections of Bushnell’s gauzily remembered youth, one in which fathers provided and presided over their wives and children with “righteousness and love,” while the subordinate members of the household reciprocated with Christian humility and obedience.<sup>351</sup>

Organicity was at the heart of Christian Nurture, and the same spirit pervaded Bushnell’s *Women’s Suffrage: The Reform Against Nature*. Although it was published two decades after the Seneca Falls Convention, the argument Bushnell made against the right of women to vote was suffused with the same highly traditional religious imagery as his earlier works.<sup>352</sup> Clearly, the path of reform in the nineteenth century would be an arduous and slow one. Bushnell conceded that men have enjoyed a monopoly of power and that historically this imbalance has proven harmful to women. “As our attention is called to the matter,” he acknowledged, “we are surprised to find how many disadvantages are laid upon the condition of woman that no principle of equity permits, and no pretense of reason or necessity justifies.”<sup>353</sup> “The law,” he declared, “must be law for women as truly as for men.”<sup>354</sup>

In spite of this sensitivity, however, Bushnell did not see women’s suffrage as appropriate redress for women’s disparate treatment. He understood women and men to be constituted differently: “The man is taller and more muscular, has a larger brain, and a longer stride in his walk. The woman is lighter and shorter, and moves more gracefully.”<sup>355</sup> Men’s work, Bushnell averred, tends to require precision and “tension of faculty,”<sup>356</sup> by

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thought or as a didactic essay on the governance of Christian households. See Daniel Walker Howe, *The Social Science of Horace Bushnell*, 70 *J. AM. HIST.* 305, 307 (1983).

347. BUSHNELL, *CHRISTIAN NURTURE*, *supra* note 343, at 272.

348. *Id.* at 271.

349. *Id.* at 44.

350. *Id.* at 45.

351. *Id.* at 44. Cf. DANIEL WALKER HOWE, *MAKING THE AMERICAN SELF: JONATHAN EDWARDS TO ABRAHAM LINCOLN 181–82* (1997) (summarizing Bushnell’s patriarchal views of the American family).

352. See HORACE BUSHNELL, *WOMEN’S SUFFRAGE: THE REFORM AGAINST NATURE* (New York, Charles Scribner & Co. 1869). Cf. ROSEMARY R. RUETHER, *CHRISTIANITY AND THE MAKING OF THE MODERN FAMILY 104–05* (2000) (exploring further the religious grounding of Bushnell’s arguments against women’s suffrage).

353. BUSHNELL, *supra* note 352, at 10.

354. *Id.* at 29.

355. *Id.* at 50.

356. *Id.* at 28.

which he meant the capacity to work in occupations such as “[t]he great departments of agriculture, engineering, and war, seafaring, railroad making, architecture, machine building, all the heaviest, roughest, tensest forms of creative labor.”<sup>357</sup> Women’s work was of a different more domestic nature and required a different set of abilities. Indeed, by conferring on women the right to vote, men will thereby cause them to become untrue to their nature.<sup>358</sup> And this loss would be far costlier than one might imagine: “Man rules by the precedence of quantity and self-asserting energy, and woman by the subject sovereignty of beauty, personal and moral together.”<sup>359</sup>

It was as if Mary Wollstonecraft had never lived or wrote and that the Seneca Falls Convention had never taken place. Bushnell’s response to Wollstonecraft’s carefully constructed arguments about the equality of reasoning capacity and the irrelevancy of “brute” strength was a flat denial that it was true, coupled with a reassertion of all of the old eighteenth-century misogynist stereotypes. Additionally, however, Bushnell built a case against women’s suffrage on the basis of marriage’s organic structure. Women’s suffrage would have the effect of “reduc[ing] marriage to a mere partnership contract.”<sup>360</sup> Marriage, rather, is a “mystic bond of God.”<sup>361</sup> It is quite literally two persons coming together to make a single unit, whole and entire. And it is the man who must lead this unit: “Is there not a man and a woman, and are not the two a complete one? And is not the man as visibly head of that oneness as any head set upon two shoulders was ever head of the body?”<sup>362</sup> Bushnell would have been very greatly at home in the world of the seventeenth-century preachers reviewed at the beginning of this Article.<sup>363</sup>

Women’s suffrage, he lamented, would have nothing less than a “dangerously demoralizing” effect on the marital relationship.<sup>364</sup> Divorce will become commonplace, discord the rule, and marriage itself destabilized.<sup>365</sup> The world as he knew it was very much at risk.

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357. *Id.* at 27.

358. *Id.* at 138 (“The active, campaigning work of political life is certainly in quite too high a key for the delicate organization, and the fearfully excitable susceptibilities of women. They have no conception now, as they look on, of the gustiness and high tempest their frail skiffs must encounter.”).

359. BUSHNELL, *supra* note 352, at 137.

360. *Id.* at 152.

361. *Id.* at 153.

362. *Id.*

363. *Supra* notes 44–61 and accompanying text.

364. BUSHNELL, *supra* note 352, at 152.

365. *Id.* at 154–55. Reva Siegel of Yale Law School has shown that Bushnell, in raising this sort of alarm, at least had a general appreciation that certain traditional aspects of marriage were at stake in the women’s suffrage debate. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 980–87 (2002). Marriage, in Bushnell’s analysis, was a single unity that could only act publicly with a certain togetherness of heart. This ideal, however, could easily slide into male domination: “The claim

### 3. *Coverture and the Treatise-Writers*

[To] be obedient to her husband, and an example therein to the rest of the family. Submissively to learn [from] her husband (if he can teach her) and not be self-conceited, talkative, or imperious. To subdue her passions, deny her own fancy and will, and not tempt her husband to satisfy her humours and vain desires, in pride, excess, or any evil matter.<sup>366</sup>

So wrote John Henry Hobart (1775–1830), the Episcopal Bishop of New York and one of the preeminent figures of the early nineteenth-century American Church. Hobart moved in exalted company—being acquainted with John Henry Newman and “his circle at Oxford.”<sup>367</sup> He stressed personal devotion and the cultivation of an active prayer life, and presided over the general expansion of the New York diocese and its assimilation into the American mainstream.<sup>368</sup> On the theology of marriage, however, Hobart’s thought was still one with the English divines of the seventeenth century.<sup>369</sup>

American legal treatises, influenced by this prevailing culture of traditionalism, similarly maintained continuity with Blackstone<sup>370</sup> and the old churchmen, strongly endorsing the wife’s subordinate position in the home and her absorption into her husband’s legal personality.

Tapping Reeve (1744–1823) was among America’s first great jurists. The founder of America’s first comprehensive law school—Litchfield School of Law—in 1784, Reeve helped to train two generations of America’s brightest legal talent while serving for much of that time as Associate Justice and then Chief Justice of the Supreme Court of Connecti-

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that women were individual citizens, with interests and agency independent of men was a challenge to male authority and to historic understandings of the marriage relationship.” *Id.* at 987.

366. JOHN HENRY HOBART, *THE CHRISTIAN’S MANUAL OF FAITH AND DEVOTION* 133–34 (1850).

367. PHOEBE B. STANTON, *THE GOTHIC REVIVAL & AMERICAN CHURCH ARCHITECTURE: AN EPISODE IN TASTE, 1840–1856* 215 (1968).

368. Robert Bruce Mullin, “*Finding a Voice, Defining a Space*”: *John Henry Hobart and the Americanization of Anglicanism*, in *ONE LORD, ONE FAITH, ONE BAPTISM: STUDIES IN CHRISTIAN ECCLESIALITY AND ECUMENISM IN HONOR OF J. ROBERT WRIGHT* 129, 140 (Marsha L. Dutton & Patrick Terrell Gray eds., 2006).

369. *Supra* notes 44–61 and accompanying text.

370. Michael Hoeflich has shown that even in the pre-revolutionary ferment of early 1770s America, there was a large and steady demand by American readers for Blackstone’s *Commentaries*. See MICHAEL H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 125–28, 131–34 (2010). Blackstone’s popularity not only survived the Revolution, it transcended it. John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 17, 22 (Anthony Kronman ed., 2004). Probably no law book was more widely read or more important to the practicing bench and bar than Blackstone’s *Commentaries*. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 7 (1996) (“Before 1900, almost every American lawyer had read at least part of Blackstone. Daniel Boorstin has observed, ‘In the history of American institutions, no other book—except the Bible—has played so great a role . . . .’”) (quoting DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* vii (1941)).

cut.<sup>371</sup> Upon retirement from the bench, Reeve devoted himself to writing his master work, *The Law of Baron and Femme*.<sup>372</sup> In his treatise, Reeve took for granted the centrality of coverture and did not offer a sustained justification for its continued survival. His work, rather, reveals a deep immersion in the Anglo-American legal tradition and is adorned with at least one thousand citations to English and American statutes. Perhaps he believed that the institution of coverture was self-justifying, and that all he needed to do was to demonstrate how deeply coverture was enmeshed in this long tradition.

In any event, Reeve opened his text with the simple assertion: “The husband, by marriage, acquires an absolute title to all the personal property of the wife, which she had in possession at the time of the marriage.”<sup>373</sup> From this beginning, Reeve marched his readers through all of the circuitous paths taken by *feme covert*, both in England and the United States. Thus he carefully reviewed such issues as the husband’s duty to pay his wife’s pre-existing obligations following marriage<sup>374</sup> and countless other narrow, technical questions of law. Reeve’s work stands as a monument to the conventional thinking on *feme covert*—technically superb even while taking no notice of changing circumstances.<sup>375</sup>

Other antebellum American jurists were more effulgent in their praise of coverture. Chancellor James Kent of New York was among the cheerleaders. A religious man who gravitated away from the Calvinism of his youth and towards an inclusive and civic-minded Episcopalianism,<sup>376</sup> he

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371. On the relationship of Tapping Reeve to Litchfield Law School, see generally MARIAN C. MCKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* (1986). Among Reeve’s students were John C. Calhoun, the future Vice President and architect of the doctrine of states’ rights that did so much to foment the Civil War. JOHN NIVEN, *JOHN C. CALHOUN AND THE PRICE OF UNION: A BIOGRAPHY* 24 (1988). Reeve also trained three future United States Supreme Court Justices—Henry Baldwin, Levi Woodbury, and Ward Hunt. See *The Best That Is in the Old*, 55 A.B.A. J. 842, 843–44 (1969).

372. TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND THE POWERS OF COURTS OF CHANCERY* (Burlington, Chancey, Goodrich 2d ed. 1846).

373. *Id.* at 1.

374. *Id.* at 67–78.

375. Reeve’s silence can be contrasted with Nathan Dane’s (1752–1835) treatment of the same subject. Active in the American founding and a founder of the Massachusetts Temperance Society, Dane’s substantial gift to Harvard University helped to put that university’s law school on firm financial footing. See Duane Hamilton Hurd, *Nathan Dane*, in 1 *HISTORY OF ESSEX COUNTY, MASSACHUSETTS* xxiii (D. Hamilton Hurd ed., Philadelphia, J.W. Lewis & Co. 1888) (temperance activities); LAWRENCE MEIR FRIEDMAN, *A HISTORY OF AMERICAN LAW* 321 (1985) (gift to Harvard University). Regarding coverture, Dane wrote: “The maxim, they are one person in law, according to Blackstone . . . This is the old maxim the courts of law adopted as a general one, but which has been almost done away in time and practice; for numerous are the cases in which *baron & feme* are viewed in courts of law, as well as of equity, as two distinct persons.” 1 NATHAN DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* 332 (Boston, Cummings, Hilliard & Co. 1823).

376. SAMUEL DAVID McCONNELL, *HISTORY OF THE AMERICAN EPISCOPAL CHURCH* 294 (9th ed. 1904).

viewed marriage as a heaven-blessed, divinely sanctioned institution, stating in his *Commentaries on American Law*: “The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race.”<sup>377</sup> The natural superiority of husband over wife, Kent maintained, is a part of this divine plan and so the husband is empowered at law to govern his household. He might “even put gentle restraints upon [his wife’s] liberty” because “[t]he husband is the best judge of the wants of the family and the means of supplying them.”<sup>378</sup> The spirit of Blackstone lived and breathed in Kent’s *Commentaries*.<sup>379</sup>

In his *Institutes of American Law*, John Bouvier (1787–1851) showed that he too belonged to the men’s rooting section. A displaced Frenchman who sought to give definition to a distinctive American jurisprudence,<sup>380</sup> he asserted that marriage was the product of natural law.<sup>381</sup> He credited Blackstone with understanding the proper relationship between male and female. “*Erunt duo in carne una*,” Bouvier wrote in Latin, citing Blackstone—a married couple “becomes two in one flesh.”<sup>382</sup> “For this reason the very being of the wife is, for most purposes, merged in that of her husband, and it is under his protection and cover that she performs every thing; hence she is called a *feme covert*, and her state during the marriage is denominated *coverture*.”<sup>383</sup>

Silas Jones, the author of both *Practical Phrenology* and *An Introduction to Legal Science*,<sup>384</sup> described the good marriage as one featuring a kind of beatific joy between the parties:

The man and the woman, who are the parties in a contract of marriage, give to each other a mutual right in their persons, love, comfort, care, and good faith, for the end and purpose of contributing to each other’s happiness, the having, taking care of, and rearing and educating children.<sup>385</sup>

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377. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 75 (New York, E.B. Clayton & James Van Norden 3d ed. 1836).

378. *Id.* at 181.

379. See JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM, 1763–1847* 264–306 (1939) (the chapter entitled “The American Blackstone”).

380. For a quick biography of Bouvier, see 4 *ENCYCLOPEDIA BRITANNICA* 336 (1910).

381. 1 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 101 (Philadelphia, Robert E. Peterson & Co. 1854) (“Marriage owes its institution to the law of nature, and its perfection to the municipal or civil law.”).

382. *Id.* at 114–15 (my translation).

383. *Id.* at 115.

384. SILAS JONES, *PRACTICAL PHRENOLOGY* (Boston, Russell, Shattuck & Williams 1836); SILAS JONES, *AN INTRODUCTION TO LEGAL SCIENCE* (New York, John S. Voorhies 1842). Jones served variously as Superintendent of the House of Reformation for Juvenile Offenders in Boston and as Superintendent of the New York Institution for the Blind. Andrew Boardman, *Sketches of Phrenological Biography*, 94 *PHRENOLOGICAL J. & SCI. HEALTH*, 11, 12 (1892).

385. JONES, *AN INTRODUCTION TO LEGAL SCIENCE*, *supra* note 384, at 95.



Jones could have moved from this emotional, affective ideal to take a critical stance of the ideology of coverture. He could have asked how mutuality and love were possibly promoted by a legal fiction that allowed for husbandly domination of the marital relationship. But Jones's imagination failed at this critical juncture. Instead of boldly embracing reform, he meekly recited Blackstone for his definition of coverture<sup>386</sup> and recommended "[t]he policy of law [that] requires that the union of the parties to the marriage relation should be cemented by a unity of property."<sup>387</sup>

No treatise writer, however, wrote as expansively or as effusively on this subject as Edward Deering Mansfield (1801–1880), who was modestly described on the title page of his treatise on the duties and liabilities of women as "Late Professor of History in Cincinnati College."<sup>388</sup> In fact, Mansfield was a West Point graduate who also pursued classical training at Princeton University.<sup>389</sup> He only then migrated to the Midwest to teach and write.<sup>390</sup> A popularizer interested in military themes, Mansfield authored biographies of both General Winfield Scott<sup>391</sup> and Ulysses Grant.<sup>392</sup> A member of the Connecticut bar, he wrote as well on political topics and federal-state relations.<sup>393</sup>

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386. *Id.* at 110.

387. *Id.* at 111. Jones does, however, concede the one-sidedness of this arrangement: "The first grand consequence of this legal unity of husband and wife is one not uniformly admitted to be equitable to the wife." *Id.* (emphasis in original). Elsewhere, Jones added: "Now it is quite possible that the above consequences . . . would be more agreeable to the husband than to the wife." *Id.* at 114.

388. EDWARD DEERING MANSFIELD, *THE LEGAL RIGHTS, LIABILITIES, AND DUTIES OF WOMEN* (Salem, John P. Jewett & Co. 1845) [hereinafter *LEGAL RIGHTS OF WOMEN*].

389. 20 APPLETONS' ANNUAL OF THE YEAR 1880 *CYCLOPAEDIA & REGISTER OF IMPORTANT EVENTS* 491–92 (New York, D. Appleton & Co. 1886). Although Mansfield graduated fourth in his class at West Point, he declined his officer's commission in order to pursue his studies at Princeton. *Id.* at 491.

390. See W.H. Venable, *Edward Deering Mansfield: Publicist and Author*, in *BEGINNINGS OF LITERARY CULTURE IN THE OHIO VALLEY: HISTORICAL AND BIOGRAPHICAL SKETCHES* 409–35 (W.H. Venable ed., Cincinnati, Robert Clarke & Co. 1891). Mansfield's father was a professor of mathematics at West Point, and introduced his son at an early age to some of the leading churchmen of the day, such as Timothy Dwight, the great Congregationalist leader and President of Yale University. *Id.* at 411–12.

391. His work on Scott went through various editions and expansions dovetailing with that General's long career. The most comprehensive edition appears to be: EDWARD DEERING MANSFIELD, *LIFE AND SERVICES OF GENERAL WINFIELD SCOTT: INCLUDING THE SIEGE OF VERA CRUZ, THE BATTLE OF CERRO GORDO, AND THE BATTLES IN THE VALLEY OF MEXICO, TO THE CONCLUSION OF PEACE, AND HIS RETURN TO THE UNITED STATES* (New York, A.S. Barnes & Co. 1852). Cf. EDWARD DEERING MANSFIELD, *THE MEXICAN WAR: A HISTORY OF ITS ORIGINS* (New York, A.S. Barnes & Co. 1848) (an account of the War written nearly contemporaneously with it).

392. EDWARD DEERING MANSFIELD, *A POPULAR AND AUTHENTIC LIFE OF ULYSSES S. GRANT* (Cincinnati, R.W. Carroll & Co. 1868).

393. EDWARD DEERING MANSFIELD, *THE POLITICAL GRAMMAR OF THE UNITED STATES: OR, A COMPLETE VIEW OF THE THEORY AND PRACTICE OF THE GENERAL AND STATE GOVERNMENTS WITH THE RELATIONS BETWEEN THEM* (New York, Wiley & Long 1835); EDWARD DEERING MANSFIELD, *THE POLITICAL MANUAL: BEING A COMPLETE VIEW OF THE THEORY AND PRACTICE OF THE GENERAL AND STATE GOVERNMENTS OF THE UNITED STATES, ADAPTED TO THE USE OF*

On marriage, Mansfield posited that “[i]n Christian countries, and with Christian people, the revealed law of God, so far as it applies to the relations of society, is the only true foundation of human laws.”<sup>394</sup> The law of domestic relations, he insisted, must therefore be understood to be grounded on a few simple biblical commands. Male and female are made one flesh by marriage.<sup>395</sup> Remarriage after divorce constitutes adultery.<sup>396</sup> Wives must submit obediently to their husbands and husbands must show sacrificial love for their wives.<sup>397</sup> “The first great principle of Scripture,” Mansfield announced, “is repeated by the law. They are *in law one person*.”<sup>398</sup>

One consequence of this biblical command, Mansfield urged, was male headship: “As the marriage creates a unity, and the husband is religiously the head of the family, the law declares that the external powers of this family, in respect to property and government, shall vest in the husband.”<sup>399</sup> Practical effects resulted from this biblically-driven conclusion, ranging from male control of the wife’s property to the marital privilege prohibiting spouses from testifying against one another in court.<sup>400</sup> “[T]he Scripture,” Mansfield observed, “declares that the person of the wife belongs to the husband.”<sup>401</sup> Speaking euphemistically, he drew the appropriate lesson: “In fine, it appears that the husband’s control over the person of his wife is so complete that he may claim her society altogether.”<sup>402</sup>

The treatise literature imbued in the spirit of Blackstone retained a narrow vision of married women’s status at law. The husband continued to exercise jurisdiction and control over his wife and this control was manifested over all of her contractual and property interests. She had no juridic personality to call her own.

### C. Seneca Falls, 1848

This monolith of male authority and privilege must have seemed as indestructible as it had in Blackstone’s day. But yet, in 1848, a blow would be struck against it that would prove fatal, not at once but in the long run. That summer a women’s rights convention would assemble in the little town of Seneca Falls, New York, to call on American men to make real the

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COLLEGES, ACADEMIES, AND SCHOOLS (New York, A.S. Barnes & Burt 1861); EDWARD DEERING MANSFIELD, A LETTER IN REGARD TO THE TARIFF ON IRON AND LABOR (Cincinnati, Wrighton & Co. 1869).

394. LEGAL RIGHTS OF WOMEN, *supra* note 388, at 261–62.

395. *Id.* at 262.

396. *Id.*

397. *Id.*

398. *Id.* at 262–63 (emphasis in original). Mansfield added: “This great principle has, therefore, all the authority of human and divine law.” *Id.*

399. *Id.* at 266.

400. LEGAL RIGHTS OF WOMEN, *supra* note 388, at 266–70.

401. *Id.* at 270.

402. *Id.* at 272–73.

agenda Mary Wollstonecraft had identified a half-century before:<sup>403</sup> equal civic participation by men and women alike and the abolition of coverture.

But if the blow was struck in 1848, there needed to be a period of preparation beforehand. The issues had to be identified, and first principles refined and made applicable. American feminism did not suddenly burst forth as an abstract statement of ideals, but was part of a larger context. And that context was abolitionism, the belief that chattel slavery was a blight on American institutions that had to be brought to a swift conclusion for the sake of the nation's very soul.<sup>404</sup>

### 1. Sarah Grimké

Sarah Grimké (1792–1873) was a planter's daughter from South Carolina and the offspring of a prominent lawyer, judge, and leading figure of the Southern slaveocracy. While this background might describe Sarah Grimké, it certainly did not limit her.<sup>405</sup> Indeed, Gerda Lerner characterized her as “the first woman to write a coherent feminist argument in the United States.”<sup>406</sup>

As Lerner would later recall, Grimké came by her abolitionist and feminist sympathies instinctively, as a reaction to the dehumanizing effects of slavery she witnessed all about her, from her earliest childhood onward.<sup>407</sup> By the time she was twelve, against the wishes of her parents, she tried to teach the family slaves to read and write to better understand the Bible.<sup>408</sup> As an adolescent she envied her brother who was sent north to attend law school and she grew frustrated that that career choice was denied her.<sup>409</sup> “Why had God given brains to both men and women,” she demanded to know, “if only men were to be allowed to use them?”<sup>410</sup> There was an unfairness to life, a hierarchy of race and gender that she resolved all the days of her life to oppose.<sup>411</sup>

403. Ellen Carol DuBois, *Introduction Part One: 1815–1861*, in ELIZABETH CADY STANTON & SUSAN B. ANTHONY, *CORRESPONDENCE, WRITINGS, SPEECHES* Ellen 2–3 (Ellen Carol DuBois ed., 1981) (connecting early American feminism with Mary Wollstonecraft).

404. 1 GARY LADERMAN & LUIS D. LEÓN, *RELIGION AND AMERICAN CULTURE: AN ENCYCLOPEDIA OF TRADITIONS, DIVERSITY, AND POPULAR EXPRESSIONS* 499 (2003).

405. GERDA LERNER, *THE GRIMKÉ SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMEN'S RIGHTS AND ABOLITION* 15 (2004).

406. GERDA LERNER, *THE FEMINIST THOUGHT OF SARAH GRIMKÉ* 5 (1998).

407. LERNER, *THE GRIMKÉ SISTERS*, *supra* note 405, at 14–15.

408. JOHN DEWAR GLEISSNER, *PRISON AND SLAVERY: A SURPRISING COMPARISON* 60 (2010).

409. LERNER, *supra* note 405, at 16.

410. *Id.* at 15–16.

411. Grimké never abandoned the hope that women might one day become lawyers or judges. Ruth Bader Ginsburg has described an incident in 1853 when Grimké, on a visit to Washington, D.C., was invited to sit in the Chief Justice's chair. “‘Who knows but this chair may one day be occupied by a woman,’” she said to the justices. Ruth Bader Ginsburg, *Introduction to Women and the Law: Facing the Millennium*, 32 *IND. L. REV.* 1161, 1161 (1999).

It was inevitable that the adult Sarah Grimké could not long remain in South Carolina—that fever swamp of man’s inhumanity to man was not the place for someone eager to inquire after first principles or to bring down the pillars of the prevailing order. In her later twenties she moved north to Philadelphia, a world utterly strange and alien from the surroundings of plantation childhood.<sup>412</sup> She converted to Quakerism, even becoming a minister in that faith.<sup>413</sup> She became a committed abolitionist as well, lecturing extensively on the moral imperative of emancipation.<sup>414</sup>

Through experience and reflection, Grimké came to realize that freedom was not divisible, that she needed to lift her voice not only in opposition to the crime of chattel slavery, but to the many ways women were oppressed.<sup>415</sup> It was in this spirit that she penned her most famous work, *Letters on the Equality of Sexes and the Condition of Woman*, written over the course of 1837 and 1838, and published in the latter year.<sup>416</sup> A trained minister, Grimké felt confident to meet head-on the biblical argument that women were created and destined to be subordinate creatures, domestic helpmeets to the powerful men in their lives. Woman, she asserted, was like man in that both sexes were created in the image and likeness of God.<sup>417</sup> Being molded from Adam’s rib, from his very flesh and bone, woman could only be perfectly equal with Adam, not a derivative, secondary being.<sup>418</sup>

Furthermore, Eve should not be held the more culpable party in the Fall from Grace. The two of them ate the forbidden fruit freely and together.<sup>419</sup> Eve and her progeny, womankind, should not therefore be eternally punished with legal subordination for this equally-shared transgression.<sup>420</sup> “All I ask of our brethren,” she addressed the law-makers who still continued to press down upon womankind the yoke of inequality, “is that they will take their feet off our necks and permit us to stand upright on that ground which God designed us to occupy.”<sup>421</sup>

Grimké then made the case for woman’s legal equality with men. Ever the careful biblical exegete, she made sure to premise this set of observa-

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412. PAMELA R. DURSO, *THE POWER OF WOMAN: THE LIFE AND WRITINGS OF SARAH MOORE GRIMKÉ* 53–54 (2003).

413. LACEYE C. WARNER, *SAVING WOMEN: RETRIEVING EVANGELISTIC THEORY AND PRACTICE* 67–68 (2007).

414. Debra Gold Hansen, *The Boston Female Anti-Slavery Society and the Limits of Gender Politics*, in *THE ABOLITIONIST SISTERHOOD: WOMEN’S POLITICAL CULTURE IN ANTEBELLUM AMERICA* 45, 52–53 (Jean Fagan Yellin & John C. Van Horne eds., 1994).

415. David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution: “On the Same Platform of Human Rights”*, 18 *CARDOZO L. REV.* 767, 799–800 (1996).

416. See generally Sarah Grimké, *Letters on the Equality of Sexes and Condition of Women*, reprinted in *THE PUBLIC YEARS OF SARAH AND ANGELINA GRIMKÉ: SELECTED WRITINGS, 1835–1839* 204–72 (Larry Ceplair ed., 1989) [hereinafter *Letters on the Equality of Sexes*].

417. *Id.* at 205.

418. *Id.*

419. *Id.* at 205–06.

420. *Id.* at 206–08.

421. *Id.* at 208.

tions on St. Paul's admonition in his Letter to the Galatians that "[t]here is neither Jew nor Greek, there is neither bond nor free, there is neither *male* nor *female*; for ye are all one in Christ Jesus."<sup>422</sup>

Stating the religious case for sexual equality was not only a natural feature of Grimké's mental universe, the mode of thinking and talking with which she was most comfortable, but was in fact crucial to the success of her whole program.<sup>423</sup> After all, her audience of abolitionists and social reformers was chiefly a religious one, accustomed to acting on moral premises derived unreflectively and automatically from scriptural sources.<sup>424</sup> She therefore required an armament of counter-examples to throw against the monolith of male supremacy erected by generations of ecclesial authorities and she was quick to develop it.<sup>425</sup>

But she was not content to base her claims solely on religious insight. Politically, she reminded her male readers, the American Revolution had been fought over the denial of representation.<sup>426</sup> Men saw fit to incur "an immense expense of blood and treasure"<sup>427</sup> to obtain the rights of representation and consent for themselves, and yet they continue to deny these same benefits of citizenship to women: "I had rather we should suffer any injustice or oppression, than that my sex should have any voice in the political affairs of the nation."<sup>428</sup> "Woman has no political existence," she lamented, and this deprivation of rights had to be remedied.<sup>429</sup>

She confuted Blackstone's odious defense of coverture with the same vigor and force. This legal principle has aimed to "crush [woman's] individuality."<sup>430</sup> After reciting the relevant quotations from Blackstone, Grimké concluded that coverture was nothing less than enslavement. "Here now, the very being of a woman, like that of a slave, is absorbed in her master. All contracts made with her, like those made with slaves by their owners, are a mere nullity."<sup>431</sup> On the subject of slavery, Sarah Grimké had credibility; the comparison was one which long resonated with women's rights advocates.<sup>432</sup> If she succeeded in making fast the connection between slavery and coverture, she surely must have reasoned, the Blackstonian universe would lose its long-term viability.

422. Letters on the Equality of Sexes, *supra* note 416, at 217. Cf. *Galatians* 3:28.

423. LERNER, *supra* note 406, at 4–5.

424. THOMAS G. MITCHELL, *ANTI-SLAVERY POLITICS IN ANTEBELLUM AND CIVIL-WAR AMERICA* 6 (2007).

425. Grimké did not use "reason" in the way Mary Wollstonecraft did, probably because it sounded too "deistic." Grimké remained much more at home with biblical allusion and allegory.

426. Letters on the Equality of Sexes, *supra* note 416, at 235.

427. *Id.*

428. *Id.*

429. *Id.* at 231.

430. *Id.*

431. *Id.* at 232.

432. JUDITH NIES, *NINE WOMEN: PORTRAITS FROM THE AMERICAN RADICAL TRADITION* 7 (2002); JOHN V. ORTH, *REAPPRAISALS IN THE LAW OF PROPERTY* 38–39 & n. 22 (2010).

## 2. *Lucretia Mott and Elizabeth Cady Stanton*

Sarah Grimké had indissolubly joined the causes of abolition and women's rights.<sup>433</sup> It was therefore, in hindsight at least, only to be expected that the World Anti-Slavery Convention, held in London in 1840, would play a formative role in the creation of a unified women's rights movement in the United States.<sup>434</sup>

There had been steady pressure in Great Britain during the first part of the nineteenth century to abolish within the British Empire first the slave trade and then even the possession of slaves.<sup>435</sup> With substantial victory over these twin evils achieved in the 1830s,<sup>436</sup> the old anti-slavery groups reorganized in 1839 to push for the international abolition of slavery, especially in North and South America.<sup>437</sup> The London Convention was to be the first large global gathering of forces in this war against human bondage.<sup>438</sup> But if the Convention is remembered today, it is because it was the place where Lucretia Mott (1793–1880) and Elizabeth Cady Stanton (1815–1902) first met and formed a friendship and an alliance that would irreversibly alter the history of the women's rights movement.<sup>439</sup>

Mott and Stanton were among only a small handful of women at the Convention and, so apocryphal accounts have it, were forced by its male organizers to sit in segregated seating away from the main floor.<sup>440</sup> The thinking of the men was that the women could only distract from the pressing business of the abolition of slavery by hoisting their divisive banner of women's rights.<sup>441</sup> The effect of this decision, however, was to unite in purpose and in will two of the most powerful voices for the emancipation of women.

433. LYNNE OLSON, *FREEDOM'S DAUGHTERS: THE UNSUNG HEROINES OF THE CIVIL RIGHTS MOVEMENT FROM 1830–1970* 28 (2001).

434. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* 122–23 (2010).

435. This movement is indelibly connected with William Wilberforce (1759–1833) who had been pressuring Parliament to act against slavery since the 1780s. See LEO D'ANJOU, *SOCIAL MOVEMENTS AND CULTURAL CHANGE: THE FIRST ABOLITION CAMPAIGN REVISITED* 158 (1996).

436. Parliament abolished the slave trade in the Slave Trade Act, 1807, 47 Geo. 3, c. 36 (Eng.). Parliament abolished ownership of slaves everywhere except territories controlled by the East India Company in the Slavery Abolition Act, 1833, 3 & 4 Will. 4, c. 73 (Eng.).

437. SUZANNE MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PATTERN* 7 (2003).

438. W. Caleb McDaniel, *World's Anti-Slavery Convention (1840)*, in 2 *ENCYCLOPEDIA OF ANTISLAVERY AND ABOLITION* 760, 760–62 (Peter P. Hinks et al. eds., 2007).

439. DOROTHY STERLING, *LUCRETIA MOTT* 120 (1964).

440. CAROL FAULKNER, *LUCRETIA MOTT'S HERESY: ABOLITION AND WOMEN'S RIGHTS IN NINETEENTH-CENTURY AMERICA* 5 (2011).

441. The goal of avoiding distraction was completely defeated, however, when the abolitionist William Lloyd Garrison chose to sit with the women. See M. Christian Green, *Christianity and the Rights of Women*, in JOHN WITTE, JR. & FRANK S. ALEXANDER, *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 302, 309 (2010).

By 1840, Lucretia Mott had attained a truly iconic reputation on the world stage.<sup>442</sup> A Quaker minister, like Sarah Grimké, Lucretia Mott was active in the American Anti-Slavery Society.<sup>443</sup> She worked directly with African-American women and had stared down a mob in Philadelphia that had ransacked the abolitionist meeting place known as Pennsylvania Hall and was poised to burn down her home.<sup>444</sup> Fearless for freedom, she took her life in her hands by traveling the South to demand slavery's end.<sup>445</sup> Her work for the emancipation of women was a natural outgrowth of her anti-slavery commitment.<sup>446</sup>

Stanton was then only twenty-five years old and the much more obscure figure. She was only in London on honeymoon, having recently married her husband Henry Stanton, a leader in the anti-slavery movement and a male delegate to the Convention.<sup>447</sup> Born in Johnstown, New York, to a prominent lawyer and judge, Elizabeth enjoyed a privileged background and at an early age distinguished herself in what were then male pursuits—winning a local Greek competition, proving herself a more than able equestrian, and holding her own in public debates.<sup>448</sup> The Second Great Awakening—an ecstatic religious movement that swept New York State in the 1830s—influenced her,<sup>449</sup> but she soon made her own way religiously, combining in interesting ways New England transcendentalism, free-thought, and a fresh, open-ended, and highly personal interpretation of the Christian message.<sup>450</sup> It was her very free-spiritedness that led her finally to

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442. Refused access to the floor, Mott addressed a breakfast meeting of delegates in a performance that earned her the nickname “The Lioness of the Convention,” by the London press. See JAMES A. MCGOWAN, *STATION MASTER ON THE UNDERGROUND RAILROAD: THE LIFE AND LETTERS OF THOMAS GARRETT 173–74* (rev. ed. 2005).

443. Indeed, she helped to organize the first women's anti-slavery society and made sure to include African-American women as members with equal rights. ROSEMARY RADFORD RUETHER, *WOMEN AND REDEMPTION: A THEOLOGICAL HISTORY* 137 (2011).

444. NEIL A. HAMILTON, *AMERICAN SOCIAL LEADERS AND ACTIVISTS* 272 (2002).

445. ANNA M. SPEICHER, *THE RELIGIOUS WORLD OF ANTI-SLAVERY WOMEN: SPIRITUALITY IN THE LIVES OF FIVE ABOLITIONIST LECTURERS* 34 (2000).

446. Dana Greene, *Quaker Feminism: The Case of Lucretia Mott*, 48 *PENN. HIST.* 143, 148–49, 151–53 (1981). Much like Sarah Grimké, she viewed coverture as a species of slavery: “The theory of the law degrades the wife almost to the level of slaves. When a woman marries, we call her condition coverture, and speak of her as *femme couverte* . . . . There is no foundation in reason or expediency for the absolute and slavish subjection of the wife to the husband.” JAMES AND LUCRETIA MOTT: *LIFE AND LETTERS* 501 (Anna Davis Hallowell ed., Boston, Houghton, Mifflin & Co. 1884).

447. ELIZABETH FROST-KNAPPMAN & KATHRYN CULLEN-DU PONT, *WOMEN'S SUFFRAGE IN AMERICA* 50 (2009).

448. ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 8 (1984).

449. Kathi Kern has raised questions about whether the Second Great Awakening's impact was as strongly felt as Elizabeth Cady Stanton herself described in her memoirs. See KATHI KERN, *MRS. STANTON'S BIBLE: ELIZABETH CADY STANTON AND THE WOMAN'S BIBLE* 41–44 (2001).

450. Encouraged by Lucretia Mott to experiment religiously, Stanton followed a highly syncretic liberalism by the 1840s. See GRIFFITH, *supra* note 448, at 45–46. One biographer describes Stanton as willing to toy and tease with whatever the passing fashion of the day might have

the abolitionist cause when she fell in love and married the wandering and impecunious anti-slavery campaigner Henry Stanton.<sup>451</sup>

As of 1840, however, she had still accomplished very little. She was as yet only an acolyte to the great Lucretia Mott. It was Mott who introduced Stanton to the ideas of Mary Wollstonecraft.<sup>452</sup> She instructed her young pupil so thoroughly that Stanton described herself as fairly trembling with the excitement of new discovery:

Mrs. Mott was to me an entire new revelation of womanhood. I sought every opportunity to be at her side. . . . She had told me . . . of Mary Wollstonecraft, her social theories, and her demands of equality of women . . . . I had never heard a woman talk what . . . I had scarcely dared to think.<sup>453</sup>

In a few years, they were no longer master and student; imbued with a shared realization that they might effect real and transforming change, their relationship gradually transmuted itself into one of equals and collaborators in a cause.

### 3. July, 1848

There are years where the forward movement of time is languid, barely perceptible, unworthy of notice, but then there are years that lunge into the future, that stair-step over boundaries that seemed unbreachable only a few years before. The year 1848 was such a year. Uprisings swept Europe, including demands for political reform, an end to censorship, and the adoption of free speech.<sup>454</sup> The forces of reaction beat back the revolutionaries, but the seeds were nevertheless planted for future reforms that had previously been inconceivable.<sup>455</sup>

Seneca Falls was far from these scenes of European disturbance. Even today, it is a sleepy little village of less than 7,000 souls, tucked away at the northern end of Seneca Lake, in New York's Finger Lakes region. It is a place of sudden winter snowfalls and deep, lusciously green summers, set

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been—"phrenology, spiritualism, or reincarnation." LORI D. GINSBERG, *ELIZABETH CADY STANTON: AN AMERICAN LIFE* 171 (2009).

451. GRIFFITH, *supra* note 448, at 24–36 (neatly recapturing the sense of high-spiritedness that characterized Elizabeth Cady Stanton at this time in her life).

452. Mott also warmly recommended Sarah Grimké's work to Stanton, telling her that it was second in importance to Mary Wollstonecraft's. See SUE DAVIS, *THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON: WOMEN'S RIGHTS AND THE AMERICAN POLITICAL TRADITIONS* 239 n. 49 (2008).

453. GRIFFITH, *supra* note 448, at 38 (quoting Elizabeth Cady Stanton).

454. A detailed documentation of these revolutions is beyond the scope of this paper, but a quick overview of events in Germany, where the revolution progressed farthest, can be found in Dieter Langewiesche, *Revolution in Germany: Constitutional State—Nation-State—Social Reform, in EUROPE IN 1848: REVOLUTION AND REFORM* (Dieter Dowe ed., 2001); WOODRUFF D. SMITH, *POLITICS AND THE SCIENCES OF CULTURE IN GERMANY, 1840–1920* 36–39 (1991).

455. SMITH, *supra* note 454, at 36–39.



against a sharply-carved landscape of hills and valleys.<sup>456</sup> It was an unlikely venue for events of such historic importance.<sup>457</sup>

It is unclear exactly how the idea for the Seneca Falls Convention first arose. Elizabeth Cady Stanton, in her *History of Women's Suffrage*, remembered that the discussion first arose in London, during the Anti-Slavery Convention of 1840.<sup>458</sup> Lucretia Mott, however, attributed the initiative entirely to Stanton, sometime after they returned to American shores.<sup>459</sup> Whoever finally bears prime credit for instigating the Convention and whatever the precise circumstances, planning for the Convention was hastily made in June, 1848, when through good fortune Mott and Stanton happened to be residing only a few miles from one another in upstate New York.<sup>460</sup> It was decided that the Convention should take place in the Wesleyan Chapel, a small but sturdy brick church that still faces the Cayuga/Seneca canal linking two of the Finger Lakes.<sup>461</sup>

The Convention was not well publicized in advance, relying on an announcement in the Seneca Falls Courier and word of mouth to generate a crowd.<sup>462</sup> Attendance was better than could have been hoped for—around 300 persons in all, about thirty men and the remainder women, many of them Quakers from surrounding congregations.<sup>463</sup> Still, the event might have gone entirely unnoticed had it not been for the fortuitous presence of Frederick Douglass, the escaped slave and abolitionist journalist.<sup>464</sup> His

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456. I am writing this description on the basis of having lived in the Finger Lakes region for several years and having visited Seneca Falls in August 2012.

457. Seneca Falls' enduring significance as a landmark in the history of women's rights was confirmed, if confirmation was needed, by President Barack Obama's mention of it in his Second Inaugural Address. See *Kudos to Obama For Seneca Falls Mention*, THE PATRIOT LEDGER (Jan. 22, 2013).

458. 1 ELIZABETH CADY STANTON, HISTORY OF WOMAN SUFFRAGE 67–68 (Rochester, Charles Mann 2d ed. 1889).

459. SALLY G. McMILLEN, SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT 81–82 (2008).

460. *Id.* at 82. Mott was visiting family members in Auburn, New York, a few miles to the Southeast of Seneca Falls. Stanton had recently settled there. Her husband Henry, lacking any obvious means of support, had read law with Elizabeth's father and had been admitted to the bar. He was now briskly engaged in making a name for himself in politics and law. JUDITH WELLMAN, THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION 10 (2004) (Mott in Auburn); *Id.* at 158 (Stanton's relocation to Seneca Falls). Henry was away from home that summer, serving as a delegate to the Free Soil Party national convention and campaigning for that Party's presidential ticket. *Id.* at 216.

461. The chapel was selected partly for convenience but also for its symbolic significance, as its congregation had already become locally famous for its abolitionist sentiments and a commitment to radical politics. DOUGLAS M. STRONG, PERFECTIONIST POLITICS: ABOLITIONISM AND RELIGIOUS TENSIONS OF AMERICAN DEMOCRACY 129–131 (2002).

462. For a reprinting of the notice see SUSAN GLUCK MEZEY, ELUSIVE EQUALITY: WOMEN'S RIGHTS, PUBLIC POLICY, AND THE LAW 6 (2003). A few local newspapers also carried the notice, but word of mouth truly counted for a great deal. See McMILLEN, *supra* note 459, at 88.

463. BRADFORD MILLER, RETURNING TO SENECA FALLS: THE FIRST WOMAN'S RIGHTS CONVENTION AND ITS MEANING FOR WOMEN TODAY 17 (1995).

464. C. JAMES TROTMAN, FREDERICK DOUGLASS: A BIOGRAPHY 69 (2011).

newspaper, the North Star, was headquartered in Rochester, New York, and Douglass not only covered the events at Seneca Falls, he addressed the Convention, lending his singular moral voice to the proceedings.<sup>465</sup>

#### 4. *Speeches and Sentiments, July 19–20, 1848*

The two-day event featured debates, speeches, and the approval of a Declaration of Sentiments. The morning of the first day, in fact, was consumed by debate over the Sentiments, which controversially had proposed that women should have the right to vote.<sup>466</sup> Lucretia Mott addressed the Convention several times over the course of the two days,<sup>467</sup> and Frederick Douglass spoke at its conclusion.<sup>468</sup> Unfortunately, only sparse summaries of their remarks survive.<sup>469</sup>

Elizabeth Cady Stanton, on the other hand, preserved a hand-written copy of her remarks, although the editor of her papers suggests that the text that comes down to us today is likely a composite of at least two speeches she delivered in the summer of 1848.<sup>470</sup> Closely tracking Wollstonecraft's arguments for legal and political equality between the sexes,<sup>471</sup> Stanton asserted that men and women were moral and mental equals and so should not be ranked in a hierarchical relationship, one greater, the other lesser, one ruling, the other meekly governed.<sup>472</sup>

She mocked the idea that men possessed innate moral superiority to women.<sup>473</sup> Coming from a family of lawyers, she merely had to point at what everybody knew: "The lamentable want of principle among our law-

465. Douglass attended "as a social reformer who saw freedom indivisibly for all humans." *Id.* He subsequently endorsed the proceedings editorially and committed the NORTH STAR to opposing all discrimination according to sex. *Id.* at 69–70.

466. BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL 46 (1999).

467. Mott "addressed the assembly more than any other speaker." FAULKNER, *supra* note 440, at 140. Cf. WELLMAN, *supra* note 460, at 196 (summarizing what we know of Mott's remarks); LLOYD C.M. HARE, LUCRETIA MOTT: THE GREATEST AMERICAN WOMAN 199 (1937) ("Lucretia Mott . . . spoke with her usual eloquence . . . on the subject of 'Reform in General'").

468. For the text Douglass subsequently published concerning his views on the Convention, which doubtlessly reflects the sentiments he shared with the assembly, see PHILIP S. FONER & YUVAL TAYLOR, FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 102–03 (1999).

469. See the sources collected *supra* notes 464–65.

470. The manuscript issues are complex and are discussed at 1 THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 94–95 (Ann D. Gordon ed., 1997) [hereinafter THE SELECTED PAPERS]. The text we are using in this Article is dated "September, 1848." *Id.* at 95.

471. An 1848 letter from Lucretia Mott to Elizabeth Cady Stanton suggests that both women had Mary Wollstonecraft on their mind in the year of the Seneca Falls Convention. See Botting & Carey, *supra* note 317, at 717.

472. THE SELECTED PAPERS, *supra* note 470, at 96–97.

473. *Id.* at 97 ("There is a class of men who believe in the natural inborn, inbred superiority both in body and mind and their full complete Heaven descended right to lord it over the fish of the sea, the fowl of the air, the beast of the field, and last tho' not least the immortal being called woman.").

yers generally is too well known to need comment.”<sup>474</sup> She furthermore asked her listeners to consider the rowdiness and the riots that take place on election day, “where man, in performing so important a duty of a citizen, ought surely to be sober-minded.”<sup>475</sup> She went on to criticize other bastions of male domination: And what of Congress, that enclosed preserve of male prerogative? Its debates are loud, long, and disruptive.<sup>476</sup> Even the students of divinity, the ministers and the men of the cloth, cannot stop quarreling endlessly over heavenly texts and earthly preferments.<sup>477</sup> After reciting this parade of horrors, Stanton concluded that not only was man not the moral superior of woman, it was entirely likely that “[man] is infinitely woman’s inferior in every moral quality.”<sup>478</sup>

Stanton then addressed the mental capacity of male and female and again, following Wollstonecraft, asserted that they were equal. Physical strength, she asserted, bears no relationship to quality of mind. The horse is not the “superior to the man—for although he has more muscular power, yet the power of mind in man renders him his superior and he guides him wherever he will.”<sup>479</sup> “The power of mind,” Stanton concluded, “seems to be in no way connected with the size and strength of body.”<sup>480</sup> And it is the qualities of mind that fit and equip men and women alike to govern.<sup>481</sup>

And if male and female are equal in the moral and mental realms, it followed that they should share an equal status in public and private life. Every man, no matter how learned, no matter how ignorant, enjoyed the same civil and political rights.<sup>482</sup> “[D]runkards, idiots . . . rum-selling rowdies,” and other men of weak and immoral character can vote while women cannot.<sup>483</sup> This by itself was an injustice but there was yet a greater injustice implicit in this one-sidedness: “The great truth [is] that no just government can be formed without the consent of the governed.”<sup>484</sup>

The right to vote, Stanton continued, was the necessary precondition to changing woman’s legal oppression. “Had we a vote to give might not the office holders and seekers propose some change in woman’s condition?”<sup>485</sup> Stanton rejected the suggestion that wives should be obedient to their hus-

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474. *Id.* at 100.

475. *Id.*

476. *Id.*

477. *Id.* at 99–100.

478. THE SELECTED PAPERS, *supra* note 470, at 99–100.

479. *Id.* at 102.

480. *Id.*

481. *Id.* at 111–15 (where Stanton makes this point through a series of historical examples of women political and military leaders who ruled effectively).

482. *Id.* at 104.

483. *Id.* at 105.

484. THE SELECTED PAPERS, *supra* note 470, at 105.

485. *Id.* at 106.

bands.<sup>486</sup> This idea is not even the steady teaching of the Bible,<sup>487</sup> and it must not become the basis of public policy.<sup>488</sup>

She similarly repudiated organic conceptions of marriage that held the woman legally absorbed by her husband, thereby making him her public and legal representative.<sup>489</sup> The effect of this teaching is to deprive woman of “rights” that men would never themselves surrender.<sup>490</sup> “A new era is dawning upon the world,” Stanton declared in conclusion, “when old might to right must yield<sup>491</sup> . . . [Woman], grown too large for her chains, will burst the bands around her set and stand redeemed[,] regenerated and disenthralled.”<sup>492</sup>

The Convention also featured the adoption of Resolutions and the approval of a Declaration of Sentiments. These documents, principally authored by Elizabeth Cady Stanton,<sup>493</sup> are widely considered today as the founding charter of the movement for women’s legal emancipation. Thus Gerda Lerner has described its impact: “[the adoption and approval of the Resolutions and Declaration of Sentiments at Seneca Falls] . . . led to a transformation of consciousness and a movement of empowerment on behalf of half of the human race, which hardly has its equal in human history.”<sup>494</sup>

The Resolutions opened with a denunciation of William Blackstone by name. The old jurist was cited for the proposition that the laws of nature and God dictate “that man shall pursue his own true and substantial happiness.”<sup>495</sup> This claim, however, was immediately turned against Blackstone: if the law of nature directed us to pursue our own substantial happiness, then laws restrictive of women’s rights must be banished from the books.<sup>496</sup> Claims that men are somehow superior in governing capacity are demonstrably false. In fact, men and women are identical “in capabilities and responsibilities.”<sup>497</sup>

486. *Id.* at 108.

487. Stanton disagreed with those who believed that the Bible commanded female subordination within marriage. Yes, she acknowledged that this statement can be found in St. Paul’s letters, but there are many contrary examples in the Old and New Testament. *Id.*

488. *Id.* Stanton rejected male domination as ruling principle in favor of “‘freedom’ . . . [and] universal justice and love.” *Id.*

489. *Id.* at 106. Noxious effects flowed from organic conceptions of marriage: The man was empowered “to chastise and imprison his wife—to take the wages which she earns—the property which she inherits, and in case of separation the children of her love.” *Id.* at 104. These laws make woman “the mere dependent on [her husband’s] bounty.” *Id.*

490. THE SELECTED PAPERS, *supra* note 470, at 106.

491. *Id.*

492. *Id.*

493. On authorship, see DAVIS, *supra* note 452, at 50.

494. GERDA LERNER, LIVING WITH HISTORY/MAKING SOCIAL CHANGE 74 (2009).

495. THE SELECTED PAPERS, *supra* note 470, at 75–76.

496. *Id.* at 76 (“Resolved, That such laws as conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature and of no validity.”).

497. *Id.* at 77.

These insights—that men and women are called to the same pursuit of happiness and share the same intellectual and moral capabilities—have their basis in Mary Wollstonecraft’s rejection of male physical superiority as a basis for legal patriarchy and her defense of a shared human reason as the true foundation for equality.<sup>498</sup> Still echoing Mary Wollstonecraft, the Resolutions went on: “[W]oman has too long rested satisfied in the circumscribed limits which corrupt customs and a perverted application of the Scriptures have marked out for her, and . . . it is time she should move in the enlarged sphere which her great Creator has assigned her.”<sup>499</sup>

The Declaration of Sentiments made specific what was meant by this enlarged sphere. First, the legal disabilities imposed on women must be removed:

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners. . . . He has made her, if married, in the eyes of the laws, civilly dead. He has taken from her all right in property, even to the wages she earns. He has made her, morally, an irresponsible being. . . . In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement. . . . He has monopolized nearly all of the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. . . . He has closed against her all the avenues to wealth and distinction, which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known. . . . He has usurped the prerogatives of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and her God.<sup>500</sup>

And there was the matter of woman’s right to vote. Stanton had been advised by none less than Lucretia Mott that advancing a claim that women should be accorded the franchise would bring laughter and disrepute to their entire effort.<sup>501</sup> Stanton, however, would not be deterred. She prevailed, and the Declaration of Sentiments made sure to advance the claim not only of marital and economic equality, but political equality as well:

He has never permitted her to exercise her inalienable right to the elective franchise. He has compelled her to submit to laws, in the formation of which she had no voice. . . . Now, in view of this entire disenfranchisement of one-half the people of this country,

498. *Supra* notes 221–22, 231–60 and accompanying text; *cf.* Botting & Carey, *supra* note 317, at 716–20 (discussing Stanton’s intellectual debt to Mary Wollstonecraft).

499. THE SELECTED PAPERS, *supra* note 470, at 77.

500. *Id.* at 79–80.

501. 2 SUZANNE O’DEA SCHENKEN, FROM SUFFRAGE TO THE SENATE: AN ENCYCLOPEDIA OF WOMEN IN POLITICS 454 (1999).

their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of these United States.<sup>502</sup>

Mary Wollstonecraft's vision that male and female should stand side-by-side as equals, sharing the right to vote, to own and transfer property, to enter contracts was a preposterous one in her own day. Yet her belief that women should stand on equal legal and economic footing was now receiving shape and substance.

## V. CONCLUSION

On the eve of the Seneca Falls Women's Convention, in early 1848, New York became the second state in the nation to liberalize its rules on coverture.<sup>503</sup> In what came to be known as the Married Women's Property Act, the State Legislature decreed:

The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.<sup>504</sup>

Defenders of traditional marriage were outraged by this legislation. Orestes Brownson, Catholic convert,<sup>505</sup> journalist, pamphleteer, and publicist, saw in this grant of womanly independence the seeds of marriage's destruction as an institution:

This separation of the interests of the husband and wife, this distinction of the unity of the married pair, making them two, and permitting them in hardly any respect to be one, effected by the recent law of the State of New York, and which all the other States are aspiring to imitate, is incompatible with the true nature and meaning of marriage, and is the most odious and immoral principle of any measure we remember ever to have been deliberately adopted by a civilized state.<sup>506</sup>

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502. THE SELECTED PAPERS, *supra* note 470, at 80.

503. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* 170–72 (1997) (providing a brief history of this bill's enactment).

504. 1848 N.Y. Laws 307. Section 2 established rules governing when a husband might access rents or profits accrued by existent marital property, while section 3 allowed women to acquire property by "gift, grant, devise, or bequest" for her "sole and separate use" even after marriage. *Id.*

505. Brownson converted from a kind of deistic, skeptical, free-inquiring Unitarianism to a strict Catholicism in the mid-1840s. See LEONARD GILHOOLEY, *CONTRADICTION AND DILEMMA: ORESTES BROWNSON AND THE AMERICAN IDEA* 113–46 (1972).

506. Orestes Brownson, *Cooper's The Ways of the Hour*, *BROWNSON'S Q. REV.* 273, 293 (July 1851). Brownson reviewed some of the provisions, allowing for separate ownership of goods and

The movement for women's rights had the effect of polarizing debate between these extremes. The defenders of women's rights saw the injustice done to individuals. Its opponents could not look beyond the organic concept of marriage espoused so thoroughly and completely by Bushnell<sup>507</sup> and defended so vehemently by Brownson. Mary Wollstonecraft had prepared the ground and the Seneca Falls reformers had performed valiant and valuable service. But, it would take time, many decades more, before the cause of individual rights would prove triumphant.

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the independent right of the wife to enter contracts and concluded that the statute was "[a]ntichristian and immoral." *Id.*

507. *Supra* notes 340–59 and accompanying text.