When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*

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This research guide collects and annotates books and journal articles about the common doctrine of coverture, which held that a wife had no legal standing because her being was completely incorporated into that of her husband. The doctrine was imported from England into Colonial America and has not yet disappeared from the law.

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Introduction

¶1 Discrimination against women throughout Anglo-American history has been well documented. Solely on the basis of their sex, women were denied legal, political, and economic rights. Traditional English common law, later adopted by the American colonies, additionally discriminated against married women. The doctrine was called "coverture" or the "unity principle," and it is best described by the great English jurist William Blackstone:

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> By marriage, the husband and wife are one person in law: that is, the 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 every thing; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her *baron,* or lord; and her condition during her marriage is called her *coverture*. . . .
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> For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would only to be to covenant with himself. . . .
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> The husband is bound to provide his wife with the necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them. . . .
>
> If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well her own; neither can she be sued. . . . But in trials of any sort they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person. . . .
>
> But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void. . . . She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. . . .
>
> These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England.[1]

¶2 Under ancient Roman law, women were generally under the wing of their husbands, although upper class women enjoyed some inheritance and property rights that were irrelevant to their less fortunate sisters.[2] As the common-law tradition developed in England, incorporating and intermingling the legal traditions of the Romans and the Normans with the canon law of the Catholic Church and the Anglo-Saxon traditions, married women were generally considered to be under the protection and cover of their husbands.[3] Widows and unmarried adult women could own property, collect rents, manage shops, and have standing in court,[4] but by virtue of her marriage, the married woman enjoyed none of these privileges, and her person as well as her personal and real property belonged to her husband.

¶3 Under coverture, a wife simply had no legal existence. She became, in the words of the Seneca Falls Declaration of Sentiments, "civilly dead."[5] Any income

1. 1 WILLIAM BLACKSTONE, COMMENTARIES *442.
2. O. F. Robinson, *The Status of Women in Roman Private Law,* 1987 JURID. REV. 143, 161 (1987).
3. Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth Century America,* 5 FEMINIST STUDIES 346, 347 (1979).
4. Amy D. Ronner, *Husband and Wife Are One—Him:* Bennis v. Michigan *as the Resurrection of Coverture,* 4 MICH. J. GENDER & L. 129, 132 (1996).
5. *1848 Seneca Falls Declaration of Sentiments*, *reprinted in* JOAN HOFF, LAW, GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 383 app. 2 (1991).

from property she brought into the marriage was controlled by her husband, and if she earned wages outside the home, those wages belonged to him.[6] If he contracted debts, her property went to cover his expenses.[7] A man who killed his wife was guilty of murder and could be punished by death or imprisonment, but a woman who killed her husband was guilty of treason against her lord and could be punished by being drawn and burnt alive.[8] To put it most succinctly, upon marriage the husband and wife became one—*him*. Social norms, as reflected in the law, maintained that this was not only the natural way of things but also God's direct intent, quoting Genesis 3:16: "Your desire shall be for your husband, and he shall rule over you."

¶4 The English common law was imported into America, and all American lawyers were trained in the law by studying Blackstone's *Commentaries,* but there were definite conflicts between the imported legal tradition and the realities of the New World.[9] Women were relatively rare and more highly valued in the colonies, and necessity had effected changes in society unheard of in England. Women frequently entered the trades in colonial America and became craftsmen and merchants,[10] but as the frontier moved West, the Eastern colonies became more "cultured," more like England, and coverture reigned again.

¶5 In the last half of the nineteenth century, the Industrial Revolution changed American society as men left to go to work away from their homes and their shops and farms. At the same time, Victorian ideals of womanhood were shaping social conventions and manners. These societal changes, as always, were reflected in the law, and although the changes altered the stated rationale for coverture, coverture itself remained firmly entrenched under new rationales.[11] Women were no longer regarded as the property of their baron/lord/husband. They were viewed as unique individuals but individuals who operated in a "separate sphere."[12] Men were responsible for all public activities and relationships outside the family, and women were responsible for the household and the children and the private world of the home. Since their private sphere was thought to be inferior to the public sphere, they still functioned legally under the cover and protection of their husbands.

¶6 Although the societal changes wrought by the Industrial Revolution were recast to maintain and reinforce the unity doctrine, it was ultimately the Industrial Revolution that began to dismantle the doctrine. As America became an industrial

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6. Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act,* 109 YALE L. J. 783, 811 (2000).
7. PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 20 (1980).
8. 4 WILLIAM BLACKSTONE, COMMENTARIES *203.
9. Basch, *supra* note 3, at 348.
10. Linda Grant DePauw, *Women and the Law: The Colonial Period,* 6 HUM. RTS. 107, 110 (1977).
11. Janet Rifkin, *Toward a Theory of Law and Patriarchy,* 3 HARV. WOMEN'S L. J. 83, 85 (1980).
12. Danaya C. Wright, DeManneville v. DeManneville: *Rethinking the Birth of Custody Law Under Patriarchy,* 17 LAW & HIST. REV. 247, 304 (1999).

society, the preeminence of commerce and the stable transition of wealth became highly desirable social values. Married Women's Property Acts were passed in every jurisdiction to further this aim,[13] especially to allow extremely wealthy families to transfer their property through their married daughters, without giving control of the family assets to their daughters' husbands.[14] Once married women were viewed as legal persons who could own, sell, and bequeath property, they slowly began to effect the changes in the law that recognized they were legal persons in other areas of the law, persons who could sue their husbands for divorce or for personal injury, gain custody of their children, and enter professions such as law.[15]

¶7 Most commentators acknowledge that the theory of coverture was never fully realized and that there were significant deviations from the purity of the theory in the actual practices of the real world.[16] But the social and legal consequences of the doctrine of coverture were pervasive and have carried over into the present. It has been a long series of slow steps for married women to overcome the presumption of "unity" and "civil death." Pioneering women lawyers were denied admission to the bar because of their married state,[17] reasoning that if a married woman could not enter into a contract, a married woman could not enter into an attorney–client relationship. Before the passage of Title VII of the Civil Rights Act of 1964,[18] women could legally be passed over for promotions in the workplace because it was assumed that they were under the protection and support of their husbands. Married women needed the consent of their husbands to obtain a loan,[19] even a commercial loan for their own successful business. Corporate antinepotism rules usually meant that it was the wife who had to find a new employer.[20] Marital rape was not recognized as a criminal act because of the presumption of a wife's consent to her *baron,* her lord,[21] and interspousal tort immunity meant that a woman had no legal recourse for injuries caused by the negligence of her spouse.[22]

¶8 Discrimination against married women solely on the basis of their marital

13. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930,* 82 GEO. L. J. 2127, 2136 (1994).
14. *Id*. at 2135.
15. Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either,* 73 DENVER U. L. REV. 1107, 1164 (1996).
16. *E.g.,* Linda K. Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic, 1776–1848,* 6 HUM. RTS. 115, 118–19 (1977); Basch, *supra* note 3, at 346.
17. JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 165 (1991).
18. 42 U.S.C. § 2000e (2000).
19. Ami L. diLorenzo, *Regulation B: How Lenders Can Fight Against the Affirmative Use of Regulation B,* 8 U. MIAMI BUS. L. REV. 215, 216 (2000).
20. Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection,* 46 WAYNE L. REV. 1, 6 (2000).
21. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape,* 88 CAL. L. REV. 1373, 1391 (2000).
22. LEO KANOWITZ, WOMEN AND THE LAW 76 (1969).

status is relatively rare today. Flight attendants[23] have won the battles against their employers' mandates that marriage meant immediate resignation from their jobs. Courts now recognize the crime of marital rape and have removed a husband's automatic immunity from prosecution.[24] Interspousal tort immunity remains on the books in some jurisdictions, but its impact is seriously eroded.[25] Federal law mandates fair credit for women, even for women who are married.[26] Married women are no longer compelled by motor vehicle and voter registration bureaus to register under their husband's surname, regardless of the name they have legally chosen to use.

¶9 But more subtle forms of discrimination still exist. Coverture has almost faded from the legal scene, but remnants remain intact. Even today, it is usually the wife who is adversely affected by corporate rules against marriage between employees.[27] It is most often the woman who suffers the greatest economic loss upon termination of a marriage, since her contribution to the family's welfare is not regarded as favorably as the husband's contribution. It is the wife who is most frequently an innocent victim of government forfeiture laws and bankruptcy laws,[28] and in these kinds of suits, courts often seem to follow the old principle that what's his is his—and what's hers is his. And in the twenty-first century, it seems incredible that new technology like the Internet has promoted a lively market in mail-order brides into this country,[29] and few of these brides realize they have any individual rights apart from the husbands who bought them and imported them. It is true that married women still face subtle discrimination, but it is also true that the legal trappings and justifications for the discrimination are eroding.

Research Guide

Historic Analysis of the Coverture Doctrine

Basch, Norma, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *Feminist Studies* 5 (1979): 346–66.

The common-law doctrine of coverture was a legal fiction, a theory that was expanded to define the relationship of a married couple to the outside world, their families, their children, and themselves. It worked during the medieval period of tenancy in land. But later, as land became a salable commodity and property and

23. James McCollum, *Title VII v. Seniority: Ensuring Rights or Denying Rights?* 26 How. L. J. 1485, 1505 (1983).
24. Hasday, *supra* note 21, at 1375.
25. Jonathan D. Niemeyer, Note, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act*, 81 Ky. L. J. 237, 249 (1993).
26. Deanna Caldwell, *An Overview of Fair Lending Legislation,* 28 J. Marshall L. Rev. 333, 337 (1995).
27. Porter, *supra* note 20, at 8.
28. Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 Bankr. Dev. J. 105, 108 (2000).
29. Vanessa B. M. Vergara, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment,* 94 Nw. U. L. Rev. 1547, 1553 (2000).

commerce rose in importance, the legal construct didn't function as smoothly. In colonial America there was a shortage of women and a shortage of labor, and the old legal principles didn't quite fit the new realities. Exceptions became commonplace, and legal scholars sought to clarify the resulting confusion. Women, especially wealthy women, could set up trusts and antenuptial agreements, which led to a perception of different kinds of marriage for different classes of women. By the middle decades of the nineteenth century, each state had passed legislation recognizing the property rights of married women, but this did little to further the quest for legal equality.

Brown, Anne B., "The Evolving Definition of Marriage," *Suffolk University Law Review* 31 (1998): 917–44.

Although not about coverture, this article describes the changing ideas of marriage and how courts and legislatures came to claim the power to regulate marriage. The origins of American marriage laws can be found in the canon law of the Catholic Church as it evolved through the English common law. Marriage is regarded not as a mere social relation but as a contract regulated by the states, and the power to regulate includes the power to set qualifications and limit rights and privileges.

Cord, William H. *A Treatise on the Legal and Equitable Rights of Married Women; As Well in Respect to Their Property and Persons As to Their Children*. 2d ed. Philadelphia: Kay and Brother, 1885.

Recognizing that he is writing in an era of revolutionary change in the law of married women, Cord attempts to pull together the historical development of the common law as well as statutes and court decisions from various jurisdictions in order to define the state of the law at the time. He traces the laws affecting the rights of married women back to Roman law, explaining that the judges of England were trained in an ecclesiastical tradition. Included among the book's twenty-nine chapters are ones on antenuptial contracts, conveyances, contracts, separate estates, dower, curtesy, and wills.

Degler, Carl N. *Out of Our Past: The Forces That Shaped Modern America*. 3d ed. New York: Harper and Row, 1984.

Degler has written a history of the United States that is not limited to a descriptive story of people and events but looks at how those people and events affected future generations. In this context, he traces the development of a woman's role in the family and in society. Degler analyzes these roles, the increasing economic importance of women in society, and the evolving views of marriage in American society. From the Colonial period onward, women in America enjoyed privileges and freedoms unknown to women in the Old World.

Hartog, Hendrik. *Man and Wife in America: A History*. Cambridge: Harvard Univ. Pr., 2000.

This is an excellent reference on marriage in the United States since 1790, and it includes a particularly scholarly and analytical look at the doctrine of coverture. Hartog offers an historical overview of the intersection of marriage and the law, with an emphasis on nineteenth-century marriages and separations. He claims that it is important to look at divorces and separations because those are the areas in which the law and marriage come into contact. In devising law and rendering

decisions, legislators and judges are not creating a coherent system but are reacting on a case-by-case basis to real lives, unacceptable patterns of behavior, and failed relationships. Hartog examines specific cases, especially those cited in old casebooks, to see how the law developed and what marriage really meant to husbands and wives.

Hoff, Joan. *Law, Gender, and Injustice: A Legal History of U.S. Women*. New York: New York Univ. Pr., 1991.

A comprehensive history of legal rights for women in the United States, this book's ten chapters, arranged in chronological sequence, examine the changing concept of the legal rights of women within each era, fitting them into the context of place and time. For example, Hoff traces the evolution of women's testamentary and inheritance rights. After abandoning the strict inheritance of laws of England, American laws and custom varied over time and between geographical regions. She also traces the legal status of married women and their property. As early as colonial times, married women could obtain the status of "feme-sole traders," which gave them the right to sue and be sued, make contracts, and sell property. But since they were still considered under the cover of their husbands, the feme-sole traders did not have the full legal status of single or widowed women. There were many women entrepreneurs in colonial cities, and it was considered appropriate for widows to manage the family business. Changing economic, demographic, social, and legal conditions led to a more repressive attitude by the end of the eighteenth century. By the nineteenth century, the same factors led to broader rights for women, including the Married Women's Property Acts. The book contains useful tables throughout the text and ten appendixes.

Kaplan, Marion A., ed. *The Marriage Bargain: Women and Dowries in European History*. Binghamton, N.Y.: Haworth, 1985.

This book is a collection of five articles on the development of the dowry in European history. The traditional dowry has affected social, political, and economic history. Paid to the groom by the bride's family in cash, goods, or property, the dowry was a means of contributing to a newly created household and establishing political and economic alliances between families. Although the husband had control over the dowry during the marriage, it reverted to the woman upon his death or their divorce. Studies of the dowry reveal the position of women within society, particularly their status as daughters, wives, and mothers.

Matthews, Glenna. *The Rise of Public Woman: Woman's Power and Woman's Place in the United States, 1630–1970*. New York: Oxford Univ. Pr., 1992.

Matthews traces the changes in American society that eventually permitted a woman full participation in public life. In her analysis of the seventeenth century, she discusses the high status of women in the Iroquois and Cherokee tribes. She also compares and contrasts the roles of women, especially married women, in Puritan and Quaker societies. Although coverture rendered a woman legally invisible, these two societies were based on an intellectual construction that permitted husbands and wives to meet as equals. Even as late as 1970, remnants of coverture lingered in laws governing domicile and access to credit.

Rabkin, Peggy A. *Fathers to Daughters: The Legal Foundations of Female Emancipation.* Westport, Conn.: Greenwood, 1980.

Women in the Middle Ages, especially noblewomen, enjoyed freedom and exercised authority unknown to women in the nineteenth century. Women were permitted to vote in England until specifically excluded from doing so in 1832. Rabkin examines this regression of women's political and legal rights, covering the uneven progression of women's emancipation by focusing on the struggle in New York State. Part 1 describes the historical context of the passage of the first New York Married Women's Property Act, and part 2 analyzes the construction and judicial review of the legislation. Rabkin views the acts not as reforms for the benefit of women, but as part of a movement to "defeudalize" real property and make it an item of commerce.

Ranney, Joseph A., "Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin," *William & Mary Journal of Women and the Law* 6 (2000): 493–559.

Ranney uses three states to test his hypothesis that date of settlement and history of slavery are the major determinants of a state's legal culture. Virginia fostered premarital trusts and women's property rights (including ownership of slaves) because it highly valued stable property ownership and social order. New York, more highly industrialized, allowed women more control over their property. Wisconsin became a state at the height of Jacksonian democracy and debated the issue of married women's property rights even at its first constitutional convention. Ranney also contrasts how the legality of divorce evolved in each of the three states.

Rifkin, Janet, "Toward a Theory of Law and Patriarchy," *Harvard Women's Law Journal* 3 (1980): 83–95.

Rifkin contends that there are fundamental connections between law, patriarchy, and culture, and that law was an essential means to carry over preexisting patriarchal systems into capitalism as it evolved into economic dominance. The rules of marriage are based on the rules of exchange and property, with the woman as the object being exchanged, not one of the partners making the exchange.

Wortman, Marlene Stein, ed. *From the Colonial Times to the New Deal.* Vol. 1 of *Women in American Law.* New York: Holmes and Meier, 1985.

Each of the three chapters in this volume is subdivided into units, followed by a collection of primary source documents. Chapter 1, "The Colonial, Revolutionary, and Early Federal Period," contains a twenty-four-page unit on "Marriage and Property" that thoroughly describes the common law system of coverture and its impact on women. This unit is followed by twenty-four primary-source documents that illustrate the textual material. The documents range from Biblical text and excerpts of cases to letters, diaries, bequests, and early premarital agreements. A much shorter unit called "Marriage and Property," with accompanying documents, is included in chapter 2, which covers 1830–1890. "Occupational Choice," also included in chapter 2, thoroughly discusses access to the legal profession, including the case of Myra Colby Bradwell of Illinois, who was denied admission to the bar on the grounds that the attorney–client relationship is contractual and that she, as a married woman, could not legally enter into contracts.

Coverture and Civil Rights for Married Women

Alexander, Shana. *Shana Alexander's State-by-State Guide to Women's Legal Rights.* Los Angeles: Wollstonecraft, 1975.

Alexander's stated intention was to compile an orderly and logical explanation and listing of women's legal rights, written in ordinary English. Although out of date, the book does contain a clear and easily understood explanation of coverture and its remnants, as well as the effects of the various Married Women's Property Acts. Most of the information contained in the book deals with generalized legal rights for women in the areas of employment, rape, age of consent, divorce, and widowhood.

Bierman, Leonard, and Cynthia D. Fisher, "Antinepotism Rules Applied to Spouses: Business and Legal Viewpoints," *Labor Law Journal* 35 (1984): 634–42.

Most antinepotism rules were enacted before there were many women in the workplace and were intended to prevent the hiring of unqualified male relatives of male employees. The rules came to have a disparate affect on women as they entered the workforce in large numbers. Antinepotism and no-spouse rules have been litigated under the National Labor Relations Act, the Constitution, Title VII of the Civil Rights Act of 1964, state statutes and regulations, and various collective bargaining agreements. Rules against one spouse supervising another usually have been upheld, while broad prohibitions against the employment of spouses have been rejected.

"Civil Rights—Employment Discrimination Based on Marital Status—*Cybyske v. Independent School District No. 196*," *William Mitchell Law Review* 11 (1985): 277–307.

This student-authored note describes a case[30] brought by a substitute teacher who was not hired for a permanent teaching position because of her husband's vocal pro-teacher stance as a school board member. The court conceded that she was discriminated against because of her choice of spouse but refused to consider this under Minnesota's act barring discrimination on the basis of marital status. In its ruling, the court reverted to a narrow interpretation of marital status discrimination and excluded discrimination based on a spouse's identity and situation.

Dubler, Ariela R., "Wifely Behavior: A Legal History of Acting Married," *Columbia Law Review* 100 (2000): 957–1021.

The focus of this article is common law marriage, using the 1932 New York case *In re Estate of Erlanger*[31] as an illustrative example. The late-nineteenth and early-twentieth centuries was an era of great change in society's view of marriage and women's roles. Married Women's Property Acts and the political movement for women's suffrage redefined social understandings of women's roles. Cases involving common law marriages were usually brought by women who had never formally married their partners but who were seeking financial

30. Cybyske v. Independent School District No. 196, 347 N.W. 2d 256 (Minn. 1984).
31. 259 N.Y.S. 610 (N.Y. Sur. Ct. 1932).

support after they died or left. Courts most frequently based their decisions on whether the woman had exhibited "wifely behavior." Therefore, the decisions in common law marriage cases offer a precise look at what marriage, and more specifically what "wife," really meant in both the legal and the social sense. The *Erlanger* case discussed in this article was chosen to illustrate the intermingling of law and societal norms regarding marriage and common law marriage.

Edelman, Joyce D., "Marital Status Discrimination: A Survey of Federal Case Law," *West Virginia Law Review* 85 (1983): 347–69.

There is no federal legislation banning discrimination on the basis of marital status. Individuals bringing an action for such discrimination must base their case on the sex discrimination provisions of the Civil Rights Act of 1964, their constitutional right to privacy, or a state law. This leads to great disparity in the decisions and a body of case law that is unpredictable. For instance, similar cases involving married flight attendants have been decided differently based on which rule was applied. State statues prohibiting discrimination on the basis of "marital status" fail to define its meaning, so courts have struggled with their interpretations.

Giattina, Anna, "Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach," *Wayne Law Review* 33 (1987): 1111–31.

Giattina examines whether no-spouse rules discriminate on the basis of marital status. Some courts have interpreted marital status discrimination to refer only to whether the individual is married, single, widowed, or divorced. Others have more broadly defined discrimination to include that based on a spouse's identity or occupation. No-spouse rules are generally acceptable under a disparate treatment analysis but often fail to withstand a disparate impact analysis. A balance is required between employers' legitimate concerns and employees' rights not to be discriminated against.

Grossman, Joanna L., "Women's Jury Service: Right of Citizenship or Privilege of Difference?" *Stanford Law Review* 46 (1994): 1115–60.

With a primary focus on the historic exclusion and automatic exemption of women from jury service, this article only mentions in passing the courts' persistent refusal to distinguish between married and unmarried women. Even after suffrage was granted, women were generally excluded from serving on juries, based on perceived differences such as delicate sensibilities and their special sphere of influence in the home away from public life. Women who were not wives or mothers were apparently not considered at all.

Iams, Howard M., and Martynas A. Ycas, "Women, Marriage and Social Security Benefits," *Social Security Bulletin* 51 (May 1988): 3–9.

Most women receive Social Security benefits due to their status as wives or widows; few claim benefits as a divorced spouse. This article contains numerous tables illustrating payments to women by marital status. The authors project current trends and analyze the future impact on the Social Security system.

Porter, Nicole Buonocore, "Marital Status Discrimination: A Proposal for Title VII Protection," *Wayne Law Review* 46 (2000): 1–48.

Discrimination based on marital status is not currently protected under Title VII of the Civil Rights Act of 1964, but it is protected under antidiscrimination laws in twenty-one states and the District of Columbia. Citing cases in which a person was fired or not hired because of marital status, regardless of qualifications and job performance, Buonocore argues that marital status should be a protected classification under Title VII. Part 4 of the article suggests an amendment to Title VII, and explores the policy arguments for and against such an amendment. Agreeing that egregious discrimination against married women is no longer common, the article focuses on current issues, such as employers' rules against spouses working together, that have a disparate impact on women.

Regan, Milton C., Jr. *Alone Together: Law and the Meanings of Marriage*. New York: Oxford Univ. Pr., 1999.

This book analyzes the meaning of marriage in the context of law and the continuing tension between the internal and external views of marriage. Reagan contends that an internal view sees marriage as a special relationship imbued with shared meaning and community. The external view looks at marriage as an affiliation of two unique and separate individuals. How the law views the relationship has historically determined legal principles such as adverse testimony in criminal proceedings, privileged spousal communications, spousal tort immunity, and division of money and marital property upon divorce. For example, should a wife be permitted to testify against her husband in a criminal proceeding if it would benefit her to do so? Since the sixteenth century, the law had recognized a husband's right to prevent his wife from testifying against him, but the federal courts and most states have abolished that privilege. On the other hand, all federal and state courts have retained the marital communications privilege, even though the same arguments for abolition would seem to apply. The ten chapters of this book are a general guide to women's rights in employment, education, and criminal justice, but chapter 7 contains a clear and concise explanation of the laws and custom of assuming a husband's surname upon marriage and the woman's right to choose her surname.

Ross, Susan Deller, et al. *The Rights of Women: The Basic ACLU Guide to Women's Rights.* 3d ed. Carbondale, Ill.: Southern Illinois Univ. Pr., 1993.

Like the other editions of this guide, this is a general work covering various rights of all women. Chapter 4 contains a clear and concise explanation of the common law doctrine of coverture and the enduring custom requiring a wife to adopt her husband's surname.

Shammas, Carole, Marylynn Salmon, and Michel Dahlin. *Inheritance in America from Colonial Times to the Present.* New Brunswick, N.J.: Rutgers Univ. Pr., 1987.

The authors trace the origin of inheritance in America to English law, while noting the differences between the English model and the American system. In the United States, the favored treatment for eldest sons was generally abolished in favor of more equal distribution among the offspring. Of particular interest is chapter 4, "Inheritance Law and the Rights of Women and Children in the Nineteenth

Century." By the end of the nineteenth century, women had ownership and control over the property they inherited and could pass on their real and personal property by will as they chose. But the husband still was legally the head of the household, and, even in Western states with community property statutes, a widow could claim only half of the community property while a widower could claim it all.

Silbaugh, Katharine, "Turning Labor into Love: Housework and the Law," *Northwestern University Law Review* 91 (1996): 1–86.

Courts have consistently denied the market value of housework, primarily because it is viewed as part of family life and done out of affection. Denying the value of household work is especially harmful to women and sets precedents in different areas of law, including tax, divorce, tort, welfare, and labor. Household labor is subordinate to paid labor in determining social security benefits—home labor is rewarded if the marriage succeeds while paid labor is rewarded without regard to family relationships. The wife's obligation to provide service within the marriage lingers today in loss of consortium and wrongful death actions. The earnings laws of the late nineteenth century gave women the right to control their wage labor, but their husbands retained the rights to their household labor.

Stannard, Una. *Married Women v. Husbands' Names: The Case for Wives Who Keep Their Own Name*. San Francisco: Germainbooks, 1973.

Stannard takes a historical approach in tracing the legality of women retaining their maiden names. With some exceptions, taking a husband's surname is a matter of custom, not law. The common law doctrine of coverture was generally understood to mean that a woman must sue and be sued, make and take grants, and execute all legal documents using her husband's surname, although there were several notable exceptions in England. States vary on the name requirements imposed on married women for voter's registration, driver's licenses, bank accounts, and mortgages.

Wells, Karen A., "Looking for Mr. Bobb: Equal Protection and Gender-Based Discrimination in *Bobb v. Municipal Court*," *Hastings Constitutional Law Quarterly* 12 (1985): 315–45.

This note concerns a California case in which a prospective juror refused to answer questions during voir dire about her marital status because only female jurors were asked such questions. She was found in contempt and sentenced to one day in jail. The Court of Appeal later overturned the judgment.[32] In overturning the judgment, however, the three appellate judges took three different approaches to the issue, and the California Supreme Court refused to hear the case. The emphasis of this article is on the historical development of the Equal Protection clause of the Constitution as it applies to gender discrimination.

Wexler, Joan G., "Husbands and Wives: The Uneasy Case for Antinepotism Rules," *Boston University Law Review* 62 (1982): 75–142.

Rules established to prohibit favoritism in the hiring of relatives have impeded the efforts of qualified women to find and keep jobs. Wexler looks at the legal issues raised in applying antinepotism rules to the hiring of spouses. Concluding

32. Bobb v. Municipal Court, 192 Cal. Rptr. 270 (Ct. App. 1983).

that most companies' antinepotism rules are overly broad, she proposes guidelines for the employment of spouses, refocusing on the legitimate goal of excluding unqualified spouses.

The Legal Profession

Aynes, Richard L., "*Bradwell v. Illinois*: Chief Justice Chase's Dissent and the 'Sphere of Women's Work,'" *Louisiana Law Review* 59 (1999): 521–41.

This article examines the possible meaning and motivation behind Chief Justice Chase's dissent in the 8–1 ruling of the United States Supreme Court denying Myra Bradwell's admission to the Illinois bar.[33] The Chief Justice was near death and did not issue a dissenting opinion. Chase was far ahead of his time in his rulings that recognized the legal rights of women and blacks, and while serving as Secretary of the Treasury, he was unique in employing large numbers of minorities. Aynes attributes Chase's progressive thinking to the influence of his daughter, Kate. The article gives a historical analysis of the social and legal climate that led to the ruling in *Bradwell*.

Cushman, Clare, ed. *Supreme Court Decisions and Women's Rights: Milestones to Equality.* Washington, D.C.: CQ Pr., 2001.

An overview of Supreme Court cases on a variety of issues affecting women, this book covers all the leading cases affecting married women. There is a good summary of the *Bradwell* case.[34] In a related area, there is also a good summary of the case involving Stephen Weisenfeld whose suit fought the social security system's practice of awarding benefits to widows but not widowers.[35] The book is heavily illustrated and easy to read.

Drachman, Virginia G., "'My 'Partner' in Law and Life': Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America," *Law and Social Inquiry* 14 (1989): 221–50.

In 1889, Lelia Robinson asked the other women lawyers in the Equity Club of Boston if it was possible for a woman to simultaneously fulfill her duties as wife, mother, and lawyer.[36] Their responses revealed three distinct attitudes toward balancing marriage and career. The separatist approach maintained that women had to remain single to pursue a career. The Victorian approach supposed that women had to forego their career upon marriage. A third, integrated approach contended that it was possible to be both a married woman and a practicing lawyer. Almost half of the members of the club were married, and almost all of the married women lawyers were married to lawyers. In 1920, the New York Bureau of Vocational Information asked the same question in a survey of women lawyers.[37] The intervening thirty-year period was a time of dramatic change in which women were admitted to most law schools, higher education for women

33. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
34. *Id.*
35. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
36. Virginia G. Drachman, *"My 'Partner' in Law and Life": Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America*, 14 LAW & SOC. INQUIRY 221, 222 (1989) (citation omitted).
37. *Id.* (citation omitted).

was taken for granted, and the women's suffrage amendment was passed. Drachman looks at the immense changes over this time, particularly the differences between the pioneering women lawyers of the 1880s and the "new women" lawyers of the 1920s.

Kanter, Rosabeth Moss, "Reflections on Women and the Legal Profession: A Sociological Perspective," *Harvard Women's Law Journal* 1 (1978): 1–17.

Women were barred from the legal profession because of their legal status, most specifically their inability to enter into a contract without their husbands' permission. Eventually, more women were able to enter the profession, often because of a supportive lawyer husband or prestigious father. Still, women who did enter the profession often accepted the nonpublic roles of research or administration and most often in protected settings such as government or family firms. Married women had a particularly difficult road because of the widespread assumption that they simply could not make a total commitment to the profession.

Lazarou, Kathleen E., "'Fettered Portias': Obstacles Facing Nineteenth-Century Women Lawyers," *Women Lawyers Journal* 64 (Winter 1978): 21–30.

Women were denied admission to law schools and to the bar for a variety of reasons: the timidity and delicacy of their sex, their inability to enter into contracts because of their status as married women, the demands of family life, and the fear they would distract the males. The article looks at the famous case of Myra Bradwell of Illinois.[38] Belva Lockwood of Washington, D.C., was another married women who was denied admission to the bar. Lavinia Goodell, a single woman from Wisconsin, however, was eventually granted admission to the bar in that state after legislation was enacted providing that no person shall be denied a license to practice law as an attorney on account of sex.[39]

Sanger, Carol, "Curriculum Vitae (Feminae): Biography and Early American Women Lawyers," *Stanford Law Review* 46 (1994): 1245–81.

This is a review essay about the art of writing biography and more specifically about women writing biographies of early women lawyers. Parts 2 and 3 of the essay deal specifically with Jane Friedman's book on Myra Bradwell[40] and recount the basics of her struggle to practice law in Illinois. Sanger criticizes the biographer for making the exaggerated claim of Bradwell as the first woman lawyer and for focusing on the subject's "Victorian virtues" while ignoring not only Bradwell's faults but also her strength of character and fortitude as well.

Weisberg, Kelly, "Barred from the Bar: Women and Legal Education in the United States 1870–1890," *Journal of Legal Education* 28 (1977): 485–507.

The article focuses on the access of women to legal education but contains some interesting information about the specific problems facing married women. Weisberg discusses the Bradwell case[41] and looks at other pioneering women law students and lawyers, both married and single. She finds that married women

38. In re Bradwell, 55 Ill. 535 (1869).
39. In re Goodell, 81 N.W. 551 (Wis. 1879).
40. JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993).
41. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

were most often excluded from the profession based on their inability to enter into contracts and because of their "divine mission" of motherhood that would render them incapable of practicing law. Yet many of the first women to seek admission to the bar were married women, and more than half of those women were married to lawyers. Weisberg finds that a significant number of the lawyer husbands facilitated their wives' training and admission to the bar. In practice, most married women lawyers who partnered with their husbands worked in the office, either assisting their husbands or practicing outside the glare of public criticism.

Marital Rape Exemption and Interspousal Tort Immunity

Bartlett, Katherine T., and Angela P. Harris. *Gender and Law: Theory, Doctrine, Commentary*. 2d ed. New York: Aspen Law and Business, 1998.

Bartlett and Harris have divided the broad topic of gender and law into six categories: formal equality, substantive equality, nonsubordination, women's different voices, autonomy, and anti-essentialism. They examine each topic in detail, supplementing the discussion with selected excerpts from a variety of cases and legal documents. Of particular interest is the first chapter on the foundations of women's legal subordination that contains a good summary of the development of the common law doctrine of coverture. Also of interest is the section in chapter 6 on the reform of the marital rape exemption.

Hasday, Jill Elaine, "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 88 (2000): 1373–505.

Most commentators agree that the movement to criminalize marital rape began with the women's rights movement of the 1970s, but Hasday shows that nineteenth-century feminists were also vocal, persistent, and public in their attempts to change the law regarding marital rape. These feminists not only fought for access to the public sphere and suffrage but also regarded a woman's control over her own body as the most basic right that preceded all others. Despite more than a century of these efforts, the marital rape exemption still survives in some form in most states. Hasday thoroughly analyzes the marital rape exemption in nineteenth-century American law, the feminist campaign against the exemption and the legal reforms that followed, and the modern debate over the exemption.

Jackson, Linda, "Marital Rape: A Higher Standard Is in Order," *William & Mary Journal of Women and the Law* 1 (1994): 183–216.

Historically the law held that there could be no marital rape because the husband and wife were one entity. In effect, the husband could not rape his wife because he could not rape himself. Today's justifications for maintaining marital rape exemptions are based on the ideas of marital privacy and marital reconciliation, fear of false allegations, and the belief that rape within marriage is not as severe as rape outside marriage. Jackson disputes each of these justifications and calls for a higher standard of judicial review.

Loue, Sana. *Intimate Partner Violence: Societal, Medical, Legal and Individual Responses.* New York: Kluwer Academic/Plenum, 2001.

This book focuses on societal responses to domestic violence and whether the responses can effectively deter future violence. Loue explores theories of causation,

society's view of women, and devotes an entire chapter to the legal responses to domestic violence, including those of police, prosecutors, courts, and legislatures. As recently as the mid-1990s, prosecutors frequently felt that such private family matters did not belong in the court system. Traditional immunity from suits by spouses, based on the marital unity doctrine, had long served to protect batterers.

"The Marital Rape Exemption," *New York University Law Review* 52 (1977): 306–23.

By the latter part of the nineteenth century, every American jurisdiction had passed Married Women's Property Acts that recognized a wife's legal capacity and independent interests. Regardless of those acts, the marital rape exemption shielding the husband from rape charges remained in force. The husband had legal immunity, even if the couple had been separated for years, and even if the other elements of the offense, such as force, penetration, and lack of consent, were present. In 1977, twenty-seven states expressly recognized the exemption by statute, and the other states uniformly recognized it by common law. There were several rationales: a wife was the property of her husband; since the husband and wife were united into one person, a husband could not rape himself; upon marriage a wife gave her consent, regardless of the force the husband uses or the injury he inflicts; the difficulty of proof and possibility of fabrication on the wife's part; the chance that prosecution would hamper possible reconciliation and hinder marital harmony; and the availability of alternative remedies under assault and battery laws. This student-authored note calls for new legislation to replace these outmoded rationales, to recognize the principle of equality in marriage, and to provide protection of the rape statutes to all classes of women.

Russell, Diana E. H. *Rape in Marriage*. New York: MacMillan, 1982.

Russell claims that this is the first book written in English on the violent sexual abuse of women by their husbands. She asserts that marital rape is an outgrowth of a patriarchal system that treats women as the property of their husbands. Separate chapters review the law; current statistics on marital rape; and husbands, wives, and women as property. The book concludes with an international perspective on the problem. Appendixes include selected cases on marital rape and a state-by-state guide to marital rape laws.

Ryan, Rebecca M., "The Sex Right: A Legal History of the Marital Rape Exemption," *Law & Social Inquiry* 20 (1995): 941–1001.

Ryan uses an historical approach to analyze changes in the law concerning marital rape. Until the latter part of the twentieth century, the law did not recognize rape within marriage, based on the common law doctrine of coverture that consolidated a woman's legal rights into those of her husband, and defined marriage in the context of rights and duties of master and subordinate. From the late nineteenth century through the 1960s, the law increasingly moved away from the most rigid forms of coverture, but the marital rape exemption was not overturned until the feminist movement of the 1970s. By then society had changed its view of marriage to that of a contract between equals, and the presumption that a husband was entitled to his wife's person and property was seen as outdated and unacceptable. Law formalized and validated the social norm.

Schneider, Elizabeth M. *Battered Women and Feminist Lawmaking*. New Haven: Yale Univ. Pr., 2000.

Schneider focuses on the relationship between law and social movements in this book. Feminists had long held that the legally sanctioned subordination of women denied them equality and citizenship. Centuries of law and social custom had given husbands the right to "chastise" their wives. Mid-twentieth-century feminists were able to raise the level of consciousness about the huge problem now known as domestic violence. The 1992 Supreme Court case, *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[42] is generally regarded as an abortion rights case, but it is equally important for the court's inclusion of statistical evidence of physical, psychological, and social abuse of women by their male partners in its decision.

Siegel, Reva B., "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117–207.

In the Anglo-American common law tradition, husbands as the masters of the household were permitted to chastise their wives as long as they did not inflict permanent harm. Nineteenth-century feminists led the move for reforms that repudiated chastisement rights, but for over a century the legal system continued to treat wife beating as different from other kinds of assault—or refused to become involved at all. The status quo was maintained, but the rationale changed, as the focus shifted to "privacy of the family" and "promotion of domestic harmony." Siegel contends that this issue is an example for other social justice movements. Even successful reforms do not necessarily effect the desired changes, because the legal system enforces status relationships and finds new rules and reasons to protect status privileges.

"To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment," *Harvard Law Review* 99 (1986): 1255–73.

This student note traces the history of the marital rape exemption. The feudal doctrine of coverture held that a wife's legal existence is suspended during her marriage and reinforced the idea of women as property. Rape was viewed as a crime against another man's property, not as a crime against the victim. As women's legal and economic status improved and the "separate spheres" idea replaced the idea of coverture, a woman's sphere was defined as the private world of the family. The law would not intrude in the private world, and husbands were free to oppress their wives. The author argues that the exemption violates a wife's right to privacy, infringes on the right of all women to marry, and violates the Equal Protection guarantee of the Fourteenth Amendment.

Tobias, Carl, "Interspousal Tort Immunity in America," *Georgia Law Review* 23 (1989): 359–478.

Tobias believes the doctrine of interspousal tort immunity is an "untidy corner of the law." It prohibits husbands and wives from pursuing civil causes of action against each other for personal injuries. The doctrine gradually eroded in the twentieth century, but remnants continue in several jurisdictions. Part 1 of the article reviews the origins and developments of the doctrine through the era of

42. 505 U.S. 833 (1992).

coverture and the passage of the various Married Women's Property Acts; it includes an analysis of more than a century of case law on this topic. This part contains an especially thorough analysis of the legal impact of coverture on married women and clearly defines the legal rights held by single women. Part 2 argues for the complete abrogation of the doctrine, while part 3 looks at possible positive and negative outcomes if the doctrine is abolished.

Coverture in England

Rivers, Theodore John, "Widows' Rights in Anglo-Saxon Law," *American Journal of Legal History* 19 (1975): 208–15

Although the legal status of all women improved in England during the late Anglo-Saxon period of the sixth to eleventh centuries, widows enjoyed more freedom than wives or unmarried daughters. Women were under the protection of male guardians and were not legally responsible for their own affairs, except for adultery, incest, homicide, and sorcery. All women had protectors, usually their husbands, fathers, or brothers, but in the late Anglo-Saxon period widows came under the guardianship of the church and state, a far more distant protector. The guardianship of church and state protected widows from sexual assault, defended their property rights, and stressed their financial obligations to the crown. Widows received financial assistance, usually money or livestock, upon the death of their husbands, leading to a degree of economic independence unknown to their single or married sisters.

Turano, Margaret Valentine, "Jane Austen, Charlotte Brontë, and the Marital Property Law," *Harvard Women's Law Journal* 21 (1998): 179–226.

Austen's *Emma* (1806) and Brontë's *Jane Eyre* (1848) were published when the common law doctrine of coverture held full sway in England. Coverture meant that a woman ceased to have any legal status upon her marriage—no personal freedom, no property rights, no rights to her children, her body, or her wages. Legally, women were required to be dependent and submissive, yet these authors created strong-minded and victorious female characters—who still longed for marriage. Turano outlines the worst effects of coverture but concedes some economic, personal, and social advantages for women to marry. Austen and Brontë play brilliantly with coverture but ultimately turn it upside down as their heroines enter full and fulfilling marriages between equals.

Coverture in the United States

Colonial Period

Rowe, G. S., "*Femes Covert* and Criminal Prosecution in Eighteenth-Century Pennsylvania," *American Journal of Legal History* 32 (1988): 138–56.

Rowe cites Pennsylvania county court cases from the 1780s and 1790s in which not only were both a husband and wife found guilty of crimes, but also they both were fined. Yet according to the law of the time, the wives, as "feme covert," should not have been liable since they were under the cover of their husbands. The contrast between the law and actual practice raises the question of whether legal custom accurately reflected legal theory. Conventional wisdom has held that under coverture, women were seriously disadvantaged in civil proceedings but enjoyed some advantages (reduced culpability) in criminal proceedings. Rowe's research indicates that, in fact, women in eighteenth-century

Pennsylvania were treated in criminal proceedings as if they were fully responsible for their actions, but in civil cases, the law supported a husband's control of the household affairs.

Salmon, Marylynn. *Women and the Law of Property in Early America*. Chapel Hill, N.C.: Univ. of North Carolina Pr., 1986.

As a legal historian, Salmon focuses on the property rights of women in the period 1750–1830. Although single women *(feme sole)* could exercise their property rights in a manner similar to men (without the related political rights), married women *(feme covert)* were in a state of forced dependence. No colony or state allowed married women independent control of their property, with very limited legal exceptions involving wives coming into a marriage with separate estates. The period studied was a time when the forces of change in education, social attitudes, and the economy set the stage for revolutionary changes in married women's rights later in the century. Separate chapters examine conveyances, contracts, divorce, separate estates, and widows.

Nineteenth Century

Basch, Norma, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York.* Ithaca, N.Y.: Cornell Univ. Pr., 1982.

Basch had originally set out to examine the history of women's rights in America beginning with the Married Women's Property Acts that were passed in every jurisdiction in the mid-nineteenth century. She had supposed that the acts started sweeping change in the law by endowing women with independent legal status. She found that they actually did little to advance women's rights, except for the narrowly interpreted area of ownership of real property. Later statutes addressed married women's earnings and power to make contracts. Basch focuses on the acts in New York State as representative of those of the country as a whole. She contrasts the theory of baron and feme with the reality of relationships, financial and otherwise, between husbands and wives. Remnants of coverture remain. Courts no longer invoke the unity doctrine as articulated by Blackstone, but there is still a definite tendency to view a woman's primary role as wife and mother.

Chused, Richard H., "Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850," *Berkeley Women's Law Journal* 2 (1986): 42–88.

Chused examines the effects of coverture on a woman's legal rights, including management of her own real property and personal property and the writing of her own will. Statutes modifying coverture were enacted in the United States as early as the 1830s, at first to protect a widow's share of her husband's estate and to permit abandoned wives to regain limited control of their property. The laws were later expanded to affirm the validity of antenuptial agreements and to protect a married woman's property from her husband's creditors. Chused offers an in-depth analysis of wills in nineteenth-century Massachusetts, showing widows emerging as the principal beneficiaries of their husbands' estates.

Grossberg, Michael. *Governing the Hearth: Law and the Family in Nineteenth-Century America.* Chapel Hill, N.C.: Univ. of North Carolina Pr., 1985.

Grossberg studies the distinctively American development of the law of domestic relations in the nineteenth century. Although activities within the family were

generally regarded as private, in America there was a dependence on the law for solving disputes in both public and private areas. Grossberg examines appellate opinions, statutes, reports and commentaries, journals, and treatises to ascertain the prevailing wisdom and contemporary public policies. During this era, the legal idea of marriage evolved from a property transfer between father and son-in-law to a contract between a man and a woman. Domestic relations law was changing rapidly to keep pace with the social conventions.

Harris, George E. *A Treatise on the Law of Contracts by Married Women; Their Capacity to Contract in Relation to Their Separate Statutory Legal Estates, Under American Statutes.* Albany, N.Y.: Banks & Brothers, 1887.

In the years immediately preceding 1887, there was a flurry of legislative activity emancipating American women from the disabilities of coverture. Because of the immensity of the changes, the courts had not kept pace with the legislatures. They hadn't yet begun to deal with the various legal ramifications of all the legislation. Harris focuses only on contract law in context of the legal changes. In forty-eight chapters, he examines in detail the origin of coverture and studies the impact of recent changes in the laws pertaining to married women on their acquisition of estates, covenants, promissory notes, mechanic's liens, deeds, trusts, insurance, lawsuits, judgments, and pleadings.

Loeb, Isidor. *The Legal Property Relations of Married Parties: A Study in Comparative Legislation*. New York: Columbia Univ. Pr., 1900. Reprint, New York: AMS Press, 1968.

This book was originally compiled in 1894 and first published in 1900. Loeb outlines the numerous contemporary changes in marital property law that were occurring because of changing social and religious views and customs. In an era of great legislative activity, he calls the changes in American and English marriage laws "revolutionary." Loeb details the restrictions on the husband's authority, as well as the removal of the disabilities imposed upon the wife. He examines the rights of the parties, the developing law regulating marital property, and the rights of succession between married people.

Matsuda, Mari J., "The West and the Legal Status of Women: Explanations of Frontier Feminism," *Journal of the West* 24 (1985): 47–56.

Under contemporary American law derived from English common law, married women were considered legally united with their husbands, and all their legal rights were surrendered to their husbands. Married women could not sue or be sued; could not have guardianship over their children; could not keep any wages they earned outside the home; could not make a will; could not inherit property; and could not buy, sell, or lease property. This enduring common law reflected social attitudes that simply didn't work in the frontier West, thus the Western states blazed the trail for women's rights. Matsuda sees a concurrence of economic, geographical, ideological, and political reasons that led to these changes in the West: women who endured the hardships of the frontier could hardly be viewed as delicate dependent childlike creatures; developing Western economies could not afford to exclude a significant portion of the consumers; women were essential to settlement and growth, and legislators hoped more liberal laws for women, including land ownership rights, would help attract women to the region; states were creating their constitutions from scratch, and there was no

longstanding establishment opposed to radical new ideas; Western states were influenced by the Spanish legacy of community property law as well as by the English legacy of coverture; if women were granted the right to vote, Mormons could double their votes in Utah, and Kansas could significantly increase voters for temperance and other moral causes.

Popkin, William D. *Statutes in Court: The History and Theory of Statutory Interpretation.* Durham, N.C.: Duke Univ. Pr., 1999.

Popkin's analysis of nineteenth-century judicial opinions focuses on cases reviewing the Married Women's Property Acts. The earliest versions of the acts prevented husbands from using their wives' property to settle their debts, but later versions often added provisions allowing married women to settle their own property as if they were single. Judges often limited the scope of the acts with extremely narrow interpretations of the statutes, but nineteenth-century judges were almost always unwilling to stretch the boundaries of the law. It is undeniable that some judges completely disregarded the statutory language giving the wife control over her property, refusing to grant economic rights to women and preserving the traditional common law over the statutory law.

Rayne, Mrs. M. L. *What Can a Woman Do, or Her Position in the Business and Literary World*. Petersburgh, N.Y.: Eagle Publishing, 1893.

Mrs. Rayne quotes the plaintive question that Harriet Martineau of Massachusetts had asked in 1840: what can a woman do? At the time, the answer was that there were seven industries open to women, including teaching, keeping boarders, and working in the cotton mills. By 1893 Mrs. Rayne proudly noted that there were more than three hundred occupations (other than domestic service) that were open to women and that 300,000 women were earning their own living in these occupations. She found that women worked by choice because they wanted to supplement their household income, earn their own pin money, or achieve independence instead of being confined by poor marriage prospects. Women also worked by necessity and to avoid the charity of relatives when they were no longer supported by a man. Each chapter is devoted to a different kind of work available to women and describes the work involved. The author wanted to educate all women about the employment options available to them so that if they went to work, by choice or necessity, they would find work suitable to their skills and talents. The chapters include the professions of literature, journalism, law, medicine, and music, as well as engraving, telegraphy, nursing, bee keeping, clerking, and stenography. In fact, Mrs. Rayne found few occupations at which married women could not excel.

Siegel, Reva B., "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073–217.

Mid-nineteenth-century feminists led the fight for women's rights by claiming that wives were entitled to property rights in their household work. The common law doctrine of coverture, holding that husbands were the owners of their wives' labor, was not entirely eliminated by the various "earnings statutes," which recognized women's rights to their labor performed outside the home. These statutes applied to relatively few women, since the social norm was for a wife to work only within the home. Most accounts of nineteenth-century feminism focus on

the suffrage issue, but the claim of joint property rights arising from a woman's contribution to the family economy was integral to the movement. In the latter part of the nineteenth century, the movement evolved to a different understanding and argued more for working women's rights to a market wage.

Warbasse, Elizabeth Bowles. *The Changing Legal Rights of Married Women 1800–1861*. New York: Garland, 1987.

Originally written as a doctoral dissertation in 1960, this work was so frequently cited when the study of women's history became popular that it was published in book form in 1987. Its seven chapters provide both a legal and historical analysis of the rights of married women in the first half of the nineteenth century. The first chapter deals with the adoption of England's common law and the chancery courts, the second covers the codification movement of the 1820s, and the third considers the reformers of the 1830s. Chapter 4 looks at the nation's first Married Women's Property Acts, which were passed in the South, not the more liberal reform states of the Northeast as Warbasse had expected. She discovers that the original acts in the South were a reaction to the Panic of 1837 and the plight of the wives left destitute after their property was sold to pay their husbands' debts. The impoverishment of these women was an affront to southern notions of chivalry. The Acts would present such outrages to innocent wives and children and would also provide the added benefit of keeping property shielded from a husband's creditors but still under his control. The final chapters deal with the spread of Married Women's Property Acts to the North in the 1840s, the birth of the women's rights movement in 1848, and an overview of the status of married women at the beginning of the Civil War.

Weisbrod, Carol, and Pamela Sheingorn, "*Reynolds v. United States*: Nineteenth Century Forms of Marriage and the Status of Women," *Connecticut Law Review* 10 (1978): 828–58.

Reynolds v. United States[43] was an anti-polygamy case decided by the United States Supreme Court in 1878, a period of social outrage at Mormon polygamy, the "complex marriages" of the Oneida Utopian community, and woman suffrage in the Territory of Utah. *Reynolds* strongly reinforced the laws that gave the husband control of the wife's person and ownership of her real and personal property, as well as guardianship and control of their children. In analyzing the decision, Weisbrod and Sheingorn give a detailed explanation of the laws of marriage in nineteenth-century America.

Twentieth Century

Baker, Katharine K., "Biology for Feminists," *Chicago-Kent Law Revie*w 75 (2000): 805–35.

This article presents an interesting perspective on the marital partnership through a sociobiological view. According to the law as it has evolved, marriage creates a shared identity that leads to an expanded definition of self. One partner in a marriage will sacrifice for the other because the other is a part of oneself. Several states still prohibit spouses from suing one another in tort or testifying against the

43. 98 U.S. 145 (1878).

other. In general, the law hesitates to interfere in the negotiations within the marital relationship. None of this is true in biology. Biology clearly recognizes exploitation of the female by the male and the use of deception to maximize reproductive potential. It would seem that biological imperatives demand the law become more active in enforcing contracts between married people.

Baker, Katherine K., "Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection," *Ohio State Law Journal* 59 (1998): 1523–97.

The law protects both horizontal (marital) and vertical (parent-child) relationships. To a great extent the protection consists of the right to be left alone until the relationship breaks down. At that time, the law steps in to regulate aspects of both the horizontal and vertical relationships. Baker argues that men are prime beneficiaries of the law's deference to horizontal relationships, and women, who overwhelmingly are the custodial parent, suffer most when the law oversees the parent–child relationship. She traces this back to the first marriage laws in Rome in 753 BC. The ancient laws required a woman to conform to her husband's temper and the husband to rule his wife as necessary and inseparable. Formal marriages in Rome, and later in England, were necessary for the efficient distribution of property. Baker argues that the application of property law principles to family law would benefit women.

Bix, Brian H., "State of the Union: The States' Interest in the Marital Status of Their Citizens," *University of Miami Law Review* 55 (2000): 1–30.

While the government's interest in the regulation of marriage is generally accepted, important social issues arise over time and require new attention. Issues involving palimony, surrogate parenting, medical decision making for minors, antimiscegenation laws, and divorce across state lines have been through this cycle. The major issues currently in the forefront involve covenant marriages (now approved in Arizona and Louisiana) and their treatment by other states and same-sex marriages or civil unions. States have an interest in marital status because it confers public benefits on individuals. These rights and benefits include control over community property, inheritance, custody, and support.

Glendon, Mary Ann, "Matrimonial Property: A Comparative Study of Law and Social Change," *Tulane Law Review* 49 (1974): 21–83.

In 1937, experts from eleven nations gathered in France to evaluate their national laws on marital property. Glendon compares and contrasts the conclusions from this conference with the evolving marital property law in the United States, specifically looking at the laws of France, Germany, and England. For more than a hundred years, marital property law in America has been in a state of upheaval, as the law tried to reconcile the conflicting ideas of the individuality of each spouse within a marriage coexisting with the idea of a community of interests between the individuals. Glendon hopes that examining these additional models will lead to the most effective solution of the conflict.

Haglund, C. G., "Tort Actions Between Husband and Wife," *Georgetown Law Journal* 27 (1939): 697–731, 893–922.

Under the unity doctrine, the wife had no legal existence. The reforms of the last half of the nineteenth century recognized married women's rights to property and granted her the right to sue her husband over the enforcement of her property

rights. After passage of the Married Women's Property Acts, the question arose as to whether tort actions by a wife against her husband were permissible and, if such tort actions were permissible, whether they would apply only to injuries to property or also to personal injuries. In the first third of the twentieth century, such personal injury actions were generally denied by the courts, even in cases where the husband's action resulted in the death of the wife and the suit was brought on behalf of her estate. Usually the suit was denied on the grounds that a wife had no cause of action against her husband during her coverture in matters of personal injury, negligence, or malicious prosecution. In cases where the tort occurred before a marriage between the two parties, their marriage extinguished the cause of action.

Johnston, John D., "Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality," *New York University Law Review* 47 (1972): 1033–92

Property law has consistently denied married women the rights and legal capacities enjoyed by their husbands, based on the assumption that husbands and wives have certain predetermined roles. These sex stereotypes shaped the common law tradition. While still subject to discrimination, single women did not face the special disabilities imposed on married women. Johnston recommends including marital property law in the law school curriculum to enhance the students' understanding of the law of property.

Kanowitz, Leo. *Women and the Law*. Albuquerque: Univ. of New Mexico Pr., 1969.

Kanowitz's book contains a highly readable and comprehensive chapter on "Law and the Married Woman." In approximately seventy pages, it covers the topics of coverture, Married Women's Property Acts, adoption of the husband's surname, wives' property rights in both common law and community property states, the right to support, and various torts and criminal laws affecting married women. It gives an especially clear analysis of the doctrine of interspousal tort immunity and actions for loss of consortium. Kanowitz was slightly ahead of his time—in decrying legal inequality between the sexes, he says that "no Americans have recently marched, picketed, or . . . dramatically demonstrated their opposition to legal expressions of sex discrimination" (p.2).

Kay, Herma Hill, "From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States during the Twentieth Century," *California Law Review* 88 (2000): 2017–93.

Family law in America developed on the English model—the husband was the legal head of the house and responsible for all relations outside the home, the public sphere, while the wife was responsible for the management of the home and the children, the private sphere. As women moved outside the home and marriages became more egalitarian and more clearly a partnership, the law evolved to reflect these dramatic changes. Kay identifies two current trends that are in direct opposition to each other. One is the view that marriage is like a "joint venture," formed for a specific transaction and renewable at the pleasure of the participants. The other is the longing for commitment and a lifelong relationship, a desire that has led to covenant marriages with their greater restrictions on dissolution. Part 1 of the article specifically deals with the older view of marriage and

the doctrine of coverture. Changes in societal attitudes and advances in female education, industrialization, and transportation all led to married women becoming more involved outside their private sphere. Kay contends that the Uniform Marital Property Act[44] must be adopted by all states to recognize the contributions both spouses make to a marriage, and she believes that all states should create family courts that incorporate marriage and divorce counseling to add dignity to the dissolution process.

Kritchevsky, Barbara, "The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family," *Harvard Women's Law Journal* 4 (1981): 1–42.

Artificial insemination of an unmarried woman is a complex and controversial issue. At first, doctors refused the procedure to unmarried women, since it was regarded solely as an infertility treatment for married couples. Kritchevsky argues that it is a legally and constitutionally protected right and analyzes the legal questions arising in a variety of situations, such as father's rights, parental duties, and the legitimacy status of children so conceived. She contends that the legal definition of family is too narrow to encompass the realities of family relationships.

Lefcourt, Carol H., ed. *Women and the Law.* St. Paul, Minn.: West Group, 1984–.

This loose-leaf volume is an authoritative treatise on all aspects of women's legal rights and legal standing. Chapter 3A, "Marital Property Rights in Transition," analyzes "The Allocation of Original Ownership," "Spousal Rights in Intestacy," "Spousal Rights Upon Divorce and Against Disinheritance," and "Who Is a Spouse?"

Nock, Steven L., "Time and Gender in Marriage," *Virginia Law Review* 86 (2000): 1971–87.

Gender norms in marriage, including motherhood, fatherhood, and domestic responsibilities, are different from gender norms in the public arena. Within marriage, men and women strongly cling to gender roles, even while embracing gender equality in all other areas. Wives and husbands view tasks in terms of shared history and future benefits—a complex give-and-take and time-valued sense of fairness independent of gender equality. This time factor, the long-term commitment to the relationship and the belief that things even out over the years, is often overlooked by researchers studying marriage who tend to take a snapshot view of a particular time. The construction of gender relationships is ongoing and fluid.

Pilpel, Harriet F., and Theodora Zavin. *Your Marriage and the Law.* Rev. ed. New York: Collier Books, 1964.

Recognizing the impossibility of covering all jurisdictions, Pilpel and Zavin have provided an overview of the laws affecting married people from engagement and getting married to children, sex, and termination of marriages. Although somewhat dated, chapters titled "Husband and Wife: The Personal Side" and "Husband and Wife: The Property Side" give clear and concise expla-

44. UNIF. MARITAL PROPERTY ACT, 9A pt.1 U.L.A. 103 (1998).

nations of the common law development of married women's rights.

Ronner, Amy D., "Husband and Wife Are One—Him: *Bennis v. Michigan* as the Resurrection of Coverture," *Michigan Journal of Gender and the Law* 4 (1996): 129–69.

In the first part of this article, Ronner explores the common law doctrine of coverture in which a married woman's legal rights, including the right to control property, are entirely controlled by her husband. Coverture was repudiated by the Married Women's Property Acts in every state and by court decisions of the late nineteenth and early twentieth centuries. Part 2 examines the "guilty property" myth, also legally repudiated, in which property was punished for the acts committed by its owners. In part 3, Ronner contends that the *Bennis* decision[45] resurrects both the coverture and guilty property fictions, and she fuses the two myths to form the deciding factor in a forfeiture case.

Scott, Elizabeth S., "Social Norms and the Legal Regulation of Marriage," *Virginia Law Review* 86 (2000): 1901–70.

Law and social norms, including gender norms and commitment norms, are intricately interwoven in the complex relationship of marriage. A couple making such a commitment faces significant challenges and risks, and marriage creates a set of behavior obligations. Deep distrust and negative response to new forms of commitment, such as covenant marriages, often arise from the interweaving of gender norms and commitment norms, assuming that the choice of increased commitment actually means choosing a patriarchal and discriminatory gender norm. Law enters into the obligations of marriage when the relationship is broken by divorce or by unacceptable behavior like abuse or assault. Enormous social changes beginning in the 1960s have diluted the gender and commitment norms of traditional marriage. Likewise, the legal framework has been dismantled with the onset of no-fault divorce, prohibitions against discrimination against women, and legal recognition of cohabitation, but there has been uneven progress toward the modern goal of egalitarian marriage.

Silberbogen, Rebecca E., "Does the Dissolution of Covenant Marriages Mirror Common Law England's Subordination of Women?" *William & Mary Journal of Women and the Law* 5 (1998): 207–44.

Louisiana's covenant marriage law,[46] passed in 1997 in order to strengthen the family and lower divorce rates, limits the legal causes of action for divorce. The Louisiana law provides an option in which the parties declare their marriage to be a covenant which can be dissolved only upon a complete breakdown of the union and a lengthy separation. The parties agree to premarital counseling and sign affidavits of their commitment. In the event of difficulty, there are prescribed steps to achieve reconciliation. It has parallels to the laws in England in the sixteenth and seventeenth centuries, when life-threatening cruelty, adultery (though usually only for a wife's infidelity), or malicious desertion were the only grounds for divorce.

45. Bennis v. Michigan, 516 U.S. 442 (1996).
46. LA. REV. STAT. ANN. §§ 9:272–275.1 (West 2000).

Vergara, Vanessa B. M., "Abusive Mail-Order Bride Marriage and the Thirteenth Amendment," *Northwestern University Law Review* 94 (2000): 1547–99.

Approximately four to six thousand mail-order brides are imported into the United States each year, mostly from the Philippines, with the rest coming from other Asian countries and a few from Russia. While some of these marriages are successful, problems arise if the marriage breaks down because the bride is often reduced to a condition of slavery or involuntary servitude. Vergara presents an overview of the mail-order-bride industry and explores the immigration laws that affect the bride's status in this country. She contends that the Thirteenth Amendment's prohibition against slavery is a powerful tool that can be used for the protection of abused mail-order brides and examines other legal and social service remedies to the problem.

Warren, Joseph, "Husband's Right to Wife's Services," *Harvard Law Review* 38 (1925): 421–46, 622–50.

There are four different kinds of statutes affecting the husband's right to the wife's services: wife has a right to own real and personal property but not her earnings; community property statutes in which both husband and wife share all acquisitions during the marriage; wife controls her earnings and services if engaged in employment by a third party not her husband and can contract only concerning her separate property; wife has a right to her labor (except her services to her husband and children in the home), retaining the right to her labor if she works in her husband's business and the right to contract with her husband. Warren examines legislation and court cases in each state to present a full picture of the topic.

Wenig, Mary Moers, "Taxing Marriage," *Southern California Review of Law and Women's Studies* 6 (1997): 561–83.

Wenig examines the federal tax on the transfer of property from deceased spouse to surviving spouse. She traces the history of the law of marriage, from the English common law ("What's his is his, and what's hers is his") to the current federal tax system, which she claims is biased toward an implicit assumption that every dollar of an individual's wealth is his or her own and passes to the surviving spouse only by the grace of the owning spouse. The estate tax reinforces the separateness of each spouse's wealth. Wenig questions the image of marriage that our society favors—the separate "What's his is his, and what's hers is hers" or the shared life represented by community property law, "What's his or hers is theirs."

Williams, Joan, "Is Coverture Dead? Beyond a New Theory of Alimony," *Georgetown Law Journal* 82 (1994): 2227–90.

Citing statistics about the poverty levels of women after divorce, Williams argues that the current system of alimony needs to be changed. Alimony still perpetuates the traditional idea of coverture in which the husband had sole ownership of the family wage. Even though coverture does not literally exist, it is still true that the awarding of property rights at divorce is so one-sided that it resembles coverture. Today mothers tend not to perform as "ideal workers." They often don't work, or they work part-time, or perhaps full-time but with interruptions on the "mommy track," and they still have the major responsibility for child care within the family. This enables the husband to be the "ideal worker" and earn higher

wages, wages that reflect both his work and hers. Williams argues that the current alimony system is inequitable in that it views the husband's wages as solely his entitlement and his property and the wife's settlement as discretionary and subsidiary to the husband's share. She says that we need to rethink property law rather than continue to rely on traditional systems of family law.