Women in English Legal History: Subject (almost), Object (irrevocably), Person (not quite)

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Introduction

Many women, including many feminists, believe that women today enjoy substantially more legal equality than has been the case in the past. We look at the contemporary legal advances such as the *Sex Discrimination Act* 1984 (Cth), the *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth), at our right to vote, our access to education, at the trend towards gender neutral language in legislation and in other documents and believe, particularly looking at the pace of change during this century, that the battle for equality is almost over. If we look at the history of legislation and custom specifically dealing with women and try to understand how and why laws and customs have changed through time, we may be less optimistic. All too often, periods of what appear to be legal progress and increasing equality have been followed by a draconian destruction of rights and radical retreat from egalitarian ideas. In what follows I shall examine both legislation and other forms of public legal record keeping. What I am seeking is material which, directly or indirectly, sheds light on the standing and roles of women within the communities in which they lived. While I shall concentrate on English law and English legal history I shall begin much earlier, both to give historical perspective and to emphasise the historic roots of the developing legal regimes.

Perhaps the most public record of the position of women is to be found in the historical records concerning the legal incidents of marriage and the property transactions associated with marriage. Thus I shall begin by considering marriage and the laws, both public and private, concerning the incidents of marriage, not because I believe that women are identified by marriage but because a historical examination of the public regulation of marriage sheds a great deal of light upon the position of women in different times and at different places. Today, even as *de facto* relationships are increasingly assimilated to legal marriage[1] and the "family question"

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1 See, for example, *Social Security Act* 1991 (Cth), s 4, especially s 4(3). This provision, inserted in 1989 as s 3A, *Social Security Act* 1947,

continues to dominate political discourse, the public face or juridical nature of marriage remains difficult to characterise. In western legal and philosophical traditions marriage has been routinely identified with contract and its incidents expressed in contractual terms. In his massive work on the laws of England, Blackstone explicitly treated the civil face of marriage as contractual.[2] Likewise, early liberal political philosophers such as Hobbes, Locke and Kant all emphasised the contractual nature of marriage, even while they uniformly identified the marriage contract as one which destroyed the legal personality of the wife and excluded her absolutely from participation in civil society. In a world view which left no conceptual space for any obligations which did not arise out of contract, no alternative existed. Contract seemingly captures the incidents of a valid marriage ceremony such as voluntariness and consent but, given that marriage no longer entails civil death for a woman, has become almost impossible to reconcile with the legally entrenched inability of the parties to tailor the terms of their relationship to meet individual needs and to have the agreement upon which their relationship is based enforced by the law. Likewise, given that laws and policies concerning marriage have undergone a period of radical change in the recent past, it becomes difficult to justify the power of the state arbitrarily and unilaterally to rewrite the terms of marriage contracts.[3]

Historically, in cultures as diverse as those of ancient Israel and ancient Rome, marriage represented a private contract between two existing agnatic lineages represented by their heads.[4] Marriage was perceived, not as an individual decision, but as a family concern, one intimately linked to the transmission of property and the securing of alliances between families. While its incidents were

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provides a list of five basic areas and fifteen sub-categories to be considered when it becomes necessary to determine if a given relationship between a man and a woman is a marriage-like relationship. While unmarried couples had, in fact, been treated as married since the inception of the Act in 1947, the insertion of formalised criteria shifted the surrounding discourse from implicit understandings to an explicit and detailed bureaucratic check list.

2 See Kerr, RM, *The Commentaries on the Law of England of Sir William Blackstone, Knt, Adopted to the Present State of the Law*, Vol 1, 4th ed, London, John Murray, 1876, at 404.

3 This, I would emphasise, is precisely what has occurred in every jurisdiction in which the laws concerning marriage and dissolution of marriage have recently been reformulated, given the pervasive assumption that marriage is fundamentally contractual, and the continuing reluctance to enforce prenuptual agreements altering the traditional incidents of the marital relationship.

4 See Neufeld, E, *Ancient Hebrew Marriage Laws*, London, Longmans, Green and Co, 1944; Crook, JA, *Law and Life of Rome*, London, Thames and Hudson, 1967, at 98-111; and Csillag, P, *The Augustan Laws on Family Relations*, Budapest, Akademiai Kiado, 1976.

intimately linked with customary law, the public consequences were profound, as remains the case today. The view of marriage as a contract privately between households and publicly between individuals remained influential until very recently. Matrimonial practices in England until the early twentieth century were strikingly similar. One way of looking at these practices and emphasising their structural character combines property and contract. Marriage represented the public symbol of a property transaction between two existing families, and the formal ceremony seems to have been essential only where property was involved. While nominal consent was required from the couple, the primary transaction was economic. A brief survey of historic marriage practices in England illustrates this clearly.

A Brief History of Marriage in England

In Anglo-Saxon England, the public, contractual face of marriage apparently took the form of a commercial bargain. The economic transactions involved contractual negotiations between families and, in wealthier families, substantial property changed hands. Written marriage contracts concerning the property transactions involved in marriage were common and several are still extant. For example, that between Wulfric and Wulfstan the Archbishop on behalf of his sister detailed the provision, or marriage settlement, to be made by the husband on behalf of the bride. Once the agreement had been satisfactorily concluded, formal betrothal took place.[5] During the early Saxon period, the *mund* or brideprice was paid by the family of the husband to the male kin of the bride, while the bride's family settled land and other gifts upon the newlyweds. By the eleventh century, however, both the *mund* and the *morgengifu*[6] were paid directly to the bride, becoming her separate property and remaining under her exclusive control throughout her marriage.[7] At this time, women could and did hold and dispose of both land and personalty in their own right, irrespective of whether they were married or unmarried, and could transmit both by will. The names of many

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5 Fell, C, *Women in Anglo-Saxon England*, London, Basil Blackwell, 1986, at 56-62 (hereafter "Fell"). See also, Cleveland, AR, *Woman Under the English Law From the Landing of the Saxons to the Present*, London, Hurst & Glackett, 1896, at 14-16, 34-48 and 62-63 (hereafter "Cleveland").

6 Literally, "morning gift", so-called because these gifts were presented upon the morning of the wedding day. It consisted of the land and other gifts settled upon the newly married couple by the family of the bride.

7 Fell, at 56-58. Gies F & J, *Marriage and Family in the Middle Ages*, New York, Harper & Row, 1987, at 99-117. See also, Rivers, TJ, "Widow's Rights in Anglo-Saxon Law" in Weisberg, DK, *Women and the Law: A Social Historical Perspective*, Vol 2, Cambridge, Schenkman, 1982, at 35.

women were inscribed in the *Doomsday Book* as tenants-in-chief.[8] Divorce was relatively freely available to both men and women during this period. A wife who left with her children retained half the marriage gifts, while one whose husband elected to retain the children was entitled to take the portion of one child.[9] While it could not be said that men and women were legally or socially equal in Saxon England, women apparently did possess significant legal rights, including the right to own and dispose of property, the right to terminate a marriage by divorce and, at least in some cases, custody of the children should the marriage fail. Their legal personhood remained essentially intact. While the paucity of concrete historical and statutory records does not allow for the drawing of unequivocal conclusions concerning the position of women in Saxon England, the available evidence is, at the least, suggestive.

Following the Norman conquest and the full flowering of the feudal system the economic and legal position of women appears to have gradually deteriorated. Indeed, the available records suggest that the Norman conquest initiated a series of legal developments which, over a period of centuries, reduced married women to the position of chattels. The position of ordinary women is particularly significant in this context. At the time of the Norman conquest in 1066 AD it is clear that married women could own and bequeath property and women engaged freely in many trades and crafts. Although the evidence for this is necessarily indirect, statutory references emphasise female participation in economic and public life. Thus, for example, 8 Hen 6, cap 11 (1430) affirmed the traditional right of free men *and women* of the city of London to put their sons and daughters as apprentices in crafts and trades. Similarly, 15 Hen 6, cap 6 (1437) specifically refers to the "masters, wardens and people" of guilds. Such references imply that both men and women were guild members, particularly given that many other statutes of the period, including those concerning guilds, refer specifically to men. More detailed and explicit references may be found in legislation prohibiting the importation of goods such as woollen and silken cloth. Perhaps the most noteworthy of these references is that in 33 Hen 6, cap 5 (1455). According to the preamble, this was enacted "by the grievous complaint of the silkwomen and spinners of the mystery and occupation of silkworking within the city of London" and prohibited the importation and sale of all goods made of silk. The form of the enactment makes it clear that the silkwomen of London, through their guild, had petitioned the Crown for the enactment of what would today be described as protectionist legislation. Both their economic rights and their public right to petition the Crown were recognised. Similarly, by the enactment of 1

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8 Fell, at 17, 42, 54, 89-90, 135-7.

9 Cleveland, at 14-16, 34-48, 62-63.

Edw 4, cap 4 (1461), s 1, the importation of an extensive range of manufactured goods was prohibited in order that the livelihood of the men and *women* of the city of London be protected. Two points are worth noting in this context. First, at least within the city of London, women played an active, perhaps even controlling, role in certain crafts and trades. Secondly, as we shall see shortly, custom and customary usages continued to prevail in London and in certain other large cities such as York long after they were displaced by law elsewhere. It would appear that these usages were jealously guarded and were only with difficulty eradicated by the Crown.

Unsurprisingly, real property provided the wedge which ultimately led to the exclusion of women from economic life and to the civil death of married women. While ordinary women continued to engage freely in many trades and callings,[10] the feudal system required the exclusion of all women from land holding in their own right where land was held by knight-service. Single women continued to hold land in their own right where tenure was by free and common socage, although this was eventually excluded as uniformity prevailed under the common law by about 1534. Legislation of the period makes it clear that this process was gradual and brought about by legislative and common law developments which displaced pre-existing customary usages. Thus, by 11 Hen 7, cap 20 (1496) it was enacted that any attempt by a woman to alienate any part of the inheritance of her late husband, even should such land be held in her sole name, was void. The clear implication is that until this legislation was passed widows both could and did alienate property which had passed into their control by marriage. By about 1540 husbands were entitled to lease and receive the profits of any land held in the right of their wives, although 32 Hen 8, cap 28 (1541), s 1(3), provided that the wife must be a party to any such lease. Section 6 specified that:

> no fine, feoffment or other act or acts hereafter to be made, suffered or done by the husband only of any manors, lands, tenements or hereditaments, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be or make and discontinuance thereof or be prejudicial or hurtful to the said wife or to her heirs,

excepting those executed by both husband and wife.[11] Again it is clear and significant that the legislation of the period was gradually displacing pre-existing legal rights and usages and that, by ensuring

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10 Legislation prohibiting the import of certain goods frequently refers to the need to protect men and women engaged in certain crafts. See 27 Hen 6, cap 1 (1449); 28 Hen 6, cap 1 (1450); and most notably 33 Hen 6, cap 5 (1455).

11 Cf Cleveland, at 14-16, 34-48, 62-63. For a discussion of the various types of tenure in land in use between AD 1066-1534, see at 81-88.

that all property remained firmly under male control, feudal hierarchies were safeguarded and entrenched.

During this same period, the husband acquired the common law right to physical custody of his wife and the right to administer moderate corporal punishment. While the origins of this "right" are difficult to ascertain, it was clearly recognised as part of the common law in *Blackstone's Commentaries* where it was noted that:

> the husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.

Significantly, the right of chastisement did not extend to adult servants, such being immediately entitled to depart from service.[12] The economic independence of married women deteriorated markedly. Upon marriage, all before and after acquired freehold estates vested in her husband for his life, he alone being entitled to manage the property and to receipt of the profits, although he had no right of disposal. All personalty, including leasehold estates, vested absolutely in the husband upon marriage, the only exceptions being her bed, apparel, and ornaments. Married women lost absolutely the capacity to contract, the only exception being those women who carried on trades within London, where traditional customs continued to prevail.[13] The *Statute of Wills* (34 & 35 Hen 8, cap 5, 1542-43), s 14, specified that a married woman lacked the capacity to devise land and could not bequeath chattels without her husband's authority. The precise statutory language is fascinating:

> wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person de non sane memory, shall not be taken to be good or effectual.

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12 Kerr, work cited at footnote 2, Vol 1. See at 420 for the passage quoted. The reference to adult servants may be found at 397.

13 But see Searle, E, "Merchet and Women's Property Rights in Medieval England" in Weisberg (work cited at footnote 7), for an argument that the property rights of peasant women were of critical economic and political importance and the merchet represented a tax upon the property transactions attendant to marriage. Searle notes that women retained the right to argue before the manorial courts. On the holding of property by women during the thirteenth century see Gies & Gies, work cited at footnote 7, at 157-185 and 186-195, particularly with respect to the new institution of jointure. A full account of the position of those married women who were sole traders in London may be found in Anon, *The Laws Respecting Women*, reprinted from the J Johnson edition, London, 1777, Dobbs Ferry, Oceana Publications, 1974, at 172-177.

Married women, by 1542, enjoyed the same legal status as infants, idiots and the insane. The clear implication of the statutory provision is that, before this time, married women had in fact been capable of devising their separate property and had retained some rights over it, despite the gradual development of coverture. It had become essential to displace these traditional usages by legislation. This is re-emphasised by the fact that less than 50 years previously, by the enactment of 11 Hen 7, cap 20 (1496), ss 1, 10, women had lost the right to alienate any part of the inheritance of their deceased husbands other than for their lifetime.

During this same period, primogeniture became the rule. In England, particularly, it seems to have prevailed, not only among the aristocratic classes, but among the more affluent peasantry, and it almost certainly magnified the importance of the economic bargaining associated with marriage. Among the more affluent segments of society, the economic significance of the property transactions attendant upon marriage equalled, and almost certainly exceeded, its sacramental significance. Dowries, settled by the bride's parents upon the couple at the time of marriage, and the dower right settled upon her by her future husband, were the subject of intense bargaining among the better off. The wealthier and more influential the family, the less significance was attached to the actual, as opposed to the formal, consent of the parties and many betrothals and marriages involved parties who, in our culture, would be deemed too young to give a valid consent to any transaction of legal significance. Blackstone expressly discussed the distinction between the civil law and the canon law in this regard. Under civil law, should parties under the age of consent marry, the marriage is imperfect and may be renounced by either upon attaining full capacity. The marriage continued to subsist, albeit in imperfect form as no further ceremony was required upon attaining capacity. Under canon law, such marriages were both valid and binding. Blackstone attributes the distinction to the sacramental character of marriage in canon law and the civil nature of marriage as entirely contractual. Capacity is essential if a binding contract is to be concluded.[14]

The role of marriage in cementing familial economic and political alliances was equally critical. Berman characterises the monarchies of this period as an "international professional elite" bound together by a system of marital alliances and frequently related by blood.[15] Similar patterns prevailed among the upper ranks

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14 Kerr, work cited at footnote 2, Vol 1, at 407-408. The age of consent was twelve for girls and fourteen for boys.

15 See Berman, HJ, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, Harvard University Press, 1983, at 409. It is difficult to know whether familial negotiations were instigated at the behest of the marital parties, or whether familial negotiations were a

of the nobility and the more affluent peasants and craftsmen. Laslett comments that "[n]o hard-headed peasant would have let his daughter get to the point of espousals until a firm agreement had been made between the two families".[16] The freedom of choice of the parties seems to have been inversely related to economic standing.[17] Likewise, the Gies' note that:[18]

> intermarriage was as natural between the better-off peasant families as among lords and barons. As with the nobility, marriage went with landholding; among the peasants this meant sons marrying when their fathers died or retired. Men consequently tended to marry in their twenties or thirties, and to be sought after rather than seeking.

The economic aspects of marriage had immense public significance, the customs of dower and curtesy, like other important property transactions, becoming legally as well as socially enforceable. A dichotomy developed between the sacramental incidents of marriage, elements which were not directly subject to political control and regulation although they were governed by canon law, and the proprietary elements of marriage, which were regulated by common law, although, given the unity of church and state, this distinction may have been one of form rather than substance. By the sixteenth century at the latest, marriage involved the transfer of the bride from dependence upon her father's house to dependence upon her husband's. Upon marriage, the bride was compelled to adopt the legal domicile of her husband, had a legal right to his support (either at the level he deemed appropriate or at the level agreed between the two families), and was able to pledge his credit to obtain goods and services appropriate to his station in life. The husband obtained an absolute and exclusive right to sexual access, an essentially absolute proprietary right in the children of the marriage, a legal right to chastise and confine his wife and children as he deemed necessary, and an absolute right to any acquests she might make for the duration of the marriage. By the middle of the sixteenth century married women had no right to the profits of their freehold

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precursor. It is certain that "love matches" were more frequent where the parties were lower on the social scale.

16 Laslett, P, *The World We Have Lost*, 2nd ed, London, Methuen, 1971, at 153.

17 For further information concerning the economic arrangements common among peasant families in medieval England, see Hanawalt, B, *The Ties That Bound*, New York, Oxford University Press, 1986, at 188-204. But see Macfarlane for an argument that love matches were the norm, except, of course, among the elite levels of society, at least by the fifteenth or sixteenth century: Macfarlane, A, *The Culture of Capitalism*, London, Basil Blackwell, 1987, at 123-143; and Macfarlane, A, *Marriage and Love in England: Modes of Reproduction 1300-1840*, Oxford, Basil Blackwell, 1986.

18 Gies & Gies, work cited at footnote 7, at 167, 169.

lands during the lifetimes of their husbands. Leasehold lands and personalty belonged absolutely to the husband. Married women were incapable of making wills, had no legal rights within marriage, and no rights over their children.[19]

By the seventeenth century, dower rights had been statutorily abrogated, and legislation introduced throughout England which eliminated the common law right of women and children to a fixed share of the husband's estate. While the origin of this common law right is difficult to ascertain, the *Magna Charta* (9 Hen 3, 1215), by s 12, attests to the division of estates into three parts, one part passing to the husband's lineal descendants, one to his wife, and only one part being his to bequeath as he saw fit. The *Magna Charta* disturbed this traditional common law right only to the extent of providing for the prior payment of debts owing to the Crown. During the years following the *Magna Charta* this right was gradually abrogated by legislation throughout England. Statutes revoking the common law dower right of widows and children each to one third of the husband's estate include 4 W & M, cap 2 (1693), s 2, which enabled the residents of York *other than those of the city itself* to freely devise their land; 2 & 3 Ann cap 5 (1704-05), s 1, which extended this right to residents of the city, and 7 & 8 Will 3, cap 38 (1701), s 9, which extended the privilege to Wales. The common law dower right appears to have been finally eliminated throughout England in 1724 by 11 Geo 1, cap 18, s 17, which entitled freemen of the city of London to dispose absolutely of their estates by will and barred any claim by their widows or children absolutely, unless by s 18 they otherwise agreed. It is clear that the displacement of traditional rights was a gradual process, one which began in the countryside where might be found the great estates and one which was extended only gradually and with some difficulty to the cities. Under the new law, "a testator was no longer bound to leave his widow or his children a third or any share of his personal estate".[20] While legal changes such as these are conventionally explained as part of the gradual process of removing legal fetters on alienation and ensuring the free disposition of property throughout England, it remains significant that the medium chosen was the total destruction of the few remaining legal protections available to women and their gradual assimilation to chattels. It may be suggested that these changes in fact emphasised the degree to which married women had lost legal personhood and their legal and political irrelevance except as incidents to proprietary transactions and to the formation of alliances.

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19 *The Laws Respecting Women*, (see footnote 13) summarises the legal effects of marriage as they obtained in 1776, at 65-70. See also Cleveland, at 161-163.

20 Cleveland, at 172-173.

It was not until 1674 that this gradual deterioration in the legal status and entitlements of women began to be reversed, the right of chastisement being legally, although not practically or socially, abrogated in *Lord Leigh's* case,[21] and "confinement" substituted as a punishment for a disobedient wife. It was not until 1891 that a "confined" wife could attain a writ of *habeas corpus* and regain her liberty.[22] Married women did not regain the capacity to contract and to hold property in their own right and to bequeath the same until the *Married Women's Property Act* 1870. Throughout, the link between marriage and property predominated. The central matrimonial concern was the protection and transmission of property and its patrilineal control.

Upon marriage, from the Norman conquest onwards, the bride gradually lost her independent legal capacity while the public status of the male remained unchanged. Whereas, before marriage, she was identified by her status as the daughter of a particular man, after marriage her status and her identity were determined by her husband. The birth of children, particularly male children, reinforced this acquired status. For a man, by contrast, marriage had limited public significance, although its economic significance might well be substantial, particularly in the case of younger sons disinherited by primogeniture. His status was determined initially by that of his father, and reinforced by his own occupation and public role. Thus, a man might be identified as a smith or a tanner, as a merchant or a clerk, but his identity depended upon his own endeavours and activities and tended to remain relatively constant throughout his adult life. His identity did not depend to any significant degree upon the incidents of the married state. For women, on the other hand, the public significance of marriage was substantial. A wife who abandoned the domicile selected by her husband for any reason might legally be charged with desertion and lost thereby any right to his support and any entitlement to pledge his credit. She had no legal entitlement even to wearing apparel and personal effects. A wife who entered an adulterous relationship could be set aside, either, in England, by Act of Parliament or by legal separation, and lost all rights to their joint children and to his support. During much of this period a husband could, without fear of legal and economic consequences and, at least among the upper classes, with social approval, maintain two "domiciles", one with his legal wife and one with his mistress.[23] Adultery by the husband was irrelevant because it did not imperil the intergenerational transmission of property in the male line. So long as an adulterous husband provided his family

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21 (1674) 3 Keb 433.

22 *Reg v Jackson* [1891] 1 QB 671. On these developments see generally, Cleveland, at 222, 278-279.

23 See generally, Cleveland, at 230-231.

with a place of abode, necessary food, and the funds to acquire appropriate clothing and goods, his wife had no cause for complaint at common law. He was deemed, by civil law, to have fulfilled his obligations under the contract of marriage.[24]

Perhaps more significantly, while a husband might be convicted of murder should he kill his wife, a wife who killed her husband *or attempted to do so* was liable to be charged with treason. Unlike her husband, she had transgressed against the patriarchal structure of the political society of the day and against the authority of God. Her act constituted a frontal challenge to religious, secular and familial authority. *Petit treason*, as the offence was known, apparently emerged as a common law offence following the Norman conquest, and applied both where the wife actually killed her husband or procured his death, and where she or her agents merely beat him severely and left him for dead. During the reign of Edward III it was mentioned in an Act of Parliament (25 Edw 3, cap 2, 1351, s 10).[25] A woman convicted of *petit treason* was, until 5 June, 1790,[26] liable to be drawn and burnt. Cleveland emphasises the political significance of the offence, and comments that "it was thought that between every wife and husband relations existed similar to those between the subject and the King. She owed to him faith and obedience, and the violation of this faith was looked upon as a species of treason".[27]

There are two ways of interpreting these structures, neither of which is entirely satisfactory. That which is most widely accepted treats the public face of marriage as contractual. This contractual element, present in canon law from the Norman conquest onwards, ostensibly depended upon the consent of the parties to the marriage, although binding espousals, or promises to marry, could be

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24 See generally, Kerr, work cited at footnote 2, Vol 1, at 404-421. For an account emphasising the "double standard" applicable to adultery and citing eighteenth century accounts to that effect, see Macfarlane, *Marriage and Love in England*, at 240-244.

25 See also 23 Hen 8, cap 1 (1531).

26 30 Geo 3, cap 48 (1790), by s 1, substituted drawing and hanging for drawing and burning for women convicted of high treason or *petit treason*, s 2 provided that their treatment prior to death was to be the same as for people convicted of wilful murder, while s 3 emphasised that from 5 June, 1790 women previously convicted of those offences were thenceforth liable only to hanging. The offence was finally eliminated in 1828. See 9 Geo 4, cap 31, s 2, (*Offences Against the Person Act*). For a comprehensive discussion of this offence, see Gavigan, SAM, "Petit Treason in Eighteenth Century England: Women's Inequality Before the Law" (1989-90) 3 *Canadian Journal of Women and the Law* 335.

27 See generally, Kerr, work cited at footnote 2, Vol 4, at 203. Cleveland provides a detailed account: see Cleveland, at 94-96, 175-176.

concluded by people as young as seven. Espousals by proxy were also permitted, although these had to be assented to when the parties attained puberty. Where parties were unconditionally espoused, either party had the legal right to bring suit under canon law to compel the celebration of the marriage.[28] It was not until the passage of *Lord Hardwicke's Act* 1753 that both clandestine marriages and espousals were rendered legally unenforceable in England, a proponent of the bill noting that "young heirs and heiresses . . . had been inveigled into mercenary and disgraceful matches. . ." through such verbal contracts.[29] Only subsequently did marriage attain more or less its modern form in England, becoming fully a matter for the civil law by the *Marriage Act* 1836. Through marriage the husband acquired specific proprietary rights in his wife and in any children she might bear him and the obligations he assumed represented the consideration for these services.

Proprietary rights need not, despite the assertions of early social contract theorists such as Locke and modern scholars[30] who argue for a natural right to property, possess characteristics such as absolute transferability and bequeathability. Rather, as the common law tradition demonstrates, limited proprietary rights are the rule rather than the exception. Thus, the fact that a husband was not legally entitled to dispose of his wife by contract ought not be thought to alter the proprietary character of the relationship.[31] This was acknowledged by the legal system. A classic illustration of the proprietary element in marriage is to be found in the decision of the United States Supreme Court in *Tinker v Colwell,*[32] an action involving "criminal conversation". The Supreme Court explicitly noted that irrespective of the wife's consent or lack of it, such an "assault" *was an injury to the property of the husband.* In a recent high-water mark the husband's consent to the rape of his wife entitled the rapist to assert

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28 Cleveland, at 122-133.

29 Cleveland, at 217-219.

30 Nozick, R, *Anarchy, State and Utopia,* Oxford, Basil Blackwell, 1974.

31 Evidence exists that in England and in certain Australian colonies wives were, among the lower classes, traded along with other chattels at bazaars and markets. While this was clearly extra-legal, it reflects the proprietary emphasis in the male-female relationship. See Eisler, RT, *Dissolution: No-Fault Divorce, Marriage, and the Future of Women,* New York, McGraw Hill, 1977, at 4, and the references cited there. For a more detailed account see O'Donovan, K, *Sexual Divisions in Law,* Weidenfield & Nicholson, 1985, at 50-53 (hereafter "O'Donovan"). See also, Macfarlane, *Marriage and Love in England,* at 225-227. Macfarlane notes that "wife sales" were the poor man's divorce and became widespread when *Lord Hardwicke's Act* made clandestine and common law marriage more difficult. A contemporaneous account may be found in *The Laws Respecting Women,* at 55.

32 193 US 473, 48 L Ed 754 (1904).

he believed that she consented despite uncontrovertible evidence to the contrary.[33]

While *Lord Hardwicke's Act* 1753 undoubtedly curtailed a number of abuses among certain segments of the upper classes, state public regulation of marriage had a very different impact among other social groups. It impugned, not only espousals, whether between infants or those of mature years, but all forms of clandestine marriage. Espousals, often termed "common law marriage", and clandestine marriages had apparently been commonplace among those with little property to protect. O'Donovan cites evidence which suggests that working class women preferred either espousals or clandestine marriage because informal marriages enabled them to retain their separate legal identity and thus to continue to carry on business in their own right, a benefit of critical importance to widows who frequently carried on trades learned from their first husbands after remarriage.[34] Likewise, common law marriages might be ended by the couple themselves in an era when divorce, to the extent available, was reserved for the wealthy and powerful, being only available through private Act of Parliament. Among the working classes, groups where large amounts of family property were non-existent, it was not uncommon for wives to be informally sold through bazaars and markets. While such sales, frequently conducted by auction at public markets, were neither enforced nor condoned by the legal system, they remained common until the end of the nineteenth century.[35] The nature of these class differences emphasises the link between formal marriage and property and the proprietary nature of the marital relationship itself.

Likewise, the legal inability of the husband to sell the children of the marriage into slavery in the strict sense does not alter the fact that he was legally entitled (and later required) to bind sons over into apprenticeships or daughters into household service and that this frequently occurred at an early age, perhaps eight or nine. English law obliged poor parents to provide apprenticeships for their children and, by the time of Kerr's emendation of *Blackstone's Commentaries*, this duty had been extended to providing for their

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33 *R v Morgan* [1976] AC 172. It is important to recognise that despite the legal issue turning upon whether or not the supposed victim consented, the fact of the woman's consent has always been irrelevant. What is relevant is whether the accused believed that she consented, a wholly different issue. The entire issue of consent is addressed from a masculine perspective, and the question is whether it is just to imprison the defendant if he believed intercourse was consensual, not whether the sexual act which occurred constituted rape from the perspective of the victim.

34 O'Donovan, at 50-53.

35 See footnote 12 and the references cited there.

education. The class bias is clear, it being noted by Kerr that "the rich are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family".[36] Whatever discussion, or indeed, shared responsibility might informally exist within individual households, from a public perspective paternal authority over both wife and children was virtually absolute. The right involved was legally exclusive in that only the husband could legally exercise the bundle of rights which became his by virtue of marriage and paternity, and only he could invoke the coercive instrumentalities of the state to enforce his will.

The limited mutuality of the rights and duties entailed by the matrimonial state poses a greater problem for a strictly proprietary analysis. Again, this problem is illusory. If we return to the basic legal analysis of marriage among the upper classes as the end result of a contractual agreement between the heads of two agnatic lineages, one in which valuable property is transferred from one lineage to another, the limited mutuality of the relationships within the family created thereby may be viewed as incorporated in the terms of the original contract and essential to its successful conclusion. Effectively, upon the transfer of a valuable and valued possession, the original owner would wish to ensure it was treated in ways which acknowledged the biological and economic investments previously made. In many ways, it is useful to view the husband as fiduciary for the residual interest of the father in his genetic and economic investment in his daughter and in his potential descendants through the female line. Something very like this is undoubtedly reflected in the arguments presented to encourage the passage of *Lord Hardwicke's Act* 1753, arguments which focussed both upon the machinations of mercenary (and impecunious) members of the upper classes to secure financial benefits through the espousal of youthful heirs and heiresses, and likewise, of the dangers to the propertied classes of clandestine marriages between rebellious or impetuous offspring and socially unacceptable mates.[37] The characteristic incidents of this quasi-fiduciary relationship were recognised by the English courts of equity and enabled them to limit the husband's authority over the property his wife brought with her to the marriage as well as gifts or bequests accruing to her after marriage. The equitable doctrine of the separate estate allowed a married woman exclusive right to the use and benefit of any property settled upon her with the proviso it was for her sole and separate use.[38] After the *Married Women's Property*

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36 Kerr, work cited at footnote 2, Vol 1, at 426.

37 O'Donovan, at 44-45 and Cleveland, at 218.

38 The equitable doctrine of the separate estate was invoked whenever property, real or personal, was given, devised or settled upon a woman for her separate use. Property which was covered by this doctrine was protected against the common law rights and claims of her husband

Acts 1870 and 1882 came into force in England the doctrine was statutorily extended to all the separate property of married women. However, her property might still be subject to a restraint upon anticipation, designed to ensure that a married woman might not unwisely dispose of her separate property.[39]

Equally, because marriage created formal legal relationships between two families, the relationships involved were deemed of sufficient importance to warrant legal enforcement. Like other transactions involving relationships between families, rather than within them, marriages possessed significant economic and social consequences and warranted regulation and control to ensure that these interests were protected. Eekelaar comments that "marriage was a major vehicle by which the intergenerational transmission of property was regulated", and it was, of course, this aspect which originally concerned the common law.[40] While initially only the proprietary aspects of marriage concerned the common law, full civil regulation commenced in England with *Lord Hardwicke's Act* 1753 and became universal with the *Marriage Acts* 1823, 1836, and 1857. O'Donovan suggests that state control reflected the growth of a centralised bureaucracy and the need thus created for the formal recognition and enforcement of relationships of dependence.[41] More importantly, underlying the demand for state control and fully public regulation lay the growing liberal passion for order, for the regulation of the social order by clear and certain public rules. The Benthamite passion for codification expresses this well. The expressive functions of family relationships remained outside the scope of legal analysis, at least in countries governed by the common law tradition. The position was otherwise on the continent where the passion for codification took hold to a far greater extent.[42]

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and his creditors and she was free to use and dispose of it both during her lifetime and by will. See *Fettiplace v Gorges* (1789) 1 Ves Jun 46.

39 Cleveland, at 138. Where property had become a part of a married woman's separate estate, either in equity or under statutory reforms, an impecunious husband would frequently attempt to persuade his wife to alienate either the property or its future income to his use. To circumvent this, Lord Thurlow invented the doctrine of the "restraint on anticipation". See *Pybus v Smith* (1791) 3 Bro CC 340; *Brandon v Robinson* (1911) 18 Ves 429, 434. Under this doctrine, during coverture a wife could only receive the income from her separate estate as each payment fell due. She could alienate neither the estate nor her future income from it, hence the title "restraint on anticipation".

40 Eekelaar, J, "Family Law and Social Control" in Eekelaar, J & Bell, J, *Oxford Essays in Jurisprudence*, Oxford, Clarendon Press, 1987, at 128.

41 O'Donovan, at 44-57.

42 The *Code Napoleon* provided by Art 213 that the husband was bound to protect his wife, his wife to obey.

Contractual analysis is only one way of approaching the legal character of family relationships. It has also often been suggested that the family is a quasi-feudal institution, one based upon status relationships.[43] A status based analysis breaks down the division between the sacramental character of marriage and its legal character. Treating marriage as a status relationship emphasises the existence of networks of reciprocal rights and obligations, emphasising the duties owed and benefits conferred. In the feudal contract between lord and vassal "virtually all the rights and obligations . . . were fixed by (customary) law and could not be altered by the will of the parties. The contractual aspect was the consent to the relationship, the legal content of the relationship, however, was ascribed".[44] In the context of the matrimonial relationship, a status based analysis has obvious advantages, but also a number of signal disadvantages. As the historical developments summarised in the discussion of the contractual aspects of marriage emphasise, the bridal pair had little to do with marital arrangements. Property arrangements negotiated between their kin were of greater importance than the ceremony itself, and the element of consent a formal rather than actual requirement. While this varied in degree, both through time and with respect to family wealth, these variable and individually negotiated proprietary arrangements played an indispensable part. Likewise, the historical evidence available gives no real reason to assume that the marital relationship itself bore the full hallmarks of a status relationship. The ascribed duties and obligations appear to have been variable with respect to both social class and economic status, relationships within less affluent families being somewhat more egalitarian. Equally, the social consequences for women varied through time. Before the Norman conquest marriage did not alter a woman's status within the wider society. While her children inherited the status of their father, she retained that of her own father rather than being absorbed into her husband's patrilineage.[45] It was not until after the Norman conquest that, coevally with the emergence of the feudal system in its fully developed form, marriage came to signify a profound change in the status of the woman, her identity becoming submerged within that of her husband. At about the same time she lost the legal capacity to control property in her

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43 Perhaps the clearest example of a treatment of marriage as a status relationship comes from Orthodox Jewish religious law. Under religious law a Jewish husband had no less than ten obligations and four rights. See Teichman, J, *Illegitimacy: A Philosophical Examination*, Oxford, Basil Blackwell, 1982, at 135-136. These were traditionally agreed to in writing by the groom as part of the marriage ceremony. Unfortunately, no remedies were available to the wife if her husband failed to honour his obligations, while he was entitled to sue for divorce.

44 Berman, work cited at footnote 15, at 306.

45 Gies & Gies, work cited at footnote 7, at 101-102.

own right, became at law a *femme covert*. Among peasants and artisans, change came more slowly. Marriage remained a working partnership between husband and wife, if not fully egalitarian, and widows frequently carried on in their own right the trade or craft of their former spouses, sometimes passing their skills on to a second husband. The patrilineage remained of lesser importance among such families, the links forged by skills and craft relationships being, at least in some areas, of equal importance. Among poor families, clandestine and common law marriages were commonplace, and evidence suggests that these forms were used to escape the formal incidents of marriage, most particularly the loss of the incidents of legal personhood by the wife, a factor which was often critical when a widow remarried.[46]

As an analytic tool a status based account highlights a number of paradoxes. In general terms, the incidents of the marital relationship seem to have undergone several profound paradigm shifts. Before the Norman conquest relative economic independence of husband and wife appears to have been the norm, each retaining the personal status of birth, with individual rights of inheritance and control of separate property, including its transmission by will. While indications of status may be found in the wife's legal role as mistress of the house, her right to the keys of storeroom, chest, and coffer, and in her duty to serve the household with food and, especially, drink, she retained critical legal rights, such as control of her separate property, the right to make a will, and the right to custody of her own children in widowhood. In this context it is significant that while, as was the case subsequently, she could not be charged as an accessory if stolen property was brought into the house by her husband, the position was otherwise if such was found in those areas under her exclusive control.[47] Following the Norman conquest, marriage eliminated the legal personality of the wife, who might be described as legally dead for the duration of the marriage, while new modes of property transmission such as primogeniture excluded both younger sons and all women. Here, too, divergence between the customs of the aristocracy and the wealthier peasants and the customs of lesser peasants and urban tradespeople and those engaging in crafts created two separate regimes. Among the affluent, marriage arrangements remained a family matter, with emphasis upon political and economic alliances, while among other groups increasing importance came to be attached to the consent of the parties, and to the skills brought to the marriage by the wife.

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46 See the discussion earlier and the references cited there. See also, Hanawalt, work cited at footnote 17, at 107-168, 205-219.

47 See Gies & Gies, work cited at footnote 7, at 99-117.

As the medieval period drew to a close, yet another paradigm shift emerged. Following the decision of the Council of Trent in 1563, clandestine marriage was delegitimated throughout Catholic Europe, a position reached in England two hundred years later with the passage of *Lord Hardwicke's Act* 1753. In England, the breakdown of the feudal system and the movement into the early modern era was marked by increasing state intervention aimed at defining and fixing responsibility for legal dependants, a development necessitated by the increasing reliance of peasant households upon wage earning rather than tenant farming for survival. The *Poor Relief Act* 1601 (43 Eliz, cap 2) provided by s 7:

> that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell or the greater number of them, at their general quarter-sessions shall be assessed.

Section 4 provided for the imprisonment of those unwilling to work and s 5 provided that the children of the poor were to be bound over as apprentices as deemed appropriate by the poor law assessors. Taken as a whole, legal developments between the early 1600s and the middle of the 1800s sought to fix the parameters of relationships of dependence within kinship groups, to determine civilly the incidents of family relationships in a fixed and public way.[48] Thus one might say that, by the early nineteenth century, marriage had finally become wholly a status relationship, one whose incidents were fixed by the state and enforced by its power. Before this time, because of the lack of civil authority and the fluidity and multiplicity of forms recognised by canon law, no universal regime existed, but rather, a series of nested forms.

Through gradual evolutionary stages, in some cases seemingly climaxed by dramatic paradigm shifts, the public status of a woman was, by the close of the nineteenth century, exclusively that acquired by marriage. For a woman, marriage involved a rite of

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48 Legislation to this end included the *Poor Relief Act* 1601 (43 Eliz cap 2, s 7); the *Statute of 1575* (18 Eliz I, cap 3, s 2) which sought to determine the paternity of children of unmarried mothers, to relocate responsibility for their support from local parishes to their parents, and to punish both father and mother; and *Lord Hardwicke's Act* 1753 (26 Geo 2, cap 3, especially s 15). The *Marriage Act* 1823 (4 Geo 4, cap 76) is remarkable for its emphasis upon publicity and the keeping of accurate records in a standard form. Section 2 and ss 5-7 emphasise the public declaring of banns and the need for accurate parish records while s 14 required an official licence. A standard form was prescribed for the registration of marriages. See generally, O'Donovan, at 21-57, especially at 37-42.

passage essential to her legitimate adult position within the community. Women who elected not to marry, or married women who sought to deny that their only public roles were those which might be categorised as normal accoutrements of the married state, were frequently categorised as deviant. Women of the working classes, of course, continued to work outside the home, although, as the "cult of domesticity" took hold pressure was brought to bear to exclude them. For women of the middle classes and above, employment outside the home commensurate with middle class values and expectations did not exist. Those who lacked or lost family support might seek employment as governesses, while others remained within the home waiting for success or otherwise in the "marriage market". In an era marked by an increasing surplus of eligible women, and an average age of marriage for men of about thirty, the effects were dramatic.[49] For a man, on the other hand, the crucial public rite of passage was that which marked his transition from childhood to manhood, his entry into the workforce or, among the upper classes, to an officially managerial role with respect to the family estate and a class ordained political role. Marriage, among his male peers, did not mark his attainment of maturity and position within the community, but his loss of the freedom associated with single life. His primary status throughout his working life was determined by his public role. These trends, and the ideologies which developed around them, have played a significant role in the twentieth century.

A status analysis has the merit of focusing attention upon the marriage ceremony itself, upon the exchange of vows between the couple. In its traditional European form the husband promises his support and protection while the wife offers her fealty and her absolute obedience in exchange.[50] This emphasises the inequality of the parties to the marriage and identifies marriage as a permanent relationship between superior and inferior parties whose rights and responsibilities are defined by their roles with respect to one another. This provides an easy and logical explanation of certain central features of the traditional account of the marital state, an account applicable from the Norman conquest onwards. First, a feudal analysis explains how and why the vassal, the wife, comes to be bound both to the physical domicile of her husband, the lord, and to essentially absolute obedience to him. It also explains why, at common law, the husband might be made liable for his wife's torts

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49 Bryant, M, *The Unexpected Revolution*, London, University of London Institute of Education, 1979, at 39-59. See generally, Hamilton, C, *Marriage as a Trade*, Detroit, Singing Tree Press, 1974.

50 The real import of these vows, unremarkably, declined through time. Originally, such phrases as "with all my worldly goods I thee endow" seem to have provided the necessary public affirmation of the common law dower right of the wife. See *The Laws Respecting Women*, at 196.

and crimes. Like the lord of the manor, the husband was legally responsible for disciplining his subordinates and for their conduct. Secondly, it explains the husband's near absolute physical and legal power over his wife and over their children. It explains her traditional legal capacity to act as his agent in certain transactions, for example, in pledging his credit in ways appropriate to his station. Finally, treating the marriage relationship as a status relationship provides an explanation of the legal invariability of the rights and duties of the married state and the traditional and legally entrenched view of marriage as a relationship which endured for the life of the parties. It is important to recall, however, that while these features appear more amenable to a status based analysis, as do parallel features in the law of master and servant, early commentators such as Blackstone accounted for them in contractual terms and encountered no difficulty in doing so. The interaction between contract and status is significant. Even during the feudal era a certain fluidity must be noted. According to some commentators, the status element in feudal relationships attached to the land involved rather than to the individuals. An individual peasant might hold both free and unfree land simultaneously, rendering his "status" ambiguous. Equally, while feudal status may have determined the relationship between a peasant and his superior in the feudal hierarchy, it seems not always to have affected more nearly horizontal relationships.[51] The status relationship involved in marriage was wholly personal. Macfarlane notes the ambiguity in the wife's status. While he likens a wife to a feudal tenant, he notes specifically that title to her real property remained hers throughout coverture, which suggests retention of a type of lineage system.[52]

Changing Times, Changing Roles: Looking at the Wider Social Context

While an analysis of marriage as a status relationship emphasises the connection between the hierarchical nature of family relationships and the role of hierarchy in the wider social context, it also tends to distract our attention from the social fact that women had gradually become chattels which could be exchanged to further inter-familial property transfers and to symbolise the formation of alliances. The broad paradigm shifts I have identified in the legal materials may, although with some risk of oversimplification, be used to suggest five overall stages, the early Saxon, the late Saxon, the feudal, the early modern and the modern. During the early Saxon period, the legal materials strongly suggest the relics of an earlier tradition of wife purchase. By the end of this era, women had seemingly attained both

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51 Gies & Gies, work cited at footnote 7, at 159.

52 Macfarlane, *Marriage and Love in England*, at 286-289.

an independent status and rights over property and children which were not to be equalled again until the end of the last century. Her legal right under the laws of Canute to the keys of the storeroom, chest, and coffer symbolised her power within the household itself. Following the Norman conquest both the independence and the power of women gradually declined even as formal status relationships within the wider society were at first entrenched and subsequently broken down by events. One of our most important tasks is understanding how and why the status relationship involved in marriage became both more rigid and more absolute during the period between the Norman conquest and the middle of the nineteenth century even while other status relationships gradually declined in importance and the ideals of political liberalism became entrenched.

During medieval times, women apparently engaged in many occupations in their own right and were members of equal and independent standing in some craft guilds, dominating brewing and baking in many areas, and this, it should be noted, in spite of a legal regime which generally denied married women separate property and contractual capacity. We earlier saw evidence of their economic centrality in legislation such as 33 Hen 6, cap 5 (1455) and 1 Edw 4, cap 5 (1461). Berman comments that guilds were common throughout urban Europe from the eleventh or twelfth century onwards, and notes also that women were accepted as full members of guilds in those trades in which they engaged.[53] There is evidence that the egalitarian attitude apparently characteristic of the early medieval period had diminished by its end. In Florence, Italy, for example, the late medieval period and early Renaissance is recognised as a time when women's public and economic participation deteriorated, and restrictions upon guild membership and upon participation in guild affairs proliferated.[54] It is tempting to suggest that one reason for this deterioration in the economic position of women may have been the increasing class polarisation postulated by Macfarlane and the likelihood that even skilled craftsmen were increasingly likely to remain employees rather than become masters in their own right. When this is coupled with the fact that many women learned skilled crafts and trades either within their father's household or within their husband's and that such opportunities diminished markedly when many craftsmen remained employees rather than master craftsmen in their own right, it seems

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53 Berman, work cited at footnote 15, at 390-392. See further, Abram, A, "Women Traders in Medieval London" in Bell, SG (ed), *Women from the Greeks to the French Revolution*, Belmont, Wadsworth Publishing, 1973, 152, at 152-158.

54 Pitkin, HF, *Fortune is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli*, Berkeley, University of California Press, 1984, at 206-209.

possible that women were among the first victims of a gradual diminution in opportunities overall.[55]

The contrast between the economic centrality of women's labour during the medieval period and its marginality thereafter is provocative, particularly when we speculate upon its connection with the shift occurring from feudal modes of social organisation to a more nearly liberal model. During the medieval period a number of skilled trades, including brewing, were dominated by women, and women played an active role in village markets and the home economy. While sex roles were one important determinate of the household division of labour, a comparatively small proportion of the woman's working day was likely to be spent in what we identify today as domestic chores.[56] Landless peasant women regularly engaged in paid agricultural labour, their wages apparently being equivalent to male wages, and a number are shown by the tax roles as paying taxes at the highest rate.[57] Child rearing and child-bearing were carried on concurrently with activities which played a significant part in the local economy. During this same period widows frequently assumed the entire management of the household and exercised economic power and social authority in their own right, becoming much sought after as wives by younger men, particularly younger sons unable to inherit.[58] As the feudal organisation which had characterised European society began to break down and social mobility increased, women's social roles became more restricted as the economic significance of their labour declined and increased legal restrictions upon its utilisation increased.[59]

Male social mobility was seemingly achieved by means of the same historic, social and economic events which deprived women of independent economic means. Some of the transitions involved are worth considering. Several changes consequent upon the Norman conquest and the legal and economic transitions which followed it were of particular significance when our attention is directed primarily to the role of women. First, the social role of unmarried women and of widows became increasingly precarious as did that of women who engaged in activities deemed inappropriate by the authorities. Primogeniture not only produced a legacy of

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55 Macfarlane, *The Culture of Capitalism*, at 21. See also, Gies & Gies, work cited at footnote 7, at 157-195.

56 Generally, see Hanawalt, work cited at footnote 17, at 107-168. See further, Abram, work cited at footnote 53, at 152-158.

57 See Gies & Gies, work cited at footnote 7, at 239-240.

58 Gies & Gies, work cited at footnote 7, at 220-226.

59 See, eg, French, M, *Beyond Power: On Women, Men and Morals*, London, Sphere Books, 1986, at 153. On the deterioration in the position of women associated with the approach of the Industrial Revolution, see at 193-204.

propertyless younger sons, it produced a legacy of propertyless daughters. While the convent was available to upper class girls whose lack of a substantial dowry made marriage impossible, no such option was generally available to peasant girls. As the early modern period dawned with the Tudor era, laws were enacted with the aim of compelling unattached peasant girls and women into domestic service. The most draconian of these laws was the *Statute of Apprentices* (5 Eliz, cap 4, (1563)) which by s 24 provided that any unmarried woman between the ages of twelve and forty might be compulsorily put into domestic service. The fact that compulsion was essential suggests that many found this option comparatively unappealing which, in turn, suggests that there may have been a social expectation of other options. The power given the poor law overseers at this time served a number of wider social purposes. First, it redressed a perceived shortage of women willing to become domestic servants and redirected unattached women from comparatively lucrative agricultural labour into less well rewarded domestic service. Secondly, it was intended to curtail the movement from the countryside into the cities and limit the right of many urban craftspeople to take apprentices. At about the same time, the increasing economic polarisation of English society led to substantial numbers of landless and impoverished individuals, both rural and urban. Unattached and impoverished women were particularly at risk, none more so than those who practiced traditional female folk arts such as herbal medicine. The frenzy of witchcraft trials and witch burnings in the fifteenth, sixteenth and seventeenth centuries reflected the newly dominant perception of single and widowed women as a threat to the social, religious and economic structure.[60] Thirdly, women gradually came to be excluded from virtually all skilled crafts and trades. Once skilled crafts and trades ceased to be household based, and many men could not hope to become craftsmen in their own right but remained wage earners, no infrastructure existed to enable these skills to be passed on within families and for a wife to learn and share in her husband's craft. The shift from a home or neighbourhood based economic structure to one based upon work performed outside the neighbourhood destroyed the structure of the domestic economy and with it the economic centrality of women. Marriage gradually ceased to be a partnership in the economic sense and became defined simply as a relationship between superior and subordinate. As a man's working life took him further away from household and family, it became more important for him to secure and enforce his position of authority within the family. With the erosion of status as a way of locating individual men and women

60 This particular threat may also be linked to the professionalisation of medicine from the fourteenth century onwards. See Easlea, B, *Science and Sexual Oppression: Patriarchy's Confrontation with Woman and Nature*, London, Weidenfeld and Nicolson, 1981, at 86-88.

within the manor and village economy, and particularly with the growing denial that inherited status ought to have anything to do with individual worth, occupational status no longer simply established the position of the individual within the economy of the household and village, but became an important component of individual identity. Since, by this time, many occupations had been entirely closed to women and more were being denied them as traditional women's occupations such as midwifery were taken over by male professional elites the only status available to women was that achieved through marriage.[61] Effectively, the affirmation of equality which accompanied the Reformation and the rise of political liberalism was achieved at the cost of the social and legal denial of personality, separate identity and equality to women.

With the decline in theoretical importance of inherited status and the increasingly limited importance of household production, two quite separate shifts occurred in the position of women. First, as domestic production became less and less important to the economic well-being of the household, women and children ceased to be economic assets and became economic liabilities. Macfarlane suggests that this attitude, at least with respect to the children of the upper and middle classes, was well established by the sixteenth or seventeenth century.[62] This trend was reinforced by the rise of a middle class which copied the customs of the nobility and relegated women to an ornamental role.

The social changes associated with the Industrial Revolution themselves provide an elegant illustration. During the early Industrial Revolution, with the gradual destruction of the household as the basic economic unit, children as young as eight or nine who might formerly have assisted in the domestic economy were commonly apprenticed by the poor law overseers to factory work. By 1802 the conditions within factories and workshops had attracted legislative response through the *Health and Morals Act* (42 Geo 3, cap 73). Such early regulation seems to have been motivated in part by the undoubtedly appalling conditions within such establishments and partly as a response to difficult economic times and the need to secure primacy for adult labour to maintain social order. During the eighteenth century successive statutes were enacted to regulate child labour and, gradually, to require those employing children and

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61 Clark, A, *Working Life of Women in the Seventeenth Century*, 1919, Reprint, New York, Kelley, AM, 1968, at 5, 25, 146, 150-151, 154; see further, French, work cited at footnote 59, at 193-204; Macfarlane, *Marriage and Love in England*, at 51-78.

62 Macfarlane, *Marriage and Love in England*, at 51-78. Cf the very different picture offered by Hanawalt for a somewhat earlier period: Hanawalt, work cited at footnote 17, at 156-168. Both, it should be noted, deal exclusively with England.

young people to make provision for their education.[63] As child labour became increasingly regulated the position of women working in such establishments also came under scrutiny. In 1844 the *Factory Act* (8 & 9 Vict, cap 15) extended the scope of the factories legislation to the regulation of the hours and conditions of employment of adult women. Section 17 provided that "no Female above the Age of Eighteen Years shall be employed in any Factory save for the same Time and in the same Manner as young Persons may be employed in Factories", a young person being by s 73 a person between the ages of thirteen and eighteen. Adult women were, therefore, restricted to the hours provided by 3 & 4 Will 4, cap 103 (1833-34), s 2, those being an upper limit of twelve hours per day and sixty-nine hours per week. While, by contemporary standards, these hours were undeniably excessive, particularly given the conditions, note ought be taken of two facts. First, women were thereby placed at a significant competitive disadvantage with respect to men. Secondly, given the agitation of the trade union movement for the enactment of such provisions it is clear that this competitive disadvantage was perceived as crucial for male jobs. While this extension was, in significant part, due to prevailing economic conditions and a surplus of labour generally, a further and potent force in its enactment had its genesis in the philanthropic activities of middle and upper middle class women. Such women, possessed of education, leisure and servants, and very often sympathetic to what today would be termed feminist causes, sought to extend the benefits of the separate spheres ideology to women of the working classes, and limiting their hours of work and encouraging them to devote themselves to domestic pursuits seemed an appropriate beginning. It should be noted that I am not denying that conditions in the factories of the period were appalling. They undoubtedly were, sufficiently so that no man, woman or child ought to have found it needful to work for the hours demanded and under such conditions. It is, however, important to emphasise that early feminists played an active role in the philanthropic movement and that this movement gradually eroded the capacity of working class women, both single and married, to compete in the market place and to earn a living. Bryant has noted that:[64]

> the movement to exclude women from factory employment, or at least to limit their hours of work, was motivated by much the same ideas as the attempt to keep middle-class women in the home. . . Evidence suggests, however, that the penetration of the working classes by middle-class ideals of domesticity meant that very few wives were able to decide for themselves.

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63 See 3 & 4 Will 4, cap 103 (1833-1834).

64 Bryant, work cited at footnote 49, at 44-45.

At much the same time in France,[65]

> Jules Simon began to spread the word of this great discovery: woman, the housewife and attentive mother, was man's salvation, the privileged instrument for civilizing the working class. It sufficed merely to shape her to this use, to furnish her with the necessary instruction. . . . The second half of the nineteenth century was marked by a decisive alliance between promotional feminism and moralizing philanthropy.

Promotional feminism, as Donzelot terms it, was predicated, as cultural feminism is today, upon affirming the value and validity of women's "traditional" roles and skills. Woman's power within her sphere, that of home and family was exalted, yet the affirmation of this separate sphere and the legislation which, it was hoped, would return women to their "rightful place" led to the erosion of the few economic options which remained open to working class women. Lacking the advantages of their middle and upper class sisters, the education, the financial security, and the freedom from responsibilities which made possible the ideology of domesticity, lacking even voices in the political process and basic property rights, working class women were gradually deprived of the "right" to compete for jobs on an equal footing, jobs which, for many of them, provided their only source of income.[66]

The nineteenth century ideal (although viewed from quite a different perspective) is elegantly illustrated by Charles Darwin's ruminations upon the costs and benefits of marriage - the benefits including companionship, the constant presence of an object to be played with, and domestic services, or as Macfarlane summarises it, a "wife would be useful in keeping away loneliness, particularly in old age; she would be a superior pet, 'better than a dog anyhow'...".[67] Despite the fact that women and children had become economic liabilities, the man's capacity to maintain an economically non-productive household became a potent symbol of his economic status, in a sense, the ultimate luxury. It enhanced his standing in the eyes of his male peers at the same time as the total economic dependence of his wife and children reinforced his authority over them. What had undoubtedly begun, at least in part, out of an understandable desire to protect working class women from the abuses of the factory and sweatshop system, ended by depriving a substantial number of them of any choice whatever. Unable to

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65 Donzelot, J, *The Policing of Families*, translated by R Hurley, New York, Pantheon Books, 1979, at 36.

66 See Olsen, FE, "From False Paternalism to False Equality, Judicial Assaults on Feminist Community, Illinois 1869-1895" (1986) 84 *Michigan Law Review* 1518, particularly at 1536-1540 where Olsen notes that the effect of protective legislation is to render women unable to compete.

67 Macfarlane, *Marriage and Love in England*, at 3-5.

support themselves and in some cases their children should they lose a partner to death or desertion, protected into lower wages and rendered economically peripheral, left with little option but the hope of marriage or remarriage, they were also deprived of any choice within marriage. As middle class ideals of domesticity were actively promulgated to the working classes, the separate sphere ideology came to affirm, not the power of women within their separate sphere, but the authority of their husbands to demand that they remain within it. The separate spheres ideology also affirmed the power and authority of the breadwinner role, and that role has persisted in strength and authority during the twentieth century.[68] Under these circumstances, despite the persistence of the view that marriage was a partnership, no true partnership was possible. A partnership relationship is a relationship among equals for the benefit of a common enterprise.[69] The parties to the marriage were neither economically nor politically equal. Indeed, it is difficult to identify any aspect in which they might be identified as equal. Because these changes coincided with the extension of the period of official childhood, motherhood came to be glorified as the only role truly appropriate for women. The feminine role was the idealised role of wife and mother, a role defined by its lack of productive significance.

Why We Ought Not Place Our Faith in Legal Progress

It is easy to dismiss these changes together with the wider social movements in which they were embedded as irrelevant to the contemporary scene. I do not believe that this easy and dismissive attitude is appropriate. Those of us who fail to learn from our history are likely to find ourselves repeating it, hostages to a past we have dismissed out of hand. All too often, we remain captive to the Enlightenment notion of progress and to the mesmerising affirmation of universally increasing rights and freedoms. To the extent that we allow ourselves to do so, we remain blind to the interaction of social, legal and economic forces, and to the precariousness of those same rights and freedoms. It has been suggested that the relatively

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68 Olsen, work cited at footnote 66, at 1536-1540.

69 Traditionally, at law, three elements were necessary if a true partnership was to exist. In the words of James LJ in *Re Megevand; ex parte Delhasse* (1878) 7 Ch D 511, 526: "There is every element of partnership in it. There is the right to control the property, the right to receive profits, and the liability to share in losses." In marriage, from the perspective of the wife, only one of these elements is present, the liability to share in losses. Under the common law, as we have seen, all her property passed into control of her husband and he was entitled absolutely to the profits thereof. She might legally be compelled, however, to share in the losses of the family although her separate real estate could not be taken to settle his debts. See Kerr, work cited at footnote 2, Vol 1, at 419.

independent position held by women in the late Saxon era owes much to Germanic traditions and the degree to which these traditions successfully resisted the hegemony of the Roman Catholic Church. As the Church gradually increased in power and authority, both secular and religious, following the Norman conquest, such traditions either fell into desuetude or were displaced by legislation. Likewise, the structural character of the feudal system with its linkage between social roles and obligations and relationships to land, a development intimately related to the centrality of warfare in feudal societies, created the structural necessity to ensure that landholding be confined to those actually or potentially capable of rendering military service. If landholdings remained or passed outside masculine control, the nexus between status and military obligations collapsed. Together these factors created the necessity to ensure that women were excluded from the actual control of property, and the need to entrench this exclusion demanded the inclusion of personalty as well as realty. If realty defined status and feudal rights and obligations, personalty was equally critical in the procurement of material and supplies. Only in the great cities, where the foundation of social organisation remained, to a far greater extent, linked to crafts and the guilds associated with these, could such pressures be resisted.

It may be thought remarkable that even as feudal structures began to break down, a process well in train by the beginning of the Tudor era, the pressure for legislative displacement of traditional rights and usages continued. Examined closely, however, this is neither remarkable nor surprising. In fact, two mutually reinforcing legislative trends coexisted, and together, at least with respect to women, these completed the process which commenced with the Norman conquest. On the one hand, the eradication of legal protections for women, such as dower rights, which was already in progress by 1542 was not complete until 1724. On the other hand, by 1575 other agencies of social control were becoming entrenched by legislation, a process which reflected both the increasing numbers of dispossessed and rootless individuals accompanying the gradual collapse of feudal structures, the rise of wage earning as a means of subsistence and the need to replace vanished feudal structures with legislative and ultimately bureaucratic control. I believe that it is reasonable to suggest that increasing legislative provision aimed at the control, identification and support of an increasingly large indigent population through the poor laws and the development of forms of public state regulation of marriage which commenced in 1753 with *Lord Hardwicke's Act* were manifestations of the same phenomena. Such legislation endeavoured to replace feudal hierarchies and bonds of obligation in which each man belonged to some other and all to the king with public identification and control of individuals. Legislation such as the *Statute of Apprentices* (5 Eliz, cap 4, 1563) which was intended to ensure that ample domestic servants (and male labourers) were available to landed estates for a

term of years emphasises the perceived need to restore order and to ensure that those outside the established order were nonetheless bound to it. Similarly, the formal, public, state regulation of marriage and later of divorce served, at least in part, to ensure that relationships were a matter of public record and that obligations could be publicly identified and enforced. As the traditional order collapsed, the threat of chaos could only be controlled by centralised record keeping and control.

Only after this had been achieved and the new hierarchies of occupational status and professional role were firmly entrenched could legislative liberalisation begin to emerge towards the end of the nineteenth century. Once the separate spheres ideology attained hegemony and the bureaucratised state was firmly entrenched it became politically possible to grant a measure of legal personhood and, subsequently, political participation to women. While hard evidence is limited, it is surely tempting to speculate that the historic link between the suffrage movement and the cult of domesticity and ideology of motherhood ensured that the increasing rights and freedoms granted to women were perceived as complementary to male power and authority rather than threatening to them. I believe that significant parallels may be found in the social, economic and legal trends existing today. Rising unemployment, the rapid replacement of unskilled and partially skilled labour with automation, and the prospect of increasing unemployment together with the social unrest inevitable in societies in which social status is coterminous with occupational status has already been accompanied by an increase in legislative and judicial intervention intended to assimilate informal relationships to legal marriage and to attach to such relationships some of the incidents of legal marriage. Likewise, welfare state ideals are coming under increasing attack and the position of workers is becoming increasingly precarious. Already women and other marginalised groups, as the most recent entrants to the social hierarchy defined by occupational status, have been most severely affected by an increasingly automated market place with the attendant diminution in entry level opportunities. Indeed, it is commonplace for women to be cited as the hidden unemployed. Similarly, given that many women, because of the demands of "unshared" unpaid labour, are likely to work part time rather than full time and to lack the protections associated with full time employment, their services are most readily dispensed with in hard economic times. These trends, in increasing state regulation, in diminishing opportunities overall, and in the traditional "last on first off" approach to retrenchment, have been accompanied by the increasing visibility of fundamentalist religious movements aimed at restoring patriarchal theologies and affirming traditional gender roles, particularly with respect to the family. It is not surprising that feminist ideas and the women's movement have been among the earliest and most enduring targets of both the "moral right" and the

emerging cult of economic rationalism. One does not need a crystal ball to suggest that if even some of the predictions of diminishing employment opportunities and increasing leisure are fulfilled one possible response will be the deployment of new strategies aimed at the reaffirmation, albeit in altered form, of the separate spheres ideology. Indeed, this movement is already under way. I believe it likely that, as was the case in the nineteenth century, this movement will inadvertently be supported and enhanced by some of the voices from within the women's movement generally. While I agree entirely with the need to affirm the worth of those fields of endeavour in which generations of women have excelled, much current literature seems also to reawaken and revitalise old stereotypes concerning femininity and the feminine role.[70] This is particularly true where the affirmation of traditional roles, perhaps unwittingly, carries essentialist overtones. It is all too easy to move from an affirmation of the value and validity of women's traditional commitment to caring and nurturing roles and the affirmation of a moral vision based upon care and nurture[71] to a very different affirmation, a suggestion that a just community can only be attained if a majority of women confine themselves to caring and nurturing roles.

Another similarity emerges as well. We saw, in the period leading up to the nineteenth century, not only a diminution in rights and contraction of opportunities generally, but also an erosion of traditional protections such as dower rights, an erosion which had earlier led to the development of the equitable doctrine of the separate estate. While, undoubtedly, women have been among the beneficiaries of what may be termed a revolution in family law during the last twenty years, certain groups among them have also been its most significant victims, particularly those women for whom the separate spheres ideology had been a way of life, the foundation of the marital contract. If the social and economic changes of the present era lead to a renaissance of the separate spheres ideology, many women are likely to be returned to a position of dependence without, except in the case of the wealthy, any significant safeguards in the event of divorce or widowhood. The current emphasis upon

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70 Much of this emphasis arises out of the work of Carol Gilligan on moral reasoning: see Gilligan, C, *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, 1982. Legal echoes may be found in Menkel-Meadow, C, "Portia in a Different Voice: Speculations on Women's Lawyering Process" (1985) 1 *Berkeley Women's Law Journal* 39. For a reasoned discussion of the equality difference debate and its implications see Minow, M, "Partial Justice" in Sarat, A & Kearns, TR, *The Fate of Law*, Ann Arbor, University of Michigan Press, 1991, at 15, and especially at 22-26.

71 Gilligan, work cited at footnote 70, at 150-160; West, RL, "Jurisprudence and Gender" 55 *University of Chicago Law Review* 1, at 28-29. See further, West, RL, "Disciplines, Subjectivity, and Law" in Sarat & Kearns, work cited at footnote 70, especially at 156-157.

superannuation as a replacement for a universal old age pension may be seen as a manifestation of this, particularly given the fact that superannuation for women is a comparatively recent development and is, as yet, available to only a select few.

Likewise, the evidence from the marketplace unfortunately makes it clear that legislation intended to enhance opportunities for women and for marginalised groups is perceived by business and industry as an expensive and unnecessary externality which depresses competitiveness and is beyond the capacity of the market to sustain. Current industry pressure for exemption from sex discrimination guidelines, such as that from the lead industry, ought also remind us that the demand for economic efficiency is often also a demand that existing injustices be allowed to continue in the name of competitiveness. Now as in the past, injustice is both comfortable and, where associated with "economically rational practices", frequently attractive to employers while justice cannot be attained without some costs. If, as seems possible in the post-modern era, occupational role is no longer adequate to provide the structural definition believed essential as a "bulwark against chaos" within the liberal order it seems likely that women (and other marginalised groups and individuals) will be among the first casualties in the battle to sustain the existing social order. As Minow notes:[72]

> A backlash against feminism and against racial justice reforms often unites business and labor groups while requiring, paradoxically, both a revived defense of the traditional family as a communal enclave away from competitive individualism, and a revitalized individualism, attacking special governmental assistance through welfare and employment rights.

Those who have least, and that but lately gained, are also those who may be most readily jettisoned in pursuit of a "new world order" bearing an uncanny resemblance to the one but recently laid to rest.

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72 Minow, work cited at footnote 70, at 24.