

**Women's Property Rights:
An herstorical dialogue of economic thought and gender inequality.**

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Introduction

In a democracy the law is the will of the people; it is a socially constructed beast that is contextually bound, imprinted with the epistemological and ontological characteristics of the people it governs. As a social construction the law plays a vital role in the performance of people's social, economic and political rights and freedoms. In this role as facilitator, the law can both encourage and impose constraints on the performance of these freedoms. A quick glance at Australia's legal history provides a chequered account of people's rights and freedoms, and the mediating role played by shifting understandings of gender, age, cultural heritage, sexuality and socio-economic positioning.

In focusing on the herstory of women's property rights in Australia, attention must be paid to the key role played by judges as makers and arbiters of the law. Through their decision-making, in their public speaking and (non-judicial) writing, judges have and continue to effect change for women in explicit and implicit ways (Easteal 2009). These 'ways' are inherently gendered. Until recently, except in specific circumstances it was assumed that the subject/object of law was male. Similarly, whilst women have made distinct inroads into the legal professions, the law is predominately developed, delivered and enacted by men. The implications of this masculinisation for women's property rights can be seen in many of the verdicts delivered in divorce settlements, custody battles and compensation claims (Genovese 2006; *de Sales vs Ingili* 2003). Informed by essentialist portrayals of women, marriage and property these decisions jeopardise women's access to property. A case in point is that of *de Sales vs Ingrilli* (2003) in which the Supreme Court of Western Australia's reduced a woman's claim

for compensation after her husband's death, on the grounds that she possessed attributes (attractiveness and age) which increased the likelihood of her remarrying (de Sales v Ingrilli 193). Whilst the decision was later overturned by the High Court the attitudes imbued within the judgement are reminiscent of the mid-nineteenth legal and economic debates regarding women's rights to property. The de Sales case reflects the conflict and contention which has marked Australian women's legal relationships with property since the late eighteenth century.

Until the *Married Women's Property Act (UK) (1870)* and its later manifestation in 1882, married women had no legal right to own or control property. Shaped by centuries of oppressive and repressive regulation married women within the Victorian legal system were a non-entity; tied to the personage of their husbands, a woman ceased to exist in her own right. As a non-person, a married woman was unable to own or control property, denying her the capacity to enter into a contract or receive income from earnings.

As early feminists claimed, without the capacity to own and control property in marriage, women would always be dependent upon men. This issue gained currency within the context of a burgeoning capitalist economy and the dominance of humanist discourse promoted through the Enlightenment project. From the late seventeenth century onwards, questions regarding the rights of women began to surface in political, legal and economic discourse. The work of several classical economists engages with the relationships between women and men, particularly as it involves the right to own and control property. Their responses present a range of positions on a continuum of equality. For some classical economists namely Adam Smith and John Locke, the right to property was neither 'God-given' nor a 'divine right' but was attained through a person's capacity to produce. This capacity was informed by the intellectual prowess and business acumen with which men were considered to be 'naturally' or opportunistically well-endowed. For the Baron de Montesquieu writing in the early 1700s women's reproductive capacity and ensuing physical fragility decreased her capacity to labour and as such to accumulate capital. This focus on the female body as vulnerable was reinforced in Descartes' mind/body divide; the irrationality of the body subjugated women to male protection, direction and control. As such, gender conservatives Jean Baptiste Say and Nassau Senior viewed women's

exclusion from economic life as not only 'natural' but desirable. For others working within the classical economics tradition, including the Marquis de Condorcet and his wife Sophie de Grouchy and later John Stuart Mill and Harriet Taylor (Mill), gender inequality and in particular women's unequal access to property was a fundamental flaw in the Enlightenment project with its commitment to a free society in which all 'men' were equal.

For many of the female classical economists writing, such as Harriet Taylor and Harriet Martineau and Sophie de Grouchy women's rights to property were intrinsic to her achievement of economic, social and political autonomy. Committed to improving women's access to educational and employment opportunity, these feminist economists identified property as a necessary precursor to enfranchisement. The work of Priscilla Wakefield and Martineau were influential in their construction of women as rational agents capable of engaging in the capitalist economy.

This paper explores the ways in which women's legal rights to property, as enshrined and enacted within seventeenth, eighteenth and nineteenth century law, were interpreted by the economists of the time. The paper begins with a brief legal description of property before describing women's legal rights to property from the late seventeenth century to the mid-nineteenth century and the enactment of the *Married Women's Property Act (1870)*. Drawing on the judgements and decisions of English law and the provisions of legislation, the paper sets the scene for understanding the legal constraints upon women's access to property. The paper then turns to the writings of the key classical economists, and their discussions of women's rights to property and broader economic autonomy. From this discussion, the paper concludes by highlighting the links between economic and legal discourse in constructing women's rights to property, providing commentary as to the extent to which theories of political economy supported and/or challenged the legal orthodoxy.

Defining property

Before examining the extent to which women were denied rights to property it is firstly necessary to define what property is, and secondly, to explain how property law affected women from an economic viewpoint. Property is illusory, it is essentially

a human construct created to give rights to interested parties. The following passage from Misk J in *Moore v Regents of the University of California* (51 Cal 3d 120 at 165) provides a concise description of property and one which has historical relevancy:

'Being broad, the concept of property is... abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object — principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or gift';

In order to access (own and control) property, a person must have a proprietary interest. This 'interest' consists of four key elements which must be satisfied; (i) the exclusive rights to (ii) the use and enjoyment of, (iii) something that is capable of being property and, (iv) where the person has the right to exclude the rest of the world from the use and enjoyment of the interest¹.

Coverture and Property Rights

In 1855 Mrs Caroline Norton wrote to her monarch, Queen Victoria, pleading for her intervention in recognising married women's property rights. As a woman deserted by her husband, Mrs Norton details the losses which she suffers, unable to divorce him or earn her own income. Mrs Norton's (1855) case is neither unique nor particular, its content describes that of any woman in the English context, in which upon her marriage 'her property is his property'. The British jurist Albert Dicey (1978, 371-372) writing in the late nineteenth century describes this process of acquisition through marriage in the following way:

Marriage [is] an assignment of a wife's property rights to her husband at any rate during coverture. Much of her property, whether possession by her at or coming to her after her marriage, either became absolutely his own, or during coverture might, if he chose, be

¹ see *Cowell v Rosehill Race Course* (1936) 56 CLR 605; *King v Davis Allen & Sons, Billposting Ltd* [1916] 2 AC 54.

made absolutely his own, so that even if his wife survived him it went to his representatives.

This practice of coverture is not limited to real property, such as money, stocks, livestock, furniture (Combs 2006, 53) but as Mrs Norton identifies, property encompasses personal goods and items;

“An English wife has no legal right even to her clothes of ornaments; her husband may take them and sell them if he pleases even though they be the gifts of relative of friends or bought before marriage”.

The incident of coverture meant that a wife had no separate property in the eyes of the law. Through coverture women became the *property* of her husband. Her legal rights were vested in her husband; she was a *femme covert*, ‘covered’ by her husband. At law, a *femme covert* has a personal incapacity to contract, control inheritance and make a will. The extent of a *femme covert*’s lack of status in property matters has been described by the British Lord Chancellor (1830-1835), Lord Brougham as one “*of disability, or immunity*” (Bingham 1980, 20);

“[H]er (a married women’s) existence is not contemplated; it is merged by the coverture in that of her husbands; and she is no more recognised than is the beneficiary or the mortgagor, the legal estate², which is the only interest the law recognises, being in others.”

The notion of ‘disability’ is also used to describe an infant’s status within English Law. However, as case law consistently reveals, married women were subject to greater disabilities than that of an infant who could in some instances be treated as a *femme sole*. The primary difference in the ‘disability’ experienced by a married woman and an infant is evident in contract law; an infant’s contract was capable of

² As opposed to the equitable interest, which is ultimately the primary interest. For example, a trustee holds a legal interest in the trust property. The beneficiary of the trust holds an equitable interest in the trust property; however, they cannot in any way affect the trust property itself until the trust is ended and the beneficiary take possession of the property (unless the trustee breaches a duty). And a mortgagor (lender) - of a house, for example has no right to enter the house (unless on default of the mortgagee [borrower]). The legal interest in the house remains with the mortgagee who is in possession of the house.

being made void³ at law whereas a *femme covert*'s contract was void⁴ at law. Bennet (1980, 191) describes the distinct differences between the two positions in the following way;

The disabilities attached to infancy are designed as a protection, for the inexperienced, against the fraudulent; those incident to coverture, are the simple consequence of that sole authority which the law has recognized in the husband, subject to judicial interference, whenever he transgresses its proper limits.

Proprietary Interest

Laws relating to women's proprietary interests can be traced to the 1660s. On her marriage, the control of and income from a woman's real property (that is, her property in freehold land) passed under common law to her husband. During coverture the proprietary interest was unified within the husband and the wife: "*in their demesne as a fee*" (as expressed in *Took v Glascock* (1669) 1 Wms. Saund., at p. 253 (n. 4) and later adopted and approved in *Robertson v Norris* (1848) 11 Q.B. 916 at p. 920)⁵. Neither had a separate right to dispose of the property without the others formal consent. This was known as the doctrine of unity of spouses. In some case a tenancy of entireties would arise where land was given as a dowry to make the wife look more attractive, however any future benefits were strictly the property of the husband;

³ An agreement, transaction or decision which may be set aside, whether it be at the will of one of the parties, by operation of law, or by court order for a legal defect. A contract or other transaction is valid until a party with the right to set it aside ('avoid' it) does so. The right may be legal or equitable. In each case, the avoidance makes the transaction void from the outset (void ab initio). At common law avoidance is the act of a party, called in the case of contracts 'rescission', and permitted only if the parties are able to return to their pre-contractual position (restitutio in integrum); equity makes common law rescission available, and offers equitable rescission, on wider grounds, although complete restitutio in integrum is not possible: *Alati v Kruger* (1955) 94 CLR 216; [1955] ALR 1047.

⁴ Legally non-existent; having no legal effect; lacking the intended legal effect: *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432; [1969] ALR 321. An act, decision, deed or transaction that is void cannot be enforced or relied upon. Whether an act, decision, deed or transaction such as a contract or a marriage, is void or voidable, depends on the principles applied in the particular area of law. 'Void' is sometimes treated as synonymous with 'voidable', or 'voidable at the election of the party for whose benefit a legal rule makes the transaction void'.

⁵ Isaacs J. citing Lord Denman J in *Robertson v Norris*: "...that he [the husband] be attained, that pernanacy will pass to the Crown, the freehold still remains in his wife." There was therefore in the wife, as judgement debtor, a sizeable (a recognised separate proprietary) interest, and the respondent's title is in my opinion complete".

there were no potential shares between husband and wife, the land being regarded as held as if by one individual (the husband), rents and profits were not divisible, all being payable to the husband (Encyclopaedic Australian Legal Dictionary, 2009).

In the event of her husband's death a woman was entitled to 'possess' the land, however, as was laid down in *Greneley's Case* (1609) (8 Rep. 71b, at 72a, 1826), she controlled it as a 'freeholder' not as the sole freeholder; "*she hath a freehold and inheritance in the land, although she hath not the sole freehold or inheritance.*" If she predeceased him, it was divided among her children or other legal heirs, subject to his retaining a life interest⁶ in it where a child has been born of the marriage⁷.

No capacity for contracts

Having no separate estate or property meant that a married woman's contract was a nullity at common law. As such a married woman could not sue or be sued, which as Lord Brougham states, fulfils "*her position of disability, or immunity at law*" (see *Murray v Barlee* (1834) 3. My. & K 209 at 220). The doctrine of coverture effectively protected married women from personal liability, meaning that the husband would be liable if a *femme covert* committed a tort or civil misdemeanour.

Personal property

A married woman's personal property (that is, all other forms of property, including leasehold land, money from earnings or investments, and personal belongings such as jewellery), passed absolutely into her husband's control and disposal. This 'right' to absorb the items is referred to as '*jure mariti*' (legal right of a husband) (Ropalje and Lawrence 1997, 707). It was deemed to be a gift of her personal chattels to her husband (I.J Hardingham and Neave 1984 at p. 6 [para] 104). The wife lost all rights

⁶ Tenure by curtesy of England the life estate of a husband in the land of his deceased wife, provided that he had living issue by her that were born alive and capable of inheriting the land. The husband was effectively a tenant by the curtesy held of the heir: *Paine's Case* (1587) 8 Co Rep 34a ; 77 ER 524. Tenure by curtesy of England has been abolished: for example (NSW) Conveyancing Act 1919 s 19(2) (b).

⁷ *Curtesy*: the right of a husband to a life estate in the whole of the land of his wife after her death. Curtesy was subject to a number of conditions, namely that: the wife was entitled to an estate in the relevant land capable of inheritance, excluding joint tenancies, life estates and estates *pur autre vie*; the estate was vested in possession of the wife before her death; the land had not been otherwise disposed of; and a child of the marriage capable of inheriting the land had been born alive, even if that child died shortly after birth.

to survivorship⁸ of her chattels. The husband could make a will devising all his personal property, including whatever he had received from his wife upon their marriage, away from her or her children. If her husband dies intestate (without a will), she never recovered more than half of the property; the remainder was divided amongst children or other near relatives or, if he had none, to the Crown. A married woman, however, could bequeath her personal property only with her husband's consent, which he could revoke at any time before probate; if she dies intestate, her personal property continued in his possession.

Settlements and equity in an era of inequity

A woman who wanted to evade the provision of coverture could do so by means of a settlement created prior to her marriage according to the principle of equity. In this way she could secure her property by a trust, and thereby removed it from the husband's common law rights of control. In *Murray v Barlee* (1834) (3. My. & K 209) the Solicitor- General described the function of equity law and the Court of Equity;

"...at law, a femme covert has a personal incapacity to contract; but in equity she has all the rights and liabilities of a femme sole (unmarried woman) in respect of her separate estate. She may deal with it in whatever manner she pleases, whether by express charge or instruments in the nature of specialties, or by simple contract. Her separate property is the creation of the Court of Equity; and the Court, though it cannot reach her person, will follow out all the equities arising from the separate rights with which it invests her, and render her estate, whether personal or real, liable upon that principle of equality which is always observed, to the general demands of her creditors.

In this way it was possible for a woman to own and control property as a femme sole; separate property subject to her own control, and exempt from all other interference or authority. This new status meant that whilst a married woman could not personally

⁸ An entitlement under a joint tenancy, by which on the death of a joint tenant the entire property remains with any surviving joint tenants. This means that no joint tenant except the last to die has any interest in the property capable of being left by will.

be sued, the property she owned and/or controlled attracted proprietary liability and as such could be subject to legal action, as Lord Brougham states;

*“...her liabilities and her rights, is here [in equity] abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself or her trustees.”*⁹

It must be noted that this idea of the separate property was neither universally recognised nor agreed upon, with many judges claiming it interfered with the married woman’s incapacity at contract law and in terms of proprietary interest. In the 1834 case of *Murray v Barlee* (My. & K. 209 at 215) the Solicitor-General Sir C. Pepys argued in the following way;

“Her [a femme covert] person is as sacred in equity as it is at law; and though the rule commonly laid down is, as to her separate estate, a married woman is, to all intents and purposes, a femme sole, it will be found that for most practical purposes this rule is incapable of application”

Whilst an option for some married women the cost of marriage settlements was considerable, their expense made them inaccessible to the majority of the middle-class. Researchers have also suggested that the real ‘winners’ of the separate estate doctrine were the families (wealthy fathers) of married women who wanted to ensure that the family wealth was not displaced or dispersed amongst non-familial members.

Tracing exclusion: Unpacking the classical economic interpretations of women’s property rights.

To understand how the law was able to enshrine such discriminatory practices in an era of Enlightenment, requires us to understand the complex debates which emerged with the birth of reason and rationality. These tenets were enshrined within the work

⁹ This passage was approved in *Heatley v Thomas* (15 Ves. 596) and *Bullpin v Clarke* (17 Ves. 387) and *Stuart v Lord Kirkwall* (1 Ves. jun. 513; and 4 Bro. C. C. 19).

of the classical economists and liberal theorists whose views both perpetuated and challenged the social and political subordination of women in the seventeenth to the mid-nineteenth centuries. The centrality of property in the new capitalist order, with its focus on productive capacity and the accumulation of capital drew unprecedented attention to gender inequality.

Religion and the law

Women's coverture and subsequent exclusion from property rights in the seventeenth, eighteenth and nineteenth centuries was not new. With its roots in the Judeo-Christian religion, English common law was embedded within monotheism and the worship of a male God, the original patriarch (Stopler 2008). The doctrine of coverture has its origins in the Old Testament, where women are 'given' to men as property to own and control. Women's exclusion from 'law' begins with the covenant God makes with Abraham (Stopler 2008). As Stopler (2008) argues, it is a covenant between God and man alone, wherein woman has no place. It is only Abraham who God addresses, and it is only he who God advises of his and his progeny's rights and duties under the covenant. In this act of exclusion, the leadership of the patriarch over his family and tribe is divinely sanctioned (Stopler 2008).

The transformation from religious edict to common law tradition is pertinent to the debate in this paper. The biblical tradition of the law reveals the ways in which patriarchal religion has operated as a fundamental force in the creation of hegemonic patriarchy in western legal systems. Whilst classical economists including John Locke and Adam Smith disputed the divine right of kings and the absolute authority of the Christian church, they failed to acknowledge the ways in which Enlightenment disciplines of science, law and philosophy transformed patriarchal religious edicts into patriarchal secular traditions.

With the industrial revolution and the proliferation of goods and services, property in its many forms was liberated from the clutches of the elite / aristocracy. Through the capitalist market it was possible for men to buy, sell, accumulate and make profit from property. Those who control the modes of production such as land, labour and capital, reap the benefits of these 'free' economic transactions. Rights in property lead to rights to profits. This unprecedented access to property through the market heralded

a new era of social and economic engagement. Political economists became interested in the interplay between principles of independence, autonomy, and free will with those of rights obligations and responsibilities; Rousseau's social contract.

The classical economists

John Locke was adamant in his opposition to the regal absolutism maintained within the European community and which constrained the performance of man's free will. Key to his dissent was a reinterpretation of the biblical narrative of Adam and Eve. For centuries the monarchy and ruling elite used this story, and in particular the notion that god had give Adam "sole regency of the world" (Nyland 2003, 43) to justify their right to absolute power. According to Locke, however, Adam did not attain a right to rule over Eve, rather, the disadvantage she suffered as a result of her fall from grace, had made her weak, and in need of protection and support. In this sense, Locke argued, Adam had gained the *capacity* to rule over Eve rather than a right. The potential of this reinterpretation to revolutionise dominant gender relations was quickly subverted by Locke who claimed that women's subordination to men was both legitimate and right because of her naturally 'weak' physical state and inferior capacity for reasoned and rational thought (Nyland 2003, 44). Whilst all men have an equal right to freedom, not all men are equal in all capacities. In this respect Locke justified the subordination of women whilst maintaining his commitment to the liberal right to freedom. Women's lack of property rights was justified in a similar way to the division between an employer and employee. Locke argued that women (like an employee), had no capacity to understand or negotiate the complexities of the contractual relationships associated with property*** (Andrew – check this please??). These were the domain of men and employers (Nyland 2003, 53).

This emphasis on the physical superiority of men was also adopted by Adam Smith in his evolutionary approach to understanding economic development and the gendering of property. Smith was convinced that the masculinisation of property was associated with and indeed played an explicit role in the evolution of humans from hunters and nomads to the development pastoral modes of subsistence which depended upon the establishment of non-transitory communities. Smith (1966, 183 in Nyland 2003, 92) paints an image of man, as hunter, pastoralist, warrior-soldier and protector, 'politician and warrior' who competes for authority with other men through the

accumulation of 'property' be it animals, crops, land, soldiers, voters, or government officials. In this evolutionary theory, the role given to men is transferred through the generations to the adult males. In strengthening the role of men in the family, as fathers and particularly as husbands, the hierarchy of adult male authority is instituted at all levels of society. This absolute or 'supreme authority attributed to men allowed for the appropriation of the female through marriage, particularly through the transfer of property to the man as husband.

Rather than permanent or stable, Smith considered gender relations to be fluid and in a constant state of emergence. According to Smith, equality between women and men will unfold as capitalism unfolds leading to increased opportunities for women's engagement in the economy. It is this access to accumulation and profit which will work to equalise the relationships between women and men. This belief in industrialisation or more specifically mechanisation of production as equalising the relationship between women and men was later advocated by Irish economists William Thompson and Anna Wheeler, although within a socialist rather than a capitalist framing. However, Smith does not propose any intervention in order to hasten or ensure that this process of equality actually takes place. As a strong advocate of the free market, state interference beyond that of positive laws, was undesirable. It can only be imagined that Smith would have considered the later instituted *Married Women's Property Acts (1870) (1882)* as destabilising the 'natural' order of gender relations, creating a disruptive influence to what he argued was a stable and predictable process.

The stage or evolutionary approach to gender relations can also be traced in the work of Marquise of Condorcet and Sophie de Grouchy both of whom considered that gender equality was inevitable; its reality was enshrined in their commitment to achieving human perfectibility. In other economic matters, both Condorcet and de Grouchy opposed the 'free' or 'invisible hand' of the laissez faire market espoused by Smith. For de Grouchy, state intervention in regulating gender equality was key to not only women's rights but for maintaining the dignity and respect which she considered was the right of all people. Her primary concerns were the work conditions and plight of working-class women. Through her work de Grouchy came to the understanding that socio-economic context was as much a mediator of a woman's experience as was

her sex. This radical approach brought the issue of women's diversity to the fore, highlighting the vastly different experiences of women who worked for wages and those ensconced in the newly burgeoning middle-classes. Access to property whether in terms of earnings or other forms was integral to women's equality with men, particularly in marriage, which de Grouchy claimed had become more about property and the accumulation of capital than love (Nyland and Dimand 2003, 9).

The efficacy and popularity of the evolutionary approach to progress was stifled with the impact of the French Revolution. The consequent lack of support for social, economic and political change heralded an era of gender conservatism. The idea of gender equality mirrored the 'radicals' calls for fraternity and liberty and as can be read in their writings, the classical economists and social theorists of the early nineteenth century were united in their calls for the status quo between women and men. Thomas Malthus, Jean-Baptiste Say and Nassau Senior, epitomised the conservatism which dominated understandings of gender equality and women's status within an industrialising era. For Malthus gender inequality was 'natural' and any intervention to change the status quo was misguided. Malthus' contempt for women is apparent in his view of their status at the turn of the century as "the best that the female sex could ever hope to attain" (Nyland and Dimand 2003, 10). Say was equally contemptuous of women's advancement considering gender equality to disturb the 'natural' order of society. Women's role was in the family and as subordinate to her husband, all other roles for women jeopardised the stability of society, a real threat in this post-revolution period.

Although regarded as a liberal theorist rather than a classical economist, John Stuart Mill played a significant role in challenging the gender rigidity of the Victorian era. In his famous *Principles of Political Economy* (1844), John Stuart Mills refers to the invisible category of women workers and the plight of women in general describing the "domestic subjection of one half of the species". Despite this radical position aspects of Mills work seem to overlook the gendered realities of capitalism. In writing about the position of property in the new capitalist economy Mills claims that "property is now inherent in individuals, not families". However, as Dalley (2006, 527) argues, "property was not inherent in the mid-Victorian woman; on the contrary, it represented one of the economic disabilities by which her individuality was most

conspicuously curtailed”. Even in his famous *Subjection of Women*, Mill’s (1989, 41) position on women and work appears contradictory in its promotion of the ‘natural’ capacities of women and men to undertake particular activities;

Like a man when he chooses a profession, so when a woman marries it may in general be understood that she makes choice of the management of a household and bringing up of a family as the first call upon her exertions, during as many years of her life as may be required for the purpose; and that she renounces all other objects and occupations but all which are not consistent with the requirements of this.

Harriet Taylor denied this ‘natural’ relationship between women and domestic life, identifying the need for women to have educational and employment opportunities. However, such inconsistencies cannot overshadow his commitment to and involvement in successive women’s rights campaigns. His support for women’s property rights, as part of a broader strategy for marriage reform, was both public and political (Shanley, 1981, 1986; Forget 2003a). Mills used his position as a parliamentarian to endorse the *Married Women’s Property Bills* of 1854 and 1867. According to Mills the equality espoused in liberalism demanded that women be included and equality in marriage and as such, in relation to property rights was central to its fruition. A vigorous abolitionist Mills extended the discourse of slavery to the marital domain describing marriage as the “domestic slavery” endured by women (Shanley 1981, 233). Drawing on the plight of the Roman slave Mills (1869, 27) considered married women to have less rights in the master-slave (husband-wife) relationship, particularly in terms of access to property; “by Roman law ...a slave might have his peculium which to a certain extent the law guaranteed to him for his exclusive use”.

Feminist economists – the pioneers

The theories and practices of women and feminists as classical economists such as Sophie de Grouchy, Harriet Martineau, Priscilla Wakefield and Harriet Taylor (Mill) provide an interesting insider-perspective on gender relations. These women raised important questions as to the contradictory nature of the law in placing constraints on married women’s capacity to own and control property, whilst supporting and encouraging the doctrine of laissez-faire capitalism? Appealing to the liberal

intolerance of restriction and slavery, Martineau also highlighted the constraints which marriage placed upon women whilst emphasising women's capacity as economic agents. Analogies between marriage and prostitution women were used to free women from the "legal prostitution that hinders moral and intellectual development" (Dalley 2006, 528). As is evident these feminist economists cleverly adopted the language of the male classical economists and the libertarians to their advantage. Integrating women into *homo economicus* whilst highlighting the benefits of women's difference was not only creative but a necessary strategy in promoting the presence of women in the labour market (Dalley 2006, 528). Adopting this framing, it was possible to present sexual difference as "simply another facet of the division of labour" (Dalley 2006, 529).

Feminists also co-opted some of the popular constructions of women circulating at the time, creating alliances and analogies between women's domestic capabilities and the ingredients necessary for market success. Coventry Patmore's (1854) depiction of women as the 'Angel of the House' was used by some feminist economists to highlight women's work ethic "infusing it with the qualities of self-dependence and industry" (Dalley 2006, 528). In particular, Priscilla Wakefield's conservative depiction of women as virtuous and moral was promoted as providing a pacifying element to the brutal aspects of market forces (Dalley 2006, 528). It must be noted however that for Wakefield paid work was ant-ethical to her ideal of womanhood, a state of being which she always regarded as a forced event rather than an informed choice or desire (Lacey 2001, 141-142).

Conclusion

In this process of exploration the intersection between legal and economic discourse is made apparent. It is a relationship which, within a capitalist economy governed by an emerging liberal philosophy was necessarily close. Although not without challenge, economic framings of 'man as provider' dominated, reinforcing the legal constraints placed upon women's rights to own and control property. This focus on the relationship between the legal and the economic also highlights the discursive complexities of formulating economic theory which could support and facilitate women's positive engagements with property, work and financial decision making.

Alternate approaches to women, work and property were consistently voiced throughout the seventeenth, eighteenth and nineteenth centuries, with many theories supporting the capitalist enterprise of production and accumulation as the means by which women could attain equality.

This paper began with a discussion of the law and its capacity to both encourage the uptake of freedom whilst also imposing limits on the exercise of freedom. The *de Sales* case identified in the introduction raises questions as to how such decisions were made, using a contextual discussion to understand the context in which the law and rights to property are embedded within a broader discussion of women's 'rights' to be free. In particular this paper has sought to respond to the questions about economic freedom, who is the arbiter of what it means to be free, and indeed, who is entitled to be free? And how are these freedoms defined? What is clear from this paper's discussion is that the interplay between the law and economics, particularly in relation to women, has a contentious history and with issues such as the gender wage gap and occupational segregation continuing to plague western economies, it is one that seems unlikely to be resolved in the future without ongoing economic, legal, social and political dialogue.

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