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## Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality

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# REVISITING THE MARRIED WOMEN'S PROPERTY ACTS: RECAPTURING PROTECTION IN THE FACE OF EQUALITY

BERNIE D. JONES\*

I. Introduction .....	92
II. The Tenancy by the Entirety and the Married Women's Property Acts: The Early Development of a Legal Doctrine .....	96
A. The Married Women's Property Acts: Removing Wives' Legal Disabilities Under the Common Law .....	99
B. The Married Women's Property Acts: The Property Doctrine, Legal Theory, and Women's History .....	110
III. <i>Coraccio v. Lowell Cents and Dime Savings Bank, King v. Greene,</i> <i>and Sawada v. Endo</i> : Failing to Ask the Debt Protection Questions .....	119
A. The Married Women's Property Acts: The Modern Day Cases in the Property Law Classroom .....	126
B. Reinterpreting the Modern Cases: What Have We Missed? .....	131
IV. Conclusion .....	144

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## I. INTRODUCTION

Judicial interpretations of the meaning of the Married Women's Property Acts in the twentieth century have misinterpreted the historical meaning and significance of the Acts in protecting married women from their husbands' debts. Although the Acts themselves never intended to absolutely equalize married women's status vis-à-vis their husbands, legislators had a specific purpose. They recognized that women were vulnerable under the common law insofar as husbands' rights to manage and control wives' property evoked the possibility of seizure for their husbands' debts. But with the passage of the Married Women's Property Acts,<sup>1</sup> wives had separate property that they could use in protecting themselves and their families. A wife need not be fearful of being put out of doors as a result of her husband's insolvency.

But married women did not have interests only in their separate property. Married women's interests in tenancy by the entirety marital property were affected by the passage of these Acts. By the twentieth century, depending on the jurisdiction and how the legislatures and courts characterized the impact of the Acts on the common law tenancy by the entirety, married women's rights developed according to different trajectories. In some jurisdictions, husbands retained full control as though the common law regime had not been changed.<sup>2</sup> In others, married women gained equal rights to manage property as their husbands once did, to control and subject tenancy by the entirety marital property to their separate debts.<sup>3</sup> Still again, other jurisdictions denied husbands the rights they once had and required them to pick up the disabilities their wives once experienced: an inability to have the property seized for their separate debts.<sup>4</sup>

These developments impacting the tenancy by the entirety took place primarily during the course of the nineteenth century—and in stages—as jurisdictions passed the Married Women's Property Acts in response to different waves of property interests. These began with the right to have labeled as separate, the property that married women brought to their marriages or that they received and acquired in the course of their marriage.<sup>5</sup> This meant that they had the right not to have their property be considered marital property or property their husbands owned exclusively.

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1. NY Married Women's Property Act, ch. 200, 1848 N.Y. Laws 307, available at [http://memory.loc.gov/ammem/awhhtml/awlaw3/property\\_law.html](http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html) [hereinafter 1848 N.Y. Laws 307].

2. Oval A. Phipps, *Tenancy by the Entireties*, 25 TEMPLE L.Q. 24, 29 (1951).

3. *Id.* at 31.

4. *Id.* at 32.

5. *Id.* at 27.

Thus, they could avoid creditors accessing property that their husbands would have controlled under the common law. Later periods extended these rights to include protections for the labor women provided in the home and recognition of the wages they earned in the course of their marriages.<sup>6</sup>

Modern twentieth century courts interpreted the Acts to mean equality between spouses with respect to property rights in a harmful way and in contravention of the intent of the nineteenth century framers.<sup>7</sup> They held that if husbands' marital interests could be seized under the common law, wives' marital interests could be seized as well. Legislators of the earlier period were interested in protecting wives and families from creditors and modern courts seemed interested instead in supporting the inconceivable: disrupting familial unity by pitting husbands against wives in their attempts to protect creditors. Thus, by the twentieth century, when jurisdictions like Massachusetts and New Jersey were interpreting their respective Married Women's Property Acts, recognition of the married woman's interest in debt protection seemed to have been lost.

In several cases where husbands' debts were at stake, courts deliberately upheld practices that appeared to directly contravene the spirit and purpose of the Acts.<sup>8</sup> These were women who owned property in their own name as wives, which the Married Women's Property Acts envisioned would be legitimate and appropriate, yet, the women's property was seized for their husbands' debts. These twentieth century courts forgot that as part of this debt protection, nineteenth century legislators imagined protection of family units and support for family unity in the face of the marketplace's vagaries.

The courts' opinions discussed the development of the tenancy by the entirety as a common law doctrine and how it was modernized by the

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6. Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1113 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2172-73 (1994).

7. Compare 1848 N.Y. Laws 307 (proclaiming that property owned separately by women prior to marriage shall not be subject to the debts of a husband), with *Coraccio v. Lowell Five Cents & Dime*, 612 N.E.2d 650, 655 (Mass. 1993) (holding that a married woman's property could be subject to payment of her husband's separate debts), and *King v. Greene*, 153 A.2d 49, 51 (N.J. 1959) (holding that a married woman's property was subject to her husband's debts).

8. See *Coraccio*, 612 N.E.2d at 652 (holding that a married woman's property could be subject to payment of her husband's separate debts); see also *Greene*, 153 A.2d at 51 (holding that a married woman's property was subject to her husband's debts).

Married Women's Property Acts.<sup>9</sup> They did not discuss in any fashion the historical aspects of the tenancy by the entirety significant to the cases before them, such as the debt protections in the nineteenth century that they should have taken note of in their twentieth century deliberations. Wives who owned separate property in these jurisdictions found that they could be required to transfer their separate property into tenancy by the entirety property. Upon doing so, they were threatened by seizure of their property interest once creditors attached their husbands' share of the property interest. Failing to take into account the debt protections meant the wives in these cases were threatened with seizure of their property upon foreclosure.

In New Jersey, a husband, seemingly at the behest of his creditors, sued his wife for money she owed him.<sup>10</sup> He won the judgment, and as part of the decree, she was required to put property she owed in her name only into both their names as tenants by the entirety, which would have been in direct contravention of the familial unity and debt protection imperatives of the Married Women's Property Acts.<sup>11</sup> Her interest in the property was later seized in satisfaction of his judgment against her.<sup>12</sup> The husband later conveyed his rights, title, and interest to a third party.<sup>13</sup> What this meant was that although she began with ownership in her name only, she had nothing in the end. Not only did she relinquish half of her interest when it became a tenancy by the entirety, but according to New Jersey law, she lost other rights because the jurisdiction interpreted that the Married Women's Property Act equalized spouses' rights to convey their interests in marital property. Her interest in the property during her lifetime and her survivorship interest could both be seized during the course of the marriage. Since each spouse gave up all rights to the property, there was nothing for her to get once she became a widow.

In a case from Massachusetts, a wife purchased real property in her own name and sought a loan.<sup>14</sup> The bank told her that she would have to put the property in both her name and her husband's name in order to do so.<sup>15</sup> The bank later gave the husband loans in his name only, without her knowledge

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9. See *Coraccio*, 612 N.E.2d at 653-54 (noting married women had an equal right to possession and control of jointly owned property); see also *Greene*, 153 A.2d at 59-60 (noting women gained right to alienate survivorship).

10. *Greene*, 153 A.2d at 51.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Coraccio*, 612 N.E.2d at 652.

15. *Id.*

or consent.<sup>16</sup> He later defaulted.<sup>17</sup> The wife only found out from a newspaper bulletin that the property, their marital home, was under foreclosure.<sup>18</sup> The court explained that the state had equalized the right of spouses to manage and control marital property and have the property subject to each spouse's separate debts. The bank was under no obligation to inform the wife that her husband's interest had a lien upon it.<sup>19</sup> The lien could stand.<sup>20</sup> She was fortunate, though, that the court found the judgment unenforceable because as a non-debtor spouse living in the property as her primary residence, she was protected from foreclosure.<sup>21</sup> Arguably, traditionalist assumptions about familial unity and property were at stake in the case, insofar as it explains why the wife was required to convey the property into her name and her husband's as tenants by the entirety. Those presumptions about familial unity were compromised when the husband was able to obtain loans without his wife's knowledge, thus jeopardizing her interest in debt protection and protecting family property from foreclosure for his debts. Nonetheless, the high court reinforced the rule of familial unity by limiting the possibility of foreclosure.<sup>22</sup>

In Hawaii, the court misconstrued debt protection and familial unity issues when it applied these to a case where it was not even relevant.<sup>23</sup> A tortfeasor husband was found liable for an automobile accident. Prior to being sued, he and his wife conveyed their marital home, which they owned as tenants by the entirety, to their sons as tenants in common.<sup>24</sup> They continued to reside on the premises.<sup>25</sup> Upon a finding of liability, the claimants sought to overturn the conveyance as a fraudulent attempt by the husband and wife to evade attachment of the property.<sup>26</sup> This was particularly important because the husband was a widower by the time the judgment creditors sought attachment.<sup>27</sup> If the court had overturned the conveyance, he would have owned the property as a surviving spouse, with his ownership interest fully liable to seizure.<sup>28</sup> The court focused instead

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 654-55.

20. *Id.* at 655.

21. *Id.* at 654, 656.

22. *Id.*

23. *Sawada v. Endo*, 561 P.2d 1291, 1293, 1297 (Haw. 1977).

24. *Id.* at 1293.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1296-97.

on the significance of the marital interest and the policy of protecting marital property from seizure, as though the wife were still alive and family unity was at stake.<sup>29</sup>

My goal in this Article is to contribute to the literature on the Married Women's Property Acts by explaining the significance of these modern debt protection cases forgetting the key historical aspects of the nineteenth century cases: protecting wives as non-debtor spouses in light of the greater family unity concerns. This is a study that does not appear to have been done to date. The First Section comprises the Introduction. The Second Section explains the common law tenancy by the entirety as a property law doctrine—one with significance for women's history and legal history. It includes a discussion of the scholarly literature on the Married Women's Property Acts and considers the Acts' impact upon the common law tenancy by the entirety. The Third Section develops an in-depth study of the twentieth century cases that interpreted the Married Women's Property Acts in New Jersey, Massachusetts, and Hawaii. The third section includes a discussion of some of the textbook literature where these cases are discussed. Not only does the scholarly literature fail to address the significant debt protection, gender questions, and family unity matters, but the textbook literature, where students first see coverage of these issues, reflects these shortcomings as well. I emphasize the significance of developing an improved understanding of the debt protections that have been at the heart of the Married Women's Property Acts.

The Conclusion appears in Section Four. This improved understanding has implications for teaching property law doctrine, advocacy, and legal theory. The debt protections and family unity concerns in the Married Women's Property Acts had a unique context in gender and women's historical status as dependents upon their husbands. Advocates failed to protect their clients' rights while adjudicators lost the true context of the Acts through these modern day interpretations.

## *II. The Tenancy by the Entirety and the Married Women's Property Acts: The Early Development of a Legal Doctrine*

The fee simple absolute is the basic form of ownership of property in American law; ownership confers rights described as a "bundle of sticks" comprising an "exclusive right of possessing, enjoying, and disposing of a thing."<sup>30</sup> What this means is that once someone becomes the owner of property, she has certain rights that will be enforced by law, including a

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29. *Id.* at 1297.

30. *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 218 (Mich. Ct. App. 1999).

right to possess it and exclude others from possessing it. Having a right to enjoyment means the right to be left alone in using the property without any other rival claimants asserting rights and without others' nuisance activity compromising one's ability to use the property. The right to dispose of the property includes the right to convey the property to others within the course of one's lifetime or by devise upon one's death.

Concurrent interests complicate matters further in that fee simple absolute rights are not held singly; rather they are held by at least one other person. Concurrent interests mean that rights have to be negotiated among the owners, as they all hold the property in fee simple absolute. They have a property relationship among themselves and to the property at stake. American property law doctrine recognizes three forms of concurrent interests: the joint tenancy, the tenancy in common, and the tenancy by the entirety.<sup>31</sup> Each has specific rules determining how the owners share the property, divide expenses, and reap the profits. Other rules determine what happens if a party wishes to leave the tenancy, the parties want to end the tenancy all together, or a party dies during the course of the tenancy.<sup>32</sup>

Beginning with the joint tenancy, there are four unities that explain and determine the distinct rights and obligations of the owners.<sup>33</sup> First, the owners must take the property at the *same* time; second, they receive their interests through the *same* document of title. Third, they have *equal* interests in the property, sharing the expenses and profits equally; within the fourth unity, there is a corresponding equal right to possess the whole. The right of survivorship states that when one owner dies, the others have the right to take the whole property. The joint tenancy can be partitioned, meaning the tenancy can be ended all together. This can be done in one of two ways: in kind, with each tenant getting a portion of the property, or by sale, with each tenant getting a share of the proceeds. The joint tenancy can also be severed, meaning one party can be removed from the tenancy and be replaced by another. This turns the joint tenancy into a tenancy in common.

With respect to the tenancy in common, the rights and obligations of these concurrent owners are different from those shared by joint tenants.<sup>34</sup> The tenancy in common requires only one unity, that of possession. Each tenant has a right to occupy the whole. They can receive their interests at different times and through different documents of title. They need not have equal interests in the property. There are no survival rights; each

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31. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 207 (2d ed. 1988).

32. *Id.* at 210, 213, 219, 222.

33. *Id.* at 207-08.

34. *Id.* at 212-14.



tenant's share can be inherited by will (devise) or through intestacy (descent). A tenant can convey a share of the tenancy and sever the tenancy in common as a result. Upon severance, the tenancy remains a tenancy in common, as a party to the tenancy is merely replaced by another. Partition acts the same as in a joint tenancy. The tenancy is ended, and the tenants take a share of the property or take a share of the proceeds from the sale.

The tenancy by the entirety, as one of the forms of concurrent interests in property law, is a tenancy held exclusively by spouses.<sup>35</sup> There are five unities where the joint tenancy had only four. The spouses must take the property at the *same* time, through the *same* document of title, with *equal* interests in the property and *equal* rights to possess the whole. The fifth unity is of marriage, which requires that the spouses must be married at the time the conveyance is made to them. Drawing upon traditionalist notions of marriage, the common law tenancy created a fictional unity that the married couple shared one legal identity. Here, the married couple held an indestructible right of survivorship, which meant the tenancy could not be severed or partitioned.<sup>36</sup> Crucially, however, legal ownership was held in the husband.

As Phipps noted in an early study of the tenancy by the entirety:

The husband had certain exclusive property rights: the privilege and power to occupy the property and to consume the income of the asset; to manage, control, and dispose of possession and of income during the marriage; to use the property as collateral, his possessory and contingent survivor interests being subject to attachment for his debts but not for those of the wife; to sue and be sued in litigation. His right to immediate possession and his contingent right to occupy the whole could be alienated by him and attached by creditors during the marriage. However, the interest taken could be defeated should the wife survive him.<sup>37</sup>

According to Phipps, the common law rule held that “a transfer of title to the husband and wife was a transfer to an entirety and unity under the husband’s dominion, since both the spouses were regarded together as one.”<sup>38</sup>

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35. Note that in those jurisdictions—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, which had a strong civil law presence, the “tenancy by the entireties never ha[d] been recognized because it [was] inconsistent with the fundamental community property system.” Phipps, *supra* note 2, at 32.

36. MOYNIHAN, *supra* note 31, at 219, 221.

37. Phipps, *supra* note 2, at 25-26.

38. *Id.* at 24.

*A. The Married Women's Property Acts: Removing Wives' Legal Disabilities Under the Common Law*

Once state legislatures began passing Married Women's Property Acts, the laws removed the disabilities that wives experienced under the Anglo-American common law when they were denied rights to the separate property they brought into their marriages or that they acquired in the course of the marriage.<sup>39</sup> This meant that family property could be protected from a husband's creditors and that family unity would be upheld. Under the common law, single women could own and manage their property as they saw fit.<sup>40</sup> That changed once they married; marital interests applied to property owned by spouses. The tenancy by the entirety defined this marital interest, with the doctrine of coverture, which set forth the husband as the source of the family's legal identity. Thus, the wife had no right to manage her property. She also had no right to manage any of the familial property. These rights were all under her husband's purview.<sup>41</sup>

The Married Women's Property Acts stated that any property a single woman brought into her marriage remained her separate property; it was not under her husband's control and not liable to seizure for paying his debts.<sup>42</sup> Any property a married woman acquired in the course of her marriage remained her separate property as well.<sup>43</sup> In addition, a wife could receive property by gift or bequest for her "sole and separate use," as though she were a single woman.<sup>44</sup> Once again, her property would not be "subject to the disposal of her husband nor be liable for his debts."<sup>45</sup> What this meant for family unity and the protection of families from a husband's creditors was that there was a limited source of property that could be attached in the wake of a husband's bankruptcy.

With respect to the rise of the Married Women's Property Acts and the

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39. See generally Amy D. Ronner, *Husband and Wife Are One—Him: Bennis v. Michigan as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 132 (1996) (noting that common law jurisdictions recognize that spouses might each hold separate property, property held in his or her name only). Community property jurisdictions in turn—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington don't recognize separate property. As marriage is a partnership, all assets held by each of the spouses is seen as belonging to the marriage as a whole. Phipps, *supra* note 2, at 32, 37-38.

40. Ronner, *supra* note 39, at 132.

41. MOYNIHAN, *supra* note 31, at 219.

42. 1848 N.Y. Laws 307.

43. *Id.*

44. *Id.*

45. *Id.*

tenancy by the entirety, jurisdictions determined “whether the husband’s powers and the wife’s disabilities, now abrogated, had been incidents of the co-tenancy status or merely attributes of the marital status.”<sup>46</sup> The answer determined what would happen to the tenancy by the entirety in the wake of the Acts’ passage. It also determined the extent to which courts in the jurisdictions would engage in the debate over protection versus equality. Phipps explained that three possibilities emerged. Those states that saw the tenancy as being predicated upon “common law property relations of spouses and the husband’s dominance,” could not reconcile women’s emancipation with the persistence of the tenancy and would abolish it all together.<sup>47</sup> Orth notes further, “courts took the entirely logical position that once the rights of married women to hold property were recognized; the two were no longer one and there was no longer any such estate as [the] tenancy by the entirety.”<sup>48</sup>

While some jurisdictions that upheld the tenancy by the entirety did not emphasize the possibilities to be found in wives’ equality, others took a different view.<sup>49</sup> These were jurisdictions that recognized the possibilities of equality to be found in the acts when they considered abolition of the tenancy by the entirety.<sup>50</sup> Equality under the law could remain a shield for inequality in fact and in practice, which a number of states realized when

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46. Phipps, *supra* note 2, at 28; *see also* 1848 N.Y. Laws 307.

Sec. 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female. Sec. 2. The real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted. Sec. 3. It shall be lawful for any married female to receive, by gift, grant devise or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts. Sec. 4. All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place.

47. Phipps, *supra* note 2, at 28-29 (“This view . . . as abrogating entireties estates all together—has been expressly followed in at least nine states.” These states are: Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina, and Wisconsin).

48. John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYUL REV. 35, 41 (1997).

49. *Id.*

50. *Id.*

they engaged in gender-based critiques. They remembered that the tenancy by the entirety had a foundation in domination that could not coexist with the rhetoric of equality found in the property acts. Courts then interpreted the acts as having abolished the tenancy by the entirety all together.<sup>51</sup> Therefore the tenancy by the entirety was “inconsistent with judicial interpretations of the common law of those states: Connecticut, Nebraska, and Ohio.”<sup>52</sup>

These jurisdictions that rejected the tenancy by the entirety on the basis of gender offer early perspectives on what was a developing jurisprudence of gender and property matters. Even though these states' doctrinal developments have been discussed, gender was not part of the conversation.<sup>53</sup> The overriding concern in those early cases, just as in those states that retained the tenancy by the entirety, was that wives could become vulnerable to husbands' creditors and that families would be unprotected if a husband went bankrupt and there was no means of protecting them from foreclosure.

In some jurisdictions, the end of the tenancy was noted merely as being a matter-of-fact implication of married women now having a legal identity

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51. *See id.*

52. Phipps, *supra* note 2, at 32; *see, e.g.*, Whittlesey v. Fuller, 11 Conn. 337, 341 (1836) (noting that the tenancy by the entirety does not exist because the wife has a separate existence and her identity is not destroyed by marriage; instead, husband and wife take land as tenants in common, because the state does not recognize a right of survivorship); Kerner v. McDonald, 84 N.W. 92, 92 (Neb. 1900). The extent to which the common law was intended to apply to the institutions of the state meant that tenancy by the entirety does not exist. *See also* Sergeant v. Steinberger, 2 Ohio 305, 305-07 (1826). A father granted to his daughter and her husband, and their heirs and assigns, 300 acres of land forever. The daughter died before the husband, leaving five children, one of whom was the plaintiff. Upon the woman's death, her husband devised the lands to three of the other children, excluding the plaintiff. The court held that no type of joint tenancy exists in Ohio, and that any such estate is treated as a tenancy in common, noting the absence of any statute recognizing a right of survivorship. Thus, an undivided half interest in the property descended to all of the children who became tenants in common with their father. *See also* Shafer v. Shafer, 30 Ohio App. 298, 298-300 (Ohio Ct. App. 1928). The defendant-wife and plaintiff-husband were married but living separately and apart, though both were joint owners of certain real estate. The wife filed for partition, which the husband resisted. The court held that a wife is completely emancipated in so far as her separate property rights are concerned, and cited three provisions of the General Code of Ohio to support its holding. § 8001 (“A married person may take, hold and dispose of property, real or personal, the same as if unmarried.”); § 7999 (“A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried.”); § 7998 (“Neither husband nor wife has any interest in the property of the other.”).

53. *See, e.g.*, Phipps, *supra* note 2, at 32-33.

separate and apart from their husbands.<sup>54</sup> Hence, the tenancy could no longer persist, especially because the Married Women's Acts offered married women protective measures. In Wisconsin, the statute of 1850 was "[an] act to provide for the protection of married women in the enjoyment of their own property."<sup>55</sup> Married women could "receive by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use . . ."<sup>56</sup> Thus, a woman's property would be no longer "liable for the debts of the husband."<sup>57</sup> In addition, her property was protected from "being sold or controlled by him."<sup>58</sup>

An interesting theme was the early recognition that the tenancy by the entirety had merely been a legal fiction. The legal fiction occurred because the husband and wife were truly one person under the law; the wife's legal identity disappeared during the course of her marriage. As such, she could not hold property in her own name and any conveyance to her alone would be void.<sup>59</sup> As an Iowa court noted, the tenancy by the entirety "always stood upon what was little more than the merest fiction, and, as this, by our legislation, has measurably given way to theories and doctrines more in accord with the true and actual relation of husband and wife, the tenancy itself must be abandoned."<sup>60</sup> As a Colorado court noted, the Married Women's Property Act was a radical move:

This statute abrogates the rule of the common law and gives to the wife a separate and distinct independent existence from that of her husband in their relative property rights. The fiction of one legal personality no longer exists. They now stand upon an equality in the acquisition, ownership, and conveyance of property, and she can now acquire and convey real estate as though the marriage relation did not exist.<sup>61</sup>

This development, an Illinois court noted, was a progressive one unique to those states that saw themselves as holding differently from other jurisdictions where married women still could not "hold separate property."<sup>62</sup>

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54. *Donegan v. Donegan*, 15 So. 823, 824 (Ala. 1894); *Walthall v. Goree*, 36 Ala. 728, 735 (1860).

55. *Wallace v. St. John*, 97 N.W. 197, 199 (Wis. 1903).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Fay v. Smiley*, 207 N.W. 369, 370-71 (Iowa 1926).

60. *Hoffman v. Stigers*, 28 Iowa 302, 309 (1869); see *Fay*, 207 N.W. at 371 (noting that even though deeds to husband and wife in the eyes of the common-law rule would create an estate in entirety, the state has never recognized the practice).

61. *Whyman v. Johnston*, 163 P. 76, 77 (Colo. 1917).

62. *Cooper v. Cooper*, 76 Ill. 57, 65 (1875).

Gwen Jordan credits Myra Bradwell with spearheading the Illinois law reform movement to pass the Married Women's Property Act in that state.<sup>63</sup> In 1861, Illinois passed its first act—one that was interpreted by the court not to mean equality for women but instead protection of their property rights in the face of their husbands' "economic misfortunes, imprudence or possible vice."<sup>64</sup> Through the Married Women's Property Act, vulnerable women could protect their property "from being levied on and sold" or "squandered."<sup>65</sup> As an example, the act did not protect a wife's earnings or any property she bought with those earnings—these earnings still belonged to her husband.<sup>66</sup> Bradwell's efforts led to the passage of a new act in 1869, one that granted women those protections.<sup>67</sup>

Massachusetts was a state whose legislation was not as broad and was less "liberal on the subject,"<sup>68</sup> since "rights in Massachusetts' tenancies by the entirety were predominantly shaped by the common law."<sup>69</sup> In 1886, the Massachusetts Supreme Judicial Court interpreted the Married Women's Property Act to apply only to the property a woman had as her separate property, and inapplicable to tenancies by the entirety.<sup>70</sup> For that reason, the tenancy persisted in its common law form: husbands alone had the right to manage tenancy by the entirety property. Only the husband's interest in the property could be attached. As a result of the Married Women's Property Act, in neighboring Maine, women were "invested with greater privileges and weighted with greater responsibilities and liabilities than before."<sup>71</sup> More striking though, the Maine court found that the common law tenancy by the entirety had an irrational and troubling basis: "[i]t had its origin in feudal institutions and social conditions which were superseded centuries ago by the more enlightened principles of a progressive civilization."<sup>72</sup>

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63. See Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L. J., 580, 595 (2009) (reporting that Bradwell published stories and editorials that described the dire consequences of women's legal inequality to mobilize support for women's rights leading up to the passage of the Married Women's Property Act).

64. *Id.* at 596.

65. *Id.*

66. *Id.*

67. *Id.* at 597.

68. *Cooper v. Cooper*, 76 Ill. 57, 65 (1875).

69. Janet D. Ritsko, Comment, *Lien Times in Massachusetts: Tenancy by the Entirety After Coraccio v. Lowell Five Cents Savings Bank*, 30 NEW. ENG. L. REV. 85, 99 (1996).

70. *Id.* at 97-98.

71. *Appeal of Robinson*, 33 A. 652, 654 (Me. 1895).

72. *Id.*

Modern Americans attuned to a unique “idea of the enjoyment and devolution of property” within “the true theory of the marriage relation”<sup>73</sup> had no time for such an outdated property concept and doctrine. As such, Minnesota retained none “of the incidents of it” and refused any longer to recognize the tenancy by the entirety.<sup>74</sup> In Nebraska, the marital tenancy was seen as being on par with another old-fashioned practice under the common law “whereby the husband was, under certain circumstances, permitted to inflict corporal punishment on his wife.”<sup>75</sup> Just as “all right-thinking men” rejected women’s subordination through domestic violence, they rejected any doctrines that supported subordination with respect to property rights:

Hence there seems to be no better reason for holding that a conveyance of an estate to two persons, they being husband and wife, by one instrument, creates an estate in entirety, than to hold that the conveyance of an estate to two persons not husband and wife will create a like estate, and not an estate in joint tenancy.<sup>76</sup>

Wisconsin is an example of a jurisdiction that also looked to the joint tenancy as the default marital tenancy once the Married Women’s Property Act was passed by its legislature.<sup>77</sup> This is not surprising because the joint tenancy offers a number of similar protections to tenants as a tenancy by the entirety, namely survivorship rights. It is also gender-neutral, meaning it is without the disabilities imposed upon married women under the common law marital tenancy. As was mentioned earlier, joint tenants take their interests at the same time, through a document of title that grants each tenant equal rights to possess the whole, with survivorship interests in case one tenant predeceases the other.<sup>78</sup> Another possibility for those jurisdictions was a tenancy in common. This concurrent property interest has no survivorship interest; the owners need not take their interest at the same time and need not have equal interests in the property. Thus, this tenancy was the least likely to accord the survivorship protections spouses might prefer.<sup>79</sup> Each tenant in common has a separate share, which can be passed on to devisees or heirs at law. For that reason, spouses in jurisdictions that do not recognize the tenancy by the entirety might prefer

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73. *Id.*

74. *Wilson v. Wilson*, 45 N.W. 710, 711 (Minn. 1890).

75. *Kerner v. McDonald*, 84 N.W. 92, 92 (Neb. 1900).

76. *Id.*

77. *Haas v. Williams*, 261 N.W. 216, 217 (Wis. 1935); *Helvie v. Hoover*, 69 P. 958, 961 (Okl. 1902).

78. MOYNIHAN, *supra* note 31, at 207-08.

79. *See, e.g., Lower v. Lower*, 203 N.W. 312, 314 (S.D. 1925); *see also Wolfe v. Wolfe*, 42 So. 2d 438 (Miss. 1949).

the joint tenancy to the tenancy in common to ensure the possibility of survivorship rights.

In Kansas, the right to maintain separate property rights was linked specifically to women's political rights, an argument developed by suffragists of the period who drew upon notions of political independence and property ownership dating back to the thinkers of the Early Republic.<sup>80</sup> Thus, a Justice on the state Supreme Court noted, "woman is in nearly all matters according civil and political equality with man. She is not his servant, nor his slave."<sup>81</sup> Notwithstanding suffragists' ideals about equality, that view did not motivate all legislatures and courts. In Montana, equal rights to property did not minimize women's obligations to their husbands to serve.<sup>82</sup>

It is striking that in a fair number of these states, the language of equality seemed to be irrelevant. Women's newfound ability to manage their own property was merely a matter-of-fact occurrence. The property law changed, and as such, either the old doctrinal order no longer existed or the matter of equality was merely a matter-of-fact occurrence. Equality was at the forefront of some courts' deliberations and assessments of the Married Women's Property Acts. This did not translate to equality in all respects, according to the legislatures and the courts. Women still had obligations to fulfill traditional roles in the home, and this equality was merely with respect to protecting their property rights. In the eyes of some reformers who supported these acts, this conceptualization of equality was linked of course, to the nineteenth century vision of feminism according to the first wave of the women's rights movement with its eventual ties to suffrage.<sup>83</sup> Women's needs and interests were not represented through men's political participation in the polity, but they deserved to be. Since property was directly tied to that participation, insofar as women could be taxed but they could not vote, suffragists like Bradwell believed in the abolition of common law doctrines and presumptions that limited women's possibilities.<sup>84</sup>

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80. Phipps, *supra* note 2, at 33.

81. *Baker v. Stewart*, 19 P. 904, 913 (Kan. 1888).

82. *Emery v. Emery*, 200 P.2d 251, 264 (Mont. 1948) ("Even under statutes such as ours, enlarging the rights of married women, it is the duty of the wife, without compensation, to attend to all the ordinary household duties and labor faithfully in the advancement of her husband's interests.").

83. *E.g.*, SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD" WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 181-84 (2001); GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 35-39 (2006).

84. *See, e.g.*, Van Burkleo, *supra* note 83, at 157-59; Jordan, *supra* note 83, at 595-98.



The married women's acts and the women's movement interacted in a cause-and-effect relationship. Initiated to meet legal and commercial needs, the earliest acts stimulated public awareness of married women's common law disabilities and encouraged the development of the women's movement [which] pressed legislatures to respond at least minimally to their increasingly radical demands, including the demand for suffrage.<sup>85</sup>

To abolish the common law tenancy by the entirety, certain legal fictions had to be abolished as well. Lon L. Fuller, the legal realist, once explained legal fictions as a rhetorical tool used by judges and writers "on legal topics" who make statements that they know to be false and fictional.<sup>86</sup> The intent is not to deceive, but they are used as linguistic phenomena when jurists and legal thinkers aim to maintain internal coherence within legal doctrine even though "the rule of law has undergone alteration."<sup>87</sup> Perhaps the law as it exists or the changes to it that have occurred do not reflect current social and cultural understandings of legal relations.<sup>88</sup> Thus, Fuller explains, statements about law can be grounded in perceptions of legal relations or in terms of legal facts.<sup>89</sup>

Fuller found the perfect example in perceptions about marital relations at the heart of the common law tenancy by the entirety: that "husband and wife are one," which was a fiction that explained a perception about legal relations not grounded in factual reality.<sup>90</sup> That perception influenced the development of legal rights under the common law tenancy by the entirety. These only came to be rejected as more states passed the Married Women's Property Acts and reinterpreted the marital relation in a different fashion. Fuller notes that "fiction[s] die when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap that previously existed between the fiction and the reality."<sup>91</sup> When a fiction does not die, an overarching premise assumed within the fiction persists, and it is useful in reconciling the decision at hand with the possibilities posed by legal change.<sup>92</sup>

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85. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN 19th CENTURY* 148, 166 (1982).

86. LON L. FULLER, *LEGAL FICTIONS* 1 (1967).

87. *Id.* at 6.

88. *Id.* at 27 ("The desire to keep the form of the law persuasive is frequently the impulse to preserve a form of statement that will make the law acceptable . . .").

89. *Id.*

90. *Id.* at 33.

91. *Id.* at 14. Compare rejection of fictions to redefinitions where, "a change in a word meaning that eliminates the element of pretense." The fiction is killed off, but in a different way from rejection in which the fiction is simply discarded. *Id.* at 20.

92. *Id.* at 53 ("It is intended to escape the consequences of an existing, specific rule

The existence of the legal fiction of marital unity justified the tenancy by the entirety. In those jurisdictions that refused to recognize the possibility of the Married Women's Property Acts changing married women's property interests, a different goal was at stake—rejection of the Married Women's Property Acts and the equality arguments of its supporters. Notwithstanding wives' interest in protecting themselves and their families from husbands' debts in the name of family unity, the legal fictions were to be maintained. Thus, one can explain the contortions the Massachusetts court went through in the late nineteenth century when it saw the Married Women's Property Acts as applying only to women's separate property, and not to property held jointly by the spouses, as though a wife could not possibly have any stake in her husband's management of marital property.

In the midst of all these discussions of marriage and their effects upon women's property rights, critics of the legal fiction of marital unity did not get so far as to view the marriage institution in general as a fiction.<sup>93</sup> Fuller explained, "the reality of a legal institution, understood in this sense, is in no wise affected by the fact that it may be convenient to describe the institution linguistically in fictitious terms."<sup>94</sup> As Richard Chused argued, mere recognition of married women's property rights did not mean wholesale rejection of traditionalist norms about women and marriage. For example, husbands were to persist as the head of the household, and women were to remain dedicated to their household responsibilities and duties.<sup>95</sup> In those jurisdictions that saw themselves as progressive in rejecting the tenancy by the entirety, a new egalitarian ethos was to define women's ability to control property while married.

It is important to note that traditionalist views about husbands as heads of households presumed a concomitant obligation of husbands to protect and provide for their more vulnerable wives; this is what made the Married Women's Property Acts palatable. What is striking about jurisdictions like Massachusetts and New Jersey, which recognized equality in spouses' property rights in the twentieth century, is that in these states courts seemed to reject traditionalist ideals about protection while they saw as perfectly normal the traditionalist behavior of the husbands in acting as heads of households with rights to manage property—theirs and their wives'. The wives had separate property in their names only, to which the husbands had access. Additionally, the wives were not protected from their husbands' debts.

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of law.”).

93. *Id.* at 37-38.

94. *Id.* at 38.

95. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1390 (1983).

With respect to those states that retained the tenancy by the entirety, Phipps noted distinctions among them that determined spousal rights.<sup>96</sup> He identified four groups.<sup>97</sup> Massachusetts fit into Group One, along with Michigan and North Carolina.<sup>98</sup> These states found that nothing had changed with the passage of the Married Women's Property Acts. A husband's creditors could foreclose on the debtor husband's interests and take possession of the whole in case he survived his wife.<sup>99</sup> In addition, "the husband, and only he, [was] vested with exclusive rights to the possession, management and control . . . ."<sup>100</sup> Finally, a creditor could seize the assets during the course of the marriage upon notice to the husband; a wife's survivorship interest could be seized only upon notice to her.<sup>101</sup> Wives in these jurisdictions were vulnerable if their husbands mismanaged marital property; they need not ever find out what was going on as creditors could seize marital property. Wives only had the right to receive the entire property upon the death of their husbands.

Group Two states explained that the effect of the Married Women's Property Acts made the tenancy by the entirety operate like the joint

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96. Phipps, *supra* note 2, at 33-34.

97. *Id.* at 33-35.

98. *Id.* at 33-34.

99. *Id.* at 30; see Diane Avery & Alfred S. Konefsky, *The Daughters of Job: Property Rights and Women's Lives in Mid-Nineteenth-Century Massachusetts*, 10 LAW & HIST. REV. 323, 326 (1992) (discussing the property rights of Massachusetts women prior to the Married Women's Property Acts). "A single woman who owned property could face substantial economic risks when she entered into a marriage. Her husband became the owner, outright, of all her personal property. Nominally the wife retained ownership of her real property because it could only be sold by joint deed and, if she survived her husband, was 'at her disposal, as it was before the marriage.' During marriage, the husband was entitled to control and manage all her real property and to receive its rents and profits. Thus, the husband owned all the economic value of any property that a woman might bring to or acquire during marriage—stocks and bonds, bank accounts, houses, farms, carriages, cattle, and even wages . . . a husband's creditors could reach all the husband's interest in this property, even to satisfy his premarital debts." See also Acts and Resolves of Massachusetts, ch. 209, 1846 Mass. Acts. § 1 (discussing a noteworthy statute enabling married women to receive the wages they earned). "In all cases where married women shall hereafter, by their own labor, earn wages, payment shall be made to them for the same." Her husband's creditors still had the right to attach wages she might have had deposited into "any individual or savings bank, or institution for savings."

100. *Id.* at 40.

101. See *id.* ("Notice to the husband [was] all that would be required to effect jurisdiction over the interests of possession, income and profits during the marriage, but the wife's survivorship interest could not be divested except upon notice to her and upon her participation in any litigation respecting the entire assets."). This applied in Arkansas, New York, New Jersey, and Oregon.

tenancy or the tenancy in common with respect to creditors' rights, without a corresponding right to defeat the right of survivorship.<sup>102</sup> A debtor spouse's interest could be attached. Group Three states, eleven jurisdictions in turn, continued to recognize the tenancy by the entirety and created certain protections (i.e., for spouses with homestead rights where each occupied the property without rights to alienate the spousal share).<sup>103</sup> Creditors could not attach for separate debts.<sup>104</sup> Group Four states comprised only two jurisdictions that permitted each spouse in a tenancy by the entirety to alienate only the contingent right of survivorship during the marriage; use and profits were protected from seizure during the marriage.<sup>105</sup>

Thus, equalizing married women's property status to that of their husbands' did not mean that the tenancy by the entirety would be rejected all together in all jurisdictions. A number of states did abolish it, as was discussed earlier and as Phipps's typology explained. Others merely kept the estate but modified the meaning to reflect greater equality in each spouse's rights. In Group Two jurisdictions, like Arkansas, New Jersey, New York, and Oregon, "the wife's prerogatives" were increased until they matched those of the husband, "making the wife relatively a free agent as to her undivided one-half interest."<sup>106</sup> The estate became a "tenancy in common during the marriage, but with the right of survivorship indefeasible by separate action of either co-owner except upon divorce."<sup>107</sup> Group Three jurisdictions included Delaware, District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming. In Group Four jurisdictions, which included Kentucky and Tennessee, "equality between the spouses" was "effected by decreasing the husband's prerogatives until his state of disability as to any separate action without connivance of the opposite

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102. *Id.* at 34.

103. *Id.*

104. *See id.* (noting that the states implicated were Delaware, District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, and Virginia).

105. *Id.* These states were Kentucky and Tennessee. Note that Phipps' article was written too early for discussion of Hawaii and Alaska as these states were territories at the time. Each eventually recognized married men and women as having equal rights to manage marital property. Alaska explained that inequality between spouses amounted to "unjust usurpation of property or natural rights," ALASKA STAT. § 25.15.110 (1974), while Hawaii interpreted its tenancy by the entirety several years later. *See Sawada v. Endo*, 561 P.2d 1291 (1977).

106. *Id.* at 31.

107. *Id.*

spouse [was] as complete as that of the wife.”<sup>108</sup>

*B. The Married Women’s Property Acts: The Property Doctrine, Legal Theory, and Women’s History*

Phipps’ work serves as an important foundation for understanding the tenancy by the entirety as a legal doctrine and for explicating the developments that followed once legislatures began passing the Married Women’s Property Acts. To gain a greater understanding of the debt protections and family unity concerns that pushed women’s rights activists to support passage of the Married Women’s Property Acts, however, it is important to turn to feminist legal theory and the state of women’s history scholarship on wives’ legal status in the nineteenth century. Feminist legal theory operates under the presumption that women have traditionally faced serious obstacles to reaching equality in society and that these obstacles have had a basis in law.<sup>109</sup> Modern feminist legal theory has its roots in various intellectual currents in American history: the movement to protect married women’s property rights in the early to mid-nineteenth century, the suffrage movement of the late-nineteenth century to the early-twentieth century, and the women’s rights movement of the 1970s.<sup>110</sup> The legal foundations for this latest women’s rights movement lay in legal realism, a school of thought that developed in the early-twentieth century in response to the older formalism of classical legal thought that pervaded American legal culture through the late-nineteenth century.

This legal realism aimed to highlight the shortcomings of Langdellian legal science in failing to recognize the value-laden realities of law.<sup>111</sup> Legal scholars adhering to this framework observed that the law is a social institution—not an entity which can be separated from the cultural. It is not autonomous as it develops its purposes, draws inspiration, cues, and rationalizations for action and policy from the society surrounding it.<sup>112</sup> Frances Olsen notes the different perspectives feminist legal theorists

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108. *Id.* at 32.

109. *E.g.*, NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* xiii (2006).

110. *Id.*

111. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 156 (1983) (“Kill the Langdellian notion of law as an exact science, based on the objectivity of black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed to be value free.”).

112. *E.g.*, Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 *BERKELEY WOMEN’S L.J.* 64, 64-77 (1985).

brought to their assessments of law.<sup>113</sup> Legal reformers believed that law was rational, objective, and principled, but highlighted how law failed to live up to this aspiration with respect to women:<sup>114</sup>

[R]eformist feminists condemn laws that deny women rights—or otherwise harm women—as irrational, subjective and unprincipled. This has been the single most important feminist legal strategy and is the theoretical underpinning of the entire women's rights movement in law.<sup>115</sup>

Their goal was to expose those irrational emblems of law because exposure would then enable the repeal of laws that denied women rights.

Crucial to this discussion is the significance of the critical lens developed by those feminist theorists with ties to Critical Legal Studies.<sup>116</sup> Olsen explains: “The idea that law is objective is refuted by the gradual recognition that policy issues appear everywhere. Every time a choice is made, every legal decision that is not obvious and uncontroversial, is a decision based on policy—which can't be objective.”<sup>117</sup> One significant observation about the development of critiques of the law is that it highlights specific trends within feminist legal theory and debates over what strategies advocates might pursue to address women's inequality under law, namely equal treatment, cultural/difference, and dominance theory.

Equal treatment presupposes that laws, social customs, and norms have contributed to inequality. Once those norms evolve through legal change, women's status then changes. Cultural/difference theory argues that women are unequal in society because their differences from men are not recognized under law, and when forced to fit into a male norm not meant to serve them, women experience inequality. Once laws are used to recognize and protect women's differences, women can become equal. Dominance feminists agree that the true sources of women's inequality are the laws, social customs, and norms. In their view, the true problem is that those laws, social customs, and norms dominate women.<sup>118</sup> Once domination is ended, women will become equal to men.<sup>119</sup>

Feminist legal theorists question everything about “the relationship

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113. *Id.*

114. Frances Olsen, *The Sex of Law*, in DAVID KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 691, 698 (3d. ed. 1998).

115. *Id.*

116. *Id.* at 701.

117. *Id.*

118. LEVIT, *supra* note 109, at 9.

119. *Id.* at 8-10.

between law and society from the point of view of all women.”<sup>120</sup> Wishik notes that these types of scholarly inquiries can take several forms:

1. compensatory scholarship, the “add-women-and-stir” approach to correcting what male scholars leave out;
2. criticism of the law and inquiries about law and society because they exclude women and use patriarchally biased assumptions to further the oppression of women;
3. collection of information about women’s experiences of law from the perspective of women; and
4. conceptualization of a feminist method with which to understand and examine the law.<sup>121</sup>

Drawing upon this typology, scholarship on the Married Women’s Property Acts has several emphases. Traditional legal scholarship on the Married Women’s Property Acts merely points to an important development in American property law doctrine, one which informed creditors’ rights to access marital assets.<sup>122</sup> By contrast, as the field of women’s history began developing in the late 1970s and 1980s, the Married Women’s Property Acts seemed a natural topic for historical and compensatory, if not critical inquiry, insofar as the Married Women’s Property Acts directly implicated women’s status in society pursuant to Wishik’s categorization. Historians focused on the impetus for the Married Women’s Property Acts and their passage as an important development in American law, a rejection of the rules of coverture that set forth women’s disabilities, namely their inability to manage and control their own property.<sup>123</sup>

Marylynn Salmon explained how women’s historians began studying the Married Women’s Property Acts.<sup>124</sup> The impetus and rationales were similar to those that motivated feminist legal theorists. According to Salmon, social history in the late 1960s and 1970s had an impact upon

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120. Wishik, *supra* note 112, at 64.

121. *Id.* at 67.

122. See, e.g., Phipps, *supra* note, 2 (categorizing the states’ treatment of women’s property rights subsequent to the passage of the Married Women’s Property Acts); Orth, *supra* note 48; Janet D. Ristko, *Lien Times in Massachusetts: Tenancy by the Entirety After Coraccio v. Lowell Five Cents Savings Bank*, 30 NEW ENG. L. REV. 85 (1995).

123. See, e.g., Chused, *supra* note 95; Richard H. Chused, *Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3 (1985); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980); PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* (1980).

124. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* xi (G. Edward White ed., 6th ed. 1986).

legal history and women's history: legal historians began thinking about the social movement's influence upon legal developments.<sup>125</sup> Her interest in the law of property developed because she "want[ed] to know how legal rules affected women's day-to-day lives."<sup>126</sup> In addition, the two fields taken together, women's history and legal history—women's legal history—had powerful intersections with feminist legal theory:

Historians of women's legal status perceive the law as a powerful form of social control, and therefore, we seek to uncover the relationship between law and social policy. Law is coercive as well as representative of community values.<sup>127</sup>

Prior to the passage of the Married Women's Property Acts, the common law tenancy by the entirety reflected the social norms that pervaded American society in the nineteenth century.<sup>128</sup> An idealized vision of middle class and elite white women's status in society focused on the "woman's sphere,"<sup>129</sup> where women's role in society was ordained by God and nature for a specific purpose. This social norm emphasized women's usefulness in fulfilling female duties in the private realm such as, "preserving the home, caring for the young and helpless, upholding morality and religion."<sup>130</sup> The public sphere of law was within the purview of the male sphere, where husbands would represent the legal identity of the household: a man with dependents, his wife and children.

New developments created a greater demand for women's access to property rights. Crafty lawyers had long used equity to protect the assets of women whose families wanted to avoid the harshness of the common law rules, and trusts enabled some married women to have separate estates maintained by third-party trustees.<sup>131</sup> However, access to equitable strategies was limited to those with knowledge; thus, large-scale reforms were still needed.<sup>132</sup> Equity was the means of effectuating legal reforms, as various factors provided the impetus for passage of the Married Women's Property Acts:

[D]evelopments in the culture at large created a milieu sympathetic to

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125. *Id.* ("The new legal history emerged that emphasized the relationship between law and social change.").

126. *Id.*

127. *Id.* at xii.

128. NANCY COTT, *THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780-1835* 202 (1977).

129. *Id.* at 203.

130. *Id.* at 204.

131. Chused, *supra* note 95, at 1361.

132. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN 19<sup>TH</sup> CENTURY* 148 (1982).



changes in coverture law. Romantic notions of family formation and maintenance, introduction of industrial production, and increases in literacy and educational goals for children gave women significant family roles. When distressed economic times appeared after 1839, the moment was right for legislatures to codify a portion of the equitable separate estate tradition by insulating wives' property from their spouses' creditors.<sup>133</sup>

Many of nineteenth-century legal thinkers believed that with separate estates, a married woman could be protected in her traditional role by having her assets spared if her husband became bankrupt.<sup>134</sup> Chused notes that it was only after these factors influenced the passage of the Married Women's Property Acts that women's rights activists became more involved in reforming coverture law.<sup>135</sup>

Nonetheless, some of these early legal thinkers were troubled by the implications of the Married Women's Property Acts. Wives who could own, manage, and control property removed themselves from being under their husband's control<sup>136</sup> and the sexual division of labor.<sup>137</sup> Married women were no longer subject to the common law restrictions that limited their property rights, which meant that a wife "might very well enter the commercial arena as a wage earner, or worse, an entrepreneur, becoming in a sense her husband's competitor."<sup>138</sup> The impetus for the Married Women's Property Acts, prior to the Civil War, lay not in attempts to cause social upheaval and gain absolute equality in society; instead, passage lay in the legal and political recognition that married women were increasingly vulnerable to marketplace conditions outside of the household, namely the possibility of their husbands falling into crushing debt. As such, gaining wives independent legal status—including their rights to control property—became a matter for legal reform.<sup>139</sup>

The debates were also colored by other parallel legal and social developments. Amy Dru Stanley found that after the Civil War, debates over the property rights of married women were colored by the language of anti-slavery, which became linked to the language of contracts and the rights of laborers.<sup>140</sup> In the wake of the abolition of slavery, individuals

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133. Chused, *supra* note 95, at 1361.

134. BASCH, *supra* note 132, at 125.

135. Chused, *supra* note 95, at 1360-61; *see also* BASCH, *supra* note 132, at 136.

136. BASCH, *supra* note 132, at 38 ("To challenge the common law marital prototype was to challenge the patriarchal organization of the family.").

137. *Id.* at 140.

138. *Id.*

139. Chused, *supra* note 95, at 1359-60.

140. *Id.*

questioned what labor should be paid and what labor should not be paid, where freely negotiated contracts were presumed to be the norm.<sup>141</sup>

Hirelings entitled to possess their own persons spoke of themselves as slaves because their labor was for sale. Feminists spoke of wives as slaves because by law, both their persons and labor belonged to their husbands. And these arguments joined in revealing the conflict between contract freedom and marriage bonds—in showing that husbands must lose their rights as masters when wives sold their labor as a market commodity.<sup>142</sup>

Antebellum concerns that wives would compete with their husbands in the workplace became subsumed by anxieties about what women in the workplace meant to working class men who could not afford to maintain their wives at home in “separate spheres” fashion.<sup>143</sup>

With more wives working for wages, the relevance of the Married Women's Property Acts took on a different shape in the form of earnings laws. By the late-nineteenth century, an overwhelming majority of states had enacted Married Women's Property Acts, whereas only a few existed prior to the Civil War.<sup>144</sup> The emphasis was on working class wives making contracts for labor and receiving wages in return for their labor. This was distinct from the emphasis in the older Married Women's Property Acts, which focused on the concerns of the middle and upper classes: real and personal property, “including land, chattels and even business enterprises.”<sup>145</sup> But wives' contracts for labor applied only to the work performed outside of the home where they were “entitled to enter into commodity relations.” These were unmediated by their husbands' control.<sup>146</sup> This meant to the average working woman that the earnings laws “established both her rights and her duties of contract, protecting her wages against the claims not only of her husband but also of his creditors.”<sup>147</sup> In addition, she was legally liable for any debts she owed; her creditors could access her pay.<sup>148</sup> At the same time, the average working woman was still bound by her obligations to provide household labor.

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141. *Id.*

142. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* xi, xii (1998).

143. *Id.* at 182 (“The exchange of service for support remained the essential legal rule, in spite of the circumstances that compelled both wife and husband to sell their labor.”).

144. *Id.*

145. *Id.* at 199.

146. *Id.* at 200.

147. *Id.*

148. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 *GEO. L.J.* 2127, 2142 (1994).

Siegel provides an important link for understanding the persistence of late-nineteenth century courts upholding women's domestic obligations even though more women were participating in commerce and working outside the home. The earnings statutes, she found, "did not completely abolish the common law doctrine that made a husband owner of his wife's labor; rather, the earnings statutes gave wives rights only in their labor outside the home and continued to protect a husband's rights to his wife's services in the home."<sup>149</sup> If anything, women's household labor could be used to minimize their contribution to the financial well-being of their families. Even when they held property in their own names as married women, wives could be found to have no interest in their property, "except as the spouse of her husband. She neither bought nor paid for it."<sup>150</sup> Wives' household labor in contributing to their households gave them no claim to their families' assets, as their household duties were merely duties for which they needed no recompense.

Perhaps it is these sorts of presumptions about married women's property ownership that enabled the Massachusetts and New Jersey courts in the twentieth century to presume that wives who owned property in their own names did not really own the property. The presumption might have been that the property was really the husbands', or that if it was wives', it should be considered marital property by nature of the perception that in all likelihood, the husbands bought the property and put it into their wives' names. These sorts of presumptions about married women and property ownership help to explain how the protectionist imperative could become lost as modern courts interpreted the Married Women's Property Acts.

Gregory Alexander noted that there was a significant tension in the Married Women's Property Acts insofar as, "two protectionist theories were at issue . . . protection of wives by husbands . . . and protection of wives against their husbands."<sup>151</sup> One can read the earliest passage of the Married Women's Property Acts in light of Alexander's formulation. The earliest passage of the Married Women's Property Acts aimed to protect wives from their husbands' creditors in the wake of "the widespread and devastating economic depression throughout the nation that followed the Panic of 1837."<sup>152</sup> This fueled an interest in "protecting family property" from attachment.<sup>153</sup> The dark side of protecting women and family property related to protecting women who were married to "an ill-tempered

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149. Siegel, *supra* note 8, at 1076; Siegel, *supra* note 148, at 2127-2211.

150. Siegel, *supra* note 148, at 2128.

151. GREGORY ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, 159 (1997).

152. *Id.* at 168.

153. *Id.* at 168.

and unprincipled husband . . . constrained by law to be the servant and slave" of her "lord and master."<sup>154</sup> These were men who, regardless of their social class and background, would take advantage of their intimate knowledge of their wives' finances for their own personal gain. Under the common law regime, these men had free reign to do with their wives' separate estate as they saw fit. Therefore, reformers, "stressed the inability of the wife to protect herself" in their demands for reform.<sup>155</sup>

Alexander's observations about the movement to reform married women's property rights provides an important link for discussing creditors' claims and interpreting the Married Women's Property Act decisions of the twentieth century. The movement was inspired by two different goals—husbands protecting wives and protecting wives from husbands. Courts seemed to forget that protection of married women from their husbands' creditors was an important goal behind the Married Women's Property Acts. Wives, who presumably had all right to protect their separate property, were vulnerable to the conservative mindset of the Court that aimed to reinforce the traditionalist view of husbands who were in charge of their wives and wielded financial control on behalf of families. As Basch noted, the Married Women's Property Acts:

[f]ailed to obliterate the historical barriers the common law had thrown around married women. Failure stemmed from the sheer inability of piecemeal, remedial legislation to reconstruct comprehensively the vast body of domestic relations laws which was an intrinsic part of the Anglo-American legal tradition. Failure also came from the readiness of the judiciary to interpret the intent and spirit of the legislation as conservatively as possible.<sup>156</sup>

Basch observed that these developments took place through specific juridical interpretations of the Married Women's Property Acts. Courts found "sections unconstitutional and void," and narrowed "the applicability of the statutes."<sup>157</sup> They referenced "precedents that required the delineation of the married woman's estate to be clear and unambiguous."<sup>158</sup> Finally, "by professing their faith in the propriety and desirability of the old common law fiction of marital unity,"<sup>159</sup> justices "eviscerated the spirit and intent of the legislation."<sup>160</sup>

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154. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN 19TH CENTURY* 118 (1982).

155. *Id.* at 172.

156. *Id.* at 200.

157. *Id.* at 202.

158. *Id.*

159. *Id.*

160. *Id.* at 203.

Basch provided various examples of how courts limited the effectiveness of the Married Women's Property Acts.<sup>161</sup> The constitutional argument that courts provided reflected concern that the Married Women's Property Acts comprised an "impairment of contractual obligations,"<sup>162</sup> insofar as men who married prior to the passage of the Married Women's Property Acts had certain expectations regarding their marital rights.<sup>163</sup> In order to protect traditional marriage, jurists argued that "the court [was] the defender of ancient constitutional rights against the excesses of modern reformers"<sup>164</sup> who would cause upheaval in traditional marital relations. The argument regarding protection of traditional marriage was easy to make, as husbands' obligations to support wives persisted notwithstanding the changes in the law.<sup>165</sup> Moreover, notwithstanding the newer laws that enabled married women to maintain separate estates, it was not uncommon for wives to commingle their property with their husbands or to purchase property for their husbands. If it was unclear that the property truly belonged to the wife only, courts were unwilling to find that a separate estate existed. Finally, if spouses were believed to be defrauding third-parties by putting property into the wife's name, courts were less willing to recognize that a separate estate existed.

Notwithstanding the possibility that nineteenth century jurists legitimately struggled to determine the true extent of wives separate estates, there may be an alternative explanation. Drawing upon feminist legal theory, an argument can be made that there was the promise of protection that floundered in the face of the common law view of domination of wives:

Antebellum feminists and many of their contemporaries viewed the married women's acts as a legal and social revolution. The critical test, however, took place in the courts, where judges clearly demonstrated the weakness of the statutes relative to the common law. For this reason, the married women's acts cannot be construed as a revolution.<sup>166</sup>

Thus, it is striking that the Massachusetts and New Jersey courts seemed to stress in the twentieth century a vision of equality that did not exist when

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161. *See id.* (providing examples of judicial resistance to litigants trying to apply the Acts retrospectively).

162. *Id.*

163. *Id.* ("If marriage was a contract like any other, the husband's marital rights were part of the contract and could not be abrogated by an act of the Legislature after the contract was made.")

164. *Id.* at 206.

165. *Id.* at 218 ("The statutes did not relieve the husband of his duty to support [his wife] regardless of the size of the wife's estate.")

166. *Id.* at 200.

the Married Women's Property Acts were passed. The common law presumed competent husbands would manage their households and property, including that of their wives' property.<sup>167</sup> Under the guise of protection, women were shielded from property management, but the law was said to protect wives from profligate husbands who would take advantage of their wives' financial status. Thus, dominance of wives with property persisted as is demonstrated by the twentieth century cases interpreting the Married Women's Property Acts.

*III. Coraccio v. Lowell Cents and Dime Savings Bank,<sup>168</sup> King v. Greene,<sup>169</sup> and Sawada v. Endo:<sup>170</sup> Failing to Ask the Debt Protection Questions*

Early interpretations of the Married Women's Property Acts tended towards a more conservative approach. Once modern courts interpreted the Married Women's Property Acts, several consequences followed. Courts ignored the original intention of recognizing wives' separate estates and protecting them from their husbands' debts.<sup>171</sup> Instead, Courts enabled what seemed to be the financial exploitation of wives by their husbands' creditors, if not by their husbands themselves.<sup>172</sup> If the traditionalist view of family unity under the common law rules presumed benevolence in paternalism, these cases marked paternalism's dark side—family unity as a mask for exploitation. It is not surprising that a comprehensive study of a case that affirmed married women's equal rights to manage marital property in Massachusetts failed to ask the gender-based debt protection questions that would have been familiar to nineteenth century reformers. The study followed the traditional model of discussing the case in light of its implications for doctrinal development, but not as a topic in women's legal history, and not as a study of how a gender-based critique of the tenancy by the entirety might be made.<sup>173</sup> This is particularly significant because the facts alleged in the case had serious implications for gender. These implications were not in the way that one might imagine, as being merely about a spouse's equal rights. Rather, the underlying facts raised

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167. *Id.* at 218-19.

168. *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650 (Mass. 1993).

169. *King v. Greene*, 153 A.2d 49 (N.J. 1959).

170. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977).

171. *Id.* at 60; *Coraccio*, 612 N.E.2d at 656.

172. *King*, 153 A.2d at 60.

173. See Robert Brooks, *Real Property—Tenancy by the Entireties—Alienability of Right of Survivorship*, 58 MICH. L. REV. 601, 601-02 (1960) (evaluating *King v. Greene* and taking a similar approach of focusing on doctrine in the face of evidence of failing to address significant gender-related questions). See generally Ritsko, *supra* note 69.

implications for advocacy—that a married woman was being defrauded of her property. The study merely examined “the [] case and its effect on Massachusetts tenancies by the entirety created thereafter.”<sup>174</sup>

Students are not learning gender-based critiques as the doctrinal model of teaching the tenancy by the entirety is reflected in the law journal commentary and literature from casebooks. Students are not learning a key point of advocacy in general or as it applies to gender-based dynamics. Amsterdam and Bruner assess advocacy in terms of developing stories and telling narratives.<sup>175</sup> They observe:

Clients tell stories to lawyers, who must figure out what to make of what they hear. As clients and lawyers talk, the client’s story gets recast into plights and prospects, plots . . . . If circumstances warrant, the lawyers retell their client’s stories in the form of pleas and arguments to judges and testimony to juries . . . . Next, judges and jurors retell the stories to themselves or to each other in the form of instructions, deliberations, a verdict, a set of findings, or an opinion.<sup>176</sup>

The problem for feminist legal theory regarding property law is that the narrative about women, as traditionally developed by lawyers and jurists, has in fact shortchanged them. The story about married women under the common law was that married women were better served by submitting to their husbands’ leadership with respect to property law, and that as such, their husbands alone should have the right to access and control marital assets and any property obtained before and during the course of the marriage. These presumptions colored the view taken by twentieth century jurists.

Returning to *Coraccio v. Lowell Five Cents and Dime Savings Bank*,<sup>177</sup> where Massachusetts adhered to a nineteenth century formulation of the Married Women’s Property Acts that did not recognize married women’s rights to access marital property, newer developments promised to improve married women’s property rights.<sup>178</sup> Through *Coraccio*, Massachusetts modernized its tenancy by the entirety. The Commonwealth of Massachusetts would no longer follow the Group One formulation. Instead it would follow Group Two and permit both spouses to alienate a share of

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174. Ritsko, *supra* note 69, at 89.

175. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAY WE UNDERSTAND THE LAW OURSELVES (2000).

176. *Id.* at 110.

177. 612 N.E.2d 650 (Mass. 1993).

178. See *id.* at 652-54 (noting that by the end of the 20th century, the Massachusetts legislature sought to equalize the rights of men and women).

the tenancy by the entirety.<sup>179</sup> Ritsko failed to address the significant debt protection and gender-based issues inherent to the case. There was no discussion of the inequities in spouses' property ownership that led to the passage of the statute in 1979 that equalized spouses' rights. As a result, the traditionalist view of husbands controlling assets was permitted to persist.

Nancy Coraccio challenged the Lowell Five Cents Savings Bank's right to foreclose on a second mortgage taken out by her husband on property that they owned.<sup>180</sup> In 1984, she purchased property in her own name.<sup>181</sup> One year later, she sought a mortgage.<sup>182</sup> The bank insisted that she convey the property to herself and her husband Stephen Coraccio as tenants by the entirety, and the bank then granted the loan.<sup>183</sup> Three years later, the bank granted a second mortgage to Stephen Coraccio alone; Nancy Coraccio was not a signatory on the loan.<sup>184</sup> Stephen Coraccio subsequently paid off the second mortgage.<sup>185</sup> In 1988, Stephen Coraccio once again sought a second mortgage in his name, without Nancy Coraccio's knowledge.<sup>186</sup> He then defaulted, and the bank began foreclosure proceedings in 1989.<sup>187</sup> Nancy Coraccio only learned of the mortgages and the foreclosure upon reading an announcement in a local newspaper.<sup>188</sup>

It is plausible that Nancy Coraccio knew about the mortgages and that the foreclosure was not a surprise. Her husband could have taken the loans with her knowledge. The important point is that if Nancy Coraccio knew about the loans, Massachusetts' status as a Group One state acted as a double-edged sword. On the one hand, its status enabled her husband to take out loans without her knowledge. On the other, it could have enabled her to hide any knowledge of his loans because the rules did not accord wives equal status with their husbands with regard to their ability to control and manage marital property.

The court read the pleadings to indicate that the property, a house in Chelmsford, was the couple's principal residence.<sup>189</sup> Based on this reading

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179. *See generally id.* at 655 (explaining that spousal consent is not required before a mortgage may encumber a property).

180. *Id.* at 651.

181. *Id.* at 652.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at n.2.



of the pleadings, it would seem that Nancy Coraccio's original intent was to purchase the house with her own funds and put it in her name only, even though she intended that her husband would live there with her. This was, without question, an unorthodox strategy to take in purchasing a house. It might have been that Stephen Coraccio did not have as much capital for a house purchase so she provided the funding, or Nancy Coraccio had better credit, and as such, she wanted to be the spouse to purchase the house, lest they be denied all together if he were the purchaser. As unorthodox as it might have been, it would have been appropriate, in light of the spirit of the Married Women's Property Acts, that Nancy Coraccio could use her own money to purchase property in her name only.

Perhaps the bank wanted another party to be equally liable on the loan in case Nancy Coraccio defaulted; thus the bank insisted that Stephen Coraccio's name go on the deed so that he and Nancy Coraccio would own the property as tenants by the entirety. It is possible that the bank's officers drew upon cultural presumptions about a married woman's role in the home, her ability to pay, or a husband's traditional role as the head of household. Any such presumptions might have developed from Massachusetts' status as a Group One state. Orth wondered whether the rationales for maintaining the common law rule lay in the perception that "women still needed the protection of a male-dominated tenancy, that men were generally better suited to decide property questions, or simply that some rule was required to resolve intra-spousal property disputes."<sup>190</sup> That logic would certainly seem to apply here.

Nancy Coraccio claimed that the bank "deprived her of her right to exercise equal control and management," with "no right to prevent the execution of the second mortgage,"<sup>191</sup> but she did not address the gender discrimination issue in any depth. The bank's response indicated that presumptions about marital property being exclusively within the province of husbands' prerogatives could have had an effect.<sup>192</sup> The Superior Court granted the bank's claims without specifying the grounds upon which the claim was granted.<sup>193</sup>

The rationale for Nancy Coraccio not having any standing because Stephen Coraccio alone signed the mortgage note is significant. Nancy Coraccio asserted that she had a continued right to possession and a right to

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190. Orth, *supra* note 48, at 42.

191. Ritsko, *supra* note 69, at 107.

192. *Coraccio*, 612 N.E.2d at 652 ("Arguing that [Nancy] Coraccio lacked standing to assert any claims arising out of the second mortgage because she was not a party to it, and that her complaint failed to state a claim upon which relief could be granted.").

193. *Id.*

survivorship.<sup>194</sup> In addition, Nancy Coraccio had rights to control and manage the property, just like her husband did. The basis for her argument was that the bank did not give her the chance to prevent the second mortgage or negotiate its terms.<sup>195</sup> Moreover, she might have believed that she had standing on another basis. When the bank required Nancy Coraccio to re-convey the property to herself and her husband as tenants by the entirety to obtain the first mortgage, she believed that the property was eventually going to be hers alone, just as before which he did six months after the last conveyance, but it was never recorded.<sup>196</sup> The bank's attorney, James A. Hall, did the paperwork for all the mortgages.<sup>197</sup> There was no explanation for the attorney's failure to re-convey the property to Nancy Coraccio alone.

The Supreme Judicial Court explained that Massachusetts' interpretation of the tenancy by the entirety retained its common law attributes notwithstanding the passage of the Married Women's Property Acts.<sup>198</sup> Massachusetts was a Group One state; husbands had the exclusive right to control and possession of the marital property and that of their wives;<sup>199</sup> "[s]tatutes relating to the separate rights of married women have not changed the common law rights of the husband in such estates."<sup>200</sup> Neither spouse could alienate, sever, or partition away the rights of the other spouse. The surviving spouse held the entirety upon the death of the creditor spouse. In practice, however, this meant that the husband alone could alienate his share of the estate.<sup>201</sup>

The Group One formulation had been the law in Massachusetts since the late nineteenth century. However, the Supreme Judicial Court was faced with a modernizing statute, forcing it to reconsider Massachusetts' status as a Group One state. Pursuant to Chapter 209 of Massachusetts General

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194. *Id.* at n.2.

195. Ritsko, *supra* note 69, at 107.

196. *Id.* at n.139 ("The Coraccios agreed that Stephen Coraccio would re-convey the property to his wife at a later date.").

197. *Id.* at 106.

198. *See Coraccio*, 612 N.E.2d at 654-55 (stating that the characteristics of tenancy by the entirety were not altered and that it remains a unitary title that guarantees each spouse an equal right to the whole).

199. *Id.* at 653 ("By that law the right to control the possession of such an estate during their joint lives is in the husband," including "the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life.").

200. *Id.*

201. *Id.* ("Although an individual creditor of the husband could levy and sell on execution his interest in the tenancy, and dispossess both the husband and wife, the property always remained subject to a survivorship right held by the wife.").

Law,<sup>202</sup> the Massachusetts' legislature gave wives equal rights to control, manage, and possess tenancy by the entirety property, and at the same time, it limited the marital property interests that could be seized by a creditor.<sup>203</sup> The statute applied to tenancies by the entirety created after February 11, 1980.<sup>204</sup>

The court applied this new rule to the facts in *Coraccio*.<sup>205</sup> Stephen Coraccio, pursuant to the common law tenancy by the entirety, had the right to mortgage his interest in the property without his wife's consent, but Nancy Coraccio still had her right of survivorship that could not be severed.<sup>206</sup> She still had a right to the whole property if Stephen Coraccio died before her.<sup>207</sup> Nancy Coraccio had the right to do the same thing her husband could do, mortgage and convey her survivorship rights.<sup>208</sup> The possibility of seizing the right of survivorship of a debtor spouse was limited, however. If the marital property was not the primary residence of the non-debtor spouse, the interest of the debtor spouse could have been seized.<sup>209</sup> The legislation added that both spouses were jointly liable for debts incurred for "necessaries furnished to either spouse or to a member of their family."<sup>210</sup>

As a result of the court's interpretation of the statute, Massachusetts fell into Group Two, since each spouse could convey a share of the marital tenancy, including the right of survivorship. The Supreme Judicial Court of Massachusetts affirmed that the case was appropriately dismissed, holding that Nancy Coraccio did not have standing to protest her husband's mortgage of his interest in the tenancy by the entirety.<sup>211</sup> The court noted further that the Land Court could not foreclose the property as long as it

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202. MASS. GEN. LAWS Ch. 208, § 1 (1979).

203. *Coraccio*, 612 N.E.2d at 654 ("The interests of a debtor spouse in property held [by] tenants [in] the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the debtor spouse . . .").

204. *Id.* at 653-54.

205. *Id.* at 652.

206. *See id.* at 655 (noting that each spouse has an indestructible right of survivorship).

207. *See id.* (stating that an estate is not subject to voluntary partition).

208. *See id.* at 655 (explaining that there are not any state laws preventing a co-owner from mortgaging or making an effective conveyance of his or her interest in the tenancy).

209. *See id.* at n.9 ("We express no views on the rights of the spouses or the creditors of either as to property held by spouses as tenants by the entirety where the property is not the principle residence of the spouses.").

210. *Id.* at 654.

211. *Id.* at 655.

was the primary residence of Nancy Coraccio.<sup>212</sup> It is interesting that she had no basis to challenge her husband's actions in the end, because, due to the court's stance on equality, wives could do what husbands once did. Each spouse is permitted to convey all of his or her property rights under Massachusetts' modern formulation of the tenancy by the entirety. Nonetheless, the court's judgment protected Nancy Coraccio from foreclosure. The bank's misapplication of the Group One formulation enabled it to require Nancy Coraccio to convey her property to her and her husband, before a mortgage could be granted.<sup>213</sup> This formulation also made it possible for her husband to take out mortgages ostensibly without her knowledge. Although the newly determined Group Two formulation enabled the court to dismiss her case, the savings clause in the statute protected her from foreclosure.

The bank thus had a mortgage on a house that it could never foreclose on for nonpayment as long as it was Nancy Coraccio's primary residence. Whether this happened as a result of negligence is an important question. The court noted that all the events in the case happened after the passage of G. L. 209, which equalized the rights between husbands and wives with respect to tenancies by the entirety.<sup>214</sup> The bank acted as though the statute had never been passed, and Stephen Coraccio had the sole right to control the property, under the older Group One formulation.<sup>215</sup> Not only did the bank require Nancy Coraccio to put her husband's name on the deed and then give Stephen Coraccio mortgages on his own, it did not require Nancy Coraccio to sign off on any of the subsequent mortgages.<sup>216</sup> If she had signed off on the mortgages, each of their interests would have been liable for seizure. Therefore, even if Nancy Coraccio knew of the mortgages, the bank's failure to recognize the growing equality in spousal rights made it vulnerable. Rooted in Group One-based paternalism, the bank missed the key link between feminist theory and changes in property law.

In the modern period, as compared to the historical periods when the first married women's property acts were passed, equalization on the basis of gender was the intent. The earlier period of the nineteenth century was marked by the perspective that a married woman's mere ability to keep property in her name during the course of her marriage allowed for traditional relationships between husbands and wives to be overturned. By the late twentieth century, egalitarianism in spousal relationships was

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212. *Id.* at 656.

213. *See id.* at 652 (noting that the bank insisted Coraccio convey the property to herself and husband as tenants by the entirety to receive the first mortgage).

214. *Id.* at 651.

215. *Id.* at 652.

216. *Id.*

becoming more and more common. With egalitarianism came the greater possibility of making mistaken presumptions based on traditionalism. The bank was not effective at protecting its interests when it appeared to let the default model of traditionalism determine policy. Accordingly, the bank's attorneys had a special role in informing the bank of the changes. Whether the attorneys did or did not is unknown, but it is not as though the change was unpublicized.<sup>217</sup>

The decision might have turned out differently had there been some recognition of the debt protection and gender-based issues that were at stake. The Married Women's Property Acts intended for wives to have separate estates so that they might be protected from their husbands' debts.<sup>218</sup> As such, there was no reason to require Nancy Coraccio to have her husband on the deed if she wanted to get a loan. If, as Basch argued, the early conservative trend of marital assets encompassing wives' separate property persisted, the decision is not surprising. If, however, Nancy Coraccio's attorney had asked the debt protection and gender questions, there might have been strong allegations that gender-based discrimination was at play, and that the bank was prejudiced against her as a married woman owning real estate in her name only. The decision might not have turned out differently, in that a gender-based argument could have led to the same outcome in the end—a refusal. The court could have refused to permit the bank to foreclose on the house because the house was Nancy Coraccio's primary residence and she was a non-debtor spouse. Raising the gender question might have enabled the court to discuss the bank's failure to recognize her rights, and ultimately, to get at the heart of the statute's meaning in a more egalitarian era—the protection of married women's property interests in the late-twentieth century.

*A. The Married Women's Property Acts: The Modern Day Cases in the Property Law Classroom*

Editors of property law textbooks are in a unique position to raise these gender-based developments in property law doctrine. The first edition of Chase's textbook explored, through *Coraccio*,<sup>219</sup> the means by which

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217. Dorcas D. Park, *The New Tenancy by the Entirety: More Questions than Answers*, 8 MASS. LAW WEEKLY 367 (Dec. 24, 1979).

218. See *Coraccio*, 612 N.E.2d at 653 (discussing that a wife's right of survivorship was not attachable by individual creditors nor alienable by her).

219. See EDWARD E. CHASE, PROPERTY LAW: CASES, MATERIALS AND QUESTIONS 323-27 (2002); JESSE DUKEMINIER ET AL., PROPERTY 367 (7th ed. 2010) (mentioning *Coraccio* and the statutes in North Carolina and Michigan—MICH. COMP. LAWS ANN. §557.71 (West 2006) and N.C. GEN. STAT. §39-13.6 (2007), which relinquished their Group 1 categorizations).

Massachusetts transitioned away from its Group One status. Massachusetts had been one of the few states that did not find that the Married Women's Property Acts made any substantial changes to married women's rights under tenancy by the entirety.<sup>220</sup> In the second edition, *Coraccio* is not the principal case. Instead, *King v. Greene*<sup>221</sup> explains the consequences of the tenancy by the entirety.<sup>222</sup> The facts in each case, when tied to its coverage, present the ideal fact pattern for addressing the focal questions of feminist legal theory and practice raised in this article.

By the second edition of the text, Chase and Forrester considered the evolution of married women's property interests in New Jersey.<sup>223</sup> New Jersey was different from the states that no longer recognized tenancy by the entirety.<sup>224</sup> The court interpreted the Act as not retaining the common law rules of the Group One states.<sup>225</sup> Instead, it put the wife on par with the husband:

"[Spouses] hold as tenants in common for their joint lives . . . survivorship exists as at common law and is indestructible by unilateral action . . . the rights of each spouse in the estate are alienable, voluntarily or involuntarily, the purchaser becoming a tenant in common with the

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Note that Dukeminier, at 361-66, focuses upon *Sawada v. Endo* as the most recent example of a jurisdiction grappling with the implications for creditors' rights in a tenancy by the entirety. *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977). This case was different from *Coraccio* in that it did not involve a wife who needed protection from a husband who took out loans in his own name. Instead, a tenancy by the entirety was conveyed by the spouses to their sons, for the alleged purpose of escaping liability for damages in a tort action.

Chase offers a more nuanced discussion through a discussion of both *Coraccio* and *King v. Greene*. Chase explored how these states grappled with other implications found in the tenancy by the entirety, tracing the evolution of the doctrine through the cases in the text. Recall, that under the common law tenancy by the entirety, a debtor husband's interest might be vulnerable to foreclosure. But the cases in the text ask, what are the rights and responsibilities of debtor spouses, husbands, and wives in the various formulations, Groups 1 through 4?

Since no state currently pursues the group 1 model, the texts explore what the logic was that led to developments. See also Patricia A. Cain, *Two Sisters vs. A Father and Two Sons: The Story of Sawada v. Endo*, in *PROPERTY STORIES* 99, 99-122 (Gerald Korngold & Andrew P. Morriss 2d ed. 2009) (discussing further the *Sawada* case).

220. CHASE, *supra* note 219.

221. 153 A.2d 49 (N.J. 1959).

222. EDWARD E. CHASE & JULIA PATTERSON FORRESTER, *PROPERTY LAW: CASES, MATERIALS AND QUESTIONS* 335-39 (2d ed. 2010).

223. *Id.* ("In the absence of legislating, abolishing or altering estates by the entirety, our role, in light of the settled precedent that they do exist in New Jersey, is merely to define their incidents.")

224. *King*, 153 A.2d at 59; see also CHASE & FORRESTER, *supra* note 221, at 337.

225. CHASE & FORRESTER, *supra* note 222.

remaining spouse for the joint lives of the husband and wife.”<sup>226</sup>

In the principal case, *King*,<sup>227</sup> Marie King had acquired, in 1913, the title to three lots in Shrewsbury. In 1931, her husband, Phillip King, brought an action against her in the Court of Chancery, which entered a decree stating that she owed him \$1,225.<sup>228</sup> The court ordered her to execute a conveyance of the three lots to herself and her husband as tenants by the entirety.<sup>229</sup> The opinion did not clearly state how these developments arose.<sup>230</sup> It is possible that she was a single woman when she acquired the lots. If this were the case, the property should have been protected from her husband or his creditors, according to the Married Women’s Property Act.<sup>231</sup> The documents do not explain why her husband was suing her. It did not appear as though they were getting divorced and hence were not dividing up the marital property.

One plausible argument is that her husband was in debt and that his creditors viewed her properties as marital assets. Here, the debt could also have been a familial debt that both were responsible for. Perhaps Phillip King’s creditors saw Marie King’s acquisition of the property as a means for the King family to hide assets. This was probable if the property was once in his name but was then put into hers, or if she bought it after the marriage but with funds that belonged to him, or even, both of them. Such strategies, if not caught, would have enabled the husband to escape liability. Finally, as might have been the case in *Coraccio*, this could have been a matter of traditionalist perspectives that survived the passage of the Married Women’s Property Acts. Such traditionalism could have pushed Phillip King to claim the assets Marie King held in her name only. It is possible he sued because he was responsible for her financial support, and thus felt he should have access to her assets. There are many questions about the facts.

Once again, from a feminist legal theory perspective, the nuances of this fact pattern are just as troubling, and probably even more so, than *Coraccio*. Nothing in the decision explains why Phillip King sued Marie King and won a judgment of \$1225, or why, as part of the order, a re-

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226. *King*, 153 A.2d at 59.

227. *Id.* at 50-51.

228. *Id.* at 51.

229. *Id.* See also CHASE & FORRESTER, *supra* note 222, at 335.

230. *King*, 153 A.2d at 51. In 1957, Marie King filed an action to possess the property; before her husband died various creditors laid claim to the property. She claimed rights as the surviving spouse. It is unclear, though, how she originally obtained ownership. The trial court decided a motion for summary judgment in her favor; the facts were merely stipulated and were not explained.

231. 1979 Mass. Act 768.

conveyance was ordered. It is inexplicable why the basic rule of the Married Women's Property Act did not apply:

the real and personal property of a woman which she owns at the time of her marriage, and the real and personal property, and the rents, issues and profits thereof, of a married woman, which she receives or obtains in any manner whatever after her marriage, shall be her separate property as if she were a female sole.<sup>232</sup>

There is no conceivable reason that Marie King's husband should have sued her and received a judgment that caused her to convey her property to both of them. Whether or not Marie King was married in 1913, the property belonged solely to her, according to the Married Women's Property Act. Without a more comprehensive discussion of the facts, there is no clear reason that explains why this happened, unless the intention was to seize her property and deny her rights in the name of traditionalism. If family unity was at stake, it was a family unity predicated on a legal action that, if anything, would have contributed to disunity in the family as a husband sued his wife. The traditional model of family unity, according to the Married Women's Property Acts, meant that wives would be protected from outsiders who might sue for and seize wives' assets. Separate property was needed to protect women, and their families, from creditors.

There is no indication that the decision in *King* has been subjected to close analysis in scholarly literature. However, a brief commentary on the decision offers some insight into how the case was received.<sup>233</sup> The recitation of the facts did not offer any commentary on some of the key gender-based questions. A husband sued his wife for some unknown reason, and once judgment was found against her, she was ordered to make a conveyance of property that she owned in her name only to both her and her husband, as tenants by the entirety.<sup>234</sup> The property was then foreclosed upon.<sup>235</sup> The commentary only offered a brief recitation of the facts and procedural history.<sup>236</sup> Mirroring the discussion of the case in the opinion, the primary issue for the court was whether a right of survivorship persisted in Mrs. King at the time of her husband's death.<sup>237</sup>

At an execution sale to satisfy a judgment against her, plaintiff's interest in certain lots which she and her husband held as tenants by the entireties was conveyed to *A* by sheriff's deed. Subsequently, plaintiff's husband

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232. See *id.* at 59 (quoting N.J. STAT. ANN. § 37:2-12 (1852)).

233. See generally Robert Brooks, *Real Property—Tenancy by the Entireties—Alienability of Right of Survivorship*, 58 MICH. L. REV. 601, 601-03 (1960).

234. *Id.* at 601.

235. *Id.*

236. *Id.*

237. *Id.*



joined *A* and his wife in a deed of their interest to *B*, who later conveyed to defendants. After the death of her husband, plaintiff instituted an action as surviving spouse for possession of these lots. The trial court entered a summary judgment for plaintiff, holding that the sheriff's deed conveyed only a severable one-half interest in use and profits of the land during the joint lives of the spouses, and not plaintiff's right of survivorship. On appeal, *held*, reversed. The purchaser from a tenant by the entirety acquires that tenant's right of survivorship.<sup>238</sup>

This discussion of the case implies that both spouses had an equal right to convey their rights to occupy and enjoy the property during the course of the marriage and their survivorship interests. Under the common law, only a husband had the right to possess and enjoy property, and he alone could convey this interest and his right of survivorship. However, his conveyance of his rights was subject to his wife's survivorship rights.

What is troubling is that the court's ruling in the name of equality—an understanding of equality in each spouse's right to convey an interest in the property—occurred when equality was not called for and protection should have been the motivation instead. In *King*, as well as in *Coraccio*, forces of institutional authority ordered a married woman to relinquish her full rights in her property pursuant to unclear theories of the case under suspicious circumstances. In these cases, prior to the threat of foreclosure, the wives held the property in their own names and were later required to put their husband's name on the deed, thus relinquishing full rights to what was once their property alone. Tragedy followed once the husbands had access to the property by tenancy by the entirety.

The irony is that if cultural presumptions about women's incompetence in financial matters held sway, in *Coraccio* it seems the husband was actually financially unreliable. Nevertheless, traditionalism presented the husband as the more capable spouse to manage and protect the family's resources. Once foreclosure occurred, the wife appeared to have no interest in her husband's ability to convey his interest in the property, even though she was protected from foreclosure as a non-debtor spouse. The husband could have conveyed his interest, as under the common law, and the wife could have done the same according to the modernizing trend. In the end, the courts found in the name of equality, equal rights, and responsibilities for husbands and wives, but these holdings were not predicated upon fact patterns where equality played an initial role. The courts should have been more willing to question the applicability of their presumption of equality and should have considered the need to protect wives against domination.

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238. *Id.*

*B. Reinterpreting the Modern Cases: What Have We Missed?*

In *Coraccio*, a bank serving as a mortgagee forced a married woman to put her husband's name on her property.<sup>239</sup> Her husband was then able to get a mortgage without her consent.<sup>240</sup> When he did not pay the mortgage, the bank attempted foreclosure and she only found out by reading the local newspaper.<sup>241</sup> The court held that she did not need to be informed that her husband conveyed his interest in the tenancy by the entirety.<sup>242</sup> Granted, she was protected from foreclosure insofar as the property was her primary residence, but she would have been better protected from foreclosure had his name not been put onto the deed.<sup>243</sup>

In *King*, a woman's husband brought suit to gain a judgment against her, the court found in his favor, and then entered a judgment ordering her to relinquish her property rights and put his name onto the deed.<sup>244</sup> Her property rights were not protected.<sup>245</sup> When the judgment was executed a year later, her interest in the property was conveyed to third parties, presumably creditors.<sup>246</sup> Then her husband conveyed his interest to other third parties.<sup>247</sup> In the end, the Kings had no interest in the property.<sup>248</sup> In both cases, tragedy followed in that the women's property became vulnerable to foreclosure once the creditors were not paid.<sup>249</sup> Yet, drawing upon these cases to modernize the tenancy by the entirety, the courts use language of equality to gloss over the inequalities between the spouses that initially existed.<sup>250</sup>

Charles Rounds has recently proposed a gender-based critique of marital property interests drawn from protectionist type arguments.<sup>251</sup> He believes that feminist legal scholars should consider the significance of a long-forgotten area of law—trusts—in addressing property matters within

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239. *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650, 652 (Mass. 1993).

240. *Id.*

241. *Id.*

242. *Id.*

243. *See id.* at 654 (quoting MASS. GEN. LAWS ch. 209 § 1).

244. *King v. Greene*, 153 A.2d 49, 51 (N.J. 1959).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 60.

249. *King*, 153 A.2d at 60; *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650, 652 (Mass. 1993).

250. *See, e.g., King*, 153 A.2d at 60; *Coraccio*, 612 N.E.2d at 654.

251. Charles E. Rounds, Jr., *The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism*, 43 U. RICH. L. REV. 1185, 1187 (2009).

marriage.<sup>252</sup> He argues that the law of trusts, which imposes fiduciary obligations on a trustee to the beneficiary, could be a means of asserting rights on behalf of married women.<sup>253</sup> He explains carefully that confidential relationships are not the same as fiduciary relationships.<sup>254</sup> The apparent blurring of confidential relationships and fiduciary relationships—insofar as courts have become more willing to see fiduciary obligations in confidential relationships—can benefit feminist legal theory.<sup>255</sup>

For example, should courts broaden the definition of a fiduciary to encompass a commercial lender who intends to extract a loan guarantee from the wife of a borrower or declare a husband to be in a per se fiduciary relationship with his wife, equity could work its magic.<sup>256</sup>

Rounds foresees courts assessing trustees' undivided loyalties, and their obligations to beneficiaries.<sup>257</sup>

The implications for Rounds' argument are apparent, insofar as his argument articulates a feminist perspective on women's property rights and the tenancy by the entirety. It highlights that presumptions about equality can mask inequalities and a lack of protection. The wives in *Coraccio* and *King* were in confidential fiduciary relationships with their husbands. Both Nancy Coraccio and Wilma King put their property in their name as well as their husband's, whether at the behest of a bank officer or at the order of a court. This was an incredible risk, in that the men suddenly had property rights that the common law tenancy by the entirety clearly recognized. Yet, equity would say that the men's rights incurred special risks for the women as a result of a fiduciary relationship. The husbands had an obligation to protect their wives' rights and interests; because the common law doctrine included ongoing presumptions about wives' inabilities, it gave husbands absolute control. Drawing upon Rounds' logic, equity might have found a remedy where the law courts could not.

One can argue Nancy Coraccio had a confidential relationship with the bank, as she relied on the bank's advice to put her husband's name on the

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252. *Id.* at 1199.

253. *Id.* at 1187.

254. *Id.* at 1197 (“A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A key difference between the two relationships is the reliance requirement. For a confidential relationship to arise, there *must* be reliance on the part of the one reposing the confidence. A fiduciary relationship, on the other hand, brings with it a duty of undivided loyalty, whether or not there has been reliance.”).

255. *Id.* at 1199.

256. *Id.*

257. *Id.*

property. She purchased the house on her own and only sought a mortgage one year later. She trusted the bank's advice that she needed her husband's name on the deed in order to get the mortgage. Moreover, she expected that once she conveyed the property to herself and her husband, he would re-convey it to her alone. He did so, but the transaction was never recorded. It is possible that the lawyer who processed the paperwork on behalf of the bank failed to do what he was supposed to do. To compound matters, the bank, knowing that Nancy Coraccio had an ongoing interest in the property, did not inform her or gain her permission when it granted Stephen Coraccio the second mortgage that led to the foreclosure.

Nancy Coraccio's claims resonated in the types of arguments Rounds' imagined might be used by plaintiff wives asserting rights based on confidential and fiduciary relations. Her claims sounded not only in negligence, in that she asserted that the bank and the attorneys neglected certain obligations they were required to undertake—processing and closing loans—but that the attorneys also breached “an implied covenant of good faith and fair dealing,” and intentionally interfered with a privileged relationship.<sup>258</sup> The language of good faith and fair dealing fits squarely within the claim that a fiduciary relationship existed between Nancy Coraccio and the bank. The bank had a confidential relationship with her, she relied upon that in acting, but the bank did not act in fairness to the obligations it incurred to protect her interests. As for interfering with a privileged relationship, the bank enabled her husband to act contrary to his fiduciary obligation to her as her spouse, and failed to protect her interests in the property. They let him take out a loan without informing her of the possible detriment for her: foreclosure.<sup>259</sup>

The Massachusetts statute seems to imply that debts held against the interest of a debtor spouse in a tenancy by the entirety might make the property liable for seizure, even if the property is the principal residence of the non-debtor spouse.<sup>260</sup> This could occur if either spouse, or both spouses, became indebted in the process of providing “necessaries” on behalf of either spouse, or their family.<sup>261</sup> The argument could be made that Stephen Coraccio did not escape responsibility for his family's maintenance. From a purely pragmatic standpoint that would make sense because indebtedness incurred for the benefit of the family fits the

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258. Ritsko, *supra* note 69, at 104.

259. *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650, 654 (Mass. 1993). Granted, the foreclosure did not take place. The Supreme Judicial Court of Massachusetts held the property could not be foreclosed as long as it was her primary residence. But if the court held differently, foreclosure could have occurred.

260. MASS. GEN. LAWS ch. 209 § 1 (1979).

261. *Id.*

traditional model of “tenancy by the entirety” by requiring husbands or heads of household to provide for the family as a whole. Evidence in the case was silent on the matter and nothing indicates that his debts were for anything more than his personal indebtedness. This was something his wife knew nothing about but left the family home vulnerable to foreclosure.

Wilma King faced a similar conundrum of a confidential, if not fiduciary, relationship violation. She purchased property in her own name, but was forced to put the property in both her name and her husband’s name when he sued and received a judgment against her. Since the court did not discuss the nature of the lawsuit, this appears to be a troubling violation of a confidential relationship between a married couple who shared intimate knowledge with one another. He knew what assets she possessed. Thus, when he received a judgment against her, the court required her to re-convey the property in both of their names.<sup>262</sup> It is unclear whether he sued on his own volition. It is possible he saw the property as family assets and merely wanted tenancy by the entirety rights. Perhaps his creditors took advantage of his knowledge of his wife’s finances, in order to reach assets that might be put up as collateral for his debts.

As in *Coraccio*, the King property was threatened with foreclosure.<sup>263</sup> Marie King’s right, title, and interest in the property was then conveyed by sheriff’s deed to a third party named Crowell, and Phillip King conveyed all of his in 1933 to another third-party, Smock.<sup>264</sup> Crowell conveyed his interest to Smock at the same time.<sup>265</sup> Phillip King then died in 1938.<sup>266</sup> In 1946, Smock conveyed his interest to the defendants Joseph and Mabel Greene.<sup>267</sup> Marie King’s argument in 1957 was that the sheriff’s deed in 1932 did not extinguish her right of survivorship and that in 1932 only half of the “rents, issues and profits of the property during the joint lives of the spouses” were conveyed.<sup>268</sup>

When Phillip King died, the spouses’ joint life estate terminated; Marie King asserted that she became the owner of the estate in fee simple.<sup>269</sup> In order for this argument to work, she must have believed that the

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262. *See id.*

263. *Id.* (“In 1932 execution was issued to satisfy the 1931 money judgment.”).

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

conveyances did not disturb their survivorship interests—that both she and her husband retained joint survivorship rights, which persisted notwithstanding the conveyances. Thus, upon the death of her husband, she retained a contingent right of survivorship to the whole estate. Reversing the trial court judgment, which held in favor of her right to survivorship, the appellate court explained:

It is clear that the Married Women's Act created an equality between the spouses in New Jersey, insofar as tenancies by the entirety are concerned. If, as we have previously concluded, the husband could alienate his right of survivorship at common law, the wife, by virtue of the act, can alienate her right of survivorship." The court added, "[t]hus, the judgment creditors of either spouse may levy and execute upon their separate rights of survivorship."<sup>270</sup>

As such, Marie King's survivorship interest was seized in 1932 when she conveyed her present interest, but Phillip King still had his right to survivorship to the whole estate, in the event that she predeceased him.<sup>271</sup> When Phillip King conveyed his present interest in the property in 1933, he conveyed his survivorship interest, and lost his interest.<sup>272</sup> Once Phillip King predeceased her, there was nothing else for her to gain in survivorship interests.<sup>273</sup>

The court noted the mechanics of the newly reconfigured tenancy by the entirety with respect to creditors' interests. Spouses:

hold as tenants in common for their joint lives; that survivorship exists as at common law and is indestructible by unilateral action. . . the rights of each spouse in the estate are alienable, voluntarily or involuntarily, the purchaser becoming a tenant in common with the remaining spouse for the joint lives of the husband and wife.<sup>274</sup>

Thus, New Jersey drafted the tenancy in common onto a tenancy by the entirety where spouses retained joint survivorship rights.<sup>275</sup> Once creditors entered the picture, however, the tenancy in common doctrine would prevail; when a creditor took the place of the debtor spouse and gained rights to the whole property, the creditor's right would be contingent upon

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270. *Id.* at 60.

271. *Id.* at 51, 60.

272. *Id.*

273. *Id.*

274. *Id.* at 59.

275. See CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 213-14 (2d. ed. 1988), for a reminder that one of the most significant differences between the traditional tenancy in common, the other concurrent interests of the tenancy by the entirety, and the joint tenancy, is that co-owners have separate interests in the property without a right of survivorship.

the debtor spouse surviving the non-debtor spouse.<sup>276</sup> If the debtor spouse did not survive, the survivorship interest of the non-debtor spouse could defeat the creditor's right to the whole.<sup>277</sup>

Nonetheless, the language of equality pervaded—even without women's history and feminist legal theory arguments—but not in a way one might anticipate. “with wives holding as tenants in common with their husbands for their joint lives. . .”<sup>278</sup> The question remained whether or not the court should consider when and how the property was acquired. That significant issue of whether the property should have been considered an asset liable to becoming tenancy by the entirety remained unaddressed. Without any information on Marie King owning the property in her name in an attempt to hide assets, the property should have been considered hers only. A discussion on the possibility that Marie King was hiding assets would have enriched the court's discussion of marriage, spouse's separate identities, and their implications on real life advocacy like protecting wives from their husbands' debts.

In both *King* and *Coraccio*, it is questionable that each wife should have been required to convey property to herself and her husband the property she owned in her own name. For example, drawing upon Basch's observations about the nineteenth century cases, there was no indication that the spouses' assets were commingled to a point where it was impossible to determine the real owner. In *King*, it did not seem that they were seeking to defraud third parties, or in *Coraccio* that there was a legitimate reason for making the husband also liable for the mortgage.

It is possible that the courts presumed the traditionalist view of marriage should be upheld, that husbands presumptively control all marital property. The courts could have presumed that husbands have greater potential to earn and accumulate assets, and thus, rejected the concept that wives might hold property in their name only. Whatever rationale motivated the courts should have been stated explicitly. If anything, *Coraccio* and *King* provide a means of drawing upon a gender-based feminist critique that addresses their similarities. The failure to recognize their similarities in scholarly texts appears to be an absolute lack of recognition that married women retained their ability to hold and manage separate property as they could if they were single women under the common law. This includes a failure to recognize the possibility that wives might need protection from their husbands' debts.

Creditors' rights and familial debts are important for students to consider

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276. *King v. Greene*, 153 A.2d 49, 57 (N.J. 1959).

277. *Id.* at 58.

278. *Id.* at 59.

when learning about the tenancy by the entirety and learning the significance of the Married Women's Property Acts as they advocate for clients. Ignoring gender is a significant shortcoming, especially in today's world. Recent reports indicate that a growing number of wives now earn more than their husbands, and as a result, they are likely to bring more assets to the marriage and obtain more assets than their husbands during the course of the marriage.<sup>279</sup> Such developments are bound to complicate the tenancy by the entirety even more so than before. Yet, the current shortcomings of the gender assessment model, might make gender-based analysis more difficult, as the current model does not address gender. It would seem that advocating, or even recognizing, gender-based issues posed by the tenancy by the entirety in these two cases, *Coraccio* and *King*, is irrelevant from the viewpoint of first year pedagogy. Nonetheless, as various scholars have argued, doctrine cannot be divorced from theory and historical analysis, and discussing gender-based doctrines cannot be ignored.<sup>280</sup>

The decisions in both *Coraccio* and *King* were steeped in discussion of the historical developments in the tenancy by the entirety as a legal doctrine, but they were not grounded in perspectives of women's history, feminist legal theory, and the traditional push for reform—protection against wives from debts incurred by their husbands. Thus, advocacy in the courtroom could not include discussion of theoretical perspectives outside of the doctrinal. A discussion of feminist legal theory was not anachronistic in all early cases as it might have been in 1880s Massachusetts, in light of those jurisdictions that abolished the tenancy by the entirety long before. It was not even anachronistic in New Jersey in the 1950s, where discussions of women's property rights dated back to the previous century.<sup>281</sup> Moreover, feminist legal theory was not anachronistic in Massachusetts in the 1990s.

Nothing explains the inadequate framing and development of the narrative on gender rights in the tenancy by the entirety. Gender-based critiques within feminist legal theory were relevant in the 1990s; if anything, the modern women's rights movement in Massachusetts provided an impetus for modernizing the older common law, Group One formulation. It is surprising that such a significant tool for analysis and

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279. Liza Mundy, *The Richer Sex*, TIME, Mar. 26, 2012, <http://www.time.com/time/magazine/article/0,9171,2109140,00.html>.

280. See, e.g., Patricia A. Cain & Linda K. Kerber, *Subversive Moments: Challenging the Traditions of Constitutional History*, 13 TEX. J. WOMEN & L. 91, 91 (2003).

281. See, e.g., *King*, 153 A.2d at 59 (noting the New Jersey Married Women's Property Act was passed in 1852).



advocacy did not seem to be relevant, even when the modern, late twentieth-century Married Women's Property Act<sup>282</sup> aimed to overturn the common law rule once recognized in *Pray v. Stebbin*.<sup>283</sup> *Pray* stated:

By that law the right to control the possession of such an estate during their joint lives is in the husband. . . . Neither could convey during their joint lives so as to bind the other, or defeat the right of the survivor to the whole estate. . . . he has the right to make a lease of an estate conveyed to him and his wife, which will be good against the wife during coverture and will fail only in the event of his wife surviving him.<sup>284</sup>

More than one hundred years later, the court in *Coraccio* noted that, since *Pray*, the ability of wives to keep property in their own names did not affect the common law tradition that limited their rights in the tenancy by the entirety.<sup>285</sup> In the twentieth century, the law modernized the status of husbands and wives with respect to marital property, thus rejecting the common law rule.

This development was apparently a response to the Equal Rights Amendment and aimed to "equalize the interests of husband and wife in real estate held by tenants by the entirety."<sup>286</sup> It came into effect on

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282. 1979 Mass. Acts 768 (amending MASS. GEN. LAWS ch. 209 § 1 (1979)) ("The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety. The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessities furnished to either spouses or to a member of their family.").

283. *See* 4 N.E. 824 (Mass. 1886) (interpreting the Married Women's Property Act).

284. *Id.* at 826-27; *see also* Kathleen M. O'Connor, *Marital Property Reform in Massachusetts: A Choice for the New Millenium*, 34 NEW ENG. L. REV. 261, 303 (1999) ("[I]t was not until 1845 that women in Massachusetts were first able to legally keep and manage as 'sole and separate' property which women brought to, or acquired after marriage, by gift, inheritance, bequest or devise. Starting in 1855, Massachusetts began revising its statutes and women were finally allowed to make legally binding contracts with their husbands or third parties, transfer or receive from their husbands title to real or personal property . . . and keep the proceeds of any work or labor performed 'for a person other than her husband or children.'").

285. *Coraccio v. Lowell Five Cents Sav. Bank*, 612 N.E.2d 650, 653 (Mass. 1993) ("Statutes relating to the separate rights of married women have not changed the common law rights of the husband in such estates.").

286. *See Tenancy by the Entirety 'Modernized,'* MASS. LAWYERS WEEKLY 19 (Nov. 26, 1979).

February 11, 1980, and “only tenancies by the entirety created after that date [were] affected.”<sup>287</sup> Although the Equal Rights Amendment was ratified in 1972, the federal amendment never became law.<sup>288</sup> Massachusetts passed its own version on the state level, however.<sup>289</sup> In all likelihood, the state version was the one being discussed.

A commentator explained what the old tenancy by the entirety looked like:

In the common law tenancy by the entirety, the husband had an exclusive right to the possession and income from the property during his lifetime, with the possibility of fee simple title on surviving the death of his wife. He could convey this interest in the property and it could be attached and sold by his creditors, but he could not destroy his widow's right to the property in fee simple absolute on his death, free and clear from all claims against the husband. The interest of the wife was limited to the possible acquisition of absolute fee simple title if, and only if, she survived her husband. She could not convey. Her creditors could not attach her interest in the property while the husband lived. She could not defeat her spouse's right to the whole should he survive her.<sup>290</sup>

Once the modification occurred, the state could “look forward to a completely modern tenancy by the entirety.”<sup>291</sup> Moreover, it explained why the common law rule persisted in Massachusetts until 1979—it was a jurisdiction steeped in the traditional common law view of women and property rights:

[The] characteristics of the tenancy by the entirety were based on the traditional way of thinking about females. Like infants and incompetents, women were thought to be inherently unfitted for worldly and economic pursuits, incapable of managing property, and in need of

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287. *Id.*

288. See ROSALIND ROSENBERG, *DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY* 227 (2008) (discussing Phyllis Schlafly's role in opposition to passage). “In 1979 the time allotted for ratification ran out. A three-year extension, passed by Congress, proved no help to ERA supporters. In 1982, Schlafly and her supporters could boast that not a single state had ratified the amendment since 1977, and five had voted to rescind their initial endorsement. The ERA was dead.” *Id.*

289. See, e.g., LEAGUE OF WOMEN VOTERS OF MASSACHUSETTS, *Where We Stand, Social Policy: Equal Opportunity*, <http://017275e.netsolhost.com/equalopportunity.shtml> (last visited May 25, 2013) (“LWVMA was successful in working with a large coalition for passage of the state ERA by two consecutively elected legislatures meeting in joint session (1973-76) and by the public in the vote on the November 1976 ballot. The con-stitutional [sic] amendment passed by 62 percent of the vote. LWVMA has been active since then to bring state laws and regulations into compliance with the state ERA.”).

290. Park, *supra* note 217, at 367.

291. *Id.*

male protection. 1 Blackstone Commentaries, 441-444. ‘And if they will learn anything let them ask their husbands at home. . .’ Corinthians 14:35.<sup>292</sup>

Recall that the facts of *Coraccio* arose after the statute was passed, and it was surprising that the loan officers did not seem to realize the bank’s vulnerable position in permitting the husband to take out loans in his own name and in the marital home, for separate debts. The loan officers should have seen the possibility that the marital home, as the non-debtor spouse’s share of the primary residence, was protected from foreclosure.<sup>293</sup> If anything, they should have insisted that Mrs. Coraccio sign off on the loans as well.

The decisions in *Coraccio* and *King* never addressed the gender-based issues of discrimination, as the courts did not even consider gender outside of noting the newer possibilities of equality found in the Married Women’s Property Acts. Under the Married Women’s Property Acts, wives could suddenly do what only husbands could do previously—have an equal right to encumber or convey their share of the marital property. It could be seized for their debts.<sup>294</sup> For both wives in these cases, this equality was quite hollow, in that the inequities of the cases were not addressed in the opinions. Their property was seized not because of equality, but because of inequality. Equality did not seem to be at play when the women were required to convert their separate property into marital property, which could then be seized for their husbands’ debts. Equality should have meant that their separate property was theirs, and not to be seized. This is what the Married Women’s Property Acts were meant to ensure, protection for

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292. *Id.*

293. Ritsko, *supra* note 69, at 138. Ritsko noted the significance of the homestead exemption as applied to marital property, but that the exemption does not apply to mortgages entered into for the purpose of purchasing the homestead property. This is notable, in light of Ritsko’s observations, that in *Coraccio*, non-debtor spousal consent was not raised; “the SJC noted the absence of an express statutory joinder requirement despite the fact that nothing in the statute’s express language conflicted with the unitary interest theory [of tenancy by the entirety property].” In fact, Ritsko has argued that the legislature might modify chapter 209 for the express purpose of including a joinder requirement; “Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber the property so held without written joinder of the other spouse.” The legislature has not updated the statute.

294. Phipps, *supra* note 2, at 31-32. Phipps described these as “increasing the wife’s prerogatives until they match those of the husband” in Group 2 jurisdictions, insofar as he alone could do under the common law, she could now do under the modern form of the tenancy by the entirety. She could now convey her share of the marital tenancy, just like he could under the common law. In Group 3 jurisdictions, his prerogatives were removed, so that the husband was now at the same level as his wife. Neither spouse had the ability to convey a share of the marital property.

wives and families in the name of family unity.

If the courts in *Coraccio* and *King* had asked gender questions as they considered equality in the way nineteenth century jurists did in the jurisdictions that abolished tenancy by the entirety, the presumptions about married women and their ability to maintain separate estates could have been attacked directly. The courts could have done this as well if they had even considered the original purposes of the jurisdictions that upheld the tenancy by the entirety. If the Massachusetts and New Jersey courts had questioned the tenancy by the entirety, they could have developed a richer and more nuanced discussion of wives' property rights. Without such inquiries, the courts reasoned and commented mechanically as they reflected the traditional doctrinal view of married women's rights under the modern tenancy by the entirety. This was a modern tenancy by the entirety consisting of a concurrent property interest grounded in gender dynamics, but divorced from any discussion of gendered implications. Thus, scholarly commentary is incomplete in its discussions.

Wilson has explained the five principal types of legal arguments—arguments from the text, drafter's intent, precedent, tradition, and policy—that first year students should understand as they learn to “think like lawyers.” These five principles provide a basis for developing skills in cases like *Coraccio* or *King*.<sup>295</sup> Huhn explained the implications for each argument type as they arise from different sources of law:

The five types of legal argument represent different conceptions of what law is. Law may be considered the legal text itself. It may be regarded as what the text meant to people who enacted it into law. Law may be conceived of as the holdings or opinions of courts setting forth what the law is. It may be thought of as the traditional ways in which members of the community have conducted themselves. Finally, law may be understood as the expression of the underlying values and interests that the law is meant to serve.<sup>296</sup>

In considering these types of arguments, it is important to think that the courts in *Coraccio* and *King* seemed to draw upon specific types of arguments. They focused on the ostensible intent that led the drafters of the statutes to inaugurate equality. A pure doctrinal perspective might look merely to the words of a statute, or court opinion, without any context in gender. The law is what the doctrine says it is: equality for spouses. But the law is also about what people have come to accept in their interactions, social norms that should be represented in law, and the cultural understandings of law that Amsterdam and Bruner discussed—that husbands should be in control not only of the marital property but also of

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295. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* ix, 3-5 (2008).

296. *Id.* at 13.

their wives' separate property.<sup>297</sup> These were the values being articulated in the cases, albeit not overtly.

The courts in *Coraccio* and *King* adhered to the purely formalistic, a decontextualized discussion of gender. Equality meant equality regardless of the underlying situations at play. The inequality that led to the cause of action was minimized and considered irrelevant in judicial determinations. The courts were merely modernizing the tenancy by the entirety. Thus, there was no critique done by anyone—advocates, jurists, or scholars—on the significance of applying the traditionalist way of organizing marital relationships to the nontraditional situation of married women holding significant real property assets in their own name.

*Sawada v. Endo* posed a different sort of challenge to the Hawaiian court.<sup>298</sup> Kokichi and Ume Endo held a tenancy by the entirety and Kokichi, the husband, was liable for damages he caused as a tortfeasor.<sup>299</sup> Finding themselves frustrated in their ability to recover, the victims alleged that conveying the property to the sons of their marriage, Samuel and Toru Endo, was a fraudulent attempt to escape the Kokichi's creditors.<sup>300</sup> The case is significant because it was the first time the court decided a tenancy case involving the tenancy by the entirety, and it highlighted the court's first impression.<sup>301</sup> Noteworthy, as well, is that the gender issues did not arise in the traditional fashion. After Kokichi and Ume Endo made the conveyance to Samuel and Toru Endo, Kokichi Endo was found liable for damages stemming from a motor vehicle accident that injured Masako Sawada and Helen Sawada.<sup>302</sup> A little over a week after the trial court passed judgment, Ume Endo died.<sup>303</sup> Kokichi Endo was thus a widower and creditors sought enforcement of a judgment against him.<sup>304</sup>

Although Phipps' taxonomy was significant in the court's assessment of the then current status of the tenancy by the entirety in American jurisdictions, the court was in the position to define property interests in Hawaii. The court decided that the jurisdiction would follow the rule set forth by those states in Group Three: spouses share "in an estate by the

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297. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAY WE UNDERSTAND THE LAW OURSELVES 231-32 (2000).

298. 561 P.2d 1291 (Haw. 1977).

299. *Id.* at 1293.

300. *Id.* at 1293-94.

301. Not only was this a modern case of first impression, but Hawaii had only just gained statehood in 1959.

302. *Id.* at 1293.

303. *Id.*

304. *Id.* at 1295.

entireties is not subject to the claims...of creditors during [their] joint lives."<sup>305</sup> The dissent believed, though, that the jurisdiction should follow the rule followed by Group Two jurisdictions<sup>306</sup> If anything, the dissent believed that those states adhering to the Group Three formulation were prejudiced against wives and their ability to manage marital property. A more enlightened view would have enabled wives to obtain the rights that were once exclusively held by their husbands, pursuant to Group Two.

In *Sawada*, the case turned on a legal matter that would have fit in with the nineteenth century Married Women's Property Acts cases, protecting wives from the debts of their husbands. When the property was conveyed to the sons, the tortfeasor husband had not yet become a widower. It was certainly feasible that, without the conveyance, his share of the marital property could have had a lien placed upon it. This became all the more crucial once he became a widower. He was the surviving debtor spouse who lost the survivorship gamble. Had he been the one to die, his wife's right to obtain the whole property, without regard to his creditors' interests, could have prevailed. Yet, the court did not seem to recognize the significance of these distinctions. The court's reasoning focused solely upon what the spouses could do with the property during the course of the marriage in an attempt to protect a significant family asset. Yet, this was not relevant once the wife died. The typical nineteenth century scenario did not apply. The court's holding meant that the sons' tenancy in common persisted; it was perfectly legitimate for the parents to convey the property to the sons. Thus, the victims' recovery depended upon whether the tortfeasor was married at the time of the accident and had the foresight to act shrewdly in hiding the assets.

Pat Cain described the implications found in the court's observations that creditors would not be disadvantaged by its decision.<sup>307</sup> She argued the analogy to commercial lenders was inapposite in the case of tort victims who would have no recourse as a result.<sup>308</sup> In light of the circumstances, I would argue that the fairer response would have been to recognize the significance of the facts and categorize Hawaii as a Group Four state,

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305. *Id.*

306. *Id.* at 1298 ("I would hold that the separate interest of the husband in entireties property, at least to the extent of his right of survivorship, is alienable by him and subject to attachment by his separate creditors, so that a voluntary conveyance of the husband's interest should be set aside where it is fraudulent as to such creditors . . .").

307. Cain, *supra* note 219, at 114 (Gerald Korngold & Andrew P. Morriss ed., 2009) ("Creditors can inform themselves about what property the debtor owns and whether the property is or is not reachable if the debtor defaults.").

308. *Sawada v. Endo*, 561 P.2d at 1298 ("Tort victims with no opportunity to review the tortfeasor's creditworthiness before the accident.").

where profits cannot be seized during the marriage, but the right of survivorship might be attached. Such a model would protect non-debtor spouses during marriage and address the possibility that the debtor spouse could become the survivor.

One can understand the court stating it did not want Hawaii to become a Group Two state, where either spouse might convey a marital interest that can be attached during the course of the marriage. This is likely what the plaintiffs would have wanted. But it is incomprehensible to make a plaintiff's recovery depend on the tortfeasor's marital status, with no recovery at all for creditors and no recovery of a survivorship interest if the tortfeasor/debtor was the surviving spouse. The court was overly protective of spousal rights and family unity where the spouse's interests were not relevant in the way the court imagined.

In *Coraccio*, *King*, and *Sawada*, courts grappled with the historical and modern significance of the Married Women's Property Acts. In the first two cases, the courts seemed to forget the nineteenth century message calling for protection of wives' separate property interests. Thus, in *Coraccio*, a wife who owned property in her own name was told that if she wanted a loan, she would have to put the property in both her and her husband's names. Notwithstanding a modern twentieth century statute equalizing wives' status, prejudices against married women managing property prevailed; her husband took out loans without her knowledge and the property was threatened with foreclosure when he failed to pay them. In *King*, a wife who owned property in her own name was sued by her husband. Once judgment was held against her, she was required to put her property in both their names. These types of determinations were not new. The message of protection became lost in the interpretations of the acts long before the modern period, when courts first began hearing the cases. The modern courts thus lost a chance to recapture and correct a longstanding trend that denied wives protection. In *Sawada*, on the other hand, the court read too much into the message of protection when it was not relevant, as the debtor spouse was already a widower when the creditors sought judgment against him.

#### IV. CONCLUSION

To the extent legal fictions highlight internal conflicts within law over changes in the law's ideals, theories, and the realities, the tenancy by the entirety indicates this tension. Legislatures were changing doctrines on marital property, whether or not idealistic views of relationships between spouses could catch up. Legal theory pointed to the rationales for change, as driven by the experiences of women affected by the law, but the courts were mixed in their responses to the changes that were happening. In the

nineteenth century, protection was the underlying goal, but jurisdictions grappled with how gender equality would be dealt with. Some courts recognized women's equality by abolishing the tenancy by the entirety, while other courts rejected equality and protected traditionalism: the traditional prerogatives of husbands and the familial obligations of wives. In the twentieth century, litigants might have used advocacy and pointed courts towards recognizing gender-based questions when interpreting the tenancy by the entirety: protection as compared to equality. This important lesson is something our students might learn about advocacy from their first year property curriculum.

It is striking that the Hawaii case, *Sawada v. Endo*, did not involve the traditional type of debt protection envisioned by the nineteenth century Married Women's Property Acts. The creditor spouse was the surviving spouse and a widower. Prior to his wife's death, they put their tenancy by the entirety into their sons' names. Once a judgment was found against the husband, and he could not pay, the creditors challenged the conveyance, alleging the Endo family only transferred their tenancy in order to escape his creditors. Pursuant to the original understanding of the common law tenancy by the entirety, if they had not conveyed their property to their sons, Endo would have been liable to his creditors as the surviving spouse who lost the survivorship gamble. Yet, he persuaded the court to reject the traditional common law perspective.

This was a case of first impression and the court decided any one spouse's share of the marital interest could not be liable for seizure. The legal fiction is that the tenancy was in need of protection. The reality is that there was not a non-debtor spouse to be shielded from foreclosure. The court protected Endo's property from being seized and created a precedent in Hawaii that protected all spouses from creditors hoping to seize tenancy by the entirety property. The creditor's ability to recover was dependent then upon whether the tortfeasor was married at the time and whether there was a marital home at stake. These factors could have placed the Endos at a disadvantage, had the court held differently and enabled the property to be seized.

Considerable time has passed since Fuller wrote about fictions from the perspective of a legal realist, fighting against the prevailing classical legal thought that thrived on the fiction that law was logical and not policy-oriented.<sup>309</sup> To that extent, the Married Women's Property Acts provide an ideal example for exploring that supposition. A fair number of the cases, decided by the courts in the wake of the Acts' passage, demonstrate the challenges of classical legal thought. It is informative that this mode of

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309. See, e.g., STEPHEN FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 188 (2000).



legal thought presupposed a “natural order” which minimized the possibilities for legal changes capable of responding to social and cultural demands.<sup>310</sup> This study of the Married Women’s Property Acts provides examples for faculty to use when discussing the development of women’s property rights, from the perspective of feminist legal history and feminist legal theory, as they might think about the role of ideology in determining how the Married Women’s Property Acts were interpreted after they were passed. Such a pedagogical strategy could lead, then, to a discussion of the rule of law, and the processes of justice, on whether there can be access to justice when ideology blinds any critique of the process.

Massachusetts’ early interpretation of the Married Women’s Property Act put it squarely in the camp of those few jurisdictions that adhered to the common law view that the tenancy by the entirety had not changed. It was not until the twentieth century, with the passage of a state equal rights amendment, that the legislature equalized spousal property rights. Yet, the case that was dispositive in interpreting the tenancy by the entirety, in light of that amendment, was grounded in the unequal treatment of a married woman who owned property. Even though the non-debtor wife escaped foreclosure of the marital home, failure to recognize the growing modern day trend towards equality meant a failure in advocacy. Ineffective advocacy could have easily lost a married woman her property rights.

Blackstone believed the traditional common law protected women and that separate spheres meant men should be in charge of the public sphere of managing household property and equality was irrelevant. As such, a woman’s legal identity merged with her husband’s upon marriage. Yet, the question became whether a woman was truly “merged” with her husband. Legal fictions are thus useful in providing context. In Massachusetts and New Jersey, the Married Women’s Property Acts were interpreted in the twentieth century on a superficial level of equality that was, itself, fictional: a presumed equality determining the ability of spouses to convey tenancy by the entirety property interests. Perhaps Hawaii took the most protective stance in the end, when it determined equality meant that spouses were equally barred from conveying a share in property held in a tenancy by the entirety. The Married Women’s Property Acts exemplify critical thought’s maxim that the law is about politics, and that legal politics affect interpretations of women’s rights. Modern courts found equality where the discussion should have focused instead on lack of protection and domination.

All this presents the eternal conundrum addressed by feminist legal theory: the appropriate recognition of, and balance in understanding the

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310. *See, e.g., id.* at 115.

significance of competing schools of feminist legal thought: cultural/difference, equal treatment and dominance. This study presents an example of the sameness/difference debate applied to marital property rights and the tenancy by the entirety, leading to questions of whether husbands and wives are always really “the same” when it comes to property rights. The Massachusetts and New Jersey cases prove that traditionalist presumptions about property management can undermine the equality imperative. These modern courts that articulated a language of equal treatment to understand the influence of the nineteenth century Married Women’s Property Acts on the tenancy by the entirety missed the persisting trends that dominated wives who owned property. They did so even though the original trend recognized differences and intended to protect wives and their property. The doctrinal concepts stemming from the law of trusts can offer insight into the implications of reconfiguring protection.

