

# The Progression of Women in Legislation: From Property to People

by

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## Abstract

In this thesis, the transformation of the legal status of women will be examined. Beginning with a discussion of the common law foundations and focusing especially on *coverture*, this paper will provide a history of how women's place in society developed through legislation as they gradually evolved from being recognized as the property of their husbands to being sovereign individuals. This progression for women was slow, and remains incomplete. Despite progress, echoes of patriarchal oppression still exist in law today.

The legal inferiority of women derives from British common laws accepted by colonists. Societal norms in those times dictated that a woman remain connected to some level of male leadership, be it a husband or immediate male family member. *Coverture*, a concept derived from the French *femme-covert*, ensured that a woman's civil identity was essentially non-existent. Once a woman married, everything she had--including property, inheritance, possessions, and earnings--belonged to her husband. Women lost rights to their names, custody of their children, and freedom to acquire property. Politically, a man and his wife were viewed as a single individual, suspending the legal existence of women altogether.

Women have fought for their legal rights and independence since the founding of our nation. Activist and women's organizations demanded suffrage and made incremental steps toward legal equality. Following the American Civil War, many women urged for a reform in the common law foundations rules of *coverture*. These laws had implications beyond those explicitly stated, as men became responsible not only for their wives' financial stability and protection, but also for instilling discipline. Many cases developed

that reinforced the role of women as property; domestic violence and rape were prosecuted as crimes against property rather than people. Much of the women's movement focused on establishing women as human beings in an effort to create policy change.

Over time, strides were made toward equality as women gained marriage rights, labor rights, suffrage, and the ability to serve in the military. These strides were slow, and oftentimes halted entirely. Each of these issues can be connected back to the concept of *coverture* and the idea of women as property. Some of these legal concepts have only been addressed in recent history, despite the timeworn logic of their foundations. There are many laws, particularly related to domestic and sexual assault that, even now, echo the idea of women as the property of others in need of direction, protection, and discipline.

“The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. ”

-Sandra Day O'Connor

The legal rights of women have completely transformed over the course of America's history. Women began life in America as civilly irrelevant. From this position women strived, incrementally, to eradicate the limitations of their own empowerment. Identifying the major political and social moments of this progression provide the necessary re-examination of law and history that will help to dissolve the laws that still inhibit gender equality today.

In this paper, multiple aspects of the progression of women will be examined, beginning with the origins of American law. We first examine British common law and the manner in which it was integrated into the various colonies. The theories that created the foundation for the female role in American society, such as coverture, had poignant implications for the legal structure that followed. These concepts, though seemingly archaic, were vehemently defended in court decisions for decades. Throughout history, we see women slowly begin to combat these oppressive laws, though this struggle was significantly more complicated than is often understood. Each period examined in this paper includes a number of significant historical events, powerful individuals, and innovative decisions that ultimately forged new paths in the realm of women's rights.

Examining this progression is also vitally important because it remains an ongoing process. In identifying key elements of the origins of the role of women in American law, it is evident that those origins can still be found in modern legislation. Finally, an examination of how those foundations, despite a significant amount of

progress, still inform the legal status of women in this country will be undertaken. Given the connection between social realities and legislation as established by this discussion, these persisting ideals ultimately serve to prevent women from achieving true equality.

#### Common Law

In order to effectively examine the progression of women in law, it is imperative to first examine the foundation of law in America. The origins of the American legal system are deeply rooted in English Law (Salmon, 1986). There was a wide range of diverse laws in England including the “law of the crown, law of parliament, law of nature... of which the common law of England was just one” (Stoebuck, 1968, p. 397). Common law specifically refers to “that body of governing principles, mainly substantive, expounded by the common law courts of England” (Stoebuck, 1968, p. 383). That being said, there is a significant amount of debate as to the extent to which colonies adopted what was truly common law.

Upon the construction of the thirteen original colonies, the need for just laws was acknowledged immediately, but a unified adoption of English law was never an expectation (Salmon, 1986). The most renowned theory on adoption of common law is attributed to Justice Joseph Story, who wrote:

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion that was applicable to their situation. (Stoebuck, 1968, p. 383)

The idea of adopting only portions of common law is echoed by law professor and author, George Haskins, who summarizes the inclusion of common law by saying “the

conditions of settlement and of development within each colony meant that each evolved its own individual legal system, just as each evolved its individual social and political system” (Salmon, 1986, p. 4).

The colonies were free to consider their unique demographic, cultural, and economic needs when incorporating the tradition of British common law (Salmon, 1986). Though it is difficult to summarize the many individual adaptations, in general, the southern colonies followed common law more closely due to, among other things, a lack of “an ideological commitment to change” (Salmon, 1986, p. 10). In the northern colonies, Massachusetts in particular, there was less of a sense of obligation to adhere to the common law standard (Stoebuck, 1968).

In establishing their individual legal systems, the ultimate goal of the colonies was to seek “social stability above all else,” which made laws regarding women and their role in society of vital importance (Salmon, 1986, p. 13). Colonies began constructing social realities for women with legal parameters of marriage. Though there were many variations of the adoption of common law, the laws constructed involving marriage were closely in line with concepts derived in common law across the colonies (Salmon, 1986).

In many ways, the colonies clung to common law in establishing the legal framework of marriage in America. The harsh realities of living in colonial America “necessitated reliance on protective strategies for wives...” (Salmon, 1986, p. 11). This concept of protection informed laws regarding women ranging from property rights to civil duties. “Her position was essentially that accorded by the common law, the fundamental thesis being the almost complete subordination of her person and property to her husband” (Salmon, 1986, p. 13). Interestingly, much of a woman’s legal inferiority

did not come into play until she was married. “At common law, unmarried females were subject to oppressive sexually discriminatory rules of law principally in the public sphere... In the areas of contracts and property, however, single women enjoyed almost equal status with single males... When single women married, however, these rights were lost or suspended” (Kanowitz, 1969, p. 35).

Though common law was applied uniquely across the different colonies, it played a vital role in the foundations of the American legal system. These foundations established and formally solidified women’s place in this new society, which remained the standard for decades to follow.

#### Coverture: Blackstone’s Legacy in the Colonies

One of the many concepts evident in the adopted British common law used by the American colonies was that of coverture. More specifically, Sir William Blackstone in his commentaries of the Laws of England in the seventeenth century, described coverture and unity of a person in such a way that influenced generations of English and American law (Stretton, 2009). Blackstone believed that subservient women were a necessary component for “ordering civil society” (Stretton, 2009, p. 122). Leaning heavily on Genesis 2:22-23, which states, “And Adam said, this is now bone of my bones, and flesh of my flesh; she shall be called Woman, because she was taken out of man. Therefore shall a man leave his father and his mother, and shall cleave unto his wife and they shall be one flesh,” Blackstone constructed the foundation of what would become the legal reality of women for centuries (Kanowitz, 1973 p. 63). In the fourth book of his commentaries Blackstone established coverture as:

By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called on in our law-french a femme covert...upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage.

(Warbasse, 1987, p. 6)

This doctrine had implications larger than mere legal inferiority. It held that “the husband and wife were but one person possessing but one will and that that will resided in the mind of the husband as the person fittest and ablest to provide for and govern the family” (Stretton, 2009, p. 112). In essence, coverture asserted that women lacked independent wills from their husbands, and therefore required no legal status at all (Stretton, 2009).

Another conceptual consequence of Blackstone’s writings was the adoption of “unity of a person” (Stretton, 2009, p. 113). The idea that the man and wife were actually one person had never been combined with coverture before Blackstone’s commentaries (Stretton, 2009). Blackstone suggested that these ideas “amounted to the key underlying principle behind married women’s status, rights, and obligations at common law” (Stretton, 2009, p. 119). These two now connected notions cemented women’s inferiority in the newly constructed American legal system.

One of several real-world implications of Blackstone’s ideas was manifested in the law that women could not, due to their lack of legal existence, convey property. Upon



marriage, “all a woman’s possessions went to her husband; he could dispose of them any way he wished during his lifetime or by will afterwards” (Warbasse, 1987, p. 7). This concept varied greatly among the colonies, and many states eventually added provisions under which women could convey property in some circumstances using The Married Women’s Property Act of 1839 (Warbasse, 1987). In the early stages, however, this restriction was overwhelming. “The fact that the law even found it necessary to guarantee her clothes, ornaments, and bedding shows how absolutely the husband controlled his wife’s personal property” (Warbasse, 1987, p. 13).

Married women were also deprived of the ability to execute a valid legal contract. This occurred for multiple reasons, the first of which was a woman’s lack of personal property. No agreement, it was argued, “could be enforced against her because she owned nothing a court could seize” (Salmon, 1986, p. 41). A lack of contracting ability extended to services a woman could provide. Such contracts were also believed to be unenforceable because “according to common law rules, a woman’s services belonged to her husband. They could not be given to another unless he consented” (Salmon, 1986, p. 41).

Unity of a person was used in contract law to further restrict women. It was established that “a man can not grant anything to his wife or enter into covenant with her for the grant would be to suppose her separate existence; and to covenant with her would only be to covenant with himself” (Salmon, 1986, p. 41). It was also widely believed that women were naturally more impressionable, as they lacked their own individual will, and therefore would likely be coerced into contracts because “they are in the power of their husbands” (Salmon, 1986, p. 42).

In addition to these contractual restrictions, women, in line with Blackstone's ideals, were not able to prosecute or be prosecuted in the court of law. "Though a married woman was theoretically liable for the injuries she inflicted in this manner, that liability was of limited significance since the law contributed her misconduct to her husband" (Kanowitz, 1969, p. 75). This inequality was reinforced by the concept of male marital privilege:

If women could be imprisoned their husbands would be denied sexual and household services. The right of a husband to the person of his wife is a right guarded by the law with the utmost solicitude; if she could bind herself by contracts, she would be liable to be arrested, taken in execution, and confined to a prison; and then the husband would be deprived of the company of his wife. (Salmon, 1986, p. 42)

This concept, and the legal ramifications that followed, had a lasting impact on legislation that continues to have consequences today.

The wife was also not permitted to act as the administrator of estates nor as legal guardians (Warbasse, 1987). This further restricted women's place in society by placing men in charge of the domain that had been assigned as especially female, the home (Warbasse, 1987). The wife was also, as an extension of these principles, expected to act as an "agent of her husband" (Salmon, 1986, p. 53). Given that this concept could allot women a certain level of freedom, the agency was limited into what was deemed as "reasonable" wifely activities (Salmon, 1986, p. 53). For example,

If a wife should purchase at a merchant's store such articles as wives in her rank in life usually purchase, the husband ought to be bound; for it is a

fair presumption that she was authorized by her husband to do so. If however she were to purchase a ship of yoke or oxen, no such presumption would arise, for wives do not usually purchase ships or oxen. (Salmon, 1986, p. 53)

These restrictions on women were seen as defensible for a number of reasons, one of which is that the restrictions were balanced by the obligations that a husband had to his wife (Salmon, 1986). These obligations included the responsibility of the husband to “maintain and treat his wife well,” “pay all her incurred debts,” provide her with the “necessaries” for life, accept liability for her in the court of law, and act as “the natural protector of her children” (Salmon, 1986, p. 53). In these obligations, Blackstone believed that wives, under coverture, received “the ultimate expression of Common Law’s benevolent paternalism” and were, therefore, able to “bask in the glow of the liberty in privileges of their free born husbands” (Stretton, 2009, p. 124).

In addition to the obligations of a husband, it was widely accepted that “married women consented to their modified legal status when they agreed to marry” (Stretton, 2009, p. 123). This was used in support of the legal inferiority of women, though it was also believed that “the married state is the only proper goal of womanhood” (Kanowitz, 1973, p. 11). These ideals conflicted with one another, arguing that women had the power to choose a more civilly active life if they choose to remain unmarried, when socially that was not considered acceptable (Kanowitz, 1973).

Considering the societal standards of the eighteenth century, and the needs of the colonies in that setting, author and historian Marylynn Salmon attempts to evaluate Blackstone’s theories in stating that:

The law of husband and wife thus bound the interests of spouses closely together. Ideally the system should have worked. If men always acted wisely and fairly, the common law rules might have served everyone well enough. To say that they did not is only to state the obvious. Unity of a Person was based on the perfect marriage, and therefore it inevitably created hardships in marriages that were less than ideal. (1986, p. 53)

Though early America may have been an environment in which these concepts were not questioned, the laws constructed in the shadow of Blackstone's writings on coverture in marriage solidified female inferiority for generations.

#### The Constitution and Separate Spheres of Influence

As the new American system of government emerged, so did the opportunity to improve upon the status of women. Colonists began drafting the Declaration of Independence, and women's role in society was further solidified as second to men. While the Founding Fathers were meeting to construct the Declaration, Abigail Adams wrote to her husband, John, with a plea to consider women when formalizing the document (Kuersten, 2003). She stated:

I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of husbands. Men of sense in all ages abhor those customs which treat us only as the [servants] of your sex; regard us then as being placed by Providence under your protection, and in imitation of the Supreme Being make use of that power only for our happiness. (Kuersten, 2003, p. 5)

Unfortunately, the founders did not take Abigail Adams's request into consideration. Many of the most prominent figures in American history were in fact, vehemently against equality for women. Thomas Jefferson said "were our state a pure democracy...[women] would yet be excluded from deliberations... women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in the public meetings of men" (Kuersten, 2003, p. xv). This idea is echoed in the Constitution, which also fails to address the inequality of women in society (Kuersten, 2003).

Many women saw the potential for progress in the passage of the Bill of Rights. The Fourteenth Amendment held particular promise, and, as will be discussed later, was used in multiple cases to advocate for the equal rights of women. The amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Though this amendment does seem to hold promise for women of this time, guaranteeing that their privileges as citizens must remain intact, this was not immediately the case. The courts failed to interpret the Fourteenth Amendment as a means to grant women equality in nearly every case during the early 1800's (Kanowitz, 1969).

During the middle of the nineteenth century, it was widely accepted that men and women each had their own distinct domain, one outside of the home, and one within the home. The first women's movement attempted to challenge this concept of "separate spheres of influences" for men and women (Kuersten, 2003, p. xvi). This idea continued to perpetuate inequality between the sexes, making it increasingly difficult for women to gain a presence outside of their own home (Kuersten, 2003). A small victory for women was achieved during this time in the success of Married Women's Property Acts, which were passed in 28 states between 1839 and 1865 (Kuersten, 2003, p. 11). These acts, which varied somewhat by state, allowed some rights to married women over their own property. They also made divorce slightly less devastating for women, as previously it would often leave them without anything to their names (Kuersten, 2003). These Acts only allowed so much control to wives, however, and men could still control much of their wives' property without their consent (Kuersten, 2003).

Little was done during this phase of American history to advance the plight of women. Even small advancements could not be fully utilized to improve the social and political realities of this time. Law professor and scholar Leo Kanowitz describes the frustration and apparent hypocrisy of this time in saying:

It had been held that a statute requiring a husband to consent to a wife's will depriving him of more than two-thirds of her estate did not violate the equal protection guarantee though the husband could make such disposition without the wife's consent...Even a state constitutional

provision guaranteeing to ‘both male and female citizens’ the equal enjoyment of ‘all civil, political, and religious rights and privileges’ [could not be utilized to change that] sex based classification had ‘always been made, and...is a natural and proper one to make. (1969, p. 151)

Though it may seem that these foundations were insignificant, these steps were vital to initiating what became the first organized movement for the equality of women.

### The Early Push for Women’s Rights

Many women saw the passage of the first Women’s Property Acts as an opportunity to challenge other foundational elements of coverture (Kuersten, 2003). The Women’s Property Acts, in addition to the antislavery movement inspired the origins of the early women’s movement. Women including Lucretia Mott, Angelina and Sarah Grimke, and Elizabeth Cady Stanton started their work for equality in the abolition movement. In doing so, they learned the necessary political savvy to encourage male politicians advocate for change (Kuersten, 2003). Mott and Stanton used their experience in the antislavery movement to also begin promoting women’s rights. Their first step was to formalize a meeting in an effort to garner support.

The Seneca Falls Convention of 1848 was the culmination of “a collective effort in an attempt to equalize women’s rights” (Kuersten, 2003, p. xvi). This meeting is often regarded as the origin of the women’s right movement. The convention, and the “Declaration of Sentiments” that followed, called for more than just suffrage, but the overall need for gender equality (Kuersten, 2003). The “Declaration of Sentiments” was modeled after the Declaration of Independence and “presented demands for equal rights of women in marriage, education, religion, employment, and politics” (Kuersten, 2003, p.

5). Despite this mobilization of women, the movement experienced a number of setbacks, many of which reflected the influence of common law and coverture.

In 1872, Susan B. Anthony, one of the major figures of the women's movement for suffrage and equality, was arrested and convicted of voting (Kuersten, 2003).

Anthony and her sisters entered a registration center and demanded to be added to the voter registry. Election officers at the site refused, but the Anthony sisters were adamant, quoting the Fourteenth Amendment and threatening to take legal action against the men. After discussing the legitimacy of that threat with their superiors, the election officers allowed the women to cast their ballots, though Anthony was arrested a few days later (Linder, 2001).

During her trial, Susan B. Anthony's defense hinged on the assertion that her persecution was exclusively a result of her gender. The defense opened by stating that "the crime therefore consists not in the act done, but in the simple fact that the person doing it was a woman and not a man, I believe this is the first instance in which a woman has been arraigned in a criminal court, merely on account of her sex..." (Linder, 2001, p. 4). Anthony's attorney also insisted that her ability to vote was protected by the Fourteenth Amendment, which prevented the creation or use of any law "which shall abridge the privileges or immunities of citizens of the United States" (Linder, 2001, p. 4). Unfortunately, the presiding judge, Judge Hunt, did not rule in Anthony's favor. The judge held that, "the Fourteenth Amendment gives no right to a woman to vote, and the voting by Miss Anthony was in violation of the law" (Linder, 2001, p. 4). This was the first of what would be many disappointing rulings that would inhibit the progression of the rights of women.



The decision in the 1873 case of *Bradwell v. Illinois* also reinforced many of Blackstone's ideals. Myra Bradwell insisted that, under the Fourteenth Amendment of the constitution, she retained the right to practice law in the state of Illinois (Kanowitz, 1969). Mrs. Bradwell stated that it was "neither a crime nor a disqualification to be a married woman," though the legal realities of that time seemed to imply otherwise (Kuersten, 2003, p. xviii). The court denied her claim, concluding that the Fourteenth Amendment in no way allocated the ability to practice law to women. In his concurring opinion, Justice Bradley stated, "it was not with the slightest expectation that this privilege would be extended to women" (Kanowitz, 1969, p. 44). He went on to justify this statement using similar language to Blackstone's writings, saying, "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the Law of the Creator" (Kanowitz, 1969, p. 44). Further outlining the social standing of women, Bradley continued, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life" (Kanowitz, 1969, p. 87).

There are a number of cases in which respected justices continued to defend the role of women as civilly inferior. *Rosencrantz v. Territory of Washington* discussed the issue of female participation in juries. Though the court ruled that women could serve as jurors, in his dissent, Justice Turner shows the continued prevalence of Blackstone's ideals, stating that he did not believe "that females are competent under the law as grand or petit jurors" (Rosencrantz, 1885, p. 308). He goes on to explain his reasoning, citing women as "the weaker sex" and claiming that their "delicacy" requires protection (Rosencrantz, 1885, p. 309). Justice Turner stated,

I cannot say, however, that I wish to see them perform the duties of jurors.

The liability to perform jury duty is an obligation, not a right. In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which... must, in my opinion, shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries... is her most sacred right. (Rosencrantz, 1885, p. 310)

Granting women suffrage was also a major issue of the time. The courts, up to this point, had failed to grant women protection under the Fourteenth Amendment, making it very difficult to establish a precedent that would allow women the right to vote (Kuersten, 2003). The notion of separate spheres for the sexes was still widely accepted, and many feared that merging the two worlds would damage the social foundations of American life. Arguments against granting women the ability to vote included that doing so “would be a detriment to the American family” (Kuersten, 2003, p. xix). This concern did not exclusively come from men. Many women also believed that “societal interests were best served through a system of domestic and political subordination” (Kuersten, 2003, p. xix). Women’s groups were further disjointed over the concept of universal suffrage for women. While some believed it was inherently necessary for all women to receive the right to vote, other groups insisted that voting be limited to the “highly literate” and those with “outstanding moral character” (Kuersten, 2003, p. xx). These

ideological divides ultimately interfered with the women's movement's ability to present a clear and cohesive message.

Though the women's movement struggled to gain national clout, they did have some success in appealing to state legislators to grant women suffrage. Because states were free to create their own qualifications for voters, the lack of national cohesion proved to be less of a barrier (Kuersten, 2003). In 1890, Wyoming granted women the right to vote, followed by Colorado, Idaho, and Utah (Kuersten, 2003). As women gained a foothold on individual states, critics of suffrage became more vocal. "Unable to choose between candidates or among issues, these critics said, women would vote according to their husbands' preferences, so women's suffrage was simply giving married men two votes..." (Kuersten, 2003, p. xx).

The success of Prohibition renewed the sense of hope that women could conceivably pass a suffrage amendment as well (Kuersten, 2003). The First World War also played a role in advancing the women's right movement. "In the immediate aftermath of the first World War, a combination of powerful rhetoric invoking modernity, democracy, and national superiority tipped the scales in favor of woman suffrage" (Thomas, 2011, p. 6). A radical women's group called the National Woman's Party, led a series of protests in front of the White House, which led to a number of their leaders' incarcerations. After an incredibly successful public sympathy campaign on behalf of the women who were jailed, Woodrow Wilson publically supported the proposed suffrage amendment in 1918 (Kuersten, 2003).

The amendment plainly stated that the right to vote "shall not be denied or abridged by the United States nor any State on account of sex" (Kuersten, 2003, p. xxi).

Congress approved the Nineteenth Amendment by the summer of 1920, and it was ratified by the states that August. Professor of gender and women's studies, Ashlyn Kuersten, discussed the impact of this landmark in saying:

Not only did the amendment void state laws that limited women's suffrage, but it was the first constitutional protection specific to women. It had been over a hundred years since the colonists had demanded popular sovereignty from their British king; finally, women were included in the privileges granted by national citizenship. (2003, p. xxi)

This marked a major victory in the woman's movement that proved to be a significant milestone in the struggle for gender equality.

### World War II

The onset of World War II proved to be the catalyst for change in terms of women's role in American society. The nature of war in and of itself is a contributing factor to the general shift in societal mores regarding women. "The dislocations of a nation at war have always created important challenges to traditional assumptions and practices" (Anderson, 1981, p. 1). Though there was potential for the immediate demands of war to lead to long-term change in cultural values, many of the advancements that occurred during the war did not continue in the decade after (Kuersten, 2003, p. xxii).

As men were deployed to fight overseas in the early 1940s, the workforce needed to be sustained by the women at home. In order to provide both the materials needed to successfully engage in war while still meeting civilian needs, "women...assumed economic roles traditionally ascribed to men" (Anderson, 1981, p. 1). A number of

organizations including the American government joined in a campaign imploring women to answer the call of their country.

Women responded in staggering numbers. “At the wartime peak in July of 1944, 19 million women were employed, an increase of 47 percent over the March 1940 level” (Anderson, 1981, p. 2). There is more to be discovered in this shift than just numbers; a closer look at the composition of the women’s labor force reveals that, due to the level of need, the number of working women did not only include single women. “For the first time in U.S. history, married women outnumbered single women in the female work force” (Anderson, 1981, p. 2). Between 1940 and 1944 the number of married women who were also employed “increased by 2 million, 72.2 percent of the total increase” (Anderson, 1981, p. 2). The contributions of women during World War Two were remarkable, but the changes of wartime subsided upon the conclusion of the War. “Rosie [the Riveter] could have been in the vanguard of social change for women,” but, for many reasons, the momentum gained during the Second World War was short lived (Anderson, 1981, p. 1).

When the men returned from the service, many women were encouraged to return to their homes (Kuersten, 2003). This exodus was further encouraged by the dramatic increase in birth rates of the baby boom. Women left their jobs to care for their rapidly expanding families (Kuersten, 2003). Women who chose to remain in the workforce were met with “seniority rankings, and preferential hiring of veterans” (Anderson, 1981, p. 7). If they were able to get or maintain employment, they did so for considerably lower wages, in positions that required significantly less skills than during the war. The “sex-

segregated labor market was successfully re-established during the reconversion period” (Anderson, 1981, p. 7).

Much of the propaganda used to mobilize the female work force during the war “stressed ideological continuity. The appeals used...emphasized the temporary and aberrant nature of the situation” (Anderson, 1981, p. 10). Ultimately, this allowed the general public to accept the change in female employment without it fundamentally challenging what people believed of women’s roles. Any reformation on an ideological level was met with fierce opposition:

The changes in women’s roles caused by the war created considerable anxiety about the stability and durability of the family, as working mothers were blamed by many for a rising divorce rate, child neglect... and a host of other ills supposedly exacerbated by women’s newly acquired independence. (Anderson, 1981, p. 10)

The resistance to allow too much female progression is reflected in a number of court decisions in the early 1950s. In the case of *Bonanno v. Bonanno* (1950), the Supreme Court of New Jersey almost directly affirms Blackstone’s early writings in establishing the husband as his wife’s keeper (Kanowitz, 1973). The separated, but still married, couple was disputing the amount of alimony that should be considered acceptable given the husband’s income and employment status.

Justice Ackerson delivered the opinion of the court stating, “The fundamental duty imposed by the common law upon a husband has long been recognized and enforced in this state. The duty to support and maintain his wife is the husband’s primary obligation...” (Kanowitz, 1973, p. 64). Not only does the justice directly affirm the

common law tradition, he also addresses and discredits the progress made in this area. He continues to say, “The Married Women’s Act, giving a wife rights which she did not formerly enjoy at common law, has not changed the common law duty of her husband to provide her with adequate support... such duty still devolves upon the husband”

(Kanowitz, 1973, p. 65).

While it may seem that requiring a husband to pay alimony is a victory for women, the implications of this ruling actually do more to inhibit women from advancing in terms of equality. In her article, “Women as Property”, feminist activist Verna Tomasson addressed the connotations of alimony directly, saying:

The concept of alimony is an insult to women. It does not represent payment for household labor done. It represents a concession to the fact that men and women do not have equal opportunities for employment.... Alimony says ‘here, you poor, helpless, unqualified, and useless person, take this. (1970, p. 1)

The courts again impeded the progression of women beyond their conventional gender roles in 1956. The case of *State v. Hunter* involved a woman who competed in a wrestling competition. The district attorney accused Ms. Hunter of knowingly violating the “peace and dignity of the State of Oregon” by participating in the wrestling match even though she was not a man (Kanowitz, 1973, p. 49). In delivering the opinion of the Supreme Court of Oregon, Justice Tooze revealed a staggering level of contempt towards the progress of females beyond traditional gender roles. He defended the conviction of Ms. Hunter by the lower courts in his decision:

Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only... in the field of sports... in the business and industrial fields...in politics, as well as in almost every other human endeavor, she had matched her wits and prowess with those of man, and, we are frank to concede, in many instances outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever increasing feminine encroachment...was the act unjust... have her civil or political rights been unconstitutionally denied? Under the current circumstances, we think not. (Kanowitz, 1973, p. 50-51)

This period in American history showed significant promise as an opportunity for women to advance in a wide range of areas from education to employment.

Unfortunately, the progress of women was continually met with resistance and a commitment to those foundational values that kept women inferior socially, legally, economically, and politically.

### Second Wave Feminism

In the final years of the 1950s, the Civil Rights Movement was just beginning in America. This movement helped inspire the re-emergence of an organized women's



movement. Many proponents for women's rights were inspired by the strategy used in the Civil Rights Movement to elicit dramatic changes in legislation (Kuersten, 2003). The National Association for the Advancement of Colored People (NAACP) "embarked on an expansive judicial interpretation of existing constitutional rights" as opposed to financially funding lobbying efforts (Kuersten, 2003, p. xxii). This gave women a method to emulate in the 1960s as the voice of the women's movement finally began to unify (Kuersten, 2003, p. xxii).

The 1960s began with significant changes for women. Major advancements in contraceptives took place in 1960 with the creation of the world's first birth control pill (Kuersten, 2003). The following year, President Kennedy held a Commission on the Status of Women. The Commission primarily conducted national research on the status of women, and gave many women the opportunity to be heard on a national scale (Kuersten, 2003).

In 1963, Betty Friedan wrote *The Feminine Mystique*, thrusting her into the spotlight of the women's movement. This book proved to be a crucial element in reorganizing the women's movement in this decade. In an unconventional approach, Friedan did not challenge specific legislation, but rather the overall social reality of the lives of women, much of which reflected the ideals expressed in those early writings by Blackstone. She wrote, "over and over women heard in voices of tradition... that they could desire no greater destiny than to glory in their own femininity" (Friedan, 1963, p. 1).

Though Friedan only focused on the plight of middle class women, this book struck a chord across the country, "and largely ushered in the second 'wave' of the

women's movement" (Kuersten, 2003, p. xxiii). Friedan opened the book by attempting to define what she called "the problem with no name," saying:

The problem lay buried, unspoken, for many years in the minds of American women. It was a strange stirring, a sense of dissatisfaction, a yearning that women suffered in the middle of the twentieth century in the United States. Each suburban wife struggled with it alone. As she made the beds, shopped for groceries, matched slipcover material, ate peanut butter sandwiches with her children, chauffeured Cub Scouts and Brownies, lay beside her husband at night – she was afraid to ask even of herself the silent question – is this all? (1963, p. 1)

The articulation of the separate spheres by Friedan and the mobilization that followed ushered in a number of important changes for women. In 1963 Friedan and a number of others organized the National Organization for women (NOW) "to lobby for the inclusion of women in the Civil Rights Act of 1964, the Equal Pay Act of 1963, repeal of criminal abortion laws, and passage of the Equal Rights Amendment" (Kuersten, 2003, p. xxiii). In this new wave, women focused on gender equality more so than women's rights. The legislation supported by the women's movement, especially the Equal Pay Act and the Equal Rights Amendment, sought to eliminate the prevalence of the protective legislation of the past. They instead demanded, that equality would be enforced for both genders on a federal level (Kuersten, 2003).

The 1960s also brought a number of judicial decisions that both advanced and hindered the progression of women. In 1965, the Supreme Court overturned the Comstock Act of 1873, which stated that the U.S. Mail could not be used to obtain

information on contraceptives. In *Griswold v. Connecticut*, the court instead decided that the expectation of privacy should be expanded to include whatever form of family planning people choose. In his majority opinion, Justice William Douglas rhetorically asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship” (Kuersten, 2003, p. xxx). This case served as a victory for women, who now had some legal protection in their use of contraception. This ruling is far from perfect however, as the Justice touched on the privacy between married couples only.

The following year, the Supreme Court took the opportunity to discuss some of the foundational elements of a woman’s role in American. The case, *U.S. v. Yazell*, forced the Justices into a conversation about coverture, and though the ruling did not favor women, this case was an excellent opportunity to discuss the legal legitimacy of Blackstone’s writings as they applied to the modern world.

The Yazell’s received a disaster loan from the SBA after a flood damaged their shop. When they defaulted on that loan, Mrs. Yazell argued that, under the Texas law of coverture, she could not be bound to the obligations of the loan because she could not execute a valid contract. The court held that the Texas law should stand in this case on the grounds that there was not a more prominent federal interest. In other words, the court affirmed that coverture should stand. In his dissenting opinion, Justice Black wrote that the doctrine rests “on the old common-law fiction that the husband and wife are one... [which] has worked out in reality to mean... the one is the husband” (Kanowitz, 1973, p. 63). To a large extent, he argued, “those changed [upon marriage] reflected the

feudal theory of ‘natural male dominance’ – a theory that is far from dead in modern times” (Kanowitz, 1973, p. 63).

Though the courts did show some level of progress in the recognition of women as civic equals, there were several cases in which women were still regarded as inferior in terms of their responsibilities in citizenship. In *U.S. v. St. Clair* a man argued that the draft was unconstitutional under the equal protection clause of the Fourteenth Amendment because it discriminates on the basis of sex (Kanowitz, 1973, p. 69). The defendant claimed that because “Congress has established women’s corps in the various branches of the Armed Forces... Congress had treated the sexes equally with respect to their ability to serve in the Armed Forces” (Kanowitz, 1973, p. 71). The defendant argued that the recognition of women’s ability to contribute to the Armed Forces established in the creation of their own corps meant that they should be equally eligible for the draft. Though the role of women in the Armed Service had expanded greatly, the Court did not feel that women should be equally eligible for the draft.

The Supreme Court ruled that women were “still regarded as the center of home and family life” and that they should “be afforded special recognition” (Kanowitz, 1973, p. 71). In establishing service rules for the Armed forces, the justices believed that “Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning” (Kanowitz, 1973, p. 71). This reflected a similar logic to the “protective” legislation ushered in during the 1950s, ultimately solidifying substantial legal differences between men and women.

The 1970s proved to be a crucial decade in the fight for gender equality. The progress made in the previous decade, coupled with the revitalization of a passionate women's movement led to a number of significant decisions in favor of women becoming equal citizens (Kuersten, 2003).

In 1971, the Supreme Court decided on *Reed v. Reed*, a case that would become the judicial precedent for a number of cases regarding the equal protection of women. The case involved two parents petitioning for the ability to administer their deceased son's estate. The Idaho courts originally relied on a state code that labeled the boy's father, Cecil Reed, as administrator over his mother on the sole basis that he was male (Kanowitz, 1973). The Idaho statute highlighted that the mother or father be granted the ability, but provided that "of several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females..." (Kanowitz, 1973, p. 514). His mother, Sally Reed, appealed this decision on the grounds that the state code violated her equal protection under the Fourteenth Amendment, a legal argument that many women had used before her (Kanowitz, 1973).

When the case reached the Supreme Court the Justices decided, for the first time in American history, that discrimination based on gender did in fact violate a woman's Fourteenth Amendment rights. Chief Justice Burger delivered the opinion of the court, stating that "the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction" (Kanowitz, 1973, p. 515). The Justices based this decision on the logic that differential treatment can only be upheld if it rests "upon some ground of difference having a fair and

substantial relation to the object of the legislation” (Kanowitz, 1973, p. 516). In considering whether sex served as a reason with relation to the goal of the code, the court decided that it was, in fact “arbitrary.” Justice Burger summarized the opinion of the court in saying, “by providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause” (Kanowitz, 1973, p. 516).

*Reed v. Reed* set an important precedent and served as an opportunity for women to demand equality in a number of other realms. One of the major figures of the women’s movement during the 1970s was Ruth Bader Ginsburg. Ginsburg was teaching at Columbia Law, while also directing the Women’s Rights Project at the American Civil Liberties Union (Thomas, 2011). Before becoming the second female Supreme Court Justice, she played an instrumental role in devising the strategy that was used to develop sex discrimination law.

Ginsburg explained this strategy through saying that the objective of the Women’s Rights Project “was to obtain thoughtful consideration of the assumptions underlying, and the purposes served by, sex-based classifications” (Thomas, 2011, p. 11). Ginsburg led a charge to challenge the differential treatment of the sexes, which had been rationalized as having been “reflective of natural differences” to that point (Thomas, 2011, p. 12). The Women’s Rights project openly attacked the protective legislation of the previous decade including provisions such as alimony, employment restrictions, and limited jury service. After the *Reed v. Reed* decision, “Ginsburg then encouraged the Court to adopt a heightened level of scrutiny for reviewing distinctions on the basis of sex” (Thomas, 2011, p. 12).

This reformed standard of review was established in the 1976 case of *Craig v. Boren*. This case reviewed the legitimacy of Oklahoma's drinking age, which at the time was 18 for females and 21 for males (Kuersten, 2011, p. xxv). Oklahoma argued that the differential treatment was based on the higher tendency for males to get into alcohol-related accidents. Despite this claim, the Court decided that the law denied equal protection to men, and declared it unconstitutional (Kuersten, 2011, p. xxvi).

This case built on the standard in *Reed v. Reed* to create a new "intermediate" level of scrutiny for gender discrimination claims. This intermediate scrutiny suggested that, "in order for a law that differentiated between men and women to prevail, the state had to prove that the use of sex as a classifying tool was substantially related to the advancement of an important government objective" (Kuersten, 2011, p. xxvi). Women used this new standard to make a number of other changes including the reformation of alimony laws and ensuring that public schools be available to both sexes (Kuersten, 2011).

Though this new level of scrutiny did serve to advance women closer to equality, there were still some examples in which, even given this intermediate level, statutes seemed to regard men and women as unequal. For example, around this time, 39 states had differing ages at which a boy or a girl could be married (Kanowitz, 1969, p. 10). In every state that enforced a different age for young men than women, with women permitted to marry at a younger age. While these states argued physical, mental, and emotional maturity to be the foundations for this difference, that, for many, is not a satisfactory explanation. Many feared that these ages were reflective of the idea that "the married state [was] the only proper goal of womanhood," whereas "the male...while not

to be denied the benefits of marriage, should also be encouraged to engage in bigger, better, and more useful pursuits” (Kanowitz, 1969, p. 10).

The intermediate level of scrutiny applied as a result of this time period successfully diminished the influence of the separate spheres doctrine that had been so pervasive in American culture (Kuersten, 2011). The Court successfully recognized the discriminatory nature of the protective legislation of the 1950s and 1960s, and, as a result, women began gaining ground in a number of important areas.

The 70’s also included a number of advancements for women in both reproductive rights and education. In 1973, the Court decided *Roe v. Wade*, ruling that, “abortion was a fundamental right based on the right to privacy established in *Griswold v. Connecticut*” (Kuersten, 2011, p. xxx). In a 7-2 decision, the Court ruled that Texas’s state law banning abortions was unconstitutional on the grounds that the right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” (Kuersten, 2011, p. xxx).

Many feminist movements targeted the education system as a source of the perpetuation of the now dated convention of separate spheres. “By 1973 over 500 colleges and universities offered over 2,000 courses in women’s studies”, and 78 institutions included women’s studies as an independent program (Berkley, 1999, p. 75). In a survey conducted on women’s educational goals in 1971, 18% of women still believed that “preparation for marriage and family was the most important reason for attending college” (Berkley, 1999, p. 75). By the conclusion of the 1970s, that figure plummeted to less than 1% (Berkley, 1999, p. 75).



This period in American history was unique in terms of the advancement of women. Progress was made not only in terms of judicial rulings, but also in the societal reality and expectations of women.

#### Gender Equality in the 1980s and 1990s

The 1980s and 1990s continued on the surge of progress enjoyed in the 1970s for women's equality. In 1981, Ronald Reagan delivered on his promise to diversify the Supreme Court by nominating the first female Justice, Sandra Day O'Connor. In her first case, *Mississippi University for Women v. Hogan*, she voiced her opinion on gender discrimination, stating, "when the purpose of a law is to exclude members of one gender because they are presumed to... be innately inferior, the objective [of the law] is illegitimate (Kuersten, 2011, p. xxvi). During her time on the Court, O'Connor, along with four other justices, continued to support the "heightened standard of review for gender discrimination cases" established in the 1970s (Kuersten, 2011, p. xxvii).

Despite promising positioning in the Court, the 1980s experienced a number of setbacks regarding reproductive rights. In 1981, a legislative program called the Family Protection Act was designed by the New Right in an effort to "strengthen" the American family (Berkley, 1999, p. 91). This movement called for "public policies favoring marriage, childbirth, heterosexuality, and the role of the husband as the head of the household" (Berkley, 1999, p. 91). Feminists spent much of the 1980s combatting reforms and restrictions made to abortion laws as the more conservative government pushed to limit access (Berkley, 1999).

As a result of the prominence of women's reproductive rights as a "wedge issue" in the 1980s, the 1990s featured an increase in female political engagement (Berkley,

1999). This increase was also spurred by the 1991 nomination of Clarence Thomas to the Supreme Court. Though Thomas was initially seen as an accomplished choice for a conservative seat, his Senate confirmation hearings brought accusations of sexual harassment from a former employee, Anita Hill (Kuersten, 2011). Hill never reported these allegations to her superiors, but many women had similar experiences of sexual harassment in the workplace, and were even more enraged when they saw Hill being questioned by the “all-male, all-white Senate” (Kuersten, 2011, p. xxxi). Following Thomas’s confirmation, the topic of sexual harassment in the workplace led to political activism, and in 1992 women took to the polls. Women were more represented in Congress, Governor’s seats, and judicial benches than at any other time in American history (Kuersten, 2011). Many called 1992 “the Year of the Woman” as a result (Kuersten, 2011, p. xxxii).

This activism was short lived, however. As was evident in previous women’s rights victories, many groups lost visibility after 1992, and election rates for women dropped back to normal (Kuersten, 2011). The tensions that developed over this time period are representative of a significant shift in the influential capacity of women. These decades showcased women actively engaging in the national dialogue on gender equality issues, ultimately leading to a dramatic increase in civil rights and responsibilities from which they had once been completely excluded (Kuersten, 2011). Though many issues do not seem indicative of advancing the cause for equality, the overall engagement of women during this time was a notable achievement.

Prevalence of Foundational Beliefs in Legislation Today

Upon examining the history of women's fight for equality, it is clear that a number of incremental victories led, over time, to widespread change. "While law has and continues to operate as a restraint upon women's full participation in society, law has also worked as a facilitating structure" (Thomas, 2011, p.1). It is vital to reexamine the gradual progression of women for a number of reasons, both to understand the restraints and facilitating nature of the law, and because "such reexaminations of American legal history contribute to discussions of the law and policy decisions of today in ways that promote women's rights, women's interests, and women's empowerments" (Thomas, 2011, p. 1). It is especially vital because, despite the progress that has been made, laws regarding sexual violence against women have evolved at a dramatically slower rate and are, even now, directly related to those legal precedents established upon the founding of our nation.

Though there are a number of laws that could be examined as having progressed slower, and being connected to common law and coverture, this analysis will focus primarily on the evolution of marital rape laws in America. Throughout history it has been the case that, despite the advancement of women in a number of other areas, laws regarding sexual morality have undergone less reform than laws in other categories (Kanowitz, 1973, p. 104).

In his writings, Blackstone claimed that a woman consented to a change in status by agreeing to marry. This consent, according to Blackstone, however, "ended abruptly at the church door" (Stretton, 2009, p. 123). This concept of a kind of eternal consent was one of the foundational elements in constructing early rape legislation. Under this assumption, clarified by Sir Matthew Hale, "a husband could not be found guilty of rape

within marriage for their mutual matrimonial consent” (Stretton, 2009, p. 123). This was further enforced by Blackstone’s concept of unity of a person. The understanding that a woman shared an identity with and became the property of her husband translated to mean that a husband was always entitled to his wife’s body. The contract of marriage insisted, according to Hale, “the wife hath given herself in this kind unto her husband, which she cannot retract” (Stretton, 2009, p. 123).

These ideas were supported by societal expectations of the time as well. It was believed that, “the purpose of marriage was procreation and the wife’s promise to obey meant that the husband had a right to sexual intercourse with the wife upon all occasions. Her personal consent was irrelevant; the women’s subjective feelings on a particular occasion were not important” (Bourque, 1989, p. 115). These beliefs permeated in the American legal system with respect to marital rape.

This resulted in dim legal realities for wives in America. Spousal exemption was the norm in all states for over nearly 200 years. It was not until the 1970s that efforts to reform rape statutes called attention to the need to reconsider spousal exemption (Bourque, 1989). In the *Oregon v. Rideout* case (1978), Greta Rideout accused her husband of rape. The trial took only six days. The jury did not feel that the prosecution had met the reasonable doubt standard, but the case did bring the issue onto a national stage (Bary, 1980).

The case was mentioned in the *New York Times* and *The CBS Evening News*. Many people discussed the defense’s claim that John Rideout felt he had a common law right to his wife (Bary, 1980). Greta Rideout’s sexual history also became a topic of conversation in national media coverage in an effort to rationalize what she did to cause

sexual aggression from her husband (Bary, 1980). This case, and the brutal media coverage that followed, forced many states to address the issue of spousal rape.

Some states responded to the national debate brought on by the *Oregon v. Rideout* ruling by amending their statutes. Many limited these changes to only stipulate that the spousal exemption did not apply if the woman had legally withdrawn consent through separation, but some states amended statutes to explicitly say that a husband could be a charged for raping his wife (Bary, 1980).

As more states began reforming their rape statutes, the issue became increasingly controversial. Some states completely repealed their spousal exemption legislation, while states such as Iowa and California followed with individual reforms. The president of the Oregon Trial Lawyers Association and head of the Oregon State Bar, Charles Burt, openly commented on “the absurdity of bringing the crime of rape as a law into marriage,” saying, “a woman who’s still in a marriage is presumably consenting to sex...Maybe this is the risk of being married” (Bary, 1980, p.1089). Other opponents of the reforms were concerned that eliminating spousal privilege gave “bitter women” too much accusatory power (Bary, 1980, p. 1090).

It took until 1993 for every state to outlaw marital rape by removing spousal exemption entirely, eliminating marriage as a defense, or specifying marital rape as a new offense (RAINN, 2009). However, even now, each state has unique limitations for what acts can be considered marital rape. For example, eleven states require that there must have been the threat of force or actual force used in order for a husband to be convicted of rape (How, 2003, p 1-5). South Carolina and Illinois both specify that the complaint must be filed within 30 days of the attack, and California requires that it must be filed

within a year (How, 2003, p. 1-5). Six states require that the couple have separate living situations, be in the process of getting divorced, or have a court ordered separation in order for the husband to be convicted of marital rape (How, 2003, p. 1-5).

The ongoing struggle for gender equality has been marked with legal victories and disappointments. Women have advanced beyond the restricted sphere of influence to which they were once bound, overcoming societal conventions, educational and employment limitations, and centuries of legal precedent. Despite the immense changes in women's rights in American history, there are clearly some remnants of coverture in society today. Ideally, this examination of the overall progression of women will call attention to the areas in which we can still hope to improve.

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