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Cover Photograph: Rose Dunn, known as "Rose of the Cimarron," fell in with Bill Doolin's band of robbers as they terrorized Oklahoma and Indian Territory in 1893. She was tried, convicted, and sent to prison, where she is likely to have had the kind of experience described by Anne M. Butler in her article on women's work in western prisons. (Western History Collection, University of Oklahoma Library)

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WOMEN, LEGAL HISTORY, AND THE AMERICAN WEST

JOHN R. WUNDER AND PAULA PETRIK, GUEST EDITORS

Hermione Kopp Brown, a lawyer and a partner in the entertainment law firm of Gang, Tyre, Ramer & Brown, describes her desire to become a lawyer quite succinctly. In 1942, married and with one child, she knew she had to do something. She and her husband had moved from California to Washington, D.C., and there, concluding that she might find legal work challenging and worthwhile, she enrolled in George Washington University's law school. There were plenty of openings because so many young men were at war. After the first minute in law school, Brown recalls thinking, "This is what I really want to do." From there she moved back to Los Angeles, graduated from the University of Southern California School of Law, and joined Martin Gang's prestigious firm. Until this issue of *Western Legal History*, Hermione Brown's story has not been told. She is symbolic of the study of western women's legal history. There are many women in the West's past, and their legal history has yet to be uncovered.

This special issue of *Western Legal History* is devoted to a consideration of the legal history of women in the American West. Four essays, excerpts from an oral history, and all of the book reviews concern western women and the law. It is important to note that this issue probably would not have been published in any journal as late as ten years ago. Although women's history was firmly established by 1984, legal historians were not quite as focused on exploring law and gender on a regional basis. Fortunately that deficiency has now been remedied, and the following essays show the extent of the diversity and dimensions of western women's legal history.

The first essay, Anne Butler's "Women's Work in Prisons of the American West, 1865-1920," explores the character of women's incarceration in the trans-Mississippi West. Although nineteenth-century concepts of women's superior moral nature guaranteed that comparatively few women entered penal institutions, some women, usually distinguished by their race,

ethnicity, class, or political beliefs, travelled through the criminal justice system and arrived in prison. Once there, they found institutions singularly unprepared for them.

At first western prison officials simply placed women in men's prisons. Predictably, sexual abuse—on occasion of scandalous proportions—occurred, and African American women were sometimes treated in former slave states, such as Missouri, Arkansas, Louisiana, and Texas, as if they were still chattels. As more women were incarcerated, they were eventually separated from the male prisoners, and traditional concepts of gender roles came to govern women's prison experiences.

Correctional policy in the American West toward men and work generally incorporated the vague idea of incarceration as rehabilitative—the "busy hands are happy hands" school of correction—but women did not fully participate in this regimen. Men might learn a potentially useful skill in a prison quarry or in laboring to build the prison itself, as was the case in Montana, whereas women, in contrast, worked at the same domestic skills common to most women in the nineteenth and early twentieth centuries. In many instances, they did not have the opportunity to work at all and simply languished in their cells.

Butler concludes that women in western prisons, particularly in their poorly designed work programs, were forced participants in society's rigidly applied rules regarding race, class, and, most importantly, gender. Women entered prison as laundresses, servants, seamstresses, and cooks, and they departed older, broken psychologically, frequently sexually abused, and less healthy, but still laundresses, servants, seamstresses, and cooks. In other words, convicted women left western prisons much as they were when they arrived, albeit probably the worse for their prison experience.

In the second article, "Gender and Protest Ideology: Sue Ross Keenan and the Oregon Anti-Chinese Movement," Margaret Holden moves beyond the walls of a single western institution to explore why Anglo women, primarily working women, supported and sometimes actively led the extralegal anti-Chinese movement that gripped most of the American West during the last half of the nineteenth century.

Using Oregon as a laboratory (to employ a Progressive Era phrase frequently applied to Oregon for the American West), Holden shows how one woman, Sue Ross Keenan, and other politically aware women in the woman's suffrage and labor movements came to favor and support discriminatory legislation and vigilante actions against the Chinese. Keenan articulated a "protest ideology" that found in law and constitutional government a means to justify such extralegal actions. Holden

shows that this development is in keeping with the stirring of nineteenth-century women's political consciousness.

Holden summarizes these connections by noting that women's rights for Anglo women in the labor movement meant equal rights to a decent wage and opportunities to become "republican citizens." Free labor was a dynamic concept that required the elimination of unfair laws and unfair competition. To Sue Ross Keenan and other Anglo women in 1880s Oregon, this ideology translated into anti-Chinese movements and Chinese exclusionary legislation.

Broadening the discussion even further, Donna Schuele, in "Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California," moves from a particular period and locale to the wider world of state politics and a legal issue of national concern. Building on the work of other historians, she takes up the evolution of California's community property law in all of its subtleties.

When Californians turned to constitution-making, they found that they had two competing legal systems: the civil law system, a legacy of Spanish occupation and the Mexican Republic, and the common law system, an Anglo import. After much debate California adopted a hybrid constitutional provision on marital property rights that included elements of both the civil and the common law.

Paternalistic impulses prompted Section 13 of California's 1850 Constitution, and the ambiguity created provided women's rights activists in that state with a useful tool. However, in the short term, enabling legislation passed by the first California legislature favored a common law view of women's property, and this created a number of contradictions that were unfair and worked hardships on wives.

California's women's rights activists seized on the property laws and the civil law ideal as a means to provide women with the same rights as their male counterparts, and they advocated suffrage and marital property reforms. Although women's groups worked hard, proposing legislation and lobbying legislators frequently, no real reform occurred, and after 1880 an organized California women's rights program waned.

In the end, however, concludes Schuele, although California's women had the legal advantages of a marital property system conceived out of civil law traditions—advantages that their eastern American sisters lacked—California still fell into line with the national trend toward a modified common law system governing married women's property rights.

Women in California found the laws of their state to be fraught with ambiguities and complexities, and the last essay, "Women and the Homestead Act: Land Department

Administration of a Legal Imbroglia, 1863-1934," also explores similar components, this time regarding women and land law in the West. James Muhn, a historian with the Bureau of Land Management, capitalizes on his unique expertise to examine women's relationships with the Homestead Act through decisions rendered by the Land Office.

From the outset the Land Office interpreted the enabling legislation of the Homestead Act as applying to single women. Unmarried women who had reached their majority could make and patent a homestead. But not all women fit so neatly into the single women category, and married women experienced a variety of situations that required Land Office clarification. Some married after their entry; others, through divorce, abandonment, or widowhood, became "single"; and still others occupied a status in between.

As personnel changed in the Department of the Interior and in the Land Office, and as interpretations regarding women in various situations swung from liberal to conservative and back again, Muhn suggests that two overarching ideas governed the Land Office's dealings with women. First, the Land Office was conscious of the need to populate areas of the nation with stable families; second, nineteenth-century ideas regarding the proper roles for husbands and wives influenced the Land Office's administrative determinations as to what constituted a family. By 1930 the Land Office's mandate to dispose of the public lands in a potentially profitable way outweighed the mandates of the traditional family.

Provided their marital credentials were in order, women in a variety of circumstances could acquire property from the federal government, a legal right that women in some states were denied. Gender roles, in short, influenced the operation of the law at the national level when it came to the disposal of western lands and influenced how women fared in the homesteading enterprise.

The essays in this special issue conclude with an oral history excerpt based upon an interview of Hermione Kopp Brown by Carole Hicke. In it, besides explaining how she came to study law and obtain a position, Brown recalls her entertainment law firm's controversial role in the actions of the House Un-American Activities Committee.

Although she was primarily involved in probate and estate planning, Brown did participate in an important women's rights case in California. She represented pro bono a woman who was passed over for promotion to be a stationmaster for the Southern Pacific Railroad near Palm Springs. Because of her gender, the woman was not given the job. Brown and another young partner in the firm heard the story and decided to bring

suit. The Southern Pacific contended that their hands were tied by California regulations designed to ensure women's safety on the job. But the judge who heard the case, *Rosenfeld v. Southern Pacific* (1968), held for Brown's client and overruled the regulation. This verdict was sustained on appeal, and a substantial early breakthrough for women's rights in the workplace occurred in California.

Taken together, these histories illustrate a number of things about the state of the study of women and law in the American West. First, there is, as Thomas Jefferson surmised when he contemplated the Lewis and Clark Expedition, a good deal left to be explored.¹ Little scholarship has been published concerning western women and criminal law, and, except for divorce, little has been accomplished by way of women and civil law.² Likewise, western women's roles in the history of property and probate need more attention. No regional historical study of western law yet exists; similarly, no history of women, the law, and the American West has been written.³

Unlike the situation in many eastern jurisdictions where nineteenth-century legal records have been destroyed or misplaced, the West is rich in documentary sources that make such studies feasible. Montana, for example, succeeded in having all of the court transcripts that came to its Supreme Court in the appeal process transferred to microfiche—a boon to the impoverished researcher. Similarly, most county courts in the West have managed to retain complete inventories of their records or have transferred them in toto to state historical societies. Although the evidence is impressionistic, western jurisdictions maintained the coroner's inquest long after others had moved toward implementing a medical examiner system.⁴ As

¹See Gary Moulton, ed., *The Journals of the Lewis & Clark Expedition*, 8 vols. (Lincoln, 1983-), and the numerous works on Thomas Jefferson.

²See David J. Langum, ed., "Law in the West," special issue of *Journal of the West* (January 1985); Paula Petrik's articles on divorce in the West; and *No Step Backward: Women and Family on the Rocky Mountain Mining Frontier, Helena, Montana 1865-1900* (Helena, 1987); Glenda Riley, *Divorce, An American Tradition* (New York, 1991); and Gordon Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912* (Westport, Conn., 1983), for a discussion of contract law and other aspects of civil law.

³The most comprehensive surveys of the history of American law attempt to grapple with the paucity of material on western women and the law. See Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York, 1985), and Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989).

⁴For a discussion on coroners' inquests and historical methodology, see Clare V. McKanna, Jr., "A Tale of Three Counties: Homicide, Race, and Justice in the American West, 1880-1920" (Ph.D. diss., University of Nebraska-Lincoln, 1993).

a result, western courthouses are filled with testimonies of the least-likely-to-be-heard historical actors. To compare a coroner's inquest transcript with a subsequent trial reveals much about the informal operation of the law and its formal procedures. Thus, to borrow from Elizabeth Chester Fisk, an early western resident, there is "a wide field of usefulness" for researchers inclined toward the study of western women's legal history.

Second, these essays suggest that the legal history of the American West, especially as it pertains to women, sits squarely in the New Western History as well as harkening back to an earlier model. On the one hand, these essays demonstrate a collision of cultures—black women in white prisons, white women in the anti-Chinese movement, California women under Spanish-Mexican law, and women farmers contending with a male-dominated federal bureaucracy—with the later one "conquering" or seeking to conquer the former. This idea of conquest as a primary explanation for the history of the American West is most clearly articulated by Patricia Nelson Limerick.⁵ Similarly, an insistence on the diversity of western populations—an emphasis maintained by Richard White, Donald Worster, William Cronon, Patricia Limerick, and many others—as a seminal factor in explaining the history of the West is present in these essays.⁶ A willingness to cast the story of westward expansion and legal development in a more frank, and sometimes less than heroic, light, emerges from these essays and represents a common position among nearly all New Western historians.

On the other hand, several of the essayists suggest that the West proved congenial to women's economic, political, and legal aspirations—at least for certain places and certain times.⁷

⁵Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987), and "What on Earth Is the New Western History?," in *Trails: Toward a New Western History*, ed. Patricia Nelson Limerick, Clyde A. Milner II, and Charles E. Rankin (Lawrence, 1991), 81-88.

⁶For example, see Richard White, *"It's Your Misfortune and None of My Own": A New History of the American West* (Norman, 1991); Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York, 1985); William Cronon, *Nature's Metropolis: Chicago and the Great West* (New York, 1991); William Cronon, George Miles, and Jay Gitlin, eds., *Under an Open Sky: Rethinking America's Western Past* (New York, 1992); and John R. Wunder, "What's Old about the New Western History: Race and Gender, Part 1," *Pacific Northwest Quarterly* 85 (April 1994), 50-58.

⁷See Lillian Schlissel, Vicki L. Ruiz, and Janice Monk, eds., *Western Women: Their Land, Their Lives* (Albuquerque, 1988), and the works of Glenda Riley, Peggy Pascoe, Betsy Jamison, Susan Armitage, Paula Petrik, Kathleen Underwood, Sarah Deutsch, and others. Particularly helpful in providing a beginning place for the consideration of western women and legal history may be Paula

These brief glimpses hint, moreover, at something often obscured in debates between partisans of the New and the Old Western History. Both emphasize the physical environment and its effects on western populations, but it is worth remembering that the West in many localities possessed a peculiar demographic composition, a human ecology that differed greatly from the East's and that was hardly ephemeral. There was a shortage of women in most of the nineteenth-century West that still carries over into some remote corners of the West today.

Demographers argue that when demographic transformations occur, they confuse society's status quo. When, for example, the sex ratio of a population becomes skewed one way or another, demographers anticipate an increase in the status of one sex. The development of the law in the American West is a good place to look for the results of these demographic disturbances, for it is in confrontation with the law that both women and men must clarify and explain a new order conditioned by a different human ecology.⁸ Western legal history may yet pose the greatest challenge to the hegemony of a new paradigm for the history of the American West.⁹

Perhaps this special issue can be best summed up by returning to Hermione Kopp Brown. She recalls her elation when she realized that she was actually going to be able to practice law. She was hired by Martin Gang and treated as a professional. "Hermione," he promised, "if you ever want it, you've got a job here." Brown reflects, "Of course, that was quite an inducement in days when women were not offered professional jobs very readily." Women have not readily been the subject of western legal history, but that past trend is clearly changing.

Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," *American Historical Review* 89 (June 1984), 620-47.

⁸For an introduction to historical demography, see E. A. Wrigley, *Population and History* (New York, 1969), and D. K. Shelestov, *Demography in the Mirror of History*, trans. Paul Garb (Moscow, 1987).

⁹Perhaps the beginning of the New Western Legal History may be traced to a conference held at Victoria, British Columbia, in 1991, and the resulting book, *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. John McLaren, Hamar Foster, and Chet Orloff (Pasadena, 1992).



The social reformer Kate Richards O'Hare, shown here in 1922, wrote about her experiences with industrial exploitation and political oppression inside the Missouri penitentiary. (Detail of photograph from Missouri Historical Society)

WOMEN'S WORK IN PRISONS OF THE AMERICAN WEST, 1865-1920

ANNE M. BUTLER

*Of course, nine hours a day at a sewing machine is no light task, but I am perfectly well and quite efficient, so manage very nicely.*¹

In 1919, Kate Richards O'Hare, a socialist and labor activist convicted for her political views, penned these confident words in her second letter from the Missouri penitentiary. Hardly representative of the female prison population, O'Hare, through her letters with their decidedly political message, provided a rare, articulate assessment of prison life for women.²

Anne M. Butler is professor of history and coeditor of the *Western Historical Quarterly* at Utah State University. She wishes to thank Utah State University and Gallaudet University for supporting the research for this article.

¹O'Hare to her family, n.d., *Kate O'Hare's Prison Letters* (Girard, Kans. [1919]), (microfilm 7648, New Haven, 1977) [hereafter cited as *Letters*].

²A short collection, published in pamphlet form to serve as a political tract, O'Hare's letters are dated only infrequently. Throughout them, O'Hare wrote openly about her privileged position among the inmates, as political prisoners were considered the "aristocracy." One of the other women prisoners cleaned her cell for her and all the "girls" tried to make her "very comfortable." See pages 4, 9, and 43 for examples of her status among the prisoners. O'Hare, who saw herself as a champion of workers, seemed comfortable with the class distinctions, as when she noted, "Emma [Goldman] and I were walking up and down the courtyard and one of the colored girls said, 'it's a d___ shame for wimmin like Miss Emma and Miss Kate to be here.'" *Letters*, supra note 1 at 93. For information about the more usual prisoner profile for western penitentiaries, see Anne M. Butler, "Still in Chains: Black Women in Western Prisons,

Despite the optimistic tone with which she began her term, within less than three months the extreme physical demands of the shop had exacted their toll. Suffering from chronic swollen feet and severe soreness in her neck and shoulders, O'Hare complained that the constant vibrations of the sewing-machine press striking against her knee had caused varicose veins.³ In her letters, she wrote increasingly of the fatigue, the strain of the work, the callousness of the matron, the unbearable heat.⁴ Work, as she learned, defined the lives of the women prisoners.

This, of course, was as penitentiary managers intended. Nineteenth-century prison officials, as well as their antagonists the social reformers, agreed that idle hands, especially those of criminals, turned to the devil's workshop.⁵ Work, whether as a punitive measure or as a reforming agent, served as the principle around which society structured penitentiary life.

This article focuses, for the years 1865 to 1920, on female labor in penitentiaries built for and managed by men west of the Mississippi River. It concerns the results from the ever-increasing occasions when states sentenced women to those male worlds and did so with virtually no formalized policy for the female offender. Nebraska typified this pattern in the western states. Between 1875 and 1885, ten women, or a raw average of one per year, entered the penitentiary. However, between

1865-1910," *Western Historical Quarterly* 20 (February 1989), 18-35 [hereafter cited as Butler, "Still in Chains"]. For more detailed information about O'Hare, see Sally M. Miller, *From Prairie to Prison: The Life of Social Activist Kate Richards O'Hare* (Columbia, Mo., 1993) [hereafter cited as Miller, *Life of O'Hare*].

³O'Hare to her family, *Letters*, supra note 1 at 30, 69, 70.

⁴O'Hare to her family, *Letters*, supra note 1 at 69, 70, 80, 84.

⁵There is an extensive literature concerning the nature of prisons and prison labor. The two standard works remain Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (Montclair, 1968), and David Rothman, *The Discovery of Asylum: Social Order and Disorder in the New Republic* (reprint, Boston, 1990). For other examples, see Gary R. Kremer and Thomas E. Gage, "The Prison Against the Town: Jefferson City and the Penitentiary in the 19th Century," *Missouri Historical Review* 74 (July 1980), 414-31 [hereafter cited as Kremer and Gage, "Jefferson City and the Penitentiary"]; Michael A. Kroll, "The Prison Experiment: A Circular History," *Southern Exposure* 4 (1978), 6-11 [hereafter cited as Kroll, "Prison Experiment"]; Martin B. Miller, "At Hard Labor: Rediscovering the 19th Century Prison" [hereafter cited as Miller, "At Hard Labor"], in *Punishment and Penal Discipline: Essays on the Prison and the Prisoners' Movement*, ed. Tony Platt and Paul Takagi (Berkeley, 1980), 79-88. For a sociologist's perspective, see Georg Rusche, "Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice," in Platt and Takagi, 10-16. Concerning women and prisons, see Nicole Hahn Rafter, *Partial Justice: Women in State Prisons, 1800-1935* (Boston, 1985) [hereafter cited as Rafter, *Partial Justice*].

1890 and 1900, thirty women, or a raw average of three per year, arrived at the Lincoln facility. Despite this slow but steady increase, Nebraska had no separate facility for women until 1920,⁶ by which time most (though not all) western states were turning their attention to the building of separate women's penal institutions.⁷

However, during the previous fifty years, prison administrators supervising the harsh labor of male inmates in quarries, mines, and factories had rarely devised any structured programs for the women prisoners, who consequently found few chances to benefit physically, emotionally, or financially from their prison labor. In general, convict work assumed a range of forms, including hard labor within the prison walls, work for a private contractor when state authorities had turned over control of the institution, and work under the lease program, especially popular in the South.⁸ Stories of abuse within each of these systems illuminate the chaos in the history of America's western penitentiaries.

WESTERN VARIATIONS IN PRISON WORK

Hard labor meant backbreaking work at the behest of the state for the state. It was intended to ensure that criminals be self-sustaining and produce a profit for the state. Central to this proposition lay the unlikely assumption that exhausting physical work, performed as a result of coercion and brutality, led to personal reformation and a cheerful spirit.

The hard-labor philosophy generally fueled the management of the Arizona territorial prison at Yuma. Built mainly by prisoner labor, it opened in 1876 and for the next three decades

⁶Information provided by Mary Norquest, Records Manager, Department of Correctional Services, Nebraska Center for Women, York, Nebraska, July 13, 1987.

⁷For example, Kansas established its State Industrial Farm for Women in 1917, Arkansas in 1920, Iowa in 1918, Minnesota in 1920. Fred E. Haynes, *The American Prison System* (New York, 1939), 103, 117. In 1919, after years of agitation by reformers, California passed legislation for its first women's industrial farm, which operated only until 1923. Shelley Bookspan, *A Germ of Goodness: The California State Prison System, 1851-1944* (Lincoln, 1991), 77-80 [hereafter cited as Bookspan, *Germ of Goodness*]. The California Institution for Women opened at Tehachapi in 1933. Haynes, 117.

⁸These labor classifications should be regarded only as general divisions. In 1911 Sir Evelyn Ruggles-Brise, president of the English Prison Commission and International Prison Committee, wrote, "There are as many systems in America as there are states, and even in the same state, we find many different systems." "An English View of the American Penal System," *Journal of the American Institute of Criminal Law and Criminology* 2 (September 1911), 356.

operated as a work in progress. Under a series of politically appointed superintendents, the inmates quarried rock, constructed the main wall, installed drainage and electricity, laid roads, tended gardens, and put up buildings. Despite a brief flirtation with a private contractor who wanted inmates to work for his irrigation company, Arizona officials retained control over labor at the Yuma prison.⁹

It soon became clear that the warehousing of prisoners represented a costly expenditure, and one that economically immature western states felt ill-prepared to shoulder. Contract labor sought to deflect these financial problems by wedding the state penal program to private business interests. However, some western politicians felt reluctant to transfer control to private interests. In Arkansas, after twelve years of being bounced back and forth between state officials and contractors, management of the penitentiary (opened in 1841) was finally assigned to the province of private business.¹⁰ Similarly, Missouri's plan in 1833 to establish a penitentiary in Jefferson City as a center for reformation had faltered by 1839. Only three years after the first prisoners entered the facility, heavy operational costs led politicians to opt for a work contract with a private businessman.¹¹

Regardless of whether the state or private interests supervised the work program, the intention remained the same—to demand and extract the greatest possible amount of work from the prisoners for the least possible financial outlay. With this attitude, legislatures, burdened by prison expenditures, distracted by other public needs, and hostile to wrongdoers, slid easily from mandating hard labor under state supervision to prison management by private entrepreneurs. In return for prisoners' labor, contractors agreed to provide food, clothing, and shelter to the inmates and maintain the security of the institution.¹² Such a shift represented a disaster for prisoners, who lost

⁹John Mason Jeffrey, *Adobe and Iron: The Story of the Arizona Territorial Prison* (La Jolla, 1969), 25-27, 52, 60-61, 100-101, 109.

¹⁰Garland E. Bayliss, "The Arkansas State Penitentiary Under Democratic Control, 1874-1896," *Arkansas Historical Quarterly* 34 (Autumn 1975), 194 [hereafter cited as Bayliss, "Arkansas State Penitentiary"].

¹¹Kremer and Gage, "Jefferson City and the Penitentiary," *supra* note 5 at 416-17.

¹²The arrangements between the state and the contractor varied from state to state and contractor to contractor. For example, in 1873, Arkansas handed carte-blanche control of the penitentiary to the contractor. Although the arrangement called for oversight from the state, supervision often faltered during the ten-year contract. See Bayliss, "Arkansas State Penitentiary," *supra* note 10 at 198-200. Note that the usual terminology refers to the contractor as the "lessee," one who has "leased" the work at the prison. This overlapping should not be confused with the third work program, the lease system.



This 1893 construction site at the Old Montana Prison depicts a common type of hard labor for inmates—breaking and dressing the rock for prison walls and towers. (Courtesy of Montana Historical Society)

any semblance of governmental oversight of judicial administration over work and physical well-being. Professional concern for correctional institutions and civic accountability to the electorate evaporated as state officials backed away from direct prison management. Contractors who assumed control of prisons seldom had any interest or expertise in penal philosophy and regarded the experience merely as a financial investment that would relieve the state of an odious responsibility and supply private industry with a pool of captive labor.¹³

Among a collection of western states that opted for the contract plan, Minnesota compiled one of the more financially successful endeavors for the investors. Between 1851 and 1853, Minnesota Territory, with funding from the United States government, constructed a twelve-cell prison, surrounded by a fourteen-foot wall. The warden himself owned the sash-, door-, and shingle-making machinery (worth eight thousand dollars)

¹³O'Hare complained about the injustice of pitting forced prison labor against the free worker. In this she echoed a common concern of labor activists who decried the uneven competition set in place by the prison-contract system. *Letters*, supra note 1, *passim*.

in the prison and, by an act of 1853, was given complete control of the institution. Since the territory's law breakers filled the cells only slowly at the outset, in 1858 (the year Minnesota entered the Union) the legislature decreed that the warden should receive all offenders from counties without suitable jail facilities.¹⁴ This move, which ignored distinctions between major and minor felonies, quickly swelled the ranks at the penitentiary, solved the prison's labor shortage, and led to an ever-expanding relationship between the warden and private businessmen.

By 1868, the manufacturing interests of Seymour and Sabin had secured the prison-labor contracts and parlayed the initial investments into a massive business. George M. Seymour, a promoter of the Stillwater and St. Paul Railroad, oversaw the employment of about eighty workers—forty convicts and forty local citizens—in making doors, sashes, tubs, and buckets, among other things. In only six years, the business grew so quickly that a joint stock company was formed and the venture took on the production of farm engines, office equipment, and furniture.¹⁵ Few states replicated such prosperity from prison-labor contracts, although the system remained popular throughout the West.¹⁶

In some western areas, especially those with cultural connections to the South, the lease program gained a foothold. In this arrangement, the warden or superintendent leased or sold inmates' labor to private businesses or persons outside the prison walls. Under these conditions, state oversight eroded further as prisoners moved beyond the confines of the penitentiary. The prison itself functioned as a receiving center from which officials sent able-bodied inmates to work on roads, levees, and cotton plantations, or in private homes. Louisiana, Texas, and Arkansas used this program as fully as possible.¹⁷

¹⁴Fletcher J. Williams, *History of Washington County and the St. Croix Valley*, and Edward D. Neill, *Outlines of the History of Minnesota* (Minneapolis, 1881), 533.

¹⁵Willard E. Rosenfelt, gen. ed., *Washington: A History of the Minnesota County* (Stillwater, Minn., 1977), 184, 297. In 1911, the prosperous binding-twine industry at the Minnesota penitentiary caught the envious attention of Wisconsin. *Journal of the American Institute of Criminal Law and Criminology* 1 (January 1911), 803-4.

¹⁶Other states enjoyed at least sporadic success with the contract system. After a long struggle to establish a productive work system, Missouri, between 1876 and 1884, added seven factories to existing industries inside the walls, and by 1891 was self-supporting. See Kremer and Gage, "Jefferson City and the Penitentiary," *supra* note 5 at 426-29.

¹⁷After the Civil War, Louisiana, Arkansas, and Texas leased out their entire prison populations. This use of prisoner labor, especially on public roads,

Administrators tended to exaggerate the supposed benefit and benevolence of any of these work programs,¹⁸ while reformers and prisoners themselves told another story.¹⁹ The differences between officials and reformers, and some of the prisoners who considered these issues,²⁰ lay not so much in the state's expectation of labor, but in what constituted an inhumane and crippling work environment.²¹ State and territorial penitentiaries in the American West, often in remote areas removed from community scrutiny, frequently allowed work conditions to sink into a morass of cruelties, undercutting any redeeming features that labor supposedly possessed.²²

helped to give rise to the chain-gang system in the South. See Kroll, "Prison Experiment," supra note 5 at 9; John Vodicka, "Prison Plantation: The Story of Angola," *Southern Exposure* 4 (1978), 34, and Jane Zimmerman, "The Penal Reform Movement in the South During the Progressive Era, 1890-1917," *Journal of Southern History* 17 (1951), 466-69.

¹⁸An excellent example of the administrator's assessment of salutary prison work conditions is found in Colonel A.J. Ward, prison manager of the Texas penitentiary at Huntsville in the 1870s. For a description of his address to the 1874 National Prison Congress in St. Louis, Missouri, see Butler, "Still In Chains," supra note 2 at 27.

¹⁹Thomas Hill Green, "Anglo-American Philosophies of Penal Law," *Journal of the American Institute of Criminal Law and Criminology* 1 (May 1910), 42-43; George W. Kirchwey, "Crime and Punishment: The Influence of the Study of the Results of Prison Punishments on the Criminal Law," *Journal of the American Institute of Criminal Law and Criminology* 1 (January 1911), 718-34; John N. Reynolds, *The Twin Hells: A Thrilling Narrative of Life in the Kansas and Missouri Penitentiaries* (Atchison, 1890), 63-64, 73-78; Gordon L. Olson, "'I Felt Like I Must Be Entering . . . Another World': The Anonymous Memoirs of an Early Inmate of the Wyoming Penitentiary," *Annals of Wyoming* 47 (Fall 1975), 160-63, 166 [hereafter cited as Olson, "Anonymous Memoirs"]. Green and Kirchwey address the issues of power abuse and the need for professional behavior and reform of public attitudes. Reynolds and the Wyoming inmate describe episodes of ill-treatment and torture connected to prison work.

²⁰The anonymous Wyoming prisoner complained about the way other inmates did or did not do their work. See Olson, "Anonymous Memoirs," supra note 19 at 167-68, 169-70, 176, 179, 182.

²¹In 1911, the *St. Paul Press* reported that twenty-eight out of forty-two governors sent messages to their legislatures about prisons. All agreed that idleness must not be tolerated and that all prisoners must be provided with appropriate employment so that they could earn money for themselves and their families. "Notes on Current and Recent Events," *Journal of the American Institute of Criminal Law and Criminology* 2 (September 1911)], 319.

²²For example, for descriptions of conditions in Arkansas, see "Discrimination Against Negro Criminals in Arkansas" and "The Convict Leasing System in Arkansas," *Journal of the American Institute of Criminal Law and Criminology* 1 (January 1911), 947-49; for Iowa, see Governor's Office: Series VIII, Boxes 11 and 13, Commissions, Investigations, Penitentiaries: Anamosa, 1876-78, Iowa State Archives, Des Moines; for Kansas, see Legislature Records, State Penitentiary Investigation, 1895: Box 15, Investigation of the Warden of the State Penitentiary, Seth W. Chase, 1895, Affidavits of Elizabeth C. Simpson and

WESTERN PRISONS AND WOMAN'S WORK

Any of the three prison-labor systems placed women inmates at a disadvantage, since men devised penitentiary work for male transgressors, for whom brutal physical punishment preceded their return to the societal fold. Women prisoners, considered to be social aberrants in the formative years of western Anglo government, were simply not a concern in prison work programs. The resulting void led to uneven policies and unjust procedures toward them.

In particular, women lost out under the system of "good time," whereby prisoners could reduce the number of days of their sentences. Formalized by law in the nineteenth century, the good-time policy took shape as a weapon used by officials to control convicts' behavior.²³ For any infraction, prisoners, especially women, found an arbitrary number of previously accrued release days subtracted from their records. Any guard, without corroboration, could report a woman guilty of a violation—talking in line, cursing, staring at male inmates—after which her good-time deduction was entered in the punishment register. Whether she had actually broken a rule or whether she had resisted some form of physical, sexual, or psychological force was not an issue. Both practically and emotionally, the system increased the guards' power and reinforced the women prisoners' awareness of how little control they had over their sentences.

Regardless of which strategy, or combination of strategies, officials pursued, the results for women were the same: prison work was yet another negative experience in a penal system that robbed them of their health, placed them in positions of

Mary Fitzpatrick, July 23, 1914, Board of Corrections, Investigation of Punishments, Governor Hodges' Papers, 1913-15, Box 3, Kansas State Historical Society, Topeka; for Minnesota, see *Report of a Committee to Investigate Punishment of Convicts at the Minnesota State Prison*, State Board of Corrections and Charities, 1891, Minnesota Historical Society, St. Paul; for New Mexico, see Penitentiary Records, Punishment Record, 1885-1913, New Mexico Records Center and Archives, Santa Fe; for Texas, see Public Institutions: *Second Annual Report of the Board of Commissioners: Kansas State Penitentiary*, 1874, 343-51, Kansas Collection, University of Kansas Libraries, Manhattan [hereafter cited as *Kansas State Penitentiary*, *Second Annual Report*]; Charles Shirley Potts, *Crime and the Treatment of the Criminal*, Bulletin of the University of Texas, 146 (Austin, 1910), 71-73; *Report of the Penitentiary Investigating Committee, Including Stenographer's Report of Evidence Adduced Before the Penitentiary Investigating Committee* (Austin, 1910), Texas State Archives [hereafter cited as *Report of the Investigating Committee*].

²³See Miller, "At Hard Labor," *supra* note 5 at 82.

sexual vulnerability, and reinforced their status as outcasts in the larger society.

The ill-devised work programs further defined women prisoners as a "nuisance" within male penitentiaries. Indecent housing arrangements, inferior medical care, and scant work opportunities persisted for women inmates into the early twentieth century. In the absence of any structured plans, idleness marked the time for many of them. In 1888, a female journalist visiting California's San Quentin noted that the nearly twenty women prisoners had nothing to do as they served out their time.²⁴ All too often this lack of occupation only intensified the sexual atmosphere in an environment where the men greatly outnumbered the women. As a consequence, wardens and contractors sometimes allowed women's sexual vulnerability and men's physical gratification to become the defining feature of female prison work.

For example, in 1890, twenty-one-year-old Manuela Fimbres, the mother of an eight-year-old child, entered the Arizona Territorial Prison in Yuma, which had no facilities for women. Still, in the first days of her sentence, Fimbres remained segregated from the prison population. However, when management of the inmates fell to Superintendent John Behan, matters changed. He moved her to an open thatched shack in the prison yard. A prostitute by trade, Fimbres spent her time wandering about the prison interior and continuing the work she knew, providing sexual service for both guards and inmates. In short order, she bore one child and became pregnant with a second. These circumstances, coupled with charges of brutality and malfeasance, brought about the removal of Behan, but only after the reports of his generally disreputable administration had spread beyond the isolated penitentiary town.²⁵

In Louisiana, between 1869 and 1894, Major Samuel Lawrence James held an exclusive state lease contract that permitted him the control of more than fifteen thousand convicts. In the 1880s, he moved large numbers of inmates, including the women prisoners, to Angola, an out-of-the-way plantation along Mississippi River swampland. The women, all African-American, worked as servants to James's family and as field

²⁴Bookspan, *Germ of Goodness*, supra note 7 at 73.

²⁵*Arizona Republican*, August 24, 1890; Manuscript, Yuma Territorial Prison, John Behan File, Arizona Historical Society, Tucson. In addition, see a description of this episode in Anne M. Butler, *Daughters of Joy, Sisters of Misery* (Champaign, 1985), 79-81. The Arizona penitentiary was not the only one where women's work took on decidedly sexual tones. Texas, for example, also had a long history of sexual abuse of women prisoners. See *Report of the Superintendent of the State Penitentiary* (Austin, 1871), 4-5; *Kansas State Penitentiary, Second Annual Report*, supra note 22 at 343-51; *Report of the Investigating Committee*, supra note 22 at 16, 20-23.

hands. At the conclusion of a successful harvest, James sent female convicts into the camp areas as a "reward" for male prisoners, thus extracting both heavy agricultural labor and sexual service from the women prisoners.²⁶ At Angola little had shifted away from the dynamics of slavery.

Of course, some prison officials made an effort (or at least said they did) to keep women prisoners carefully separated from male inmates. After years of allowing women the freedom of the prison until 10:30 at night,²⁷ in 1905 Idaho officials decreed that females should be permanently closeted away from the rest of the prison population and, for the first time, supervised by a matron.²⁸ Outside the main prison, a small stone building, surrounded by a wall seventeen feet high and two and a half feet thick, became their quarters. Removing female inmates from the easy reach of male prisoners (although not from that of male guards) inspired officials to develop a separate schedule of work for women. The women soon took on a domestic program of cleaning the new building and washing and cooking for themselves. Future plans called for them to make shirts for the male prisoners.²⁹ Having weathered a number of penitentiary scandals, Idaho decided it could no longer condone the blatant sexual use made of its women prisoners and cast them into the only other role that seemed appropriate—that of domestic workers.

DOMESTIC WORK IN PRISON

By instituting a program of household chores, Idaho fell into step with other western prisons, where domestic labor and sexual coercion dominated work assignments for prison women.³⁰ The historian Gary Kremer indicates that in 1876, approximately 87 percent of all labor performed by about forty women in the Missouri prison fell under the heading

²⁶Roger S. Thomas, Assistant Warden, to Frank C. Blackburn, Warden, "History of Angola: Major Samuel Lawrence James," December 27, 1985, 1,3,4, Office of the Assistant Warden, Louisiana State Penitentiary, Angola.

²⁷Old Notes, n.d., Women's Facilities, Women Prisoners' File, Idaho State Penitentiary, Boise.

²⁸Warden's Report, 1905-06, Women's Facilities, Women Prisoners' File, Idaho State Penitentiary.

²⁹Ibid.

³⁰Typically, domestic labor has represented the employment of most women, whether criminals or not. This subject is treated to some extent for English female prisoners in Russell P. Dobash, R. Emerson Dobash, and Sue Gutteridge, *The Imprisonment of Women* (Oxford, 1986) [hereafter cited as Dobash and Gutteridge, *Imprisonment of Women*].

of domestic work. In addition to those sent as servants to private homes, other women inside the walls cooked, mended and sewed prison clothing, and washed the men's laundry. Women working for private citizens accumulated more than nine thousand days of domestic labor, while comparable chores inside totaled well over three thousand days of work for the state.³¹

In 1892 the warden of the Minnesota penitentiary reported that his six women inmates were "quiet and orderly and submissive." None had been punished for at least two years, apparently because they had been kept busy with "sewing, . . . darning, cleaning, scrubbing," and caring for the officers' quarters.³² At the New Mexico penitentiary, officials employed women prisoners in the same manner. Incarcerated women—usually African Americans and Hispanics—cleaned the warden's quarters, washed windows, and prepared food in the prison kitchen.³³

Most women inmates must have looked on this work as predictable, for they came largely from the ranks of domestic workers. At the Kansas State Penitentiary, between 1865 and 1901, 110 of 151 women committed gave their occupation as housekeeper, servant, or washerwoman. The others called themselves laborers and dressmakers, or professed to be without occupation. Of the total number of women, only one, a native of Spain, listed a non-domestic profession—that of trapeze artist.³⁴

A distinct racial element shaped the type of labor that officials required. By the early twentieth century, Texas, in an effort to curtail sexual abuses at the Huntsville penitentiary, had moved the women prisoners to an agricultural camp twenty-three miles from the main prison. There, one Hispanic and three Anglo women, who had separate quarters, performed the "light chores" of the camp, while the sixty-seven African-American women did all the heavy field labor for the production of corn and cotton.³⁵

³¹Gary R. Kremer, "Strangers to Domestic Virtues: Nineteenth-Century Women in the Missouri Prison," *Missouri Historical Review* 84 (April 1990), 303-4.

³²*Biennial Report to the Governor of Minnesota*, July 31, 1894 (St. Paul, 1894), 37.

³³New Mexico Penitentiary Records, Punishment Record, 1885-1913, 119, 153, 164, 176, 178, 180, 181, New Mexico Records Center and Archives, Santa Fe.

³⁴Kansas State Penitentiary, Statement of Convicts, Prisoner Ledgers A, F, G, H, Records of Prisoners Received, 1864-1901, Kansas State Historical Society, Topeka.

³⁵*Report of the Penitentiary Investigating Committee, Including All Exhibits and Testimony Taken by the Committee* (Austin, 1910), 14, Texas State Archives.

Generally, then, women's work in prison replicated their work outside the walls, but within an intensified context and with severe consequences for shoddy or delinquent performance. In New Mexico, authorities sent Dolores Jaramillo to the dark cell for three days for fighting at her job in the kitchen. At the same prison, Juana Chacon accumulated a long list of violations in the punishment register. Most of her misbehavior occurred while she worked in the kitchen or the warden's quarters. Among her punishments, she was locked in a closet for one day through the work hours and lost at least twelve days of good time toward her release.³⁶

For authorities, the use of women for domestic chores inside male penitentiaries seemed a practical solution to an awkward situation. Apparently, as long as officials considered themselves saddled with women in a facility that made little or no provision for gender differences, they felt they might as well take advantage of the domestic support services women could give. The day-to-day operation within penitentiaries—virtually contained communities—depended on arrangements for cooking, cleaning, and sewing. Women inmates represented a readily accessible supply of workers for the domestic needs of a prison. After all, society offered few social or economic guides to prison officials for any different program for women.

Most of the women sent to western penitentiaries had been convicted of minor crimes against property. For example, in Arkansas between 1901 and 1906, eighteen women were committed for nonviolent crimes and seven for violent crimes. Between 1915 and 1919, forty women received penitentiary sentences for nonviolent crimes and seventeen for violent ones. In Kansas, between 1865 and 1901, forty-six women entered the penitentiary for violent crimes and 105 for nonviolent ones. In Missouri, between 1865 and 1871, ten women faced penitentiary time for violent crimes and seventy-eight for nonviolent ones.³⁷ With the exception of a relatively few prisoners convicted of murder or manslaughter, women seldom rated special treatment as dangerous criminals who required maximum-security precautions. Even women convicted of murder and

³⁶New Mexico State Penitentiary Records, Punishment Record Book, 1885-1913, 119, 176, 178, 180-81, New Mexico Records Center and Archives.

³⁷For Arkansas, see *Biennial Report, State Penitentiary*, 1901-02, 28-35, 1903-04, 30-34, 1905-06, 27-35, Arkansas History Commission, Little Rock, and Handbook: Register of Prisoners, n.d., Arkansas State Penitentiary, Pine Bluff, for Kansas, State Penitentiary, Statement of Convicts, Prisoner Ledgers A, F, G, H, Kansas State Historical Society; and for Missouri, Pardon Papers, Record Group 5, 1865-72, Missouri State Archives, Jefferson City. See also Rafter, *Partial Justice*, *supra* note 5 at 107-19.

assault usually mingled with the other female prisoners, unless their behavior took a violent turn.³⁸

One of the exceptions was Lizzie Woodfolk, an African American woman who in 1913 entered the Nevada State Penitentiary, convicted of manslaughter. In March 1915, prison officials brought her before the First Judicial District Court for an inquiry into the matter of her sanity. Testimony from both the officer in charge of the women's department and Woodfolk herself indicated that she had thrown food out of her window, tried to kick down her door, struck the guard, and attacked another woman inmate with a stick. The warden testified that he felt it impossible to allow her to exercise in the yard in the presence of the male inmates or the other female prisoner. Authorities solved the problem for the prison staff by sending the unruly prisoner to the insane asylum, a decision officials often seemed to choose for expedient reasons rather than medical ones.³⁹

Despite the occasional woman who refused to buckle to prison rule, officials felt comfortable about female inmates as a "docile," perhaps even pathetic, class having access to domestic work areas, such as the kitchen and the officers' living quarters. Thus, women in prison, regarded as more of an aggravation than a security risk, could contribute through domestic labor to the desired goal that the prison be a self-sustaining, self-perpetuating institution.⁴⁰

WOMEN'S ROLE IN MAKING PRISONS SELF-SUSTAINING

Each state expected the warden or private contractor to strive for self-sufficiency in prison management. For example, in 1867, the inspector for the Missouri State Penitentiary indicated that the state hoped to realize a return of about eighty thousand dollars on inmate labor contracted out to various shops, and that the figure was likely to increase to one hundred fourteen thousand dollars a year. The institution would therefore "become self-sustaining, if not a source of income to the

³⁸Generally, society assumed that women were naturally more passive than men. Therefore, women criminals were not seen as "dangerous," especially compared with men. *The American Prison from the Beginning: A Pictorial History* (American Correctional Association, 1983), 172.

³⁹Transcript of Testimony and Proceedings at the Nevada State Prison, Carson City, March 8, 1915, Lizzie Woodfolk File, Board of Pardons, Nevada State Penitentiary, Nevada State, County, and Municipal Archives, Carson City [hereafter cited as Lizzie Woodfolk File].

⁴⁰Dobash and Gutteridge, *Imprisonment of Women*, supra note 30 at 8-12, 21-23, 39-40, 65-72. Larry E. Sullivan, *The Prison Reform Movement* (Boston, 1990), 20.



Lizzie Woodfolk, who spent six years in the Nevada penitentiary for manslaughter, devised creative strategies to resist prison mistreatment. (Courtesy of Nevada State Library and Archives)

state."⁴¹ Similarly, in 1874, a report on the unsavory condition of the Kansas State Penitentiary reviewed the fiscal soundness of all United States prisons and pointed to Maine's penitentiary, the only one to show "an excess of receipts over expenditures," as the model for all others to emulate.⁴²

In some states, prison officials decided to expand women inmates' domestic skills to an entrepreneurial scale comparable to that of the men's labor. Thus, Kate Richards O'Hare found herself at the Missouri penitentiary as one of sixty of the eighty women prisoners working Monday through Friday, nine hours a day and half a day on Saturday, making overalls and jackets for a manufacturer who had contracted with the state for prison labor. She estimated that at the 1919 wage scale, the women "earned" from twelve to twenty dollars a week, although they received no compensation. She noted that the shop's seven half windows, positioned ten feet above the floor, were useless and that the one full window had been nailed shut and painted over because, according to prisoner legend, a woman had once looked out from it at a male inmate. O'Hare complained that the matron directed all three of the ancient fans at her own desk, leaving the inmates to swelter at their machines.

Despite O'Hare's rather privileged status as a political prisoner, nothing spared her from the grueling daily routine that usually began with less than two hours' sleep followed by a

⁴¹Missouri General Assembly, *Inspector's Report*, 24th General Assembly, regular sess., 1867, 502, Missouri State Archives.

⁴²*Second Annual Report of the Board of Commissioners* (Topeka, 1875), 296, Kansas Collection, University of Kansas, Manhattan.

bleak and silent breakfast, included hours of sitting in one position, and ended with a so-called exercise period, during which the women huddled against the yard wall trying to avoid the vicious summer heat radiating from the pavement. No one relieved O'Hare when she ran a sewing-machine needle through her finger. The matron simply doused it with turpentine and sent her back to her machine. Kate O'Hare soon understood that, despite her education, her middle-class background, and her high profile as a political detainee, she should fear the black hole or the bread-and-water punishment as much as did her companions, many of whom had long criminal histories and far greater experience with prison procedures.⁴³

She learned to assess the length of a woman's prison tenure by the level of the inmate's mental and physical deterioration and came to perceive that the prison regimen stripped a woman of her individuality, her judgment, and even her mind. In one letter she wrote, "I have no more control over the amount of work . . . I must do than my sewing machine. . . . The law of the shop is the absolute limit of human endurance and to that law I must bow."⁴⁴

In addition to the work assignments inside the walls and the contractual arrangements made with manufacturers and businessmen, officials leased women prisoners' domestic service to local homes, as indicated by the 1876 Missouri operation. Although this policy removed an inmate from within the walls, her situation was tenuous, for at any moment, for real or imagined infractions, she could be sent back inside.

Nor did the women prisoners' sexual vulnerability disappear when they were leased out from the penitentiary. In 1880, the governor of Texas, O.M. Roberts, waived ninety dollars of a one-hundred-dollar fine levied against Ann Cushman, who had been convicted of adultery. Cushman had already served a "hired-out" contract of one and a half years for this minor charge. A pregnancy that began while she was in private service, coupled with her general poverty and the uncertain fate of her other children, seemed to be the factors that moved Roberts to act. The silence in the record of the circumstances surrounding the pregnancy suggests that officials preferred not to draw attention to the matter.⁴⁵

Certainly racism drove this domestic-service leasing practice, commonly found in Texas, Arkansas, and Missouri, where a

⁴³See O'Hare, *Letters*, *supra* note 1, *passim*, esp. 15, 19, 35, 43, 51, 69, 71, 80, 84.

⁴⁴*Ibid.* at 15.

⁴⁵Ann Cushman, 3171, December 17, 1880, Executive Clemency Records, Texas State Archives.

disproportionate number of women prisoners were African-American.⁴⁶ Nonetheless, for some women this system provided a possible avenue for permanent release from the penitentiary, if the contracting family remained agreeable.

Such was the circumstance in which Belle Ragsdale found herself. In May 1866, Ragsdale, a former slave from Paris, Missouri, was sentenced to two years in the penitentiary for grand larceny. Shortly after, the warden released her to the home of George McIntire to do domestic work. In December 1867, McIntire's wife decided to travel to Fulton, Missouri, for the winter, and asked that Ragsdale should go along to care for the children. George McIntire, in an appeal to the governor, noted that Belle was "a very smart girl, a good girl to take care of children . . . her conduct has been good. She has been at my house for nearly twelve months. . . . My wife is anxious . . . to obtain her pardon."⁴⁷

The decision about Ragsdale's fate fell to the warden, H.A. Swift, and the governor, Thomas Fletcher, who together compiled one of the few fairly positive nineteenth-century prison administrative records, especially in regard to women inmates.⁴⁸ Swift forwarded McIntire's letter, with his own, to the governor. He wrote of Ragsdale, "She is an apt Negro. . . . The opportunity for a home . . . may not occur again and under the circumstances I . . . recommend her for clemency."⁴⁹ Ragsdale received her pardon on December 7, 1867, and presumably left to winter in Fulton.

Despite the opportunity for abuse, the lease system continued. In 1867, J.W. Cox interceded on behalf of Catherine Mullenly, stating that she had been living with his family for several months as a "trusty house servant," and that he wanted her pardoned before the Missouri warden turned all the women back inside.⁵⁰ In 1868, another Missouri employer sought

⁴⁶See Butler, "Still in Chains," *supra* note 2.

⁴⁷McIntire to Fletcher, December 5, 1867, Belle Ragsdale "Colored" File, Pardon Papers, 1867, RG 5, Box 25, Folder 10, Missouri State Archives [hereafter cited as Ragsdale File].

⁴⁸Thomas Fletcher, a Radical Republican, assumed the office of governor on January 2, 1865. He found conditions in Missouri tumultuous after the Civil War and the penitentiary overcrowded and archaic. He expected to use the penitentiary to suppress "lawlessness begotten of treason" and responded favorably to Swift's requests to lease out or pardon women convicts. See Swift's letters to Fletcher and notations on pardon applications, Pardon Papers, RG 5, 1865-72. Also see Floyd Calvin Shoemaker, *Missouri and Missourians: Land of Contrasts and People of Achievements*, 5 vols. (Chicago, 1943), 934, 954.

⁴⁹McIntire to Fletcher, December 5, 1867, Ragsdale File, *supra* note 47.

⁵⁰Catherine Mullenly File, Pardon Papers, 1867, RG 5, Box 23, Folder 17, Missouri State Archives.

release for Jane Brooks, who had spent the majority of her term leased out and had distinguished herself, he said, as a "good, obedant [*sic*] and fathful [*sic*] girl."⁵¹ In 1877, the matron at the Missouri penitentiary reported that working outside the walls had been "abolished, with a few appropriate exceptions."⁵²

Those few appropriate exceptions allowed Missouri and other states to cling to the lease system as a way to secure income for the penitentiary and favors for some citizens. As late as 1901, E. T. McConnell, the superintendent of the Arkansas penitentiary, testified to an investigating committee that he permitted prisoners to work outside the walls for private citizens and that he had a woman inmate working in his own home. Asked if he knew that the action was against the law, he replied defiantly that the penitentiary board was his law, and then boasted that, after all, his administration represented an improvement in the treatment of prisoners. He explained that when he first arrived at the penitentiary *all* the black women prisoners were hired out for a monthly pittance. He felt quite pleased that he had reduced the number of leased convicts.⁵³

WOMEN'S RESPONSES TO PRISON LIFE

Despite the arrogance and inhumanity that ruled their prison work, women inmates found ways to respond to the constraints. Some of their strategies were designed to extricate them from prison, through lease, parole, or pardon. In 1889, after being imprisoned for seven years, Annie Peterson applied for a pardon on the grounds that she was the only female prisoner in the Nevada penitentiary and thus could not "participate in any of the pastimes that the other prisoners enjoy." It is

⁵¹Jane Brooks File, Pardon Papers, 1868, RG 5, Box 25, Folder 26, Missouri State Archives. For other examples of this system in Missouri, see Rebecca Boyd, Josephine, Cornelia Mitchell, Mary Weber, and Hanora McMara, Pardon Papers, 1867, RG 5, Box 21, Folder 16, Box 22, Folder 2, 37, Box 23, Folder 7.

⁵²Missouri General Assembly, 30th General Assembly, *Biennial Report on the State Penitentiary*, 1877-78, Matron's Report III, 151-52.

⁵³*Report of the Penitentiary Joint Committee of Arkansas, 1901*, 240, Arkansas State History Commission, Little Rock. For a general assessment of the Arkansas penitentiary, see Thomas O. Murton, "Observations on the Correctional Needs of the State Of Arkansas: A Proposal Prepared for the Arkansas Prison Study Commission." Murton wrote, "The Arkansas Penitentiary System can best be described as archaic. It remains an isolated remnant of an ancient philosophy of retribution, exploitation, corruption, sadism, and brutality. The sordid history of this penitentiary is indelibly recorded on the bodies of these citizens who had the misfortune to be committed to penal servitude in this barbaric system," 48. A copy of his report is at the Arkansas State History Commission.



Carrie Scott, expressing distaste and humiliation when required to sit for this mug-shot, found that poor health did not hasten her parole from the Nevada penitentiary. (Courtesy of Nevada State Library and Archives)

hard to imagine what she meant by enjoyment, but two years later she was still trying to get her pardon.⁵⁴ In December 1910, Carrie Scott sought clemency from her murder conviction, explaining that two doctors "say that I have a tumor in my stomach as large as a man's head and . . . I can never get well unless I have a serious operation."⁵⁵ Despite medical documentation and legal opinions from the district attorney that she was only a bystander at the murder, she received no pardon until November 1911.

Other women took aggressive action in an effort to control their lives inside the prison. Lizzie Woodfolk, who created havoc in the Nevada penitentiary, may have known exactly what she was doing, in an effort to get away from a guard captain who knocked her down and terrorized her. At her insanity hearing, she articulated the simple expectation of all prisoners that a penitentiary should have its limits when she told the judge, "if you mistreat a prisoner, you can't get no good out of them."⁵⁶ At the asylum she had no problems, worked without

⁵⁴Annie Peterson File, May 1, 1891, Board of Pardons, Nevada State Penitentiary, Carson City, Nevada State, County, and Municipal Archives.

⁵⁵Carrie I. Scott File, November 14, 1911, Board of Pardons, Nevada State Penitentiary, Carson City, Nevada State, County, and Municipal Archives.

⁵⁶Transcript in the Matter of the Inquiry as to the Sanity of Lizzie Woodfolk, An Inmate of the Nevada State Prison, Carson City, March 8, 1915, Lizzie Woodfolk File, *supra* note 39.

complaint, and was ultimately returned to the penitentiary and discharged in May 1919.⁵⁷

Women who had little hope of parole or of being leased out to a civilian family found ways within the prison to express their distaste for the work demands. In New Mexico, women cut holes in the kitchen screens so as to pass hair chains to male prisoners and accept contraband tobacco and cigarettes. They wrote notes to the men and to each other every chance they got—in the dining hall, in the toilets, in the chapel. To get excused from a work detail, one woman tied a strip of gingham to her leg and left it until the interruption to the circulation caused discoloration and swelling. This self-mutilation cost her thirty days' good time.⁵⁸ When possible, women turned to the prison doctor with a recurring number of medical complaints—influenza, bronchitis, chilblains, grippe, and neuralgia. Physicians responded to these ailments, whether real or imagined, with the same prescription—work.⁵⁹ Undaunted, women protested inhumane demands, even when to do so brought additional punishment and abuse. Individually and through group action, they found ways to thwart the prison world.

CONCLUSION

Once they entered the penitentiary, women in the American West faced greater physical hazards and discrimination than their male counterparts. Working accentuated this fact in several ways.

First, society excused the lack of planned work for women in the nineteenth and early twentieth century on the basis of the small population of female prisoners and the fact that male penitentiaries had no means to accommodate women inmates. However, these arguments overlooked the demographics of the female prison population, as the number of incarcerated women slowly but steadily increased into the twentieth century.⁶⁰ Actually, no appropriate facilities existed for women because tightfisted legislatures failed to allocate funds for

⁵⁷*Ibid.*

⁵⁸New Mexico Penitentiary Records, Punishment Record Book, 1885-1913, 163, 164, 166, 176, New Mexico Records Center and Archives.

⁵⁹In over a year at the New Mexico penitentiary, the physician, Dr. Massie, made this single-word response to almost every medical case. New Mexico State Penitentiary Records, Physician's Record Book, 1914-15, New Mexico Records Center and Archives.

⁶⁰All prison registers for the states discussed in this paper reflect the increased numbers.

prison renovation or construction.⁶¹ Crowded facilities and the small numbers of convicted women trivialized the significance of female prisoners in the minds of the public. Once dismissed as a person of no social consequence, the woman prisoner had a slim chance of capturing the attention of policy-makers or the public funds needed to establish an appropriate work program.

Second, prison work entailed turmoil, hardship, and degradation for women. Officials did not plan work programs carefully and, faced with female inmates, simply yielded, allowing them to be used for sexual gratification or domestic service. Both hard labor within the walls and private-contractor arrangements exploited women in specific gender terms. Women either languished in their cells in forced inactivity, provided sexual diversion for male officials and inmates, or worked merciless hours in the prison industry. Leasing to private families, despite declarations of good intention by citizens and possible opportunities for better physical surroundings, really meant that prisoners entered into bondage with those families. Many situations became brutal, while all showed scant attention paid to women's rights, played on women's sexual vulnerability, accentuated women as domestic workers, brought about a decline in women's health, and failed to assist women in changing their lives upon release. Prison work was one more gender disadvantage for women, in which authorities neglected both their physical and emotional well-being.

Within this difficult atmosphere women found their voice and in small ways, sometimes at a painful price, responded to the prison system and its grueling routines. Some negotiated with officials and carved out the best possible penitentiary time. Others, through individual resistance, open defiance, and conspiracy demonstrated their contempt for the unmitigated regimentation and brutality. These actions should not, however, be overromanticized. The crazed and broken women who surrounded Kate Richards O'Hare gave witness to the inflexible power wielded by the state in western penitentiaries.

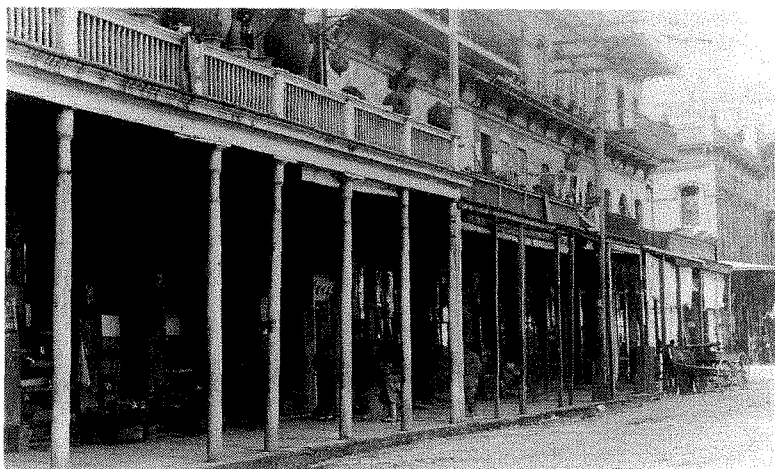
In May 1920, almost fourteen months after her arrival at the Missouri penitentiary, O'Hare left prison, her sentence commuted by her political foe, President Woodrow Wilson. When she arrived at Jefferson City she must have seemed privileged, both to herself and to the other women inmates. She enjoyed

⁶¹In 1916, Governor Alexander of Idaho vetoed a modest allocation targeted for expansion of the women's quarters (at that time, one room with five women). When he was criticized for this action, he suggested that the prison matron should be fired and her salary used to enlarge the female ward. *Idaho Daily Statesman*, February 26, 1916.

greater access to the warden, her prison companions deferred to her, and loving friends and family sustained her. However, her experiences closely paralleled those of the other inmates. Like many of them, O'Hare, tried and convicted on questionable legal grounds, burdened with an excessively severe sentence for the crime charged, entered an antiquated, remote western prison to be absorbed into the hideous conditions of work inside the walls.⁶² She turned her back on prison to reenter an economic and political world that allowed her to use her penitentiary time as evidence of the importance of social reform. The gender constraints Kate Richards O'Hare faced in prison strengthened her voice as a reformer to the American public.

Such was not likely to be the case for other women inmates as they walked away from the penitentiary gates. For them, prison, especially in its poorly designed work programs, only tightened society's rigidly applied rules of race, class, and gender. They departed—laundresses, servants, seamstresses, cooks—as the unfortunate heirs to a prison legacy created by a negligence in work provisions and an exclusive focus on sexual and domestic matters. In the American West, penitentiary work did little to expand the horizons of opportunity for convicted women.

⁶²O'Hare's biographer reports, "The prosecutor told the jury that O'Hare was not a criminal but a dangerous woman, dangerous because she was 'shrewd and brainy.'" Miller, *Life of O'Hare*, supra note 2 at 150.



A street in Portland's Chinatown (Oregon Historical Society)

GENDER AND PROTEST IDEOLOGY: SUE ROSS KEENAN AND THE OREGON ANTI-CHINESE MOVEMENT

MARGARET K. HOLDEN

*Wars are often necessary—but evils, at the best.
They find our loyal citizens and their manly courage
test.*

*But our soldiers' widows are the sufferers, and often
cry in woe.*

*Our Children had no bread to eat; The Chinaman
must go.*

*Yes in their heathen land, across the raging main;
For coolie labor in their fair land we will ne'er
entertain.*

*They have robbed us our birthright, as every woman
knows.*

*In the cooking of your food, and the laundering of
your clothes.*

*They perform other domestic duties here, in prudence
I can't name.*

*And there is nothing left for us to do but lead a life of
shame.*

*We feel our position keenly, whilst tears down our
cheeks do flow.*

*Give us our Christian sympathy, say the Chinaman
must go.¹*

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¹Verses recited at a meeting of the Anti-Coolie League Encampment No. 8 held

William Cole, an anti-Chinese sympathizer and Knights of Labor organizer, wrote these verses at the height of the anti-Chinese agitation in Oregon in the winter of 1886. Its language suggests a heretofore unexplored dimension of the anti-Chinese movement in the Pacific Northwest—the role that women and domestic ideology played in shaping the protest.² As its imagery makes clear, anti-Chinese agitators

in Albina, directly across the Willamette River from Portland. Portland's *Daily News* reported the meeting on January 26, 1886. For verse on women and the anti-Chinese movement, see John Wunder, "Law and Chinese in Frontier Montana," *Montana: The Magazine of Western History* 30 (July 1980), 20 [hereafter cited as Wunder, "Law and Chinese"].

²In the winter of 1885-86, anti-Chinese protesters organized up and down the Pacific Coast to decry the lax enforcement of the Chinese Exclusion Act of 1882 and to demand the expulsion of Chinese workers. Standard accounts of the Pacific Northwest anti-Chinese movement do not examine, or analyze, the role Euro-American women played in agitating for the expulsion of Chinese workers. For Oregon, see Malcolm Clark, Jr., "The Bigot Disclosed: Ninety Years of Nativism," *Oregon Historical Quarterly* 75 (1974), 109-90 [hereafter cited as Clark, "Bigot Disclosed"]; Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984), esp. 627-37 [hereafter cited as Mooney, "Deady and Judicial Response"]; idem, "The Deady Years, 1859-1893," in *The First Duty: A History of the U.S. District Court for Oregon*, ed. Carolyn M. Buan (Portland, 1993), 63-125; Christopher H. Edson, *The Chinese in Eastern Oregon, 1860-1890* (San Francisco, 1974) [hereafter cited as Edson, *Chinese in Eastern Oregon*]; David H. Stratton, "The Snake River Massacre of Chinese Miners, 1887," in *A Taste of the West: Essays in Honor of Robert G. Athearn*, ed. Duane A. Smith (Boulder, 1983), 124-25 [hereafter cited as Stratton, "Snake River Massacre"].

For the Pacific Northwest, see Jules Alexander Karlin, "The Anti-Chinese Outbreaks in Seattle, 1885-1886," *Pacific Northwest Quarterly* 39 (1948), 129, 112, 119, 128 [hereafter cited as Karlin, "Anti-Chinese Outbreaks"]; idem, "The Anti-Chinese Outbreak in Tacoma, 1885," *Pacific Historical Review* 23 (1954), 271-83; W.P. Wilcox, "Anti-Chinese Riots in Washington," *Washington Historical Quarterly* 20 (July 1929): 204-12; Carlos A. Schwantes, *Radical Heritage: Labor, Socialism, and Reform in Washington and British Columbia, 1885-1917* (Vancouver, B.C., 1979), 25-29 [hereafter cited as Schwantes, *Radical Heritage*]; Robert Edward Wynne, *Reaction to the Chinese in the Pacific Northwest and British Columbia in 1850-1910* (New York, 1978) [hereafter cited as Wynne, *Reaction to the Chinese*]; M. Alfreda Elsensohn, *Idaho Chinese Lore* (Cottonwood, 1970); John R. Wunder, "The Courts and the Chinese in Frontier Idaho," *Idaho Yesterdays* 25 (Spring 1981), 23-32; Kenneth Owens, "Pierce City Incident," *Idaho Yesterdays* 3 (Fall 1959), 8-15; Larry D. Quinn, "'Chink Chink Chinaman': The Beginning of Nativism in Montana," *Pacific Northwest Quarterly* 58 (April 1987), 82-89; Wunder, "Law and Chinese," supra note 1. One exception is Stacey A. Flaherty, "Boycott in Butte: Organized Labor and the Chinese Community, 1896-1897," *Montana: The Magazine of Western History* 37 (1987), 37-38, which considers gender in the ideology and arguments of the anti-Chinese agitators in Butte [hereafter cited

believed that Chinese workers undercut women's domestic role and threatened the job opportunities for working women.

Among Cole's supporters were Euro-American women, one of whom was Sue Ross Keenan, an East Portland boardinghouse keeper and a member of the Knights of Labor. She became a highly regarded leader of the 1885-86 protests, and her anti-Chinese stance provides an example of female working-class political activism, pursued outside the more conventional middle-class moral-reform and suffrage organizations.³ In short, the anti-Chinese movement not only represented Euro-American workingmen's prejudices, interests, and demands, but also reflected the economic and domestic concerns, as well as the leadership, of working women.⁴

Historians have long acknowledged that nineteenth-century Americans divided the world into separate spheres for men and women, the men traditionally being active in politics and the women in the private world of the home, where they cared for their families' moral and physical needs. Middle-class women pushed for reform from within the proscriptions of this domestic world, typically in organizations limited to women.⁵

as Flaherty, "Boycott in Butte"]. See also Barbara Cloud, "Laura Hall Peters: Pursuing the Myth of Equality," *Pacific Northwest Quarterly* 74 (1983), 28-36 [hereafter cited as Cloud, "Laura Hall Peters"].

³*New Northwest*, January 28, 1886. Little biographical information is available on Keenan. She ran the Home Hotel in East Portland, where she and her husband, a street contractor, raised a family. *Daily News*, January 12, 1886; *East Portland Directory*, 1885-92.

⁴The anti-Chinese movement's ideology and membership can be pieced together from sparse newspaper accounts. The *Daily News* had the best coverage of the meetings. Occasional reports from Portland's *Oregonian*, a statewide Republican paper, and Abigail Scott Duniway's *New Northwest* (Portland) provide further information. While newspaper reports are not the most reliable of historical sources, no other sources reveal the movement's ideology, rhetoric, and membership.

⁵On women's traditional sphere in nineteenth-century America and the language of domesticity, see Robert L. Griswold, "Anglo Women and Domestic Ideology in the American West in the Nineteenth and Early Twentieth Century," in *Western Women: Their Land, Their Lives*, ed. Lillian Schlissel, Vicki L. Ruiz, and Janice Monk (Albuquerque, 1988), 15-29 [hereafter cited as Schlissel, *Western Women*]; Nancy F. Cott, *The Bonds of Womanhood: Women's Sphere in New England, 1790-1835* (New Haven, 1975); Kathryn Kish Sklar, *Catherine Beecher: A Study in American Domesticity* (New York, 1976); Barbara Welter, "The Cult of True Womanhood, 1820-1860," *American Quarterly* 18 (1966), 151-74.

On single-sex moral-reform organizations, see Mary P. Ryan, "The Power of Women's Networks: A Case Study of Female Moral Reform in Antebellum America," *Feminist Studies* 5 (1979), 66-85; Lori D. Ginzburg, "'Moral Suasion is Moral Balderdash': Women, Politics, and Social Activism in the 1850s," *Journal of American History* 73 (1986), 601-22 [hereafter cited as Ginzburg, "'Moral Suasion'"]; Marijo Buhle, *Women and American Socialism, 1870-1920*



Sue Ross Keenan and other anti-Chinese agitators feared competition from Chinese men for domestic jobs. (San Francisco Public Library)

However, rural women joined the Grange, the Farmers' Alliance, and the Populist party in order to reform economic and social relations. Urban working women joined labor organizations such as the Knights of Labor to advance wide-ranging reforms.⁶ Although their activities seldom occurred in legislative chambers, governors' offices, or courtrooms, their efforts were political in the broad sense of the word. They acted formally and informally to change government and community behavior,⁷ and to forge an ideology of equal rights in their organizations.⁸

Many of Portland's working women were among those

[Urbana, 1981], 50-67; Ruth Bordin, *Women and Temperance: The Quest for Power and Liberty, 1873-1900* (Philadelphia, 1981); Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," *American Historical Review* 89 (1984), 635-38 [hereafter cited as Baker, "Domestication of Politics"]; Margaret Nan Haines, "Women in Jackson County, Oregon, 1875-1885: A Group Portrait" (M.A. thesis, University of Oregon, 1980), 170-73 [hereafter cited as Haines, "Women in Jackson County"].

⁶Donald B. Marti, *Women of the Grange: Mutuality and Sisterhood in Rural America: 1866-1920* (Westport, 1991); Julie Roy Jeffrey, "Women in the Southern Farmers' Alliance: A Reconsideration of the Role and Status of Women in the Late Nineteenth-Century South," in *Our American Sisters: Women in American Life and Thought*, ed. Jean E. Friedman and William G. Shade (Lexington, Mass., 1982), 348-71; Douglas A. Bakken, ed., "Luna E. Kellie and the Farmers' Alliance," *Nebraska History* 50 (1969), 184-205; MaryJo Wagner, "Helping Papa and Mama Sing the People's Songs: Children in the Populist Party," in *Women and Farming: Changing Roles, Changing Structures*, ed. Wava B. Haney and Jane B. Knowles (Boulder, 1988), 319-37; MaryJo Wagner, "Farms, Families and Reform: Women in the Farmers' Alliance and Populist Party" (Ph.D. diss., University of Oregon, 1986) [hereafter cited as Wagner, "Farms, Families and Reform"]; Susan Levine, "Labor's True Woman: Domesticity and Equal Rights in the Knights of Labor," *Journal of American History* 70 (1983), 323-39 [hereafter cited as Levine, "Labor's True Woman: Domesticity and Equal Rights"]; idem, *Labor's True Woman: Carpet Weavers, Industrialism and Labor Reform in the Gilded Age* (Philadelphia, 1984) [hereafter cited as Levine, *Labor's True Woman*]. On female political activism after the Civil War generally, see Mary P. Ryan, *Women in Public: Between Banners and Ballots, 1825-1880* (Baltimore, 1990), 155-56 [hereafter cited as Ryan, *Women in Public*].

⁷I am indebted to Paula Baker for this broad definition of political activity. She defines politics as "any action, formal or informal, taken to affect the course of behavior of government or the community." Baker, "Domestication of Politics," supra note 5 at 622. See also Ryan, *Women in Public*, supra note 6, which uses a broad definition of "public" to examine politically active women in the public sphere at large.

⁸Herbert G. Gutman, *Work, Culture, and Society in Industrializing America: Essays in American Working-Class and Social History* (New York, 1976), 85. Ginzburg, "Moral Suasion," supra note 5 at 620-21. Ginzburg and Gutman suggest that after the Civil War, workers and farmers carried on the legacy of Christian perfectionism exhibited by antebellum evangelical and reform movements.

breaking into public life, participating in anti-Chinese demonstrations at the city's largest public meeting grounds, and even attending bonfire-lit, open-air rallies.⁹ Perceiving Chinese labor as an economic threat, they joined anti-Chinese leagues and even the Knights of Labor, calling for equal rights for white men and women at the expense of the Chinese. Among the protesters, both men and women stressed domestic themes and emphasized traditional gender roles and domestic values to strengthen their free-labor ideology. This made for further opportunities within the movement for women.

THE MAKING OF A SUFFRAGIST ANTI-CHINESE IDEOLOGUE

Before Sue Ross Keenan joined the anti-Chinese movement, she played a vital role in Oregon's suffrage campaign. In the early 1880s, she worked for a suffrage amendment to the state constitution, attending the annual meeting of the Oregon State Women's Suffrage Association, serving on its committees, and delivering speeches on behalf of the constitutional amendment.¹⁰ When the amendment failed, she lobbied the state legislature to pass a bill to extend the vote to women, to which end she testified before the Oregon Senate Judiciary Committee in February 1885.¹¹

Her testimony reveals her partisan nature and her attitudes about race and gender. She reminded the Judiciary Committee that Abraham Lincoln, a Republican president, had enfranchised the Negro. "We have waited long and anxiously for his Republican followers to enfranchise the women [*sic*]," she pointed out. "They have turned a deaf ear to our entreaties, and now our only hope lies with the Democratic party." An avowed Democrat, she urged the legislature to take this "golden opportunity" and follow the lead of New York Democrats, who supported a suffrage bill similar to the one under consideration in Oregon. Throughout her testimony, she unabashedly proclaimed her Democratic sympathies: "The fact of my being a Democrat I neither attempt to palliate or deny." That she could

⁹For an insightful analysis of women in public places, see Ryan, *Women in Public*, *supra* note 6 at 58-94, especially 59, 92, 131.

¹⁰Keenan served as treasurer of the Oregon State Women's Suffrage Association in 1880 and sat on the program committee in 1884. She campaigned for female suffrage in Portland, Sandy, Eagle Creek, and East Portland. *New Northwest*, January 3, February 14, May 1, October 2, October 9, 1884; *Oregonian*, February 14, 1880.

¹¹The suffrage amendment lost in a public referendum in June 1884; see Ruth Barnes Moynihan, *Rebel For Rights: Abigail Scott Duniway* (New Haven, 1983), 178-82.

not vote would not stop her from defending policies based on her partisan views.¹²

Keenan also presented two nonpartisan arguments in favor of woman suffrage. Her testimony foreshadows her later stand on Chinese labor. First, she argued that women should have the vote because of their domestic role and moral superiority. "I come to you as a wife and mother, the mother of men, of voters," she told the committee. "I am proud of the name mother, and I ask a voice in making the laws that govern my children. I ask that a mother's voice be heard in your legislative hall." She molded her appeal carefully to fit the bounds of Victorian motherhood and domesticity, and demanded political equality on the basis of her special female qualities.¹³

Her second contention drew on the conservative, anti-immigrant—and even racist—argument used by some suffragists after the Civil War. She told the committee that she did not belong to the inferior classes specifically forbidden from voting under the Oregon Constitution: "I am neither a Chinaman, Indian, idiot, lunatic nor criminal, and I stoutly and strongly protest against being classed with them any longer." For her, the state could legally classify Indians and Chinese on the basis of racial inferiority, but gender was not a legitimate category. In other words, she claimed the right to vote on the grounds that all people were not equal. White women and men—especially the civilized and the educated—shared an equality that excluded those she viewed as the inferior races and society's misfits.¹⁴

During her suffrage campaigning, Keenan established herself

¹²*New Northwest*, February 12, 1885. For further evidence of Keenan's political sympathies, see *New Northwest*, November 9, 1884, May 28, 1885. On women who participated in political parties, see Ryan, *Women in Public*, supra note 6 at 155-58.

¹³*New Northwest*, February 12, 1885. Baker, "Domestication of Politics," supra note 5 at 632-35, 638.

¹⁴*New Northwest*, February 12, 1885. On the conservative turn of the suffrage movement and the close relationship between Euro-American supremacy and suffrage, see Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (Ithaca, 1978), 79-104; Aileen S. Kraditor, *The Ideas of the Women's Suffrage Movement, 1890-1920* (New York, 1965), 123-62, esp. 127; William L. O'Neill, *Everyone Was Brave: The Rise and Fall of Feminism in America* (Chicago, 1969), 16-21, 69-76. Some writers have emphasized that this argument was more racist than expedient; see Rosalyn Terborg-Penn, "Discontented Black Feminists: Prelude and Postscript to the Passage of the Nineteenth Amendment," in *Women and Power in American History: A Reader*, vol. 2, ed. Kathryn K. Sklar and Thomas Dublin (Englewood Cliffs, 1991), 132-45; Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (New York, 1984), 64-67, 123-27; Angela Y. Davis, *Women, Race and Class* (New York, 1981), 112-21.

as a capable lobbyist and a political being: a dedicated Democrat who relied on her party's racial attitudes to bolster her arguments for suffrage.¹⁵ As the Oregon suffrage campaign dwindled after the 1885 legislature had voted against the suffrage bill, she turned her energies to a new cause—expelling the Chinese. Once again, to fight this battle, she marshalled her domestic ideology and her racist assumptions.

WOMEN AND THE ANTI-CHINESE MOVEMENT IN OREGON

The anti-Chinese movement of 1885-86 had its immediate origins in the depression of 1884, which weakened the Pacific Northwest's economy. With the completion of the Northern Pacific Railroad in 1883 and the collapse of its stock the following year, the company let thousands of Chinese and Euro-American workers go. The unemployed floated to Portland in search of work and soup kitchens, but instead found fierce competition for jobs.¹⁶ In the autumn of 1885, Euro-American laborers formed anti-Chinese leagues to protest what they perceived as unfair Chinese competition.¹⁷ In less than a month, eight weekly anti-Chinese encampments organized in the Portland environs, springing up in the working-class neighborhoods of Albina, East Portland, Beaver Creek, and Oregon City. Agitators elsewhere held meetings in Pendleton, Baker City, and

¹⁵On Democratic racial views before and after the Civil War, see Jean H. Baker, *The Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (Ithaca, 1983), 212-58.

¹⁶On the depression in Oregon, see E. Kimbark MacColl with Harry H. Stein, *Merchants, Money and Power: The Portland Establishment, 1843-1913* (Portland, 1988), 205-51; Margaret K. Holden, "The Rise and Fall of Oregon Populism: Legal Theory, Political Culture and Public Policy, 1868-1895," [Ph.D. diss., University of Virginia, 1993], 226-35 [hereafter cited as Holden, "Oregon Populism"].

¹⁷David Johnson estimates that the Chinese population in Portland in the mid-1880s could have been as high as 25 percent. The United States 1880 census takers counted 1,678 Chinese in Portland (9.5 percent of the total city population). This increased to 4,539 in 1890 (8.8 percent of the total). Johnson and Malcolm Clark assert that for a brief period the proportion and number of Chinese in Portland increased dramatically because of the five thousand Chinese who had entered the region to work on the Northern Pacific but were forced to seek refuge from the Tacoma and Seattle expulsions, as well as from threats of violence in neighboring Oregon towns. David A. Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (Berkeley, 1992), 445 n. 19 [hereafter cited as Johnson, *Founding the Far West*]; Clark, "Bigot Disclosed," supra note 2 at 131. *Tenth Census of the United States, 1880* (Washington, 1883), Population I: 753 [hereafter cited as *U.S. Census, 1880*]; *Eleventh Census of the United States, 1890* (Washington, 1895), Population I: 652 [hereafter cited as *U.S. Census, 1890*].

Medford.¹⁸ Protesters called for the strict enforcement of the Chinese Exclusion Act of 1882, the legal removal of Chinese workers, and the boycott of all Chinese businesses, Chinese-manufactured goods, and employers of Chinese workers.¹⁹

Simultaneously, the Knights of Labor began to form assemblies along the West Coast, recruiting heavily from the fledgling Oregon leagues. Organizers conducted initiations following league meetings.²⁰ A national labor organization headed by Terence V. Powderly, the Knights sought to create a producers' community based on mutual interdependence and citizen participation. Working men and women joined the movement, calling for an end to wage slavery and the factory system, which they believed crushed the economic independence of laborers. The Knights inherited an eighteenth-century republican tradition based on beliefs in the dignity of work, a republican form of government, and equal rights for men and women. Through organization, cooperation, and education, they hoped to restructure the economy into an interdependent society of producer-citizens.²¹

West Coast Knights embraced this national agenda and equal-rights ideology, but also advocated the exclusion of Chinese laborers, at the expense of what one eastern visitor called the "humanitarian" nature of the national organization. In California, Washington, and Oregon, Knights assemblies demanded the exclusion of the Chinese on the grounds that the race was antithetical to the social, cultural, and economic values of Americans.²² A Knights newspaper in Pendleton

¹⁸*New Northwest*, April 5, 26, 1886; *Daily News*, November 7, 1885, March 7, 1886.

¹⁹*Daily News*, October 29, 1885; Holden, "Oregon Populism," supra note 16 at 362-73.

²⁰*Daily News*, January 8, 22, 25, 1886. The Knights organized fourteen new assemblies in Multnomah, Washington, and Clackamas counties in 1886; see Jonathan Garlock, *Guide to the Local Assemblies of the Knights of Labor* (Westport, 1982), 403-5; Schwantes, *Radical Heritage*, supra note 2 at 26-29, 229; Holden, "Oregon Populism," supra note 16 at 378-81. In August 1886 a Willamette Valley Knights meeting gathered members from Portland, East Portland, Sellwood, Salem, Harrisburg, Junction City, and Salem; see *Daily News*, August 28, 1886.

²¹Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Urbana, 1983), 1-17 [hereafter cited as Fink, *Workingmen's Democracy*]; Levine, *Labor's True Woman*, supra note 6; Chester MacArthur Destler, *American Radicalism, 1865-1901* (1946; Chicago, 1966) [hereafter cited as Destler, *American Radicalism*]; David Montgomery, *Fall in the House of Labor: The Work Place, the State, and American Labor Activism, 1865-1925* (New York, 1987); idem, *Beyond Equality: Labor and the Radical Republicans, 1862-1872* (New York, 1967), 336-446.

²²W.W. Stone, "The Knights of Labor and the Chinese Labor Situation," *Overland Monthly* 7 (1886), 225-29 [hereafter cited as Stone, "Knights of

complained that hardworking men and women refused to support Chinese rights because their "wages now are reduced almost below living rates on account of the inevitable inflution of cooley l[a]bor."²³ A sympathetic Portland editor predicted that the Knights would be effective in "defeating" corporations and capitalists that imported and employed coolie labor, and stated that only the Knights foresaw the "magnitude of the crisis" resulting from the degradation of white labor by the Chinese.²⁴

Knights recruiters used the anti-Chinese issue in their push for reforms. For instance, Daniel Cronin, a Knights veteran from San Francisco, encouraged laborers to turn their anti-Chinese feelings into an attack on "capitalists, bankers, [and] railroad monopolists," and argued that workers must hold the corporate monopolies responsible for the Chinese in their midst.²⁵ At a rally at Portland's New Market Theater, he recounted to his audience how proponents of Chinese exclusion had forced nine hundred Chinese from Eureka, California, and three thousand from the Puget Sound region. Cronin approved of Portland's local boycott, which he hoped would force the Chinese to leave without violence. But, he warned, if businessmen did not take action, the workers would.²⁶

Anti-Chinese protesters and Knights members encouraged women to join the leagues.²⁷ Women frequently attended the

Labor"; Schwantes, *Radical Heritage*, supra note 2. Western labor reformers had a model for racial integration. In the South, organized labor faced the choice of excluding blacks from Knights assemblies or including all workers along class lines regardless of race. Many chose to integrate at the state level. For the race question in the South, see Fink, *Workingmen's Democracy*, supra note 21 at 122-41, 163-71; and C. Vann Woodward, *Origins of the New South: 1877-1933* (1951; Baton Rouge, 1971), 229.

²³Pendleton, *Oregon Laborer*, June 3, 1886. Another article commented on the "heathen" laundrymen's fear of the white laborers' protests.

²⁴*Daily News*, October 14, 1885. Over the next few years, Knights assemblies, together with other labor organizations, called for anti-Chinese legislation. In the 1887 legislative session, Knights assemblies endorsed a bill to restrict Chinese from owning or leasing real estate or property. See *Oregonian*, February 3, 1887; Holden, "Oregon Populism," supra note 16 at 450-52.

²⁵*Daily News*, January 28, 24, 1886. In addition Cronin was an organizer for the International Workingmen's Association. For background on Cronin and the IWA, see Schwantes, *Radical Heritage*, supra note 2 at 26; idem, "Unemployment, Disinheritance, and the Origin of Labor Militancy in the Pacific Northwest, 1885-1886," in *Experiences in a Promised Land: Essays in Pacific Northwest History*, ed. G. Thomas Edwards and Carlos A. Schwantes (Seattle, 1986), 182-84; Destler, *American Radicalism*, supra note 21 at 78-104.

²⁶*Daily News*, January 25, 1886; *Oregonian*, January 28, 1886.

²⁷*Daily News*, January 20, 1886. Newspapers occasionally printed editorials and speeches that invited women to attend meetings; see, for example, *Oregonian*, October 7, 1885; *Daily News*, October 30, 1885.

anti-coolie meetings, and often numbered about "one-third" of the audience.²⁸ At least two reasons explain why many of them became members. The precarious status of Euro-American working women meant that they often competed with Chinese men, and undoubtedly shared the racist attitudes that pervaded the movement.

Wage work was a fact of life for a growing number of women in the late nineteenth century. In Portland the percentage who worked outside the home—as boardinghouse keepers, seamstresses, mill operatives, and domestic servants—increased from about one-tenth in 1860 to almost one-quarter in 1880.²⁹ More importantly, urban working women often competed directly with Chinese for jobs in domestic service, tailoring, and the mills.³⁰ Between 1870 and 1890, Chinese workers in

²⁸Newspapers reported from four hundred to "thousands" of people at the citywide meetings. *Daily News*, October 7, 8, 30, 1885, January 12, 20, March 12, 1886. See also Wunder, "Law and the Chinese," supra note 1 at 20; Flaherty, "Boycott in Butte," supra note 2 at 37-38. For a distinctly middle-class response, see Michele Shover, "Chico Women: Nemesis of a Rural Town's Anti-Chinese Campaigns 1876-1888," *California History* 67 (December 1988), 228-43 [hereafter cited as Shover, "Chico Women"]. The suffragist Abigail Scott Duniway, who did not take part in Oregon's anti-Chinese meetings, wrote extensively about the movement. She provides an analysis of Chinese labor in contrast to her working-class counterparts; see Holden, "Oregon Populism," supra note 16 at 387-88.

²⁹Levine, "Labor's True Woman: Domesticity and Equal Rights," supra note 6 at 324. Mary C. Wright, "The World of Women: Portland, Oregon, 1860-1880" (M.A. thesis, Portland State University, 1973), 26, 70; Haines, "Women in Jackson County," supra note 5 at 21-38; Mary Lou Locke, "'Like a Machine or an Animal': Working Women of Late Nineteenth Century Urban Far West in San Francisco, Portland, and California" (Ph.D. diss., University of California, San Diego, 1982).

According to the census, the number of women as a percentage of the entire Oregon work force increased from 2 percent in 1870 to over 8 percent in 1890. For women as a percentage of nonagricultural workers, the percentage jumped from less than 4 to almost 12. These and the following statistics are derived from *Ninth Census of the United States, 1870* (Washington, 1872), Population, I: 753; *U.S. Census 1880*, supra note 17 at Population, I: 842; *U.S. Census 1890*, supra note 17 at Population, II: 600-601.

³⁰On Chinese labor in Oregon, see Holden, "Oregon Populism," supra note 16 at 89-90; P. Scott Corbett and Nancy Parker Corbett, "The Chinese in Oregon, c. 1870-1880," *Oregon Historical Quarterly* 78 (1977), 73-85 [hereafter cited as Corbett, "Chinese in Oregon"]; Edson, *Chinese in Eastern Oregon*, supra note 2. Chinese labor in the West is covered in Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860-1910* (Berkeley, 1986); Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle, 1988), 14-20, 71-74 [hereafter cited as Daniels, *Asian America*]; A.W. Loomis, "How Chinese are Employed," *Overland Monthly* 2 (1869), 231-40; David M. Katzman, *Seven Days a Week: Women and Domestic Service in Industrializing America* (New York, 1978), 55-56, 221-22.

For the competition for work between Chinese men and Euro-American women, see Julie Roy Jeffrey, *Frontier Women: The Trans-Mississippi West*,

Oregon moved away from mining (which supported over three-quarters of the state's Chinese population in 1870 and less than one-tenth in 1890). By 1890 Chinese men were usually employed in domestic service, laundry washing, and common labor.³¹ Census takers in 1880 found nonfarming Euro-American working women predominantly in teaching, domestic service, dressmaking, tailoring, and millinery. Women in all these occupations except teaching competed with Chinese laborers for their jobs.³²

More telling, however, is a comparison of Chinese men and Euro-American women in specific industries in 1880. Over half the domestic servants were Euro-American women, while 40 percent were Chinese men. In laundry, Chinese men made up more than two-thirds of the workers, and Euro-American women less than 20 percent, while in the cotton and woolen mills employers hired about 9 percent Chinese men and one-third Euro-American women. In millinery and tailoring, 80 percent of the workers were Euro-American women, compared with 10 percent Chinese men.³³ Although the absolute number of Chinese men in these occupations was relatively small, their presence led to the perception that they were stealing jobs from white women.

According to community leaders and anti-Chinese activists,

1840-1880, 3d ed. (1978; New York, 1981), 125; Sarah Deutsch, "Landscapes of Enclaves: Race Relations in the West, 1865-1990," in *Under an Open Sky: Rethinking America's Western Past*, ed. William Cronan, George Miles, et al. (New York, 1992), 116 [hereafter cited as Cronan, *Under an Open Sky*]; David Newsome, *David Newsome: The Western Observer, 1805-1882* (Portland, 1972), 204-6.

The league acknowledged this competition when it established the Free Labor Bureau to help unemployed white workers find jobs in the Portland area. *Daily News*, January 1, 1886; see also October 29, November 10, December 5, 7, 30, 1885, January 6, 1886.

³¹In domestic service, the proportion of Chinese workers grew from 8 percent in 1870 to 12 percent in 1890; laundry washers jumped from 5 to 10 percent. Common laborers experienced the greatest growth, from less than 5 percent in 1870 to more than one-third of all Chinese workers by 1890.

³²In 1880, over 20 percent of teachers were women, while domestic servants numbered more than 36 percent. In the same year, dressmaking, millinery, and tailoring had their highest number of female workers, with 22 percent.

³³These percentages provide only suggestions of the numbers in an industry. The 1880 census does not specify China as a place of origin. It lumped Chinese with other non-Northern European nationalities in a category called "other."

In the 1880 census, domestic servants included 972 women (51 percent) and 756 "other" (39.8 percent); laundry workers included 60 women (14.5 percent), 350 male "other" (84 percent); cotton, wool, and silk operatives included sixteen women (36 percent) and four male "other" (9 percent); dressmakers, milliners, seamstresses, and tailors counted 599 women (79.8 percent) and 76 male "other" (10 percent); boardinghouse keepers counted 89 women (66.9 percent) and 15 male "other" (11.3 percent).

women attended protest meetings because they felt this economic threat. One newspaper editor, for instance, praised the "proper" open policy of the labor movement because women suffered "from coolie competition as much as men."³⁴ A Knights of Labor leader called on women to join because so many Chinese domestics competed for their jobs.³⁵ A Democratic politician observed that for "mothers and fathers" honest toil was now "disreputable" because Chinese stole jobs for lower wages.³⁶ One newspaper even blamed Chinese competition for increasing the number of female prostitutes. Protesters claimed that cheap Chinese labor forced Anglo women out of work and into careers of "depravity." The *Daily News* reported a 33 percent increase in "depraved" women in 1885, because of economic competition.³⁷ While this charge was most likely fabricated by a prejudiced editor, it nonetheless illustrates the degree to which anti-Chinese agitators considered Chinese labor as "women's work" that threatened women's livelihoods.³⁸

When it came to the Chinese, Euro-American women could be as racist as their male counterparts. Sue Ross Keenan revealed her own racial prejudices regarding suffrage, insisting that white women should gain the vote before the "inferior" races did so. A similar prejudice appeared to be at work during the winter of 1885-86.³⁹

³⁴*New Northwest*, October 22, 1885. The Oregon Women's Christian Temperance Union also resolved that women needed jobs at the expense of Chinese laborers; see *Oregonian*, January 14, 1886.

³⁵*Daily News*, March 12, January 25, 1886. See also January 22, 1886.

³⁶*Daily News*, January 20, 1886.

³⁷The editor's claim also reinforced the stereotype that Chinese residents increased urban immorality and decay; see *Daily News* editorials in September and October 1885. *Daily News*, September 30, 1885; *New Northwest*, October 8, 1885. In the following decade, similar arguments surfaced in Butte, Montana; see Flaherty, "Boycott in Butte," supra note 2 at 38. For the economic factors that influenced women's entry into prostitution, see Anne M. Butler, *Daughters of Joy, Sisters of Misery: Prostitutes in the American West, 1865-1890* (Urbana, 1985); Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (Baltimore, 1982).

³⁸Euro-American men deemed undesirable occupations as "women's work" that could not support a decent income. Several historians note this derogatory label used by Euro-American men to describe Chinese work. See Daniels, *Asian America*, supra note 30 at 74-79; Corbett, "Chinese in Oregon," supra note 30 at 77-78; Shover, "Chico Women," supra note 28 at 230.

³⁹"New Western" historians have recently opened the study of the American West to issues of race and gender. Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987); Cronan, *Under an Open Sky*, supra note 30; Patricia Limerick, Clyde A. Milner II, and Charles Rankin, eds., *Trails: Toward a New Western History* (Lawrence, 1991); Richard White, "Race Relations in the American West," *American*

GENDER AND ANTI-CHINESE IDEOLOGY

The story of the anti-Chinese protests in the Pacific Northwest is well known. Laboring men and women, with the encouragement of ambitious, demagogic politicians, formed anti-Chinese leagues in Tacoma, Seattle, and Portland. Motivated by their perception of unfair economic competition, Chinese cultural inferiority,⁴⁰ and the lack of enforcement of the 1882 Exclusion Act,⁴¹ protesters hoped to oust the Chinese by limiting the available jobs and by strict enforcement of federal treaties and acts. Their methods included boycotting, mass protest, and, as a last resort, violence.

Portland's anti-Chinese agitators cited economic competition

Quarterly 38 (1986), 396-416; "Historical Commentary: The Contributions and Challenges of Western Women's History—Four Essays by Sarah Deutsch, Virginia Scharff, Glenda Riley, and John Mack Faragher," *Montana: The Magazine of Western History* 61 (Spring 1991), 57-73. See also Susan Armitage and Elizabeth Jameson, eds., *The Women's West* (Norman, 1987), and Schlissel, *Western Women*, supra note 5. For a recent critique of some of these new works on gender and race, see Antonia I. Castañeda, "Women of Color and the Rewriting of Western History: The Discourse, Politics, and Decolonization of History," *Pacific Historical Review* 61 (November 1992), 501-33.

⁴⁰Protesters contended that the Chinese race and culture were incompatible with the American way of life. Euro-Americans living on the Pacific slope shared with native-born Americans elsewhere in the country deeply embedded racial prejudices. Many Portlanders believed that Chinatown overflowed with opium smokers and prostitutes living in squalor, a short step to viewing all Chinese as dishonest, immoral, and licentious. See *Daily News*, September 30, October 1, 4, 1885. One of the best examples of this ingrained prejudice lies in the criminal proceedings against Chinese; see, for example, John R. Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17 (1986), 25-41; idem, "Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (1983), 191-211; idem, "Law and the Chinese," supra note 1. Euro-American laborers used these stereotypes to rob the Chinese of their humanity and to support their claim that Chinese immigrants could not be assimilated. Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (1939; Urbana, 1973), 34-37 [hereafter cited as Sandmeyer, *Anti-Chinese Movement in California*]; G.H. Atkinson, "The Spirit of Portland," *Oregonian*, January 1, 1880; Stone, "Knights of Labor," supra note 22 at 226. Daniels, *Asian America*, supra note 29 at 30. Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, 1971), 9-10, 19-44 [hereafter cited as Saxton, *Indispensable Enemy*].

⁴¹Agitators claimed that the lack of federal law enforcement (both by federal judges and customs officers) allowed too many Chinese into the country illegally and justified the expulsion of the Chinese. In the words of one protester, the U.S. district courts "virtually nullifie[d] the [1882] Restriction Act" and allowed the Chinese to enter fraudulently. *Daily News*, October 2, November 22, 1885, see also October 13, 20, 1885; Holden, "Oregon Populism," supra note 16 at 347-62; Daniels, *Asian America*, supra note 30 at 56; Wynne, *Reaction to the Chinese*, supra note 2 at 308-9.

as the primary reason for Chinese expulsion, and contended that Chinese workers competed unfairly with white laborers by working for lower wages and living in substandard conditions. At early meetings, Euro-American workers complained that Chinese laborers in laundry, cigar manufacturing, tailoring, and boot-and-shoe manufacturing took jobs from Portland's white men, women, and children because they willingly worked for low wages.⁴² Protesters charged that most Chinese worked in a "coolie" contract system, selling their labor under contract at wages that, by local standards, were "slave wages." Euro-American workers viewed these wages as a symbol of the inherent "antagonism between American free labor and coolie serf labor." The *News* editor complained that "the whole contract system is but one remove from slavery itself." He continued:

The coolies are imported under contract and after their arrival in this country they are as much subject to the wills and orders of the contracted as were the negroes of the South under the old slave system. Chinese contractors operate like slave owners—their serfs are compelled to report their earnings promptly and contractors get a share.⁴³

In fact, few Chinese entered the country under contract and few were employed in competitive industries. Still, agitators argued that this "coolie" system created an immoral, flawed economy.⁴⁴

Workers in Portland believed that the future of their society and economy was in danger. A slave economy could not thrive. By focusing on the stark dichotomy between Chinese slave labor versus free white labor, protesters veiled their attack on industrial capitalism. They challenged capitalists for denigrating white labor and encouraging "coolie" employment.⁴⁵

⁴²*Daily News*, September 30, 1885. According to the census, in 1880 boot-and-shoe manufacturing employed three hundred persons, of whom 12.6 percent were categorized as "other" (including at least some Chinese). Of the forty-two Oregon cigar makers counted in 1880, one-third were "other." *U.S. Census, 1880*, supra note 29 at Population I: 842. For domestic service and laundry, see note 31.

⁴³*Daily News*, October 14, 1885.

⁴⁴Daniels asserts that most Chinese probably worked voluntarily. Idem, *Asian America*, supra note 30 at 13-14, 20. Contract gang labor was common on the railroads and in Oregon's rural areas where laborers cleared land. There is no reason to believe that urban Chinese workers were not independent contractors. Holden, "Oregon Populism," supra note 16 at 89-90.

⁴⁵*Oregonian*, March 3, 1886; *Daily News*, March 17, January 28, 1886. Sandmeyer, *Anti-Chinese Movement in California*, supra note 40 at 25-33; Saxton, *Indispensable Enemy*, supra note 40 at 9-10; Ronald T. Takaki, *Iron Cages*:

Euro-American workers argued that West Coast capitalists created a labor system that artificially reduced wages by hiring cheap Chinese labor, which, in turn, undermined whites' economic independence. Their solution was to oust the Chinese from the state and restore their own wages.

The free labor rhetoric of Portland's anti-Chinese leagues sprang from antebellum American cultural and political values. The cult of the self-made man, the promise of equal opportunity, and the hope for social mobility were all linchpins of nineteenth-century political culture. By the 1850s northern Republicans had transformed these ideals into a critique of slavery and the southern economy; they believed that the dynamic, expanding, capitalistic northern economy provided laborers with dignity, respect, and a chance to get ahead. With hard work and self-improvement, every laborer could obtain economic independence through self-employment. In contrast to the robust northern economy, Republicans felt that the South's dependence on slave labor created economic stagnation and a corrupt labor system.⁴⁶

Thirty years later, anti-Chinese advocates resurrected this free-labor ideology to remind capitalists of the ideals of social mobility and equal opportunity for whites. They believed that

Race and Culture in Nineteenth Century America (New York, 1979), 215-49, especially 236-39. Takaki argues that western capitalists used Chinese workers as a "yellow proletariat" that served American capitalism "without threatening the racial homogeneity of America's citizenry." Chinese labor helped promote the republican virtues of industry and thrift by upgrading Euro-American workers' jobs. This, in turn, "resolved the tensions of class conflict in white society, as Chinese migrant laborers became the 'mudsills' of society." See also Mooney, "Deadly and Race," *supra* note 2 at 627-37.

⁴⁶Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Palo Alto, 1957); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1970; New York, 1980), 1-73, 226-317 [hereafter cited as Foner, *Free Soil*]. According to Foner, the free labor ideology suited northern workingmen who harbored anti-Negro feelings. They cared neither for southern slaves nor for saving the static southern economy. Instead, they called for reserving territory in the West for free white labor.

Oregon laborers in the Gilded Age were not alone in adapting free labor ideas to service their class and racial interests. Lawyers and judges embraced a liberal version of free labor republicanism; see William E. Forbath, "The Ambiguities of Free Labor: Labor and Law in the Gilded Age," *Wisconsin Law Review* (1985), 767-817. *Idem*, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass., 1991); Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Supreme Court Historical Society Yearbook* (1985); Foner, *Free Soil*, 38; Paul S. Taylor, "Foundations of California Rural Society," *California Historical Society Quarterly* 24 (1945), 193-228; Alice Kessler-Harris, "Law and a Living Wage: The Gendered Content of 'Free Labor,'" in *Gender, Class, Race and Reform in the Progressive Era*, ed. Nora Lee Frankel and Nancy S. Dye (Lexington, Ken., 1991), 87-109.

Chinese labor threatened economic prosperity and degraded white workers to the level of a "serf system" not unlike slavery.⁴⁷ Racism led these workers to conclude that the ideal of free labor could not extend to Chinese workers, whom they believed to be incapable of assimilation and, thus, incapable of participating in a republic.

What appeared to be a straightforward ideology that drew a line between free Euro-American workers and unfree Chinese laborers was complicated by the interests of women. Anti-Chinese activists used gender to strengthen their cause by drawing on domestic values and women's traditional role in Victorian America. For instance, agitators stressed that white workingmen were family men with starving wives and children, unlike Chinese bachelors who sent money home to China. The *Oregonian's* editor noted that the Chinese were a "menace to free institutions, to home, and family."⁴⁸ League activists used gender to underscore their fight between "liberty and slavery." On one side were symbols of Victorian domesticity, including "elevation, morality, social purity," and "benevolence," as well as a few American political principles thrown in for good measure: "freedom, progress, and law." On the other side, the Chinese wallowed in "serfdom, foulness, filth, roguery, vice, theft, murder, [and] remorseless cruelty."⁴⁹

These domestic values also influenced the protesters' vision of the future. Agitators envisaged a classless society in which laborers and employers worked together to ensure a living wage and dignified labor for all citizens. One rank-and-file member imagined a future in which "every hard working and honest working man has his own home, his little vegetable and flower garden, his little library of useful books, his healthy, well-clad, and well-fed wife and children, a home where there dwells sunshine and happiness upon every face. No patricians, no plebeians, but a well-to-do community of happy and contented citizens." Once wages were restored, Euro-American workers planned to mimic middle-class gender roles, preferring women to be wives and not workers.⁵⁰

⁴⁷*Daily News*, October 4, 1885. Oregon's next governor, Sylvester Pennoyer, drew on this theme in a campaign speech in 1886. "The free soil of Oregon, dedicated by the founders of the state to free labor, must forever remain its exclusive home," he told his audience. If Chinese laborers remained, he claimed that "the Willamette Valley [would] be home to only rich capitalists and Chinese serfs." *Oregonian*, May 27, 1886.

⁴⁸*Oregonian*, February 14, 1886.

⁴⁹*Daily News*, October 6, 1885. See also January 21, 28, 1886, September 30, 1885. For parallels with the California Workingmen's Party's use of gender, see Ryan, *Women in Public*, supra note 6 at 160.

⁵⁰*Daily News*, March 4, 1886. On the classless vision, see November 6, 1885.

Women used similar language and symbols to attack Chinese labor. Keenan, the "chosen angel of the working class," frequently spoke at encampment meetings on women's duty to assist in the Chinese question, stressing the dignity of work and the family. She told one audience that as a mother she had worked hard to raise her family and wanted her children to have a chance to make an honest living "by the sweat of their brow." Without jobs, she lamented, her children would have no future.⁵¹ She appealed to mothers to join the Knights of Labor, which would rescue all families and reform society.⁵² She also echoed her male counterparts in insisting on the law-abiding nature of the group, and declared before a large rally that they were not "mobs, mudsills, [or] cranks," but "hungry" lawful citizens.⁵³ A few nights later, she implored her audience to remove the Chinese without bloodshed "in the interests of our children."⁵⁴

Her leadership in the anti-Chinese movement challenged the notion of separate spheres, or, at the least, represented a woman's active extension of the domestic into the public realm. In the spring of 1886 Keenan spoke at Portland's anti-Chinese rallies and also toured eastern Oregon, lecturing for the Knights of Labor. In addition, her anti-Chinese cohorts nominated her to sit on the permanent committee for boycotting businesses that violated the leagues' principles.⁵⁵

OREGON'S EXTRALEGAL ANTI-CHINESE RIOTS

Despite the leagues' claims of lawfulness, Portland erupted in violence in mid-February 1886, when Euro-American men embarked on a campaign of terror. The trouble started when the Anti-Chinese Congress met at Portland's Turn Hall on George Washington's birthday, and called for the Chinese to leave Oregon. The congress instructed all delegates to return to their homes and to "peaceably assemble and politely request

Portland Knights shared this domestic future with many other laborers. Leon Fink and Susan Levine argue that the Knights idealized family life as the "moral and material mainstay of society," which in turn served as their basis for criticizing industrial capitalism; see Fink, *Workingmen's Democracy*, supra note 21 at 1-17; Levine, *Labor's True Woman*, supra note 6 at 132-33.

⁵¹*New Northwest*, April 15, 1886; *Daily News*, January 8, 1886.

⁵²*Daily News*, January 8, 25, 28, 1886.

⁵³*Daily News*, January 25, 1886.

⁵⁴*Daily News*, January 28, 1886; *New Northwest*, January 28, 1886.

⁵⁵*New Northwest*, April 14, 1886; *Oregonian*, February 14, 1886.

the said Mongolian race to remove from the state . . . within thirty days."⁵⁶

A week after the congress adjourned, rioters forced thirty-nine Chinese loom operators at the Oregon City Woolen Mill to leave town on a steamer.⁵⁷ A few days later, thirty Euro-American men armed with revolvers charged 180 Chinese woodchoppers and grubbers who were camped below the Albina flour mill. The mob ordered them to leave and paid their ferry fares. The Albina ferry made three crossings to Portland that night, carrying the men with their belongings on their backs. The exiled Chinese sought lodging and safety in the city. The following Friday, at 3 o'clock in the morning, exclusionists drove some one hundred to two hundred Chinese out of Albina and East Portland. Once again, the expelled took shelter in Portland's Chinatown. Later that morning, fifty masked men forced "coolie" woodchoppers in Mt. Tabor to the Albina ferry. The following week the *Oregonian* reported "another Ku klux raid" on fifty Chinese ranchers and gardeners north of Guild's Lake. Thirty men with blackened faces committed robbery and arson, destroying the vegetable gardens and hog ranches of the Chinese, attacking them and ordering them to walk to town.⁵⁸

Abandoning their goal of class cooperation and boycott, the anti-coolie leagues continued to brutalize and threaten many Chinese laborers. Sporadic violence against the Chinese continued into the summer as the protests waned.⁵⁹ This dwindling

⁵⁶*Oregonian*, February 14, 12, 1886; *New Northwest*, February 11, 1886; *Daily News*, February 12, 1886. In the same week, Seattle guards shot five men to keep order. Karlin, "Anti-Chinese Outbreaks," supra note 2 at 103; Wynne, *Reaction to the Chinese*, supra note 2 at 90-105.

⁵⁷*Oregonian*, February 23, 25, 1886. *New Northwest*, February 25, 1886. The following day, a U.S. marshal arrested several rioters for being in disguise on the highway and for depriving individuals of equal protection and privileges and immunities. See Mooney, "Deady and Race," supra note 2 at 609-10. In the same week, exclusionists asked the Chinese camped in Beaver Valley to leave. *Daily News*, February 25, 1886. Residents of the Willamette Valley town of Butteville followed the Anti-Chinese Congress resolutions and put twelve Chinese on a steamer out of town. Meanwhile the Brownsville City Council considered a Chinese laundry tax. *Daily News*, February 26, 1886; H.J.C. Averill to John Knox, February 25, 1886, John F. Weatherford Papers, Oregon Historical Society, Portland.

⁵⁸*Daily News*, March 3, 1886; *Oregonian*, March 1, 5, 13, 1886.

⁵⁹Other acts of violence included an attempt to dynamite a Portland Chinese washhouse, and the burning to the ground of a Chinese shanty in East Portland. There was more dynamiting in July, August, and September, as well as attacks on Chinese laundries, woodchopper settlements, and other labor camps. Harvey W. Scott, *History of the Oregon Country*, ed. Leslie M. Scott (Cambridge, Mass., 1924), 3: 224-26. *Oregonian*, March 24, July 7, August 12, September 9, 1886. John Wunder's careful study of western anti-Chinese violence demonstrates the relatively high incidence of violence in rural Oregon. Wunder,

enthusiasm coincided with the successful election of a labor-endorsed gubernatorial candidate and the revival of trade unions in Portland.⁶⁰ Significantly, women could neither vote nor join the unions. In only a few years, they had moved from active protest to an auxiliary role.

This rapid transition did not stop Keenan. By the end of the decade, she was again pursuing political reforms. In 1892 she served as a delegate to a convention of the newly organized farmer-labor third party, the Populist party. However, without the right to vote, there was little room for female participation, and her name fades from the newspapers after the party's initial organization. What ties all of her reform interests together was a deep faith in women's rights. The Oregon State Women's Suffrage Association, the Knights of Labor, and the Populist party each affirmed the right of women to participate in the public realm, as well as a rough equality between the sexes.⁶¹

"Anti-Chinese Violence in the American West, 1850-1910," in *Law for the Elephant, Law for the Beaver: Essays in the History of the American West*, ed. John McLaren, Hamar Foster, Chet Orloff (Pasadena, 1992), 214-16. See also Mooney, "Deady and Race," supra note 2 at 544-75; Edson, *Chinese in Eastern Oregon*, supra note 2 at 43-44, 51; Stratton, "Snake River Massacre," supra note 2.

The success of the movement is difficult to gauge. As a percentage of the total state population, the Chinese in Multnomah County declined between 1880 (7.8 percent) and 1890 (6.9 percent). Oregon's Chinese population declined dramatically between 1880 and 1920, from 9,515 to 3,090, because of a changing regional economy, the 1880s violence, the federal exclusion policy, and the disproportionate number of male Chinese immigrants. Gordon B. Dodds, *The American Northwest: A History of Oregon and Washington* (Arlington Heights, 1986), 120; Clark, "Bigot Disclosed," supra note 2 at 122-31. David Johnson notes that although Portland did not resort to the levels of violence and intimidation in Seattle and Tacoma, Oregon's Chinese population did decline after the mid-1880s because attitudes and practices were more "subtle, persistent and effective" than in movements elsewhere. Johnson, *Founding the Far West*, supra note 17 at 445 n. 19.

⁶⁰For the gubernatorial campaign of Sylvester Pennoyer, see Holden, "Oregon Populism," supra note 16 at 393-400; Harry W. Stone, "The Beginning of the Labor Movement in the Pacific Northwest," *Oregon Historical Quarterly* 47 (1946), 146.

⁶¹Marion Harrington, "The Populist Movement in Oregon, 1889-1896" (M.A. thesis, University of Oregon, 1935); Joan Cross, "The Populist Party in Oregon" (M.S. thesis, University of Utah, 1962); *Oregonian*, May 6, 1892. On the auxiliary role of women in trade unions and the Populist party, see Levine, *Labor's True Woman*, supra note 6 at 148-52; MaryJo Wagner, "Farms, Families and Reform," supra note 6 at 227, 264, 267, 283. See Cloud, "Laura Hall Peters," supra note 2, especially 35-36, for a view of another woman in a variety of reform movements of the era.

CONCLUSION

Sue Ross Keenan and other anti-Chinese leaders created a protest ideology that included notions about free labor and gender. Implicit within their speeches was the idea of equal rights for both sexes: white men and women deserved a decent wage and the opportunity to become republican citizens. The free labor ideology of the agitators distinguished race before that of gender. The notion of "free labor" was not a static, universal ideology, but one that could be shaped to fit local circumstances and specific social conflicts. On the West Coast, Euro-American workers perceived Chinese laborers as economic competitors, which led them to call for Chinese exclusion. The Chinese, they reasoned, lacked the qualities essential for social advancement. "Coolie" workers were unfit for American citizenship—the very foundation of the free labor ideology—whereas white citizens could, with self-improvement and economic independence, become part of the producers' republic. This notion of equality was not based on egalitarianism and natural rights. Race significantly narrowed the movement's equal-rights philosophy.

More important than the free labor ideal, however, was the ambiguous legacy of separate spheres. The Oregon anti-Chinese movement brought working women and men together to organize, deliberate, protest, and boycott. Their goal was to force government action, to compel capitalists' support, and to pressure the Chinese to leave (in some cases using terror and vigilantism). Men, the principal actors in the movement, used gender references and domestic ideals to support their class and racial interests. On the surface, their rhetoric and social vision idealized home and hearth: women would tend to the home and family, while men would work in the public realm. By contrast, working-class women like Keenan used these same ideals—family domesticity and womanhood—to step out of the private sphere and organize with men. If the ideal of separate spheres had ever held any salience for working women, by the late nineteenth century it had finally begun to disintegrate. In the process, Keenan and other women in the labor and farmer protest movements of the Gilded Age carved out public roles for themselves. The precarious equality of men and women in Oregon's anti-Chinese movement was enhanced by the apparent erosion of their separate spheres.



Activists in 1870s California worked toward the concept of marriage as a partnership rather than as the individual domination of separate spheres. (Private collection)

COMMUNITY PROPERTY LAW AND THE POLITICS OF MARRIED WOMEN'S RIGHTS IN NINETEENTH-CENTURY CALIFORNIA

DONNA C. SCHUELE

American marital property law has always been the province of the individual states. During the nineteenth century, this became a particularly volatile issue across the nation, and no two jurisdictions treated the subject identically. Nevertheless, marital property schemes did divide into two general categories: those based in the common law, and those situated within the French and Spanish civil law tradition. These schemes generally separated geographically; states east of the Mississippi were common law jurisdictions, while community property states and territories were west of the Mississippi.¹

In connection with the increased attention given to women's history, American legal historians have undertaken studies of the development and changes in nineteenth-century marital

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¹The following states and territories operated under the community property system during the nineteenth century: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. William Q. de Funiak, *Principles of Community Property* (Chicago, 1943), 1:72 [hereafter cited as de Funiak, *Community Property*].

property law, thereby elucidating transformations in women's legal status and changes in domestic relations. Such studies have properly focused on individual jurisdictions, but by and large it is the eastern common law states that have garnered scholars' interest.² And, when historians sought to generalize from their individual case studies, community property states were marginalized or ignored.³ Yet the history of the nineteenth-century West suggests that the evolution of marital property law there was distinctive enough to warrant separate study. This, in turn, would more fully inform our understanding of women's legal status and domestic relations in nineteenth-century America.⁴

²Peggy Rabkin, *Fathers to Daughters: The Legal Foundations of Female Emancipation* (Westport, Conn., 1980); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, 1982) [hereafter cited as Basch, *Eyes of the Law*]; Richard Chused, "Married Women's Property Law," *Georgetown Law Journal* 71 (1983), 1359-1425; Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, 1986) [hereafter cited as Salmon, *Women and the Law of Property*].

³Even when a community property state has been the subject of a study, the focus has remained on the common law, with historians seeking to explain the development of marital property law in that jurisdiction as a product of common law influence. Kathleen E. Lazarou undertook a study of marital property law in Texas from 1840 to 1913, primarily focusing on doctrine in order to discern the continuity between Texan developments and the national experience. She did not search for potential regional differences in legal or political cultures, which may have been unique to Texas. Idem, *Concealed Under Petticoats: Married Women's Property and the Law of Texas, 1840-1913* (New York, 1986). Meanwhile, Susan Westerberg Prager's study of California led her to conclude that California's system operated no differently from a common law marital property regime modified by married women's property acts. "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," *UCLA Law Review* 24 (1976), 1-82 [hereafter cited as Prager, "Persistence of Separate Property Concepts"]. Other recent work has concluded that the retention or adoption of community property systems in the American West can be traced to the growing interest in reforming married women's property rights in the common law states. See Ray August, "The Spread of Community-Property Law to the Far West," *Western Legal History* 3:1 (1990), 35, 63 [hereafter cited as August, "Community-Property Law"]; Carol Shammass, Marylynn Salmon, and Michael Dahlin, *Inheritance in America from Colonial Times to the Present* (New Brunswick, N.J., 1987), 291-92, n. 2 [hereafter cited as Shammass, *Inheritance*].

⁴Mari Matsuda, "The West and the Legal State of Women: Explanations of Frontier Feminism," *Journal of the West* 24 (January 1985), 47-56. If nothing else, the gender-neutral notion of common property could lead one to hypothesize that there was no need for reform of property rights specifically targeted at wives. See also Gloria Ricci Lothrop, "Rancheras and the Land: Women and Property Rights in Hispanic California," *Southern California Quarterly* 76:1 (1994), 59, 79 [hereafter cited as Lothrop, "Rancheras and the Land"]. Nevertheless, the national trend toward married women's property acts as a means of providing either family protection or female independence swept over the West in the nineteenth century. But it would be unwarranted to

Such a full understanding can only be achieved by placing marital property law within American legal, political, economic, and social history, as was ably recognized by Norma Basch in her path-breaking study, *In the Eyes of the Law*. While Basch described the doctrinal changes in the mid-nineteenth century in New York's marital property law, focusing on early instances of what was to become a nationwide trend of enacting married women's property acts, she went further by incorporating accounts of the leadership played by women (such as Elizabeth Cady Stanton) in the political maneuverings resulting in these statutes, which altered the common law.⁵ Previous accounts of women as political reformers in the nineteenth century focused mostly on the suffrage movement, showing women as outsiders agitating for an avenue into politics.⁶ Basch's work reminded us that the woman suffrage movement was born of a broader-based women's rights movement, in which increased property rights for married women were an important part. In addition, Basch portrayed women in the pre-suffrage era, moving successfully within the political realm to bring about self-interested reform.⁷

This article attempts to correct the overwhelming focus on eastern common law states in the history of nineteenth-century marital property law in America, while examining the role of woman's rights activists in the political system as they worked to effect an increase in women's legal status and changes in family relationships. In particular, it homes in on middle-class Anglo women in the young state of California during the 1870s, as they worked to reform the community property, probate, and divorce statutes that had been instituted only twenty years previously at the meeting of California's first legislature.

assume that community property states' experience with marital property reform was identical to that of eastern common law states. To that end, studies of community property jurisdictions, which set out to discover continuities and commonalities with common law jurisdictions, are not framed so as to permit us to uncover the regionality of nineteenth-century marital property developments.

⁵Basch, *Eyes of the Law*, supra note 2, esp. ch. 6.

⁶Some writers, notably Ellen Carol DuBois, acknowledged the tremendous value of the abolitionist experience for many suffragists, yet DuBois focused on the tactical adjustments the experience required of female suffrage workers as they became political actors in their own right later in the century. Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (Ithaca, 1978), 22, 182-84.

⁷See also Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," *American Historical Review* 89 (June 1984), 620-47.

FOUNDATIONS OF COMMUNITY PROPERTY LAW
IN THE STATE OF CALIFORNIA

Fixing the point at which California "became" a community property jurisdiction is not as straightforward a task as it might seem. Examining the formation of California's state government reveals a more complex story. To some appearances, California retained the community property system introduced by Spain and continued by Mexico; alternatively, the state seemed to be adopting a community property system; yet it is fair to say that the state of California in the nineteenth century failed to operate within a true community property framework.⁸ Throughout the period, the question was, at the least, complicated by the difficulty of merging just one portion of the civil law into the common law jurisprudence adopted by California at statehood. The issues arising from that arrangement were closely intertwined with the place of women in society. Even before Anglo women became demographically significant in California, their presence was felt in the initial formal considerations of marital property law,⁹ which provided a forum for debating crucial questions of family protection and individual female independence. The issues of both formal law and the role of women were issues of culture, and they were played out during a period of upheaval and change, when the state's legal and political systems became increasingly dominated by Anglo-Americans steeped in common law culture, and when women's legal and political status was coming under critical scrutiny not just in California but throughout the United States.

During the Spanish and Mexican periods, the territory of

⁸De Funiak noted that commentators before him often mistakenly believed that California had "adopted" the community property system, in the sense that they believed that the acts of the first legislature gave force to the system. De Funiak pointed out that both theoretically, under international law, and actually, based on the actions of United States military governors, the community property system continued in force from the Mexican period to the time of statehood. "Thus, even the absence of any action by the legislature would not have affected the existence of the community property system. . . . Legislative action could only have the effect, so far as permitted by constitutional limitations, of defining certain provisions of the existing community property system." *Community Property*, supra note 1 at 110 n. 33. Notwithstanding the force of this reasoning, it does not describe the consciousness of participants in nineteenth-century law and politics.

⁹While native-born women were not ignored in the 1849 Constitutional Convention debates on marital property law, monopolization of the debate by Anglo delegates marginalized the concerns of women and their families native to the state. J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution* (Washington, 1850), 257-69 [hereafter cited as Browne, *Debates*].

California operated, at least formally, under a civil law system that included a community property regime.¹⁰ Under this system, marriage was said to create a partnership in which economic benefits and burdens were shared equally by the spouses, who retained their individual identities under the law.¹¹ Accordingly, what mattered in determining the rights of each spouse to property was the time, the method, and the type of acquisition; title—always crucial under the common law—was not determinative.¹² Common property consisted of “acquests and gains by the spouses during the marriage while they are living as husband and wife,”¹³ with each spouse holding equal ownership rights.¹⁴ Thus the system acknowledged economically the wife’s contribution to the marriage and valued it equally with the husband’s contribution.¹⁵ Anything not part of the community was designated as separate property, leaving gifts, legacies and inheritances in this category.¹⁶

¹⁰De Funiak, *Community Property*, supra note 1 at 40. The community property system was derived from Germanic law, but early commentators, believing that the system had Roman roots, subsumed the Spanish marital property system under the rubric of civil law. *Ibid.* at 23-24. In giving voice to the Anglo-American lawmakers, I will sometimes refer to the Spanish system as being part of the civil law.

De Funiak’s treatise was unique in its treatment of the subject. While its stated goal was to provide the bench and bar with information regarding the Spanish sources of community property law, the author adopted a critical stance toward the Anglocentric attitudes of judges and lawyers trained in the common law, which had served to warp the development of community property law. *Ibid.* at iv. When his position met with skepticism, he then asserted that these judges and lawyers even went so far as “to deny that the Spanish law and its principles have anything to do with the present day community property system.” *Ibid.* (1948 Supplement) at 5. His treatise is thus a valuable resource for a cultural inquiry into the subject.

¹¹De Funiak observed that “this recognition of the wife as a person in her own right is one of the outstanding principles of the civil law and is one of those in which it diverges sharply from the common law.” *Ibid.* at 6.

¹²*Ibid.* at 3. Later, de Funiak commented, “Indeed, the civil law generally has given primary consideration to the question of ownership, in contradistinction to the English common law which developed to such an extent the technical importance of title that it had to be offset by the development of equitable principles.” *Ibid.* at 142.

¹³*Ibid.* at 136-37.

¹⁴*Ibid.* at 159.

¹⁵*Ibid.* at 167. De Funiak reasoned that this result could be justified even when the wife herself acquired no earnings or similar gains, by recognizing that such acquisition was made “at the expense of the community in that the one making the earnings or gains is furthered therein by the use of community property or by the joint efforts of the other spouse, [which] may consist, as in the case of the wife, in maintaining the home and rearing the children, for that is a sharing of the burdens of the marital partnership and a contribution to the community effort.” *Ibid.* at 146-47.

¹⁶*Ibid.* at 137, 136-37 n. 4.

While the husband was given full control of the common property during the marriage, he was required to operate within limits to protect the wife's ownership interest.¹⁷ Yet, for the vast majority of marriages, the community property system probably mattered most as an instrument of succession.¹⁸ Both spouses were entitled to make testamentary disposition of their respective properties, including each one's share of the common property.¹⁹ Intestate succession also operated in a gender-neutral fashion to pass both common and separate property to the deceased's heirs.²⁰ Upon the death of either spouse, the surviving spouse was treated the same, whether husband or wife,²¹ and there is no evidence that the regime failed to

¹⁷Ibid. at 284-85. According to de Funiak, "even during the marriage [the wife's] ownership [of the common property] was so full and complete that she might vigorously oppose and seek to correct any administration by the husband that was in fraud or prejudicial to her interest, and upon occasion the administration of the entire community property might be shifted to her." Actions "in fraud or prejudicial to her interest" included any acts of management "which deprived or tended to deprive her of the benefit and enjoyment of half the community property or to deprive her of such half without adequate consideration." Ibid. at 298-99. However, after statehood, Anglos in California would wrongly attempt to equate these management rights with the rights of control that the husband held under the common law. The difference between the two systems arises from differing notions of possession and ownership under each system. De Funiak complained that "Many lawyers trained in the common law . . . seem to fail to comprehend . . . that the management of the common property placed in the husband was an administrative duty only . . . and not in any sense the equivalent of the common law 'control' by the husband of the wife's property which made him virtual owner and gave him the right to appropriate its use to his own enjoyment and benefit." Ibid. at 298.

¹⁸In Spanish and Mexican California, marriages appear to have ended only with death. Consistent with those countries' Catholic heritage, legal divorce did not exist, and few, if any, couples even sought a legally sanctioned permanent separation. David Langum, *Law and Community on the Mexican Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987), 232-67 [hereafter cited as Langum, *Law and Community*]; de Funiak, *Community Property*, supra note 1 at 623-25.

¹⁹De Funiak, *Community Property*, supra note 1 at 554. However, Spanish law placed restrictions on this disposition, so that four-fifths of the property had to be bequeathed to blood relatives, if any. This restriction also applied to limit bequests to spouses, although the surviving spouse could be bequeathed a usufructuary interest in the property otherwise required to be given to the children of the marriage. The law made it clear that a bequest to the wife in no way affected her ownership of her half of the common property. Ibid. at 557-58.

²⁰Ibid. at 558-59. The spouse succeeded to the deceased's property only if there were no descendants or ascendants. Lest this all sound too harsh for the surviving spouse, the law provided that he or she have a usufructuary interest in the property inherited by the children, which was retained until death or remarriage. Ibid. at 560-61.

²¹Ibid. at 554. On the other hand, traditional common law rules governing marital property and devise and descent were highly gendered. Once a woman married, her legal identity merged with that of her husband. He took ownership

achieve its purpose of providing for the surviving spouse. In fact, it appears that some widows made out quite well, amassing large landholdings.²²

After the signing of the Treaty of Guadalupe Hidalgo in 1848, United States military governors initially maintained the status quo as far as the legal system was concerned. However, this displeased many Americans.²³ During the 1840s, and particularly following the discovery of gold, California experienced a huge influx of fortune-seeking Americans who were not interested in adapting to the local culture.²⁴ The newcomers brought with them a strong allegiance to Anglo-American common law culture that was quite at odds with the prevailing legal culture.²⁵

This eventually contributed to the calling of a state constitutional convention in 1849.²⁶ While the rise in American influence corresponded with declining local power, the delegates elected to the convention nevertheless consisted of a mix of native Californios, longer-time Anglos, and new arrivals drawn by the gold rush.²⁷ In resolving one of the first orders of business, delegates agreed that proposed constitutional provisions would be issued from the standing committee on the

of any personal property she brought into the marriage, as well as any acquired thereafter, and gained management control of her real property. For the wife to gain assets from the marriage upon the husband's death, title to the property would have had to be transferred to her, under the guise of dower rights or by virtue of the terms of the husband's will. Dower rights were meant to protect a wife from the husband's inter vivos and testamentary caprices, but the extent of these rights did not depend on when the husband's property was acquired or the length of the marriage. The status of wife could give her significant rights in the property of an already wealthy husband. In addition, under traditional common law, dower rights could not be defeated by a husband's acting alone during the marriage. Dower rights did not restore property a wife had brought to the marriage, nor were they nearly as generous or as autonomous as the one-half full ownership provided by the Spanish system. Life estates in land, as well as the lack of dower rights in personal property, functioned to keep widows dependent, usually on their grown children. Salmon, *Women and the Law of Property*, supra note 2 at 142-47.

²²Lothrop, "Rancheras and the Land," supra note 4 at 68-70.

²³Leonard Pitt, *Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846-1890* (Berkeley, 1966), 35-39, 42 [hereafter cited as Pitt, *Decline of the Californios*].

²⁴Langum, *Law and Community*, supra note 18 at 21-24; Pitt, *Decline of the Californios*, supra note 23 at 52.

²⁵John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, 1980), 11; Langum, *Law and Community*, supra note 18 at 271, 275.

²⁶Pitt, *Decline of the Californios*, supra note 23 at 42.

²⁷Browne, *Debates*, supra note 9 at 478-79.

Constitution. Yet the standards adopted for determining membership on the committee led to its underrepresentation of the newcomers.²⁸

CALIFORNIA'S FIRST CONSTITUTION AND COMMUNITY PROPERTY LAW

The issue of a marital property regime was first hashed out at the Constitutional Convention.²⁹ Notwithstanding the lack of Anglo women and children in California,³⁰ issues of female independence and family protection swirled through the debate amongst the Anglo delegates, following the standing committee's presentation of Section 13 to the delegation. It read:

Section 13. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held *in common* with her husband. Laws shall also be passed providing for the registration of the wife's separate property.³¹

²⁸The standing committee consisted of two delegates from each district appointed by the president of the convention, and was charged with "report[ing] the plan or any portion of the plan of a State Constitution for the action of this body." Ibid. at 19, 29. The number of delegates seated from each district depended on the relative population of that district. Ibid. at 11. The Anglo delegates, especially the newcomers, tended to come from the more populous, and more Anglo-populated, northern section, while the Californios and old-time Anglos represented the southern section. David Alan Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* (Berkeley, 1992), 104-8; Pitt, *Decline of the Californios*, supra note 23 at 43-44.

²⁹The proposal nearly replicated a provision of Texas's constitution, adopted almost five years previously. It appears that none but the scrivener realized the source of the standing committee's proposal. De Funiak, *Community Property*, supra note 1 at 96-97; Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," *California Law Review* 3 (1915), 359, 369 [hereafter cited as McMurray, "Beginnings of the Community Property System"].

³⁰Hubert Howe Bancroft, *History of California* (San Francisco, 1884-90), 6:221.

³¹Browne, *Debates*, supra note 9 at 257 (emphasis added). No records of the internal workings of the standing committee survive to explain why it proposed this provision. In the debates among the delegation as a whole (conducted in English), the Californios often proved reticent even though translators were provided. They may have wielded much more influence at the committee level. Nevertheless, Henry Halleck, a member of the standing committee whose bid for president of the convention was thwarted by a

Apparently, during an earlier break in the convention proceedings, delegates had been tipped off to the standing committee's proposal, and concern was raised among some Anglo delegates as to whether "this was an attempt to insert in our Constitution a provision of the civil law."³² Thus a counterproposal had been prepared by Francis J. Lippitt, a lawyer from New York who had settled in California in 1847.³³ It stated:

Section 13. Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, demise [*sic*], or bequest, or otherwise than from her husband.³⁴

Taken together, both versions of Section 13 indicated a widely held interest by the delegates in securing married women's property rights in California. The difference between the two, however, was the reference in the committee's version to property "held in common" by the husband and wife. "Common property" within marriage had a specific, essential meaning in Spanish law, none in the common law.³⁵ Furthermore,

widespread belief that he had come to ram through a facsimile of the New York Constitution, later recalled that he had formulated most first drafts of the articles, which were then submitted to the committee for consideration. H.W. Halleck to Dr. Francis Lieber, July 5, 1867, in Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 9 n. 41. Noteworthy for this study is the fact that the alternative to Section 13 more closely resembles New York's marital property statute, raising doubts about Halleck's influence over the formulation of the standing committee's version.

³²Browne, *Debates*, *supra* note 9 at 258.

³³*Ibid.* at 478-79.

³⁴*Ibid.* at 257. Inasmuch as elevating marital property law to constitutional status was outside the Anglo-American legal tradition, it is not surprising that discussion first centered on the concern that the committee's version would institute an "experimental" marital property system: "The relative rights of property of husband and wife, I think, are matters involving laws that can more safely be entrusted to the action of the Legislature, than introduced at once into one Constitution, and form part of the fundamental irrevocable law of the land. . . . I do not say that the experiment is not worth trying; . . . what I contend against is, trying the experiment in our Constitution." 257-58. That the alternative version of Section 13, which itself accorded with legislative reforms, would do the same was lost on its proponent.

³⁵Common property was not simply what was left over after the designation of certain property as separate. With their common law bias, however, "Some American writers have remarked that it is easier to define separate than community property and that the difficulty of defining the latter is avoided by saying that all that is not separate is community property. . . . Indeed, the practice of the Spanish law . . . was to define the community property first." De Funiak, *Community Property*, *supra* note 1 at 136-37. Failure to define the term "common property," argued de Funiak, was irrelevant to a determination

within the civil law, the category of separate property contained no characteristics of gender. The concern was with distinguishing separate property from what was otherwise presumed to be common, and not (as in the common law) in fencing off the wife's separate property from the rest, which was the husband's.³⁶ Thus the committee's version appeared to be neither a clear call for retention of the existing community property regime, nor a requirement that California should adopt the progressive reforms of a state such as New York in married women's property.³⁷

If the standing committee's intent had been to retain the marital property system in place, framing the section in terms of married women and their separate property rights (hardly central to a community property regime) at least obscured the lurking concept of common property. Moreover, in distracting attention from the notion of joint ownership of property within marriage, the section's language hinted at the contemporary Anglo-American controversy over married women's property rights under the common law.³⁸ The non-native delegates seem

of whether a jurisdiction meant to continue the recognition of the community of marital acquests and gains. He noted that "since our community property law is that developed in Spain, which clearly and sufficiently defines what is community property . . . , there is in fact no necessity that our American statutes should have to define what is community property, for that is already clearly established." *Ibid.* at 137.

³⁶De Funiak concluded that Anglo-American definitional problems over common property were actually motivated by concerns over what constituted separate property, and, more specifically, what constituted the wife's separate property. Furthermore, he recognized that the jurisdictions had been "most careful" about defining the wife's, and only the wife's, separate property, even though these definitions merely repeated well-settled principles of the Spanish system. He attributed this to "training in the English common law," which caused a fixation on the wife's separate property. Yet he did not discuss whether the concern was to separate the wife's separate property clearly apart from the husband's, or clearly apart from the community's. *Ibid.* at 145-46, 173.

³⁷In his eagerness to demonstrate that later legislative tinkering with the marital property system was often unconstitutional, de Funiak reasoned that "It is obvious . . . that the constitutional provision providing for community of property must mean a community of property according to some system with established principles, and it is equally obvious that the system provided for was the continuation of the system already in force and effect . . . at that time. That is to say, the Spanish community property system." *Ibid.* at 72-73. This formalistic objective blinded him to the ambiguities and ignorance under which the delegates actually labored, both in constructing Section 13 and in debating its merits.

³⁸Reva Siegel demonstrates that notions of joint ownership of marital property were beginning to seep into American consciousness about this time. "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880," *Yale Law Journal* 103 (1994), 1073, 1091-1146 [hereafter cited as Siegel, "Home as Work"].



Colton Hall, Monterey, was the site of California's first Constitutional Convention. (City of Monterey Collection, Colton Hall Museum Archives)

to have known of this means of using the wife's separate property to mitigate the harsh effects of the common law,³⁹ but were probably unaware of the subtle but radical difference between a system based on common property with ungendered notions of separate property, and a system, always gender-based, that was just beginning to carve out distinct property rights for women.⁴⁰ In short, the American delegates may have been caught off guard by use of the same term, "separate property," to describe two very different concepts.

Nevertheless, these delegates realized that the committee's version of Section 13 embodied something more than simply the establishment of married women's property rights, and that it was rooted in Spanish law. Inasmuch as the constitutional provision itself did not define "common" property (while it did define separate property), some discussion was held as to whether the proposal actually constituted a new order, or simply a retention of the Californios' law.⁴¹ But before that issue could be resolved, delegates were distracted over a larger debate

³⁹Joan Hoff, *Law, Gender, and Injustice* (New York, 1991), 122 [hereafter cited as Hoff, *Law, Gender, and Injustice*].

⁴⁰Contributing to this singular fixation on the wife's property rights, one delegate, a young bachelor lawyer from Louisiana presumably well versed in the civil law of that jurisdiction, asserted the superior treatment of women there. Browne, *Debates*, supra note 9 at 263-65, 478-79.

⁴¹*Ibid.* at 258-60.

on the merits of the civil and common law systems, although it was put off as being outside the scope of the convention.⁴²

Lippitt, who had introduced the alternate version, was the only delegate to come close to acknowledging the potentially radical difference between the two systems, as he argued:

I have lived some years in countries where the civil law prevails, and where such a separate right of property is given to the wife. . . . If there is any country in the world which presents the spectacle of domestic disunion more than another, it is France. . . . There the husband and wife are partners in business . . . raising [the wife] from head clerk to partner. The very principle . . . is contrary to nature and contrary to the interest of the married state.⁴³

Other delegates missed the oblique reference to the nature of common property. Instead, they responded to Lippitt's Anglo-centric reference to the wife's separate property as a general attack on married women's property rights.⁴⁴ Again an opportunity to explore the true ramifications of the standing committee's proposal was bypassed.

It has been argued that, had the delegates really understood the philosophies behind the community property system, they would have opted instead for the common law system, enhanced by reforms in married women's property.⁴⁵ To them,

⁴²Ibid. at 258-61, 265-67. The issue of choosing between the common and civil law was left for the first legislature to decide. "Report of Mr. Crosby on the Civil and Common Law, Senate Committee on the Judiciary," *Journal of the California Senate* (Sacramento, 1850), Appendix O [hereafter cited as "Report on the Civil and Common Law"].

⁴³Browne, *Debates*, supra note 9 at 261.

⁴⁴Ibid. at 262-68.

⁴⁵Prager, "Persistence of Separate Property Concepts," supra note 3 at 10-11. It will probably never be clear why the majority of the delegates favored the standing committee's version of Section 13, as apparently no roll-call vote was taken on the issue, nor do the debates reveal vote totals. Among recent commentators, Shammas et al. reject out of hand any explanations based on ethnic and cultural traditions, finding that the pre-existing Spanish system was a necessary, but not sufficient, condition. Instead, they argue simply that "the debates on married women's property were what swung legislators over to acceptance of the community property system," while assuming that legislators were initially disinclined to support the system. Shammas, *Inheritance*, supra note 3 at 291-92, n. 2. The basis for this conclusion is unclear, and it apparently does not include Prager's nuanced analysis. In addition, this conclusion is unsupported, at least in California, by actions in the first legislature that made women worse off than if they had lived in a common law jurisdiction with married women's property statutes. Meanwhile, August documented the correlation suggested by Shammas between the growing interest in married

however, the two different systems appeared to lead to similar enough ends, in whatever way that might be characterized.⁴⁶ It was only later, when legislation to implement Section 13 was enacted, that the lurking word "common" could not be ignored, as lawmakers were required to face head-on the issue of whether California would retain the Spanish marital property system or adopt a modified common law scheme.

The Anglo delegates' focus on married women's property rights really involved two concerns, sometimes overlapping, but more often conflicting: whether women ought to be empowered by the law, and whether families ought to be protected by the law. As noted above, both versions of Section 13 offered property rights to married women. From this angle, the debate is best characterized as being over whether any form of Section 13 ought to be included in the Constitution, rather than over which version.

Some delegates actually argued for increased legal power for women,⁴⁷ one of them quaintly admitting,

Having some hopes that some time or another I may be wedded . . . I shall advocate this section in the Constitution, and I would call upon all the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution.⁴⁸

women's property rights in the common law states and the increasing number of community property states. According to him, initial common law reform, which took place in Mississippi, can be traced to the Louisiana community property system. In turn, the Mississippi reforms influenced Texas's formulation of a marital property system. "Community-Property Law," *supra* note 3 at 49, 57. However, August does not refer to Prager's work, either here or in his doctoral dissertation ("Law in the American West: A History of Its Origins and Its Dissemination" [Ph.D. diss., University of Idaho, 1987]).

This focus on a connection between married women's property acts and the community property system causes these authors to conflate the two very different concepts of separate property operating under each, and thus to fail to notice those points where the nineteenth-century lawmakers were doing the same. Prager falls into the same pattern in concluding that "*the* separate property concept was not simply dependent on a civil law ancestry; rather it reflected concern for married women's property rights substantially similar to social policies voiced in reform common law states [emphasis added]." Prager, 32.

⁴⁶One delegate argued that if California were to become a common law state, the committee's proposal was imperative for the just treatment of married women. Browne, *Debates*, *supra* note 9 at 265-67.

⁴⁷*Ibid.* at 258, 259; 263; 265.

⁴⁸*Ibid.* at 259.

This position engendered vociferous opposition.⁴⁹ Another delegate railed in response:

I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature. . . . This doctrine of women's rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe. . . . It is often the case that the union takes place between a man of little or no property, and a woman of immense landed estate. But do you mean to say that, under such circumstances, the husband must remain a dependent upon his wife? a dependent upon her bounty? Would you, in short, make Prince Albert's [*sic*] of us all?⁵⁰

Later, he added:

If [woman] had a masculine arm and a strong beard, who would love her? She had just as well have them as a strong purse; she is rendered just as independent by the one as the other, and as little lovable.⁵¹

On the other hand, the delegates knew that California was a place where fortunes could be made and lost in a day, and that the new state would be in no position to provide for the welfare of its inhabitants. Trying to protect the wife and family from the misfortunes of an unlucky or unscrupulous husband seemed a laudable goal. One delegate remarked,

Any cool, dispassionate man, who looks forward to California, as she will be in five years to come, who does not see that wildness of speculation will be the characteristic of her citizens, as it has been for some time past, is not, I think, gifted with the power of prophecy. I claim that it is due to every wife, and to the children of every family, that the wife's property should be protected.⁵²

While a counterpoint was attempted, defending husbands from this peremptory charge of bad faith, the vagaries of economic bad luck, which certainly did not suggest a husband's

⁴⁹*Ibid.* at 259-60, 268, 261.

⁵⁰*Ibid.* at 259-60.

⁵¹*Ibid.* at 268.

⁵²*Ibid.* at 258.

culpability, could not reasonably be denied.⁵³ Probably more important was the realization that full exposure to liability for the husband's ventures could leave a family with "no other means of subsistence," the implication being that dependence on the state would result. To avoid this, it was imperative for family protection to be constitutionally mandated.⁵⁴

Protection of some family property was thus in the interests of all married men, and in the interests of the state as well. At the same time, protecting that which was defined as the wife's separate property was fast becoming the conventional way to protect the American family.⁵⁵ One other method of family protection coming into vogue in the mid-nineteenth century permitted the set-aside of a homestead; tellingly, this option was considered and enacted by the delegates immediately following the vote on Section 13.⁵⁶

The inclusion of Section 13 in California's first Constitution should not, therefore, be seen as an indication of the convention's support for the legal empowerment of women;

⁵³Botts certainly took a hard line against granting the wife property rights for any reason: "I say, sir, that the husband will take better care of the wife, provide for her better and protect her better, than the law. He who would not let the winds of heaven too rudely touch her, is her best protector. When she trusts him with her happiness, she may trust him with her gold." Tefft remarked that opposition to the protection of the wife's property was, he believed, due to false pride on the part of men, who wrongly believed that protection of women's property necessarily implicated husbands in unscrupulousness. *Ibid.* at 259.

⁵⁴*Ibid.* Another delegate pointed to the limitation of such a provision in attempting to shield the state from welfare responsibilities: "You may give the right and control of separate property to the wife—but every wife who habitually yields to her husband, will yield to him in all cases relative to the disposition of that property, and the husband will have control of it, just as if no such enactment existed." *Ibid.* at 261.

⁵⁵Anglo-American legal culture made room for the notion of sequestering a wife's property from the debts of the husband (even when these debts were contracted for the benefit of the family), beginning with equitable marriage settlements and moving on to married women's property legislation. Implied throughout this evolution appear to be three correlative beliefs: first, that a wife would be less likely to waste property to the detriment of her family, and that protecting her property would thus achieve the goal of family protection; second, that it was somewhat acceptable for a husband to waste property he brought to, or acquired during, the marriage, or that it was at least acceptable (even laudable) for him to speculate with this property to improve his family's finances; and third, that it was contrary to the accepted norm to permit men to be paternalistically protected. Hoff, *Law, Gender, and Injustice*, *supra* note 39 at 119-24.

⁵⁶Browne, *Debates*, *supra* note 9 at 269-271; Paul Goodman, "The Emergence of Homestead Exemptions in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," *Journal of American History* 80 (1993), 470-98.

paternalistic impulses appear to have been much more strongly at work.⁵⁷ Furthermore, such impulses continued to influence the later development of California's law of marital property. Yet, by choosing the committee's version over the "New York" alternative, the delegates, ultimately although unwittingly, provided later woman's rights activists with the advantage of having the already established category of common and separate property.

SECTION 13 IN PRACTICE

Although California's voters approved the Constitution, which contained the standing committee's version of Section 13, the marital property provision required enabling legislation to give it meaning and force. With its inherent textual ambiguities and the unfocused nature of the debate that followed its introduction in the convention, the section did not clearly mandate a community property system.⁵⁸ Although the first legislature met less than three months after the Constitutional Convention, the unprecedented gold rush immigration of Americans among other conditions guaranteed that the balance of legislative power would tip clearly toward the newcomers

⁵⁷August, "Community-Property Law," *supra* note 3 at 50-51, 52-53, 56. This is consistent with the national mood of the time, according to Hoff, who argues that "The Married Women's Property Acts before the Civil War represented a necessary afterthought in the ensuing codification process that was based on protecting, not granting, equality to females." *Law, Gender, and Injustice*, *supra* note 39 at 120. Having concluded that Texas delegates were persuaded by the protective, rather than the enabling, strand of debate, August asserts that California delegates, on the other hand, were more interested in providing an advantageous climate for women. "Community-Property Law," *supra* note 3 at 56. Although there was a scarcity of marriageable Anglo women in California at the time, this position gives undue emphasis to Halleck's above-quoted comment, which August himself notes was derided when made as a "light and trivial argument." Browne, *Debates*, *supra* note 9 at 259.

⁵⁸De Funiak argued that "The language of [Section 13] as well as the views expressed in the debates in the Constitutional Convention of 1849 show conclusively that it was the intention to place in the framework of the constitution itself the Spanish system of community property; and to place it therein beyond the reach of the legislature." *Community Property*, *supra* note 1 at 109. However, it is difficult to make a case for ascribing any particular intention to the delegation as a whole, inasmuch as the debates on Section 13 skipped from issue to issue without resolution. Further, such an exercise somewhat misses the point of discerning the process by which California's marital property system evolved during the nineteenth century. Material to that inquiry is the question of the degree to which the first and subsequent legislatures, as well as the judiciary, believed that a mandate for a community property regime based on Spanish-Mexican law had emerged from the 1849 convention, as well as the ways in which that belief was or was not expressed.

and away from the Californios.⁵⁹ It would not have been at all surprising if the first legislature had ignored the use of the word "common" in Section 13, focused instead on the gendered language, and gone on to enact a statutory scheme creating a modified common law marital property system.

Yet the legislature first took up the task of deciding whether the state's jurisprudence generally would be based in civil or common law, and it found surprisingly strong support for the civil law among certain influential Anglo settlers.⁶⁰ Resolving this overarching issue in favor of civil law would have determined the interpretation Section 13 would be given. Fueling the debate was a report issued by the Senate Committee on the Judiciary that provided a scathing indictment of both the legal system of territorial California and the civil law in its "pure" form. The report included a telling discussion of marital property law under each mode of jurisprudence that was far more balanced.⁶¹ Although the committee appeared to view the systems as containing somewhat comparable tradeoffs of rights and duties, it accused the civil law of treating marriage as a

⁵⁹Pitt, *Decline of the Californios*, supra note 23 at 46-47; Prager, "Persistence of Separate Property Concepts," supra note 3 at 30. Prager notes that the gold rush, occurring in the months surrounding the convention, had boosted the number of Americans in California more than 900 percent, so that by January 1850 they outnumbered native Californians by more than four to one. Ibid. at 29 n. 143. She also notes that "Fear created by ignorance of the Californians and their customs, disregard for non-democratic institutions and a typically American arrogance all combined to produce an intensely antagonistic climate." Ibid. at 29-30.

⁶⁰Support for the civil law came from somewhat unexpected sources. First, in an address to the new legislature, Governor Peter H. Burnett recommended the adoption of the Civil Code and the Code of Practice of Louisiana, while suggesting that crimes, evidence, and commercial transactions be controlled by the common law. This drew howls of protest from most of the members of the San Francisco bar, who then met to enact a resolution recommending the full-scale adoption of the common law. Their action in turn encouraged a splinter group (about one-fifth of the members) to file a formal petition with the state Senate praying that the civil law be substantially retained. This group was led by John W. Dwinelle, who had written an early history of San Francisco based on his role in pre-statehood litigation. McMurray, "Beginnings of the Community Property System," supra note 29 at 373, 374. Some advocated the civil law as a retention of the status quo, but others, who maintained that territorial California had been virtually lawless, believed that, as compared with the civil law, the common law would provide an enlightened reform.

⁶¹In an effort to show that the first legislature behaved in a manner consistent with an understanding of the community property system as constitutionally mandated, de Funiak claimed that the debate over the adoption of the civil and common law dealt with matters other than marital property rights. However, this is not supported by the evidence in the final report from the Senate, inasmuch as the report contains a comparison of marital property law under each system of jurisprudence. De Funiak, *Community Property*, supra note 1 at 109; "Report on the Civil and Common Law," supra note 42 at 588, 596.

partnership "no more intimate than an ordinary partnership in . . . commercial business." It also indirectly acknowledged the value of the common property arrangement for women by conceding that dower rights and the shifting of the wife's debts to the husband provided "ample equivalent for the communion of goods allowed her by the Civil Law."⁶² Nowhere else was the report arranged in a way that required the common law to measure up to the civil law.

In the end, the common law was made the basis of jurisprudence in California, while at the same time the first legislature interpreted Section 13 of the Constitution as requiring the continuation of the pre-existing marital property regime. Not only was legislation permitting registration of the wife's separate property to be introduced, but a bill covering the whole subject of marital property was put forward that included the establishment of the two categories of separate and common property and otherwise accorded with the Spanish system.⁶³

Legislators appear to have been unable to ignore their common-law heritage and may even have been hostile toward the property rights of married women.⁶⁴ Contrary to the spirit of Section 13, women were given no management rights over their separate property, much less over the common property.⁶⁵

⁶²"Report on the Civil and Common Law," supra note 42 at 588, 596.

⁶³Act of April 17, 1850, ch. 103, *California Statutes* at 254-55.

⁶⁴Circumstances suggest that common law attitudes ruled the legislature generally as it set about the task of designing a code of laws to govern the new state. While a convention delegate had urged that a committee be formed to draft a code to be considered by the first legislature, this was rejected in favor of hammering out a scheme within the give-and-take of the legislative process. J.M. Jones to his mother, October 1, 1849, in Prager, "Persistence of Separate Property Concepts," supra note 3 at 33 n. 160. Given the short time the legislature had for formulating a code, the body resorted to a "cut-and-paste" method of lifting statutes wholesale from other jurisdictions, notably common law states. As a result, laws were imported that disabled married women in ways wholly antithetical to the Spanish community property scheme. *Ibid.* at 28, 32-33. De Funiak noted continuing hostility toward community property law and speculated that its sources lay in "the mistaken belief that the community property system substitutes some sort of cold blooded partnership for marriage as a sacrament," or in "injured male vanity which resents anything recognizing woman as a person in her own right and which would seem to threaten or question male dominance of all conjugal affairs." *Community Property*, supra note 1 at 8-9.

⁶⁵Act of April 17, 1850, ch. 103, sec. 6, *California Statutes* at 254. See also Prager, "Persistence of Separate Property Concepts," supra note 3 at 26. De Funiak indicated that common law attitudes of early legislators led them to believe that Spanish law accorded with English common law in granting management control of the wife's separate property to the husband. In fact, Spanish law made no distinction between the spouses in the management rights of separate property. *Community Property*, supra note 1 at 316.

More important, in a society and legal system that permitted divorce and separation, the language of the statutory scheme failed to indicate that the wife had any interest in the common property during the marriage.⁶⁶ It appeared that women's legal status was by that time worse in California than in common law states with married woman's property acts.⁶⁷ The resulting superimposition of this portion of civil law on a common law regime thus created a variety of anomalies and contradictions that were largely unfair to wives.⁶⁸ Only later would the woman's rights movement bring this to light.

THE POLITICS OF PROPERTY RIGHTS IN CALIFORNIA'S WOMAN'S RIGHTS MOVEMENT

Over the remainder of the nineteenth century, legislative and judicial machinations led California's marital property regime to function more like a common law scheme modified by married women's property acts. A husband's reach over community property became indistinguishable from his rights to his separate property, while on her husband's death a widow in California was treated similarly to a widow in the East.⁶⁹ California's law not only failed to deliver what it purported to in the way of rights to married women, but in some ways offered less than a modified common law system would have.⁷⁰ Would this arrangement be protested, and, if so, by whom, on what basis, and to what end?

During marriage, most wives (East or West) would have

Common law attitudes were also reflected in the remedies available to a wife for the husband's mismanagement of her separate property—remedies involving the assignment of power over property to a trusted third party—rather than any transfer of power to the owner-wife. Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 26, discussing Act of April 17, 1850, ch. 103, sec. 8, *California Statutes* at 254.

⁶⁶*Ibid.* at 35.

⁶⁷*Ibid.* at 28.

⁶⁸An intestacy scheme was enacted without regard to the community-property regime, while the community-property statute also provided for descent, albeit of only the common property. Further, the common-law tradition of requiring the husband's consent to the wife's testation was carried over by statute, thus removing control of the wife over her separate property even at her death. Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 33 n. 161.

⁶⁹*Ibid.* at 46-47; de Funiak, *Community Property*, *supra* note 1 at 7-11.

⁷⁰Initially, the husband was given sole management rights over the wife's separate property. Act of April 17, 1850, ch. 103, sec. 6, *California Statutes* at 254, discussed in Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 26.

had little opportunity to experience the workings of marital property law. The reaction of women in California to the state's marital property scheme would have depended first of all on their legal awareness,⁷¹ and many of them, having reached adulthood in the East, might not have realized that California's marital property laws supposedly differed from those in much of the rest of the nation. Even if women had been aware of the laws, they might have lobbied for an elimination of the warped community property system in favor of a system that recognized property rights simply in the individual husband and wife—especially considering their eastern, common law roots. However, the notion of common property appeared to hold particular promise for women's equality, and would certainly have been lost in a switch to a reformed common law system.⁷² By the 1870s this "foreign" marital property regime fitted well with important aspects of Victorian legal and popular cultures, and with a strain of marital property rhetoric that had been developing in the woman's rights movement for about twenty years. Activists thus focused from the start on making the system gender-neutral as the way to give women the same rights men enjoyed.

By the 1870s, women in California who were crucial to the movement had become aware not only that the state operated under the community property scheme, but that the scheme had been skewed in ways unfair to them. The nascent woman suffrage movement in California, which early considered the goals of political equality and legal equality as being inextricable, offered these women a forum for addressing marital property reform. Most of them were married, and many of them had experienced the force of marital property law, whether in California or elsewhere, while supporting themselves and their families, sometimes because their marriages had ended (by separation, divorce, desertion, or widowhood), or sometimes because of their husbands' disabilities.⁷³

⁷¹Basch noted the difficulty with assessing lay understanding of common-law principles affecting the marital relationship, but found "considerable evidence . . . that the parroting of common law classifications and designations for married women went beyond legal abridgments to popular books and magazines." *Eyes of the Law*, supra note 2 at 67. In a related vein, Ronald Schaffer raises the issue of the development of political consciousness in California's woman-suffrage movement in the early twentieth century in "The Problem of Consciousness in the Woman Suffrage Movement: A California Perspective," *Pacific Historical Review* 45 (1976), 469. Schaffer implies that historians have paid insufficient attention to the issue of consciousness in studying the early woman's rights movement. *Ibid.* at 470 n. 2.

⁷²See Siegel, "Home as Work," supra note 38 at 1091-1146.

⁷³See Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage, eds., *History of Woman Suffrage* (Rochester, 1881), 3:740-66 [hereafter cited as

These women's experiences with the law may have been personal, but their reaction to it was organized and political. Linking marital property reform to suffrage no doubt seemed natural to them, given that California's marital property law was firmly based in statute, born of the legislative process, rather than (as was the case in the East) in judicially determined common law. The connection between the political and the legal processes was therefore far clearer. Although the lack of any legal training at first hindered the women themselves in arguing for specific changes in the property laws, they were helped by some dedicated male lawyers, judges, and legislators.⁷⁴

In the fall of 1869, individuals interested in pressing the cause for equal rights formed the San Francisco Woman Suffrage Association. This group immediately pushed for a statewide organization while encouraging other counties to form local affiliates, and undertook a petition drive for an amendment of the state Constitution giving women the vote. A few months later the California Woman Suffrage Association was inaugurated, and the association presented the suffrage petition to the California Senate on March 2, 1870. The roster of signers extended to thirty-one pages and represented a wide geographic range.⁷⁵

Meanwhile, the concerns of California's suffragists were broadening to include legal as well as political equality, particularly in regard to the law's treatment of married women's rights in both separate and common property. At the inaugural meeting of the Suffrage Association, Judge Addison M. Crane, who was already active with the San Francisco group, gave a detailed exposition of the laws affecting married women in California.⁷⁶ Before recounting the probate laws and their differing

Stanton, *History of Woman Suffrage*]; Reda Davis, *Woman's Republic* (San Francisco, 1967), 201-32, for discussions of the woman suffrage movement in California during the 1870s [hereafter cited as Davis, *Woman's Republic*].

⁷⁴Not too many years later, two women who were mainstays in California's woman's rights movement, Clara Shortridge Foltz and Laura deForce Gordon, fought for the right of women to be admitted to the bar and themselves gained admission after a period of private study. Barbara Allen Babcock, "Clara Shortridge Foltz: Constitution-Maker," *Indiana Law Journal* 66:4 (1991), 849-940 [hereafter cited as Babcock, "Constitution-Maker"] and idem, "Clara Shortridge Foltz: 'First Woman,'" *Arizona Law Review* 30:4 (1988), 673-717 [hereafter cited as Babcock, "First Woman"]. Babcock connects the relative ease with which women were admitted to the practice of law in the West with the fact that woman suffrage was first adopted there. "Western Women Lawyers," *Stanford Law Review* 45 (July 1993), 2181-82.

⁷⁵Davis, *Woman's Republic*, supra note 73 at 201, 206-7, 212; "Petition for Woman's Suffrage. In the Senate, March 2, 1870," in *Woman's Rights Pamphlets*, Bancroft Library.

⁷⁶Crane "was never too busy to explain California law to women, including property law, which he considered most unjust." Davis, *Woman's Republic*, supra note 73 at 228.

effects on husband and wife, he began with an assertion that was consistent with the theory of community property and the convictions of woman's rights advocates: "A man and a woman without property marry, and gain it mutually."⁷⁷

With California remaining at least nominally a community property state, Crane could more advantageously advocate gender-neutral treatment in the realm of marital property. The idea of marriage as a partnership, rather than as the individual domination of separate spheres, could be authoritatively expressed in this jurisdiction. The same could not be said for women living in common law states with the modified common law, where any discussion of equal treatment had to proceed from that system's gendered, individualistic notions.⁷⁸

This speech, with other convention activities, was carefully reported in the *Pioneer* by its editor and proprietor, Emily Pitts Stevens, a founding force in San Francisco for women's political and legal equality. Her weekly publication—the only one of its kind on the Pacific slope—was devoted to reporting the activities of California woman suffrage societies, and to raising the consciousness of her readers regarding the unfairnesses women faced in politics, law, and labor.⁷⁹ Pitts Stevens followed the publication of Crane's speech with a lengthy article, which included case and statutory authority proposing changes to remedy the inequities in California's laws.⁸⁰

The exposition concluded as follows:

The fact is that husbands are better than the law. They do not, with rare exception, avail themselves of the power, and the unjust advantages which the law gives them. They do, on the contrary, very generally respect the wife's property interests, beyond and above what the law requires. . . . The changes proposed here would

⁷⁷*Pioneer*, February 5, 1870, 2. While Crane was loath to base woman's deprivations on man's animosity, suggesting instead that man simply failed to understand the matter, he predicted that reform of the laws would occur only when women gained suffrage rights.

⁷⁸Siegel documents the complexities involved with making claims based on a partnership notion of marriage in common law jurisdictions. "Home as Work," supra note 38 at 1114-18.

⁷⁹Sherilyn Cox Bennion, *Equal to the Occasion* (Reno, 1990), 57-62. See also Roger Levenson, *Women in Printing: Northern California, 1857-1890* (Santa Barbara, 1994), 89-113. Levenson notes the persistent misspellings of Pitts Stevens' name, both then (e.g., San Francisco newspapers used "Pitt"), and now (e.g., Bennion's Pitts-Stevens). *Ibid.* at 89, 91, 89 n. 3.

⁸⁰*Pioneer*, February 12, 1870, 2. This piece was probably written by Crane, as it echoes the opinions he expressed in his speech to the California Woman Suffrage Association, and no evidence suggests that Pitts Stevens possessed the legal training required to produce such an article.



Emily Pitts Stevens, a founding force in San Francisco for women's legal and political equality (Detail of a drawing from the Huntington Library, San Marino, California)

merely conform the law to what is now the higher and better moral sense of both husband and wife. . . . [They] will then become equal before the law. . . . The enfranchisement of woman will place in her hands the power to make these needed reforms in the law. The ballot and nothing short of this, will secure to her justice and equality.⁸¹

Presaging rhetorical tactics used later, this call was at the same time conservative in its assessment of the problem, that most men were not to blame and that the law needed to be "conformed" rather than reformed, and radical in its proposed solution, that only women could be relied on to correct the injustice.⁸²

⁸¹Ibid.

⁸²Crane, who regularly attended the weekly San Francisco Woman Suffrage Association meetings, spoke again on the law at the end of March, and this time a Mrs. Barber followed with her own comments on the subject. *Pioneer*, March 26, 1870, 1. Two months later, Judge Tweed, another ardent supporter of the cause, explained a recent amendment to the state's divorce statute to the San Francisco group. *Pioneer*, May 21, 1870, 1.

THE PRESSURE FOR LEGAL REFORM

When disagreements within the California Woman Suffrage Association caused an offshoot to be formed in 1871, the new group, the Pacific Coast Woman Suffrage Association, adopted educative and reform missions regarding married women's legal rights that were similar to those of the original group.⁸³ Plans were made for a publication that would show "just what the laws are which bear unjustly on women. . . . Lawyers and lawmakers feel terribly hit by being held up to the gaze of the world as a little less gallant than they have professed to be."⁸⁴ To that end, at the group's Fourth of July picnic, C.C. Stephens,⁸⁵ a lawyer from San Jose, read a paper on the subject that was later reprinted.⁸⁶ At the same time, "a resolution was introduced, and unanimously carried, to the effect that there be a form of amendments prepared, by which these laws should be made equal, and that such should be referred to the commissioners now engaged in revising the laws of the State. This will bring a direct issue before the people, and will show how far it is true that men are ready to make and administer law equitably."⁸⁷

As a result of this new prodding, woman's rights activists began to lobby legislators directly for reform of the community property system, with the biennial legislative session for the 1871-72 term opening in only a few months. Their strategy was to link legal and political rights instrumentally by arguing that the legal system would operate fairly toward women only when women secured the right to vote. This position did not prevent them from working immediately for reform of California's marital property system. In 1872 the California Woman Suffrage Association presented the legislature with a petition that called for an amendment to the state Constitution granting women suffrage and that generally requested changes in statutes so as to equalize marital property rights. The petition was officially

⁸³These disagreements appeared to mirror those on the East Coast, which caused a split resulting in the formation of the National Woman Suffrage Association and the American Woman Suffrage Association. Babcock, "First Woman," *supra* note 74 at 677 n. 15.

⁸⁴H.M. Tracy-Cutler, "Letter from California," *Woman's Journal*, April 1, 1871, 104 [hereafter cited as Tracy-Cutler, "Letter from California"].

⁸⁵Later in the decade, Stephens tutored Clara Shortridge Foltz, in her quest to be admitted to the California bar. Babcock, "First Woman," *supra* note 74 at 685.

⁸⁶Tracy-Cutler, "Letter from California," *supra* note 84 at 232.

⁸⁷*Ibid.*

presented by Leland Stanford, the former governor, and bore more than five thousand signatures.⁸⁸

Although it was not spelled out in the petition, a significant concern of the activists was inheritance inequalities. Upon the death of a wife, her husband automatically succeeded to the common property, while a widow's succession to the common property was subjected to estate administration, inasmuch as she was not viewed as having had ownership in the property during the marriage.⁸⁹ This meant that more of a widow's assets would be subject to statutorily prescribed administration fees, resulting in a consumption of assets sorely needed to support the widow and children. The fact that these fees were set by male legislators, were enforced by male probate judges, and lined the pockets of male executors and administrators, while the process required the widow to hire a male attorney, was not lost on woman's rights agitators. This arrangement seemed patently unfair, and even rigged. Although many statutes needed to be changed in order to fulfill the mandate of the petition, activists concentrated particularly on the law's differing treatment of surviving spouses.⁹⁰ This appears to have been a

⁸⁸State of California, "Report of Special Committee in Relation to Granting Women Political Equality," in *Appendix to Journals of the Senate and Assembly*, 19th sess., 1871-72, 3:7, 3 [hereafter cited as "Report of Special Committee"].

⁸⁹Under common law, the probate process played a necessary role in enforcing the dower rights of widows by overseeing the transfer of property rights through a transfer of title. Under Spanish law no similar judicial function was necessary, as widows (and widowers) used the estate administration process chiefly to obtain division of the community property. Otherwise, they simply took control of property they had always owned. In Mexican California, estate administration appears to have been very informal, with much of the process involving property division and debt payment taken care of by the surviving spouse and the decedent's heirs. No formal process was required for title to the decedent's property to pass to the heirs. De Funiak, *Community Property*, supra note 1 at 580-83.

Thus Anglo-American legal culture led legislators to construct an estate administration scheme and to do so without questioning its necessity or purpose vis-a-vis the marital relationship. The first legislature borrowed the wills statute and the intestacy scheme from traditional common law, so that there was no distinction between separate and common property. Meanwhile, the community property statute dealt with the passage of common property at death. Neither statute referred to the other. According to Prager, "It is highly doubtful that . . . legislators considered the interrelationship of the basic community property statute with these other essential elements." "Persistence of Separate Property Concepts," supra note 3 at 33 n. 161.

⁹⁰A legislative committee report, responding later to the petition, noted that there were too many laws "which in their operations work severe hardships upon wives." Thus the committee decided to pay "particular attention to the very great hardships which the existing probate laws work upon widows and orphans." "Report of Special Committee," supra note 88 at 9.

good strategy; not only did the law work hardships on many women, but men would be more inclined to support such a change, since they certainly would not want what they might view as "their" assets to be eaten away by the legal system.⁹¹

Nettie C. Tator, a suffragist from the Santa Cruz area who had studied law in an unsuccessful attempt to become California's first woman lawyer, was sent to address the legislature on behalf of the petition.⁹² Her address first pointed to the wife's claim on common property: "When a man and his wife commence life poor, and struggle along together in the acquirement of property, by good right half of that property and whatever income accrues from it, is hers. But does she get it? No!"⁹³ The nature of the "good right" was unclear, and her argument seemed more ideological than formalistic.

This position highlighted the dissonance between California's community property law and the law that had developed through Spanish-Mexican jurisprudence. Two aspects of Anglo-American legal culture during the last third of the nineteenth century should have served to sensitize Californians to this dissonance. First was the increasing characterization of the common law, by courts and legalists, as a "science" striving for internal consistency.⁹⁴ Second, and not unconnected, was the codification movement, with its greatest successes in the West, particularly in California, beginning with the adoption of a civil code during this same legislative session considering

⁹¹As the committee noted later regarding probate judges and other public officers who did not directly gain from statutory fees, "The great hardships and cruelties which this system imposes are familiar. . . . The great injuries it inflicts are matters of almost daily observation and experience." The members believed that, but for "custom," which had desensitized the "public mind," "there would be a general outcry against its continuance." Ibid. at 10.

⁹²Tator made the attempt in the few months before this appearance in the legislature. After examining her qualifications, a local committee unanimously recommended her admission. When it was determined that the state barred women from the legal profession, Tator made an unsuccessful attempt to change the law. Stanton, *History of Woman Suffrage*, supra note 73 at 757; Babcock, "First Woman," supra note 74 at 686 n. 65; Carolyn Swift and Judith Steen, eds., *Georgiana: Feminist Reformer of the West* (Santa Cruz, 1987), 45-46. This last source refers to "Nellie" Tator, as does Babcock. All other sources consulted for this study designate her as "Nettie" Tator.

⁹³"Address of Mrs. Nettie C. Tator before the Joint Committees of the Senate and Assembly of the State of California on the subject of Extending the Right of Suffrage to Women, Sacramento, March 13, 1872," 8 [hereafter cited as "Address of Mrs. Tator"].

⁹⁴This view, which, according to Lawrence M. Friedman, was "in the air" in the late 1860s, can be connected to the ideas of Christopher Columbus Langdell, whose educational reforms at Harvard Law School most notably treated common law as a science. Idem, *History of American Law*, 2d ed. (New York, 1985), 405 [hereafter cited as Friedman, *History*].

community property issues.⁹⁵ According to Lawrence Friedman, law reformers of the time embraced the theory that a legal system is at its best when it "conforms to the ideal of legal rationality—the legal order which is most clear, orderly, systematic (in its formal parts), which has the most structural beauty."⁹⁶

Tator might have been appealing to these essentially conservative, hegemonic cultural threads to win support for a legal change whose effect would actually be quite radical—increased legal status and power for women.⁹⁷ However, if indeed this was her strategy, it was not transparent: in her argument for gender-neutral treatment, she did not appear to be holding lawmakers to the internal logic of the community property system. Calling attention to inconsistencies within the system could just as easily have led to solving that problem by jettisoning the Spanish-based system altogether.⁹⁸

Instead, Tator seemed to be appealing to a more widely accepted notion of joint property rights. By that time the ideal of companionate marriage was firmly fixed in American culture, and, as one scholar has argued, it "provided a powerful counterbalance to male dominance in nineteenth-century male-female relationships."⁹⁹ Consistent with this, from the start, the eastern-based woman's rights movement called for a partnership vision of marriage that included the idea of joint ownership interests in property acquired during the marriage. According to Reva Siegel, who has documented the development of this claim, antebellum rights advocates sought recognition of the wife's concrete contributions to the family's well-being by creating a legal right to share in the wealth resulting from that contribution.¹⁰⁰

⁹⁵Ibid. at 394-95, 405-6. Friedman specifically mentions the civil law tradition of the western states as an explanatory factor for this success.

⁹⁶Ibid. at 407.

⁹⁷Siegel has analyzed the advocates of joint-property rights. "In their view," she writes, "marital property reform was not about protecting economically dependent women from men, but instead was about empowering economically productive women to participate equally with men in managing assets both had helped to accumulate." "Home as Work," supra note 38 at 1116.

⁹⁸However, two years later, Laura deForce Gordon reported that Senator Laine, representing Santa Clara County, was considering introducing a bill that would "re-establish the Common Law in California, or . . . repeal all ordinances and statutes pertaining to women that are modifications thereof." *Stockton Weekly Leader*, March 7, 1874, 2. Suffice it to say that Laine was sorely misinformed as to the history of the state's jurisprudence regarding marital property law, both in its inception and its subsequent modifications.

⁹⁹Karen Lystra, *Searching the Heart* (New York, 1989), 233; Carl N. Degler, *At Odds* (New York, 1980), 50.

¹⁰⁰Siegel, "Home as Work," supra note 38 at 1112-35.

However, when suffrage issues moved to the foreground of the woman's rights movement, joint property claims took on a decidedly different cast. According to Siegel, "Joint property conversations began to revolve around questions of social roles rather than legal rights. . . . The joint property concept appeared as a species of marital therapy, rather than a claim of right."¹⁰¹ Yet she also found that the antebellum approach to joint property appeared to survive on the western frontier, as the emphasis remained on the wife's actual contribution to the family maintenance.¹⁰² No doubt the fact that the community property system formed part of the legal framework of California, and that other jurisdictions helped keep the stronger rights-based rhetoric alive, enabled Tator to inject an urgency into her argument that would have been taken less seriously in the East.

Tator also focused legislators' attention on the differential treatment of the marital estate depending on whether the decedent was the husband or the wife. She challenged this arrangement: "You say this is necessary to protect the interest of her children. Who, I ask, looks after the interest of children more closely than mothers do?"¹⁰³

THE LEGISLATURE CONSIDERS REFORM IN MARRIED WOMEN'S PROPERTY RIGHTS

The Special Committee in Relation to Granting Women Political Equality was then formed to consider both the suffrage and the property rights matters, and issued an exceedingly favorable report two weeks after Nettie Tator's appearance. The committee came out in favor of granting women suffrage, and in doing so adopted two rhetorical tactics, playing down the radical nature of this stance while portraying the call for woman suffrage as yet another aspect of California's superior

¹⁰¹Ibid. at 1166.

¹⁰²Ibid. at 1165. Californian farm wives provide an interesting study of the vitality of the position of valuing wives' actual contributions to the marriage. The California Grange developed at the same time as the woman's rights movement in the 1870s. The organization not only decreased the isolation of farm wives, but was ostensibly dedicated to equality of the sexes in recognition of the farm wife's necessary and significant contribution to the family economy. The group's newspaper, the *California Patron*, contained a women's section called "The Matron," which published contributions regularly from a member in San Diego, Flora M. Kimball, who became known as a leading suffragist. In September 1878 she offered a fable for farm wives on the concept of common property, but also pointed out the theoretical inconsistency in women's lack of ownership and control over that property. *California Patron*, September 7, 1878, 2.

¹⁰³"Address of Mrs. Tator," supra note 93 at 8.

brand of progressiveness.¹⁰⁴ Following this line, the committee asserted that the equalization of property rights, "being within the province of ordinary legislation, [could] be granted without delay."¹⁰⁵ It would be an almost matter-of-fact realignment of law "which has survived its usefulness."¹⁰⁶

The committee echoed Tator's assertion that it was the mother who best looked after the interests of the children upon the death of their father;¹⁰⁷ more importantly, it recognized the wife's contribution to the marriage. At first the committee fell into a quite traditional "separate spheres" analysis. Though it did not characterize the wife's activities as adding to the family's financial wealth, it did assert that her contribution, made within the home, was no less important than her husband's, made outside the home, and thus should be equally valued.¹⁰⁸ Having reached this conclusion, the committee could easily assert that the method for valuing the wife's contribution was to treat her survivorship interest in the common property of the marriage no differently from that of her husband.¹⁰⁹

¹⁰⁴The committee asserted that "there is nothing in the proposed [woman suffrage] amendment which is either of a revolutionary character or in opposition to the spirit and genius of the Government." "Report of Special Committee," *supra* note 88 at 5.

¹⁰⁵*Ibid.* at 3.

¹⁰⁶*Ibid.* at 10.

¹⁰⁷"Who is prepared to toil harder, or to economize more rigidly, or willing to make greater sacrifices for their good than she?" *Ibid.* at 11.

¹⁰⁸According to the committee, a wife "gratifies] the family pride by the embellishment of the home," and, through "the cultivation of her mind, the refinement of her taste, and the protection of her health," places herself in a condition "to bear . . . well formed and beautiful and healthy children, and to intelligently surround them with improving and refining conditions that will tend to give them a noble direction in life, and thus honoring [her husband's] name, transmit it to the future untarnished." The committee concluded, "Unless money is more valuable than the mind of man, and coin than character, the business qualifications of the husband may be fairly and equitably offset by the home duties of the wife." *Ibid.* at 10. This position was more consistent with the eastern postbellum developments in joint-property rhetoric. Siegel notes that, for the first time, "advocates began to talk about the joint property claim as compensation to keep woman in her 'sphere.'" "Home as Work," *supra* note 38 at 1165.

This argument was in response to the claim that the widow should not be permitted to succeed to the husband's estate because "he earned it by virtue of his own personal foresight, enterprise, perseverance and business energy, and that therefore it belongs to him," a claim the committee characterized as "one of the most plausible and forcible objections that has been and probably that can be urged against the proposed change." "Report of Special Committee," *supra* note 88 at 10. That this was really an absurd objection in a community property regime seems to have been lost on the committee.

¹⁰⁹"Report of Special Committee," *supra* note 88 at 11. While the committee was sensitive to the fact that this was a rough calculation, it seemed to recognize that marital property rights involved something more than a

The committee then explored less charted but more realistic territory as it acknowledged the experiences of many married women:

Facts are numerous showing that wives during years of wedded life experience great hardships, arising from the inability of their husbands to provide for their wants, but who, on becoming widows, supported themselves, educated their orphan children, and accumulated property. Instances are numerous where wives . . . have rescued and brought out incumbered estates, involved by the unfortunate speculations or business incapacities of their husbands.¹¹⁰

The committee attributed the achievements of these women simply to a transference of skills learned in running a household: "These once learned, it is an easy matter to transfer them from one system of arrangements or business to another. The skill necessary to manage a large household with success would be useful when directed to the control of any ordinary business."¹¹¹ And, even more, "it is notorious that woman has a natural tact for business. They [*sic*] are great contrivers and economists. Their watchful care and industrious habits are proverbial."¹¹²

Finally, the committee believed that giving the wife survivorship interest in the common property of the marriage would positively influence the interactions between husbands and wives:

If . . . husbands knew that their widows would succeed to their business, this would necessarily operate as a powerful stimulus to induce them to instruct their wives not only in business matters generally, but also to enlighten them as to their own pecuniary condition and manner of conducting their affairs. It would stimulate wives to fit themselves for the proper discharge of the new responsibilities and duties which the changed order of things would impose upon them.¹¹³

contractual agreement when it asserted, "If either partner of the matrimonial firm fails to perform a full share of the labor assumed or assigned that is a misfortune, but it should not be allowed to vitiate the personal or property right of either partner." *Ibid.* at 10.

¹¹⁰*Ibid.* at 11.

¹¹¹*Ibid.*

¹¹²*Ibid.*

¹¹³*Ibid.*

For all of its enlightened attitudes toward the capabilities and place of women, the committee did not acknowledge that such a change in the law would, for the most part, simply bring California's community property law back to its Spanish-Mexican form.¹¹⁴

At the time the committee submitted its report to the legislature, one of its members offered a bill in the Assembly that would invest the widow "with the ownership and management of the family estate on the decease of her husband."¹¹⁵ The bill was voted on two days later, with thirty-six legislators in favor and twenty-seven opposed.¹¹⁶ Its passage occurred late enough in the session for the Senate to avoid acting on the measure.¹¹⁷

When the legislature convened for the 1874 session, the California Woman Suffrage Association again presented a petition "for legal and political equality with men," signed only by the officers of the organization. The petition set forth specific "grievances," asking that they "be repealed and the Constitution amended so that women may vote." Five of the grievances pointed out the different treatment accorded wives regarding both common and separate property.¹¹⁸ The petition was presented to both the Assembly and the Senate by sympathetic legislators, and, rather than mounting a show of support in Sacramento, the association formed a special committee to lobby individual legislators before the start of the session in December 1873.¹¹⁹

Although the reformers were unable to change the probate law, issues arose during the session that brought success in another area of married women's rights. In the previous session, California had adopted a civil code, its own version of the Field Code. Code Section 162 returned to wives a right that constituted a crucial part of the community property system: the right of each spouse to manage his or her separate

¹¹⁴In states such as California where the community property system was provided for constitutionally, de Funiak pointed out, "the state legislature [or the courts, for that matter] cannot constitutionally abrogate the community property system so incorporated in the constitutional framework or alter the principles of such system. . . . It is probable, indeed, that many of the present legislative enactments in these states are in fact unconstitutional and invalid." *Community Property*, *supra* note 1 at 73.

¹¹⁵State of California, *Journal of the Assembly*, 19th sess., 1871-72, March 23, 1872, 883. At the same time, a bill was introduced permitting women to hold management offices in public schools, and a constitutional amendment was proposed granting women suffrage.

¹¹⁶*Ibid.* at 880.

¹¹⁷*Woman's Journal*, January 24, 1874, 32.

¹¹⁸*Woman's Journal*, January 10, 1874, 11.

¹¹⁹*Woman's Journal*, June 6, 1874, 179.

property.¹²⁰ The legislature was now on the verge of enacting contradictory amendments to the code that would effectively have obliterated this right. Key members of the organized suffrage movement rushed to Sacramento and, after two weeks of vigorous lobbying, were able to procure a harmonization of various code sections affecting married women's property rights, thereby salvaging the rights accorded under Section 162.¹²¹

The reformers did not give up on the probate law. In the 1875-76 legislative session, Sarah Wallis presented the Senate with a bill to equalize the probate law, this time regarding the ability of the wife to devise or bequest her portion of common property.¹²² Wallis, thrice-married (lastly to Judge Joseph B. Wallis, who served as a state senator in the early 1860s), was one of the founding mothers of the California woman suffrage movement.¹²³ Of all the women associated with the organized movement, she made the most sustained efforts toward securing equal treatment for women within community property and probate law. Unsuccessful in 1876, five years later she could be found circulating a petition to the legislature for passage of "an Act to confer upon the wife the right to succeed to the community property on the death of the husband."¹²⁴

¹²⁰*Codes and Statutes of California* (Sacramento, 1876), 1:595, §5162.

¹²¹M. Louise Willson, "State Woman Suffrage Society: Reports Showing the Origin of the Amendments to the Code Concerning Woman's Property Rights," *Common Sense*, July 11, 1874, 108. Willson was serving as secretary of the California Woman Suffrage Association. Indicative of disagreements continually plaguing the suffrage cause in California, her letter to the editor was prompted by an "extraordinary misunderstanding that ha[d] arisen in regard to the agencies concerned in the passage of the very important amendment to the Code concerning the property rights of married women." She went on to say that "we are not willing that any misrepresentation should cover or distort the fact that Mrs. [Sarah] Wallis, aided by Mrs. L[aura] deForce Gordon [as well as the writer] and the delegated authority of the Society, procured the amendment to the Code giving to women the right to control and manage their separate estate." *Ibid.*

While Prager may be correct in her assessment that the right of married women to manage their separate property came about because of the adoption of the Field Code, her observation that this, "ironically," was not "the product of specific reform-minded activity in behalf of married women," seems conclusive. Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 41.

¹²²*Stockton Weekly Leader*, January 22, 1876, 2.

¹²³Dorothy Regnery, "Portraits of Sarah," *The Californian* 8 (1986), 8.

¹²⁴Wallis to Gordon, January 25, 1881, on printed petition form entitled "Petition for Equal Rights." Laura deForce Gordon Collection, Bancroft Library. However, by then Wallis was complaining to Gordon that the organized movement had inexplicably removed her from the task of lobbying "my bill." *Ibid.*

ONE LAST ATTEMPT AT REFORM

By 1876 those working through organized channels had to share the stage with a recently widowed San Franciscan, Marietta Stow.¹²⁵ Unlike other woman's rights activists, Stow conducted her crusade as a personal one, motivated by the belief that she had been severely wronged by San Francisco's male-dominated probate system and California's marital property laws, which she claimed had robbed her of a two-hundred-thousand-dollar estate.¹²⁶ Backed by some separate property of her own and by her experience as a lecturer before her marriage (often speaking in favor of women's economic rights), Stow was able to fight back with a vengeance. She published an account of her travails, entitled *Probate Confiscation*, which also served as a manifesto calling for reform of California's marital property law. Inasmuch as her voice was never subjected to the modulating influence of an organization, it was far more strident than those of the suffrage activists.¹²⁷

Early in 1876, Stow herself drafted legislation entitled "A Bill for the Protection of Widows and Orphans."¹²⁸ The proposed

¹²⁵Stow was one of the original members of the San Francisco suffrage society in 1869, even serving as vice-president, but she left the organization late in that year over a disagreement regarding tactics. She remained aloof from woman's rights causes until 1876, and after that operated on the fringe of the organized movement in the 1880s. Donna C. Schuele, "Marietta Stow, the Widow's Widow: Reform in the Nineteenth Century," presented at the annual meeting of the Pacific Coast Branch of the American Historical Association, Corvallis, Oregon, August 1992 [hereafter cited as Schuele, "Marietta Stow"].

¹²⁶Marietta Stow, *Probate Confiscation* (reprint, New York, 1974) [hereafter cited as Stow, *Probate Confiscation*].

¹²⁷Like the organized suffragists, Stow strove to raise the consciousness of women in California regarding marital property and probate law by educating them to the actual shortcomings of the community property scheme when measured against its theoretical framework of spousal equality. She promoted the sale of her book assiduously, and was quite successful in the number of reviews (mostly positive) she garnered in newspapers across the country. In her book, she chided women for remaining ignorant about the laws that governed them, and warned that, with exclusive rights of management and control, during the marriage a husband could "with almost his last breath, . . . convey away the community property so deftly that no known law can reach it." Ibid. at 65. She also wrote scathingly of those widows who would refuse to challenge a husband's will and secure what belonged to them for fear of being "anathematized . . . as a woman's-righter, crusader, or any kind of rebel." Ibid. at 80-81.

¹²⁸Ibid. at 13-20; "The Intestate Laws: Text of a New Bill to be Presented to the Legislature," *San Francisco Chronicle*, January 8, 1876, clipping in Marietta L. Stow scrapbook [hereafter cited as MLS scrapbook], Special Collections, University of San Francisco. Although the *Chronicle* considered her proposal "radical," her crusade met with approval from others. The *Evening Express* (Los Angeles), June 8, 1876; *San Francisco Evening Post*, December 30, 1876;

law would have equalized the rules governing property distribution upon the death of a spouse and given the survivor broad administrative rights. Further, it called for exempting half the common property, as well as the family home and its contents, from estate administration. The decedent's half of the common property would descend to the children of the marriage, or to the surviving spouse if there were no children; nor could an executor exercise any control over this half of the common property. The surviving spouse would be responsible for disposing of common property necessary to pay the debts of the deceased.¹²⁹

Although her legislative proposal was more narrowly drawn than that of the organized reformers, Stow argued for broad changes in the probate and marital property systems. Much of her criticism of California's system was based on her understanding of marriage as a partnership and on the concept of common property.¹³⁰ She assailed the notion that a wife lacked any tangible interest in the common property during the marriage as being inconsistent with the partnership philosophy.

and *Sacramento Daily Bee*, March 31, 1877, clippings in MLS scrapbook. Stow appears not to have worked within any organization in her attempts to get her probate bill passed, and never acknowledged any significant support by other women activists. The title of this bill was probably a bit of political legerdemain. Stow resisted mightily the notion that women needed to be protected, either by men or the legal system. According to her, equality of treatment under the law was the best form of protection. *Probate Confiscation*, supra note 126 at 97-98.

¹²⁹Stow, *Probate Confiscation*, supra note 126 at 13-14. The law would have injected theoretical consistency into California's community property system by negating provisions applying only to the wife. Broadening the rights of estate administration was meant to support the partnership notion of marriage. The bill likened the surviving spouse's administrative control to that of "a surviving partner [who] has the sole power to settle the affairs of a copartnership at the death of one of the partners." *Ibid.* at 13.

¹³⁰The condition of California's community property scheme caused Stow to conclude that "there is no such thing as a partnership relation in the marriage union The rights of the married woman are still nearly all suspended during coverture. . . . In spite of our boasted progress and civilization, in wedlock woman is still a slave, because she is not a free agent. She cannot use a dollar of the common property which she has helped to earn, without the husband's consent. . . . You may say that making the wife a legal partner will embarrass and cripple the business transactions of the husband. . . . Nothing but recognition of the importance of the wife's consent will lift her out of the position of a legal nonentity." *Ibid.* at 232-33.

Stow traced the oppressive treatment of widows in California to English law, claiming that "in many of the Continental countries the wife is as free—as regards her own property and industry—in wedlock as out of it." *Ibid.* at 353. It is unclear whether she was unaware of the roots of California's marital property law, or whether she simply recognized the effect of the vagaries of a common law consciousness upon it.

"A thorough knowledge of the financial condition of the marriage-firm is quite as important to the wife as to the husband. . . . A true partnership has no secrets."¹³¹ She also pointed out the inconsistency and unfairness of subjecting the widow's own portion of the common property to the probate process (while a widower avoided such), again arguing that the arrangement "sets at nought the true relation of husband and wife as business partners."¹³² Based on her own experiences, she recognized the difficulty faced by women who married late, after their husbands had acquired their assets as separate property. She believed that the absence of common property permitted men who owned such property to keep their wives hostage to their testamentary whims and encouraged secrecy in the marriage, which again was contrary to the notion of marriage as a partnership.¹³³

¹³¹Ibid. at 72.

¹³²Ibid. at 16. She asked: "Why are not widowers probated? Why these one-sided laws which refuse their vulture protection to men? Would that they . . . be obliged to plead . . . for . . . the allowance money . . . taken out of their hard earnings, and be refused even that! I think this charming probate business would sink down low . . . into the seething, boiling caldron beneath this crust of earth where it belongs, never to rear its hydra head again." Ibid. at 39.

¹³³Ibid. at 223-25. Under traditional Spanish law, the fruits and profits of separate property would have been considered common property, while intrinsic increases in value remained separate property. De Funiak, *Community Property*, supra note 1 at 180, 187. However, in *George v. Ransom*, 15 Cal 322 (1860), the California Supreme Court invalidated a portion of the 1850 enabling legislation, which had properly designated income from separate property as common property. In its decision, the Court was purporting to be upholding the constitutional guarantee of married women's separate property. *George v. Ransom* at 323-24.

De Funiak saw this case as an example of the court's thinking on common law: "The court was constitutionally bound to determine what was community and what was separate property, not by the common law, but by principles of the Spanish community property system which had been incorporated into the framework of the state constitution." *Community Property*, supra note 1 at 183-84.

However, Stow's proposals went even further than the theories of community property would allow. First, they called for categorizing intrinsic increases in the value of separate property as common. More radically, they suggested that "the moment a man marries, the half of his entire possessions should belong to his wife." On the other hand, Stow believed that men should not have an automatic half-interest in the wife's separate property. She based this conclusion on social realities: that women usually abandoned self-supporting work when they married, that it was difficult to resume this work upon widowhood, especially if there were children to care for, and that women's wages were far below men's. Stow also believed that widows facing an insolvent estate ought to have a claim against it for "services . . . rendered as wife, domestic, nurse, and housekeeper," thus proposing a method for recouping the wife's contribution where the husband's management of the common property had dissipated it. Stow, *Probate Confiscation*, supra note 126 at 26, 223-26.

In most of her arguments against California's probate and marital property

Stow lobbied this bill to no successful end in 1876, and then set off on a cross-country campaign to reform the probate laws in the eastern common law states. On her return to California in the early 1880s, she tried again to get her proposal passed, but by that time she was giving much of her attention to other reforms.¹³⁴ Furthermore, the organized woman's rights movement in the state had fallen into the doldrums, ceasing for the time to be a force in Sacramento politics.

California never strenuously resisted the national, common law-based trend of carving out special individual property rights for married women, and by the 1890s the state's scheme operated much like a modified common law system.¹³⁵ With no one championing the potential of common property for women's equality, the focus turned to the category of separate property, more specifically a wife's separate property, as a way to provide women with additional rights, short of suffrage. Nationally, earnings statutes that lodged the title in wives' earnings with the wives gained popularity, while undercutting the force of joint-property rhetoric. In California the same trend was occurring, even as reformists worked unsuccessfully to shore up women's rights to common property. This was the nature of the legacy left to California's women.¹³⁶

CONCLUSION

Although the agitation for marital property rights in California in the 1870s hardly represents a success, it does show that the agitation and arguments were made on a different basis from those in the East. Reformers in the West began from the

systems, Stow was in touch with the basic philosophies of the community property system and indicated where the state's laws were inconsistent with the notion of marriage as a partnership that required a gender-neutral treatment of spouses. However, these three ideas exhibited a certain confusion. While the first proposal may simply have displayed an ignorance of the finer points of the community property system, the second, based on status, was more consistent with the common law system. The third suggestion, based on quasi-contract principles, ignored the fact that the marital community was based on sharing in gains and losses, and was inconsistent with Stow's own view of marriage as a partnership.

It is not surprising that Stow succumbed to the gendered, status-based notions of the common law. Seemingly unconscious of the contradictions, like her contemporaries in the woman's rights movement she fought for equal treatment of women while arguing for special, protective treatment based on the ideology of separate spheres.

¹³⁴Schuele, "Marietta Stow," *supra* note 125 at 14, 22.

¹³⁵Prager, "Persistence of Separate Property Concepts," *supra* note 3 at 46.

¹³⁶*Ibid.* at 47; Siegel, "Home as Work," *supra* note 38 at 1179.

point that marriage was a partnership, not simply because they believed it to be so, but because the marital property system chosen by male lawmakers was based on that notion. While those who gathered at the Constitutional Convention in 1849 may have intended to enact a marital property system that would protect wives and families from the fluctuations of the state's economy, they left women with a powerful tool in the form of common property.

Although California's marital property law may quickly have functioned like a modified common law system, the nominal designation of common property was a politically valuable asset that eastern woman's rights agitators lacked. Reva Siegel has noted of advocates of joint-property rights, "In their view, marital property reform was not about protecting economically dependent women from men, but instead was about empowering economically productive women to participate equally with men in managing assets both had helped to accumulate."¹³⁷ The recognition of joint property in California's law thus gave woman's rights activists in the state a critical advantage over their eastern sisters. While these women by the 1870s were focusing their efforts on seeking the ballot as well as gender-based marital property rights, in the Golden State, advocacy of joint property remained a politically potent force for much longer, and with it attempts to use marital property law to empower women rather than simply to protect them.

¹³⁷Siegel, "Home as Work," *supra* note 38 at 1116.



A woman homesteader is shown receiving the deed to her land. (Title Insurance and Trust Photo Collection, California Historical Society, University of Southern California Library)

WOMEN AND THE HOMESTEAD ACT: LAND DEPARTMENT ADMINISTRATION OF A LEGAL IMBROGLIO, 1863-1934

JAMES MUHN

I am very enthusiastic," wrote Elinore Pruitt Stewart in 1913, "about women homesteading."¹ It was, to Stewart, "the solution to all poverty's problems."² For whatever reason they may have had, thousands of women made application to take up tracts of the public domain in their own name.³ Before 1900 their numbers were small, generally constituting less than 10 percent of those with entries. Still, their presence was significant. One woman in 1886 noted that

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¹Elinore Pruitt Stewart, *Letters of a Woman Homesteader* (Boston, 1914), 214.

²*Ibid.*, 215.

³Studies on women settlers include H. Elaine Lindgren, *Land in Her Own Name: Women as Homesteaders in North Dakota* (Fargo, 1991); Paula M. Bauman, "Single Women Homesteaders in Wyoming, 1880-1930," *Annals of Wyoming* 58 (Spring 1986), 39-49; Richard H. Chused, "The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law," *Law and History Review* 2 (1984), 44-78; Katherine Harris, *Long Vistas: Women and Families on Colorado Homesteads* (Niwot, Colo., 1993); Paula M. Bauman, "Women Homesteaders on the Great Plains Frontier," *Frontier* 1 (Winter 1976), 67-88; Sherry L. Smith, "Single Women Homesteaders: The Perplexing Case of Elinore Pruitt Stewart," *Western Historical Quarterly* 22 (May 1991), 163-83; Jill Thorley Warwick, "Women Homesteaders in Utah, 1869-1934" (M.A. thesis, Brigham Young University, 1985); and Anne B. Webb, "Minnesota Women Homesteaders: 1863-1889," *Journal of Social History* 23 (Fall 1989), 115-36.

"thousands" of women had taken up public land in Dakota Territory. "In fact," she remarked, "the woman who has not some kind of claim proved up is either a newcomer or a curiosity."⁴ After the turn of the century, the number of women applicants increased significantly. One advocate of homesteading for women put the number of female entries at "more than one-third."⁵

In enacting laws to promote the settlement and development of the public domain in the nineteenth century, Congress gave women the opportunity to take up public lands. The Preemption Act of 1841, Homestead Act of 1862, Timber Culture Act of 1873, Desert Land Act of 1877, and others allowed for women, under certain circumstances, to enter land under their provisions. Of all of them, however, it was the Homestead Act that proved most attractive to women.

Passage of the Homestead Act came after years of debate. By its provisions, which embodied the principles espoused by free land advocates, a person could enter up to 160 acres of public land if he or she were willing to live on the tract and cultivate it for five years. The law, with its many later amendments, proved to be the most enduring of the settlement laws.⁶

Administration of the new law fell to the Department of the Interior and its bureau, the General Land Office. Known as the Land Department of the Department of the Interior, the General Land Office was responsible for the supervision of the public domain and the laws by which it was alienated to private interests. Rules and regulations had to be framed. Furthermore, the Land Department, acting as a quasi-judicial tribunal, had to resolve disputes between rival homesteaders and others. The decisions made in such cases were similar to decisions made by the courts.⁷

⁴Quoted in H. Elaine Lindgren, "Ethnic Women Homesteading on the Plains of North Dakota," *Great Plains Quarterly* 9 (Summer 1989), 158.

⁵Mabel Lewis Stuart, "The Lady Honeycker: How Girls Take Up Claims and Make Their Own Homes on the Prairie," *The Independent* 75 (July 1913), 133.

⁶Although many historians contend that the Homestead Act was repealed with the passage of the Taylor Grazing Act of 1934, the law remained in force until its repeal in 1976 by the Federal Land Policy and Management Act. The act did, however, provide that entries under the law could be made in Alaska until 1986. While the law operated after 1934, the entries were few, with correspondingly few new legal controversies regarding women and the law. Consequently, this article largely restricts itself to issues adjudicated before 1934. See Act of June 28, 1934 (48 Stat. 1269), and Act of October 21, 1976 (90 Stat. 2743, 2787).

⁷For thorough discussions of the Land Department's role as an administrative law tribunal, see Charles R. Pierce, "The Land Department as an Administrative Tribunal," *American Political Science Review* 10 (May 1916), 271-89, and Henry L. McClintock, "The Administrative Determinations of Public Land Controversies," *Minnesota Law Review* 9 (April 1925), 420-41, 9 (May 1925),

Of the innumerable questions the administration of the act posed to Land Department officials, among the most troublesome and demanding to resolve were those pertaining to the eligibility of women to make entry under the provisions of the law. "Any person," the act provided, "who is the head of a family, or who has arrived at the age of twenty-one years" was eligible to make entry.⁸ In general, the Land Department held that those words allowed unmarried women who had reached the age of majority to make entry, but that married women could not avail themselves of the privilege.⁹ Reaching those conclusions, however, was not always easy, and peculiar or extenuating circumstances led to the adoption of exceptions to those general rules.¹⁰

SINGLE WOMEN'S RIGHTS UNDER THE HOMESTEAD ACT

The ability of unmarried women to make entry under the Homestead Act did not, in itself, pose any particular dilemma to the Land Department.¹¹ The gender-neutral wording "any person . . . over the age of twenty-one" in the act was straightforward and left no doubt that unmarried women who had reached their majority could make application.¹² There could

542-54, and 9 (June 1925), 638-56 [hereafter cited as McClintock, "Administrative Determinations."]

⁸Act of May 20, 1862 (12 Stat. 392). Since passage of this law, Congress has codified the laws of the United States twice. Under the *Revised Statutes*, enacted in 1874, the eligibility criteria of the Homestead Act were placed under Section 2289 (R.S. 2289). In 1928, with the enactment of the *United States Code*, the provisions were placed under Title 43: Public Lands, as sec. 161 (43 USC 161).

⁹Another requirement for eligibility to make entry under the Homestead Act was that a person also be either a "citizen of the United States," or have declared his or her intent to become one. This issue as it related to women is not taken up in this discussion.

¹⁰This article does not consider all the various questions and issues that involved the eligibility of women to make and prove up under the Homestead Act, nor does it discuss all the exceptions to the general rules of law established by the Land Department.

¹¹The Land Department, in making decisions regarding the eligibility of women to make entry under the Homestead Act, often applied the principles laid out in rulings involving preemption and timber culture laws. Conversely, many decisions rendered for homestead entries were applied to those laws. An attempt has been made to restrict most of the Land Department rulings cited in this article to those involving homestead entries; however, a few of the more pertinent and applicable rulings under the other settlement laws are referenced.

¹²U.S. Department of the Interior, General Land Office, *Annual Report of the Commissioner of the General Land Office for the Year of 1863* (Washington, 1863), 10 [hereafter cited as *ARGLO* for the year in question]; Commissioner of

be exceptions to this general rule. For example, the Land Department held that single unwed mothers who were not yet twenty-one years of age could make entry. As the natural guardians of their children, these women met the provision that allowed for the "head of the family" to do so.¹³ An underage woman could also complete title to entry if she were the heir of someone who had made application.¹⁴

Aside from these and other similar exceptions, the Land Department held firmly that a single woman must have reached the age of majority before she could make entry.¹⁵ Even the pleading of an eleven-year-old girl like Kattie Prehm could change the interpretation. Writing to President Rutherford B. Hayes in 1878, young Prehm told the chief executive that her "Papa and oldest brother [were] each going to take a claim in Kansas." "I thought," she went on, "mayby [*sic*] if I asked[,] you would let me take a claim. . . . I am strong and hearty and as willing to work as any man. My ma say [*sic*] that i [*sic*] was there i [*sic*] would give you a good hug and a sweet kiss if you will only give me the deed to 160 acres of land in Kansas."¹⁶ Her letter was forwarded to the General Land Office, which responded "that Congress passes [the] laws regulating the disposal of public lands and as no provision is made for granting homesteads to little Misses of eleven years, it is impossible to grant your request."¹⁷

the General Land Office [CGLO] to Miss Annie D. Spencer, August 22, 1873, General Land Office, [Division "C"] Miscellaneous Letters Sent by the General Land Office, 1796-1899, Microfilm Publication 25, National Archives [hereafter cited as GLO, Div. "C," Misc. LS, M25]; and *Single Women, Copp's Land Owner* 10 (December 1883), 294 [hereafter cited as CLO].

¹³George Male, 13 CLO 102 (1886); and ARGLO 1887, 124.

¹⁴*Allsop v. Dumas*, in *Decisions of the Department of the Interior and General Land Office in Cases Relating to the Public Lands*, U.S. Department of the Interior (Washington, 1884), 2:82 [hereafter cited as LD (Land Decisions) or ID (Interior Decisions)].

¹⁵Most reported cases on this issue regard young men, but the force of these rulings applied equally to women. See CGLO to Register and Receiver [R&R], Jackson, Minn., July 22, 1872, General Land Office, Division "C," Letters sent to Registers and Receivers, 1829-1897, RG 49. Records of the Bureau of Land Management, NA [hereafter cited as GLO, Div. "C," LS R&Rs, RG 49].

¹⁶Kattie Prehm to Uncle Sam, August 1, 1878, General Land Office, Division "D," Mail and Files Division, Miscellaneous Letters Received from Private Persons, Land Entrymen, Attorneys, and other Persons, 1801-1909, File 1878-61587, Record Group 49, Records of the Bureau of Land Management, NA [hereafter cited as GLO, Div. "D," LR, RG 49].

¹⁷Acting CGLO to Prehm, August 22, 1878, GLO, Div. "C," Misc. LS, M25.

MARRIED WOMEN'S RESTRICTIONS

While the eligibility of single women to make entry was a fairly simple issue, interpreting the proviso stating that one who was the "head of a family" could do so proved more troublesome. The Land Department held that those words meant that married women, unlike single women who had reached their majority, could not make entry.¹⁸ As the commissioner of the General Land Office, James H. Edmunds, explained in 1864, "It is held [by the courts] that a married women has no legal existence, her services and the proceeds of her labor being due and belonging to her husband; hence, although 'arrived at the age of twenty-one years,' she can *per se* do no act that will not enure to the benefit and use of her husband; that if permitted to enter land because of having arrived at twenty-one years of age, the legal restrictions growing out of her matrimonial relations would at once be violated. The same objection arises should she claim as the 'head of the family,' as the husband is the 'head' during the existence of the marital tie."¹⁹ There were some exceptions to this rule, as Edmunds pointed out, for if "the husband is *non compos mentis*, or imprisoned for life, or abandons his family, the wife would be considered, *de facto*, the 'head of the family,' and would be entitled to entry."²⁰

The assistant attorney-general for the Department of the Interior echoed the General Land Office's position in 1871. An opinion involving Sarah E. Demmond, who had voluntarily left her husband but had not obtained a divorce, held that "the husband, in contemplation of the law is the head of the family. This is the general rule" and, therefore, "[a married woman] was, *prime facie*, incompetent to make a homestead entry as 'the head of [a] family.'"²¹

The "general rule," as the assistant attorney-general called it, was not seriously challenged until 1882. In that year, Rachel McKee made application for a homestead near Brighton,

¹⁸To be recognized as married by the Land Department, a couple need not have solemnized the relationship. If by their acts they gave the appearance to the community that their relationship was that of a husband and wife, such as cohabitation, they were viewed as being married. See *Burton v. Christenson*, 18 CLO 97, 98 (1891); *Strain v. Hostolas*, 16 LD 137, 139-40 (1893); *Wilson v. Wilson*, 27 LD 294 (1898); and *Fitzgerald v. St. Paul, Minneapolis and Manitoba Ry. Co. et al.*, 37 LD 576, 578-79 (1909).

¹⁹ARGLO 1864, 10.

²⁰Ibid.

²¹Assistant Attorney-General to Secretary of the Interior, July 6, 1871, Department of the Interior, Lands and Railroads Division, Letters and Other Communications Received, 1849-1881, Assistant Attorney-General, RG 48, Records of the Office of the Secretary of the Interior, NA.



A woman operating a grain binder during the harvest. (Courtesy of Fort Collins Public Library)

Colorado. Officials at the Denver Land Office, however, rejected her application because she was married.²² She appealed their decision to the commissioner of the General Land Office.

Her attorney, Daniel Witter, wrote a lengthy appeal in which he pointed out that the homestead law stated that "Every person who is the head of a family or who has arrived at the age of twenty-one years . . . *shall be entitled to enter*" public land under the Homestead Act. "It will not probably be denied," Witter remarked, "but that in a legal sense Mrs. McKee [was] a person," for, as John Locke defined a person, McKee was "*a thinking intelligent being that has reason and reflection.*" She was also over the age of twenty-one years and, therefore, entitled to the provisions of the Homestead Act to make entry.

Witter conceded that "a married woman [could be] so fully under the control of her husband that she [was] not competent to comply with the provisions of the Homestead Act." But even if that "was admitted to be true," Congress should have specifically excluded married women from making entry as it had under the Preemption Act of 1841.²³ "Who," Witter ended, "shall deprive her of this privilege—certainly it should not be

²²R&R, Denver, to CGLO, September 11, 1882, GLO, Div. "D," LR, File 1882-79570, RG 49.

²³The Preemption Act provided that entry could be made only by "the head of the family, or widow, or single man over the age of twenty-one years." Act of September 4, 1841 [5 Stat. 453, 455].

lightly done. It cannot be done in accordance with that principle of liberality that should prevail in the dealings of your department with settlers upon the public domain. It cannot be done in accordance with that spirit of higher civilization that is day by day lifting women up nearer and nearer to that place of equality with men which the better interests of mankind demand she occupy. I do not believe it can be justly done."²⁴

Witter's eloquent arguments did not sway the commissioner of the General Land Office, Noah McFarland. Citing earlier rulings on the matter, McFarland upheld the register and receiver in the Denver Land Office on the "established rule of the Department that a *feme covert* [sic] [was] incompetent to make a homestead entry."²⁵

Daniel Witter appealed the General Land Office's decision to the secretary of the interior, Henry Teller. In another lengthy brief, the Denver lawyer challenged Commissioner McFarland's interpretation of the law. The problem, in Witter's mind, was that the General Land Office failed to see that the law allowed anyone over the age of twenty-one to make entry regardless of whether he or she were the head of a household. He also felt that reliance on the fact that the Land Department had for so long followed the rule that a married woman could not make entry held little weight when such a practice wrongfully withheld a right from people who were entitled to that right by law.

Witter also pointed out that the appeal before the secretary went beyond the interests of Rachel McKee. "It is a question," he argued, "as to whether or not, a very large class of the most estimable and deserving persons . . . shall be deprived as a right that is clearly granted to them by law and that every consideration of equity and just demands they should have." Moreover, "A decision in Mrs. McKee's favor will send thousands of families upon the public domain that cannot now go, because the husband has exhausted rights to enter land. It will give new life to western emigration, throughout the whole country and will send tens of thousands of families from poverty and dependence in the over populate east, to prosperity and independence in the new west." To Witter, the case appeared "to be perhaps the most important that [the] Department has ever been called upon to decide," for its effects would be felt "throughout the whole country." Therefore, "believing that equity and justice and the best interests of our whole country demand it," Witter "respectively ask[ed] that the decision of the Commissioner of

²⁴Witter, "Ex parte Rachel M. McKee," ca. October 30, 1882, GLO, Div. "D," LR, File 1882-84290, RG 49.

²⁵CGLO to R&R, Denver, December 7, 1882, GLO, Div. "C," LS R&Rs, RG 49.

the General Land Office refusing Mrs. McKees [*sic*] application be overruled and that she be allowed to make the entry for which she has applied."²⁶

Secretary Teller "carefully considered the questions raised" by Witter. He was not, however, swayed. Teller felt that the General Land Office's construction of the Homestead Act prohibiting entry by married women was correct. The interpretation, he noted, was in agreement "with the practice of the Department since the enactment of the homestead law," and he saw "no reason whatever for setting it aside."²⁷

While the McKee decision settled the question of the eligibility of married women to make homestead entries,²⁸ numerous other issues had to be addressed.²⁹ One of these was the question of Mormon plural marriages. In 1871 the commissioner of the General Land Office ruled that "in construing the said Homestead Act, no consideration can be given to any usages governing the condition of the applicant that does not accord with the laws of the U.S." Therefore, since "under the laws of the U.S. the second wife of a man is not recognized as such, . . . she could not be denied entry [as a married woman]."³⁰

²⁶Witter to Secretary of the Interior, June 8, 1883, GLO, Div. "D," LR, File 1883-56751, RG 49.

²⁷*Rachel M. McKee*, 2 LD 112 (1883).

²⁸*Martha O. Murray*, 2 LD 112 (1883); *Anna D. Wohlfarth*, 10 CLO 323 (1884); *Prestina B. Howard*, 8 LD 286 (1889); *Jennie Routh*, 13 LD 601 (1891); *Bush v. Leonard*, 25 LD 129, 131-32 (1899); *Heath v. Halliman*, 29 LD 267-68 (1899); *McGuire v. Rogers*, 29 LD 297-98 (1899); *Brown v. Cagle*, 29 LD 381-82 (1899); *Sarah J. Walpole*, 29 LD 647-48 (1900); *Brown v. Cagle*, 30 LD 8-9 (1900); *Case v. Kupferschmidt*, 30 LD 9, 11 (1900); *Martha Henrikson*, 35 LD 425 (1907); *Ingram v. Guernsey*, 38 LD 142-43 (1909); *Margaret J. Dingman*, 39 LD 363 (1910); *Suggestions to Homesteaders and Person Desiring to Make Homestead Entries*, 48 LD 389, 392 (1922); and *Information for Prospective Homesteaders* [Circular 1264], 54 ID 127-28 (1932); and U.S. National Archives, *Code of Federal Regulations*, Title 43: Public Lands (Washington, 1976), sec. 2511.1[b] (1) [hereafter cited as 43 CFR].

²⁹There were situations where married women made entry in good faith, but Land Department officials, for one reason or another, failed to deny the application. In instances in which the husband was eligible to make entry, the department permitted the woman to relinquish the entry in favor of her spouse. Other cases were not so simple, and only Congress could preserve a married woman's interest in her claim through special legislation. See CGLO to R&R, Booneville, Miss., March 20, 1866, GLO, Div. "C," LS R&Rs, RG 49; *L.A. Jennings*, 10 CLO 241 (1883); *Martha O. Murray*, 2 LD 112 (1883); Acting CGLO to Congressman L.K. Lippencott, March 6, 1876, GLO, Div. "C," Letters Sent to Members of Congress, 1868-1888, RG 49: Records of the Bureau of Land Management, NA [hereafter cited as GLO, Div. "C," LS Congress, RG 49]; Act of March 13, 1876 (19 Stat. 416); U.S. Congress, Senate, Committee on Public Lands and Surveys, *Martha Austin*, S. Report 284, 76th Cong., 1st sess., 1939 (Serial 10293); and Act of July 15, 1939 (53 Stat. 1477).

³⁰CGLO to R&R, Salt Lake City, April 22, 1871, GLO, Div. "C," LS R&Rs, RG 49.

Eight years later the Department of the Interior abandoned that rationale.³¹ While agreeing with the General Land Office that the marriage of a plural wife did not make her the legal wife of the man, such a woman did allow her "husband" to control her acts and she did maintain a marital relationship. Such a woman could not, therefore, be allowed to make a homestead entry, for the law required that the entry be made for the exclusive use and benefit of the applicant.³²

LAND RIGHTS OF SINGLE WOMEN WHO MARRIED AFTER MAKING ENTRY

A more significant issue dealt with the status of an entry made by single women who later married before they had proved up on their homesteads. This question arose as early as 1867, and the General Land Office took the position that if a woman were eligible at the time of making entry, her subsequent marriage did not debar her from taking her claim to patent as long as she continued to comply with legal requirements of residence and cultivation.³³

That rule remained undisturbed until the commissioner of the General Land Office, William Andrew Jackson Sparks, reversed it in 1886. In a series of decisions, the overzealous commissioner, who saw fraud wherever he turned, announced, without lengthy discourse or legal reasoning, that "under the ruling of this office it is held that a woman who makes a homestead entry and subsequently marries before completing the same forfeits her right thereby to acquire title to the land."³⁴

Sparks' ruling caused considerable alarm. *Copp's Land Owner*, the leading public lands newsletter of the day, regretted his reversal of a rule that "was long sanctioned by long practice and public policy in encouraging marriages." The ruling, the journal went on to say, was "opposed to the spirit of the age

³¹One historian surmises that few plural wives made entries under the Homestead Act. See Lawrence B. Lee, "Homesteading in Zion," *Utah Historical Quarterly* 28 (January 1960), 33-34.

³²*Lyons v. Stevens*, 6 CLO 107 (1879).

³³CGLO to R&R, Traverse City, Mich., August 30, 1867, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Omaha, December 7, 1868, *ibid.*; CGLO to R&R, Vermillion, Dakota Territory, June 23, 1870, *ibid.*; CGLO to R&R, Vermillion, Dakota Territory, January 27, 1873, *ibid.*; *W.H. Werdelange*, 1 CLO 3 (1874); *ARGLO* 1874, 32; *Mary Latt*, 4 CLO 103 (1877); *Eda M. Carnochan*, 8 CLO 121 (1881); and *ARGLO* 1881, 196-97.

³⁴*Maria Good née Wilcox*, 13 CLO 102 (1886). Also see *Mrs. Lizzie C. Salmon*, *ibid.*; and *G.L. Sigman*, *ibid.*, 170.

which denies the common law doctrine of married women's property rights." As a consequence, the editor believed that the ruling would not be supported by Secretary of the Interior Lucius Lamar.³⁵

The decision also caused concern among women homesteaders. Mary Strong of Potter, Nebraska, wrote the secretary of the interior about the dilemma Sparks' ruling caused for her and other women homesteaders:

I am thinking of being married sometime within the next year and as I will have spent two years in my home, and besides considerable hard-earned money (earned by teaching). I wish to know if I must forfeit all that besides my homestead, should I do so.

If I wait until I "prove up" I am afraid I shall be left for a handsome girl, for I am now 26 years old, and I don't want to give up my homestead for any fellow I have seen since I came west or any back in Ohio for that matter either.

By being so kind as to answer this, you will greatly oblige several girls here in Potter besides myself, as we are in rather a quandary whether to give up the land or the fellows, and we would like to have you assure us that we need do neither.³⁶

In reply to Strong's concerns, Assistant Secretary of the Interior D. L. Hawkins stated that "the policy of the law is to encourage matrimony, and this Department will not . . . put anything in the way of what is evidently for the good of the country, and the personal happiness of its young men and women—and the older ones too, for that matter."³⁷

A few months later, Secretary of the Interior Lamar issued a decision that supported Hawkins' statement. In reviewing the case of Maria Good, he told Sparks that he could not concur on the General Land Office's ruling. The secretary pointed out that a person had to meet "certain prerequisite qualifications" to make entry. One was being a single woman over the age of twenty-one years. "The fact of marriage of the claimant in this case after she made her entry," stated Lamar, "cannot of itself

³⁵"Women Homesteaders Who Marry," *ibid.*, 97.

³⁶Mary Strong to Secretary of the Interior, September 28, 1886, Department of the Interior, Land and Railroads Division, Letters Received, 1881-1907, File 1886-7499, RG 48, Records of the Secretary of the Interior, NA.

³⁷Assistant Secretary of the Interior to Strong, October 5, 1886, Department of the Interior, Letters Sent by the Land and Railroads Division, Microfilm Publication 620, NA.



A woman homesteader and her children near McCook, Nebraska
(Nebraska State Historical Society)

work a forfeiture of any right which she may have acquired by virtue of said entry.³⁸

The basic principles laid down in the *Maria Good* decision were thereafter followed by the Land Department.³⁹ In *Maria Good*, however, Lamar did point out that the marriage of a woman entryman could indirectly furnish a reason for the forfeiture of her entry.⁴⁰ Such a situation arose when a woman with an unperfected homestead claim married a man who had similar entry.⁴¹

³⁸*Maria Good*, 5 LD 196 (1886).

³⁹*F.T. Berkey*, 13 CLO 255 (1886); *Lawrence v. Phillips*, 6 LD 140 (1887); *Mrs. R.C. Gettany*, 14 CLO 283 (1888); *Alice M. Gardner*, 7 LD 470 (1888); U.S. Department of the Interior, General Land Office, *Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands and Under the Pre-emption, Homestead, and Other Laws. Issued January 1, 1889* (Washington, 1889), 13; *Angie Williamson*, 10 LD 30 (1890); *Hanson v. Earl*, 13 LD 538 (1891); *Hattie E. Walker*, 15 LD 377 (1892); *Jane Mann*, 18 LD 116 (1894); *Shaffer v. Fox*, 20 LD 185 (1895); *ARGLO* 1896, 92; U.S. Department of the Interior, General Land Office, *Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands and Under the Homestead, Desert Land, and Other Laws. Issued July 11, 1899* (Washington, 1899), 12; *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 35 LD 187, 190 (1906); and *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 42 LD 35, 39 (1913).

⁴⁰*Maria Good*, 5 LD 196, 197 (1886).

⁴¹Another related issue dealt with women who had settled on unsurveyed public lands, then married before the completion of survey and the time when they could make entry under the Homestead Act for their tract. The Act of

The issue had arisen before the *Maria Good* controversy. At first, the General Land Office was of the opinion that as long as the husband and wife maintained separate residences upon their respective entries, they could take each to patent without a problem.⁴² That position was quickly abandoned, and the rule that a married couple could have but one home was adopted. The Homestead Act stipulated that each settler both live on and cultivate his or her entry.⁴³ This situation required that one of the couple prove up an entry, or, if that were not possible, one would have to relinquish a claim back to the government.⁴⁴ If they did neither, the General Land Office would cancel one for failure to comply with the provisions of the Homestead Act as to residence.⁴⁵ This policy continued after the *Maria Good* ruling.⁴⁶

May 14, 1880 (21 Stat. 140), permitted settlers do this and relate their "right" to the land to the date of actual settlement and not to when they filed their homestead application. Beginning in 1898, the Department of the Interior held that if a woman who had settled on unsurveyed lands married before making entry, she lost her right, since a married woman could not make entry. Congress provided relief to women who found themselves in such a position with passage of the Act of June 6, 1900. That law allowed a woman who was eligible to make entry under the provisions of the Homestead Act, and who had "improved, established, and maintained a bona fide residence" on unsurveyed public lands, to marry before entry and not lose her right. The man she married, however, could not have a claim under the Homestead Act. See *Heath v. Hallinan*, 29 LD 267 (1898); *Brown v. Cagle*, 29 LD 381 (1899); and *Brown v. Cagle*, 30 LD 8 (1900); Act of June 6, 1900 (31 Stat. 683); and *ARGLO 1900*, 137-38.

⁴²CGLO to R&R, Ironton, Mo., September 4, 1866, GLO, Div. "C," LS R&Rs, RG 49.

⁴³The Homestead Act provided settlers with two means by which they could prove up on their homesteads. The first was to live on and cultivate their entry for five years. The other method was termed commutation. As originally provided for in the Homestead Act, an entryman could, with satisfactory proof of residence and cultivation, pay the minimum price per acre for the land entered at any time after entry had been made. In 1869, the General Land Office required that a person filing a commutation show six months of residence and cultivation to demonstrate good faith. In 1891, Congress amended the commutation clause, so as to require fourteen months of residence and cultivation before proof could be submitted. See Act of May 20, 1862 (12 Stat. 392, 393); *ARGLO 1869*, 24; and Act of March 3, 1891 (26 Stat. 1095, 1098).

⁴⁴*ARGLO 1867*, 84; CGLO to R&R, Omaha, December 7, 1868, GLO, Div. "C," LS R&Rs, RG 49; CGLO to N.J. Paul, St. Paul, Neb., April 12, 1873, GLO, Div. "C," Misc. LS, M25; CGLO to C.J. Ballard, Chicago, August 15, 1873, *ibid.*; and *A.J. Buckland*, 4 CLO 107 (1877).

⁴⁵CGLO to R&R, Beatrice, Neb., January 13, 1869, GLO, Div. "C," LS R&Rs, RG 49; and CGLO to R&R, Ionia, Mich., March 2, 1871, *ibid.*

⁴⁶*Mrs. R.C. Gettany*, 14 CLO 283 (1888); *Angie L. Williamson*, 10 LD 30 (1890); *Bullard v. Sullivan*, 11 LD 22 (1890); *Orphia J. Simons*, 14 LD 241 (1892); *Hattie E. Walker*, 15 LD 377 (1892); *Jane Mann*, 18 LD 116 (1894); *Thompson v. Talbot*, 21 LD 430 (1895); and *Anderson et al. v. United States*, 202 F. 200

Some homestead couples who had adjacent homestead entries sought to solve the problem of residence on each claim by occupying a house built on the line between the claims. In 1868, the commissioner of the General Land Office, Joseph Wilson, felt that such an action showed "a disposition to evade the requirements of the law, rather than comply with the same."⁴⁷ However, in 1874, when the same question was posed to Commissioner Samuel Burdett, in light of an analogous ruling by the secretary of the interior he saw no problem with the practice.⁴⁸ Burdett's position remained undisturbed for nearly a decade and half.⁴⁹

Soon after the *Maria Good* decision, Commissioner Sparks was asked his opinion of the practice. Having lost none of his zeal for rooting out what he perceived as deceptive and illegal practices under the public land laws, he remarked that "it will be difficult to satisfy me that such barefaced legerdemain can by intelligent, honest officials be regarded as good faith in perfecting entries under the law."⁵⁰

The commissioner had the opportunity to put his opinion into law. In 1887 the Niobrara, Nebraska, land office sent up on appeal the case of Lydia A. Fannon, whose final proof had been rejected by the register because residence under the law could not be maintained by her and her husband with a "house built across the line and occupied by both parties." The receiver dissented from the opinion, citing earlier General Land Office rulings allowing for such a practice. Sparks sided with the register, expressing the opinion that Fannon had to be regarded as living on her husband's entry and that building a house on the line appeared to be "a case of attempted and gross evasion of the law."⁵¹

[1913]. For a few exceptions to the general rule, see *Wilhelmina Roth*, 22 LD 528 (1896); *Leonora H. Fores*, 26 LD 194 (1898); *Anderson v. Hillerud*, 33 LD 335 (1904); and *Patrick Flynn*, 39 LD 593 (1911).

⁴⁷CGLO to R&R, Brownville, Neb., June 29, 1868, GLO, Div. "C," LS R&Rs, RG 49.

⁴⁸*William S. Headlee* [June 19, 1874], in *Public Land Laws, Passed by Congress from March 4, 1869 to March 3, 1875, with the Important Decisions of the Secretary of the Interior, and Commissioner of the General Land Office, the Opinions of the Assistant Attorney General, and the Instructions Issued from the General Land-Office to the Surveyors General and Registers and Receivers During the Same Period*, compiled by Henry N. Copp (Washington, 1875), 238-39 [hereafter cited as CLL 1875].

⁴⁹*Alfred C. Sowle et al.*, 4 CLO 93 (1879); and *ARGLO* 1880, 80.

⁵⁰*F.T. Berkey*, 13 CLO 255 (1886).

⁵¹*Lydia A. Fannon, Formerly Tavener*, 13 CLO 282 (1887). Also see Sparks' comments in *Nels J. Christensen and Laura A. Salisbury*, 15 CLO 198 (1888).

Fannon appealed her case to the secretary of the interior. This time, however, the Department of the Interior was inclined to agree with Sparks' ruling. It recognized that while a married woman had the right to complete a homestead entry made before her marriage under the decision rendered in *Maria Good*, a husband and wife lived as one family, and, therefore, could not maintain separate residences at the same time.⁵² It was a position to which the department held steadfastly thereafter.⁵³

The position of the Land Department made it difficult for many couples to prove up under the law. Thus, in 1912, Senator Moses P. Kinkaid of Nebraska introduced a bill that provided that the marriage of homesteaders would not impair the right of either to prove up their entries,⁵⁴ for the couple would be allowed to select one claim upon which they would fulfill the residence requirement for both entries.⁵⁵ Secretary of the Interior Walter Fisher, however, opposed the bill, deeming it a "radical departure from the principles of the homestead laws and one which ought not to be carried into effect." He contended that the law would "result in the making of a vast number of fraudulent entries." Moreover, "a broader and more important reason why the measure should not be enacted" was that the area of good agricultural land on the public domain was disappearing, and the law would permit certain families to acquire "a larger area than is necessary for its reasonable and proper support" while denying other families the opportunity of making a home.⁵⁶

During the following congressional session, another measure was introduced for the benefit of homesteaders who married. The bill provided that both members of the couple must have fulfilled the requirements of the Homestead Act for one year before to their marriage. The law then permitted the couple to select one entry upon which they would live, while they

⁵²*L.A. Tavener*, 9 LD 426 (1889).

⁵³*Emily M. Dronberger*, 10 LD 88 (1890); *Thomas E. Henderson*, 10 LD 266 (1890); *John O. and Minerva C. Garner*, 11 LD 207 (1890); *William A. Parker*, 13 LD 734 (1891); *Lincoln v. Gisselberg*, 17 LD 215 (1893); *Thompson v. Talbot*, 21 LD 430 (1895); and *Leonora H. Fores*, 26 LD 195, 196 (1898). Also see *Anderson v. Watts*, 138 U.S. 694, 706 (1891).

⁵⁴Legislation similar to that made by Senator Kinkaid was suggested by Commissioner of the General Land Office J.A. Williamson in 1876. See *ARGLO* 1876, 18-19.

⁵⁵HR 27409, 62d Congress, Department of the Interior, Central Classified Files, 1907-1936, Legislation Files, 62d Congress, 2-19, Homestead Entries, Part 8, RG 48, Records of the Office of the Secretary of the Interior, NA [hereafter cited as DOI, CCF 1907-1936, Legislation, RG 48].

⁵⁶Secretary of the Interior to Acting Chairman, Committee of Public Lands, House of Representatives, January 15, 1913, *ibid*.

continued to improve both claims. The Interior Department felt that the one-year provision removed "all serious objection" to the bill, since it appeared to prevent abuses of the proposed law.⁵⁷ The Act of April 6, 1914, allowed the husband of a couple with homestead entries, each of whom had fulfilled the requirements of the Homestead Act for one year before their marriage, to select, under rules and regulations devised by the secretary of the interior, which of the two entries would become their home. The law was extended not only to prospective entries under the Homestead Act but also to existing ones at the time of the new law's passage.⁵⁸

WIDOWS' RIGHTS TO LAND

A widow, if she were the head of the family or over twenty-one years of age, could, like any other woman, make a homestead entry.⁵⁹ But more important was the status given the widow of a man who had already made an entry, and who died before proving up. Under Section 2 of the law, the right to complete the entry passed to the widow first.⁶⁰ None of the other public land laws gave a widow such a privilege; under those laws she stood equal with all the other heirs.

Only a widow was held to be competent to submit proof for the entry of her deceased husband,⁶¹ and the patent upon issuance was put in her name.⁶² This right given to widows by

⁵⁷U.S. Congress, House, Committee on Public Lands, *Marriage of Homestead Entryman and Entrywoman*, Report 247, 63d Cong., 2d sess., 1914 (Serial 6558), and U.S. Congress, Senate, Committee on Public Lands, *Marriage of Homestead Entryman and Entrywoman*, S. Report 288, 63d Cong., 2d sess., 1914 (Serial 6552).

⁵⁸Act of April 6, 1914 (38 Stat. 312); and *Intermarriage of Homesteaders—Act of April 6, 1914: Circular*, 43 LD 272 (1914). The law was amended in 1921 to include settlers on unsurveyed lands who had complied with the homestead law for at least a year. See Act of March 1, 1921 (41 Stat. 1193); and *Instructions*, 48 LD 106 (1921).

⁵⁹CGLO to R&R, Chillicothe, Ohio, July 15, 1865, GLO, Div. "C," LS R&Rs, RG 49; and CGLO to R&R, St. Peter, Minn., July 7, 1866, *ibid.*; CGLO to R&R, Ironton, Mo., September 4, 1866, *ibid.*; CGLO to R&R, Visalia, Calif., June 20, 1870, *ibid.*; ARGLO 1868, 100; *Peter Kackman*, 1 LD 86 (1883); *Prestina Howard*, 8 LD 286 (1889); and *Florida Central and Peninsular Ry. Co. v. Campbell*, 18 LD 304 (1894).

⁶⁰Act of May 20, 1862 (12 Stat. 392).

⁶¹The rights accorded to a widow did not apply to a widower. See CGLO to R&R, St. Cloud, Minn., July 25, 1872, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Menasha, Wis., March 19, 1874, *ibid.*; and *Mary Latt*, 4 CLO 103 (1877).

⁶²At first the General Land Office treated the widow as an heir without any special privilege, but see CGLO to R&R, La Crosse, Wis., April 6, 1868, GLO,

Congress could not be defeated by any husband's will.⁶³ Her subsequent remarriage before offering proof did not even disturb her right.⁶⁴ She could be declared legally insane, and she would retain the right, but in that case her appointed guardian would be responsible for proving up the entry.⁶⁵

A widow could, however, lose her rights under certain circumstances. She could voluntarily give up her right in favor of her children or other heirs.⁶⁶ A wife's desertion of her husband before his death, as well as divorce from him, could forfeit her right as a widow.⁶⁷ The murder of her husband, and her subsequent conviction for the crime, also proved grounds for excluding the widow.⁶⁸

With the widow's right to her husband's entry, it was ruled that she must continue to fulfill the requirements of the Homestead Act, otherwise she would forfeit the claim.⁶⁹ If her husband had complied with the requirements of law as to

Div. "C," LS R&Rs, RG 49; CGLO to R&R, Junction City, Kan., June 5, 1868, *ibid.*; CGLO to R&R, Stevens Point, Wis., December 2, 1868, *ibid.*; CGLO to R&R, Vermillion, Dakota Territory, October 30, 1869, *ibid.*; Secretary to CGLO, July 18, 1870, DOI, LS L&RR, M620; CGLO to R&R, San Francisco, August 19, 1870, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Menasha, Wis., August 27, 1870, *ibid.*; *John Dillon*, CLL 1875: 245 (1871); *Thaddeus Armstrong*, 18 LD 421 (1894); *ARGLO* 1898, 125; *Steberg v. Hanelt*, 26 LD 436 (1898); *Keys v. Keys*, 28 LD 6 (1899); *David R. Weed*, 33 LD 682 (1905); *Trueman v. Bradshaw*, 43 LD 242, 244 (1914); *Information for Prospective Homesteaders* [Circular No. 1264], 54 ID 127, 129 (1932); and 43 CFR 2511.5-1(a) [1976].

⁶³*John Dillon*, CLL 1875: 245 (1871); *John Rhoades*, 5 CLO 117 (1878); *ARGLO* 1879, 72; *Jens Thybo*, 18 CLO 212 (1891); *Thaddeus M. Armstrong*, 81 LD 421 (1894); *Bucker v. Benham*, 28 LD 53 (1899); *Heirs of Mojek v. Widow of Mojek*, 38 LD 490 (1910); *Knight v. Heirs of Knight*, 39 LD 362 (1910); and *Anna Hess, Widow of William J. Hess*, 49 LD 169 (1922). Also see *Newkirk v. Marshall and Another*, 10 P. 571 (1886); and *Mary McCune v. N. Fred Essig and Emma C. Essig*, 199 U.S. 382, 389 (1905).

⁶⁴CGLO to R&R, Visalia, Calif., June 26, 1873, GLO, Div. "C," LS R&Rs, RG 49; and *Peter Kackman*, 1 LD 86 (1883).

⁶⁵*ARGLO* 1893, 90.

⁶⁶CGLO to R&R, Greenleaf, Minn., December 4, 1866, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Ionia, Mich., August 28, 1868, *ibid.*; *Eliza Willis*, 22 LD 426 (1896); *Phillippina Adam et al.*, 40 LD 625 (1912); *Heirs of Jacob M. Davis*, 45 LD 100 (1916).

⁶⁷*Allsop v. Dumas*, 2 LD 82 (1884); *George W. Law*, 6 CLO 190 (1880); and *Snow v. Heirs of Snow*, 40 LD 638 (1912).

⁶⁸*ARGLO* 1879, 73.

⁶⁹Acting CGLO to R&R, Minneapolis, June 30, 1865, GLO, Div. "C," LS R&Rs, RG 49; *ARGLO* 1865, 23; CGLO to R&R, Brownville, Neb., July 13, 1868, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Ionia, Mich., August 28, 1868, *ibid.*; CGLO to R&R, Lincoln, Neb., April 12, 1870, *ibid.*; and *Stewart v. Jacobs*, 1 LD 636 (1878).

residence and cultivation, she could, if she so chose, commute the entry.⁷⁰ The alternative was to wait until the end of five years, in which case she did not have to reside on the entry but only cultivate it.⁷¹ This latter interpretation of the law by the Land Department enabled widows to hold two homestead entries simultaneously. If she had not previously used her right and if she were eligible, a widow could make an entry in her own right.⁷² She could then prove up her deceased husband's entry by cultivating it while complying with the requirements of residence and cultivation on her own entry.⁷³

Congress gave widows further rights under another homestead law. In the Soldiers' and Sailors' Homestead Act of 1872, veterans of the Union Army were accorded certain benefits,⁷⁴

⁷⁰ARGLO 1867, 83-84; CGLO to R&R, Junction City, Kans., August 8, 1867, GLO, Div. "C," LS R&Rs, RG 49.

⁷¹The Land Department first held that the heirs of a homestead entryman had to both live on and cultivate the claim in order to prove up, but in 1875 the rule was changed, except in the matter of commutation, so that one needed only to cultivate the entry to prove up. Sparks tried to require both residence and cultivation in 1886, but his rulings were overturned by the Department of the Interior. See CGLO to R&R, Minneapolis, September 2, 1864, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Ionia, Mich., August 28, 1867, *ibid.*; CGLO to R&R, Lincoln, Neb., August 22, 1871, *ibid.*; CGLO to R&R, Springfield, Mo., March 31, 1873, *ibid.*; *Dormane v. Towers*, 2 CLO 131 (1875); ARGLO 1877, 44; *Tauer v. The Heirs of Walter A. Mann*, 4 LD 433 (1886); *W.D. Evans*, 13 LD 40 (1886); *Edna Sagstad*, 13 CLO 78 (1886); and ARGLO 1886, 198; *Skiddie v. Cook*, 7 LD 309 (1888); *Heirs of Stevenson v. Cunningham*, 32 LD 650 (1904); *Hon v. Martinas*, 41 LD 119 (1912); and *Heirs of Daniel Mahoney*, 47 LD 44 (1919).

⁷²CGLO to R&R, Beatrice, Neb., April 13, 1870, GLO, Div. "C," LS R&Rs, RG 49; ARGLO 1875, 88; *Adolphine Hedenskay*, 2 CLO 83 (1875); *F.M. Heath*, 10 CLO 90 (1884); ARGLO 1894, 123; *Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries*, 44 LD 91, 98 (1915); *Information for Prospective Homesteaders* [Circular No. 1264], 54 ID 127-28 (1932); and 43 CFR 2511.1(d) (1976).

⁷³*Entries—Widow as Legal Representative*, 2 LD 169 (1883); *Dullivan v. Snyder*, 5 LD 184 (1886). ARGLO 1892, 72; and *Martha E. White*, 23 LD 52 (1896).

⁷⁴Provisions of the 1872 law did not extend to single women who had served as nurses in Union hospitals. The same position was later taken regarding women who had served in the Spanish-American War. The contention was that women were not eligible because they were "disqualified to legally engage in the service of the United States as a 'private soldier, officer, seaman, or marine.'" It was not until World War I that women who served in the military were afforded the same rights as men, and only later was it held that married women could transfer their right to their husbands. See CGLO to Miss Annie D. Spencer, Au Sable, Mich., August 22, 1873, GLO, Div. "C," Misc. LS, M25; *Hallquist v. Cotton*, 35 LD 625 (1907); *Instructions*, 47 LD 128 (1919); *Regulations*, 49 LD 567, 569 (1923); Act of September 27, 1944 [58 Stat. 747]; and U.S. Department of the Interior, Administrative Decisions (unpublished), *Earl D. Deater v. John C. Slagle*, A-28121 (1960), 4 n. 3, U.S. Department of the Interior, Bureau of Land Management, Service Center Library, Denver.

including the privilege to subtract time equal to that of their enlistment from the five-year settlement period.⁷⁵ The privileges of the 1872 law descended to a veteran's widow,⁷⁶ as heir to her husband's entry, or, if he had not made one, to an entry made in her own right.⁷⁷ To be eligible to make an entry as the widow of a Union veteran,⁷⁸ a woman could not remarry by the time she made entry; otherwise the right went to the veteran's minor children.⁷⁹ The widow could, however, marry after she had made entry and still be entitled to deducting the time credit of her deceased husband.⁸⁰

A minor daughter, through her guardian, could also exercise the privilege if it were not used by her mother. At first the Land Department held that if she, too, married before making entry, she was not entitled to the benefits of the law,⁸¹ but that position was later reversed.⁸²

⁷⁵A soldier had to comply with the requirements of the Homestead Act for at least one year.

⁷⁶This law became widely abused at the turn of the century because in 1896 it was ruled that widows who made entry under the Soldiers and Sailors Homestead Act need not live on their homesteads to comply with the law. This prompted livestock companies to get veteran widows to make entries, for which they in turn would lease or obtain options to purchase the claims. In reaction, the Land Department reread the law and decided that residence was required of the widows and that the right was not transferable. See *Ella I. Dickey*, 22 LD 351 (1896); *Anna Bowes*, 32 LD 331 (1903); *Instructions*, 33 LD 84 (1904); and *Instructions*, 33 LD 126 (1904).

⁷⁷Act of June 8, 1872 (17 Stat. 333); and *ARGLO* 1872, 22-25. Widows of soldiers who served in the Indian Wars, Spanish-American War, Philippine insurrection, and World Wars I and II were afforded, under certain circumstances, the same privileges as Union veterans. See Act of March 1, 1901 (31 Stat. 847); Act of September 21, 1922 (42 Stat. 990); Act of March 3, 1933 (47 Stat. 1424); *Instructions*, 30 LD 623-25 (1901); *Circular*, 39 LD 291, 293 (1910); *Instructions*, 49 LD 357 (1922); *Circular*, 54 ID 199 (1933); and Act of September 27, 1944 (58 Stat. 747, 748).

⁷⁸A woman could not use the provisions of the law in the case of entry she made in her own right before her marriage. *ARGLO* 1874, 32-33; *L.J. Crans & Co.*, 1 CLO 35 (1874); and *Mary H. Beckwith*, 40 LD 350 (1911).

⁷⁹Act of June 8, 1872 (17 Stat. 333); *ARGLO* 1872, 22-25; *Cora E. Harper*, 2 LD 99 (1883); *Daniel Winter*, 12 CLO 36 (1885); *Mrs. Ella G. Willson*, 13 CLO 102 (1886); *Snow v. Dicken*, 33 LD 477 (1905); and *Circular*, 39 LD 291, 293 (1910).

⁸⁰*Elizabeth Porter*, 2 LD 179 (1880).

⁸¹*E.H. Crouse*, 7 CLO 24 (1880).

⁸²*ARGLO* 1881, 62.

LAND RIGHTS OF MARRIED WOMEN
WHOSE HUSBANDS DESERTED THEM

An issue more troubling than any other with which the Land Department had to grapple was the problem of wives whose husbands deserted their homestead entries and their families. Early in its administration of the Homestead Act, the General Land Office considered a deserted wife competent to make entry as a *femme sole*.⁸³ Such a woman, however, had to have been deserted by her husband. Leaving a husband without having obtained a divorce did not, in the minds of Land Department officials, make a woman a deserted woman.⁸⁴ A deserted woman also had to meet the eligibility requirements of being either twenty-one years of age or the head of a household. A woman in her minority who was not the head of family could not by law be allowed to make entry as a deserted wife.⁸⁵

Vexing for the Land Department was the problem of a man who had made a homestead entry and later deserted both it and his family. The situation was not uncommon, but determining the equities of a wife in the entry made by her husband proved to be one of the most difficult legal questions for Land Department officials in administering the Homestead Act.

When the General Land Office commissioner, James H. Edmunds, first addressed this issue in June 1864, he said the deserted wife would not be "interrupted in the possession of

⁸³ARGLO 1864, 10; CGLO to R&R, St. Cloud, Minn., August 10, 1868, GLO, Div. "C," LS R&Rs, RG 49; *Wakeman v. Bradley*, 2 CLO 162 (1876); U.S. Department of the Interior, General Land Office, *Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands and Under the Pre-emption, Homestead, and Other Laws*. Issued March 1, 1884 (Washington, 1884), 12; *Kamanski v. Riggs*, 9 LD 186 (1889); *Wilber v. Goode*, 10 LD 527 (1890); *Pawley v. Mackey*, 15 LD 596 (1892); U.S. Department of the Interior, General Land Office, *Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands and Under the Homestead, Desert Land, and Other Laws*. Issued July 11, 1899 (Washington, 1899), 12; *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 35 LD 187, 189 (1906); *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 48 LD 389, 392 (1922); and *Information for Prospective Homesteaders* [Circular No. 1264], 54 ID 127-28 (1932); and 43 CFR 2511.1(c) (1) [1976].

⁸⁴*Sarah Demmond*, CLL 1875: 261 (1871); *Allsop v. Dumas*, 2 LD 82-3 (1884); *Giblin v. Moeller's Heirs*, 6 LD 296 (1887); *Willard v. Hashman*, 18 CLO 196 (1891); *Brown v. Neville*, 14 LD 459 (1892); *Roberts v. Seymore*, 36 LD 258 (1908); "Anna Miner," First Assistant Secretary to CGLO, September 14, 1920, Department of the Interior, CCF 1907-1936, 10-6, Appeals-Settlement Cases, General, Part 758, RG 48; and *Rudolph Josef Fehnle*, 55 ID 471 (1936). For an exception to this general rule, see *Nolan v. Olson*, 43 LD 5 (1915).

⁸⁵CGLO to R&R, Jackson, Minn., July 22, 1872, GLO, Div. "C," LS R&Rs, RG 49; and *Vivian Anderson Pace Feemster*, 41 LD 509 (1912).

the lands" entered if she continued to comply with the requirements of law, and that, after five years, if she offered satisfactory proof, she would, as a deserted wife, be "entitled to the advantages which the equities of the case will allow." What those equities were could not be determined until the case was brought before the General Land Office for adjudication.⁸⁶

Edmunds soon spelled out what equities a deserted wife had in her husband's entry. As long as the entry was in the husband's name, the entry had to continue in his name only, but if the wife could show that she had been deserted, as the "defacto [head] of the family" she could make entry for the land in her name after his entry had been canceled for abandonment.⁸⁷

The husband's interest in his entry had to be protected, however, and the General Land Office therefore required that he be notified, either through personal service or advertisement in the newspapers, of his wife's contest against his entry for abandonment. This afforded him an opportunity to protect his entry, provided he could be found.⁸⁸

Such protection of the husband's interests was justified, for not all women claiming to be deserted wives had been abandoned by their husbands. Mary Davis is a case in point. Her husband, an itinerant music teacher, left to make money for the improvement of the family's homestead claim. In his absence, Mary Davis took up with another man, secured cancellation of the husband's entry for abandonment, and made entry for the land in her own name. On discovering the fraud, the General Land Office canceled her entry and reinstated her husband's.⁸⁹

Cancellation of the husband's entry did not necessarily secure a deserted wife her husband's entry. Under the law, she had to be the first legal applicant after the cancellation of her husband's entry to be assured of getting the land.⁹⁰ Perhaps

⁸⁶CGLO to R&R, Ionia, Mich., June 21, 1864, GLO, Div. "C," LS R&Rs, RG 49.

⁸⁷CGLO to R&R, Brownville, Nebraska Territory, September 19, 1864, *ibid.*; *ARGLO* 1868, 99; CGLO to Senator T.W. Terry, April 19, 1871, GLO, Division "C," LS Congress, 1868-1888, RG 49.

⁸⁸CGLO to R&R, Brownville, Nebraska Territory, September 19, 1864, GLO, Div. "C," LS R&Rs, RG 49.

⁸⁹CGLO to R&R, Sioux Falls, Iowa, September 6, 1873, *ibid.*; and CGLO to R&R, Sioux City, Iowa, April 7, 1874, *ibid.*

⁹⁰Before 1870, the General Land Office conceded to deserted wives the right to make entry for the tract at issue before anyone else, but the general Land Department rule of the time was that land embraced in a relinquished or canceled entry could not be entered by another party until the General Land Office had formally voided the entry, after which the tract was open to whoever made entry first. A preference right was not given to successful contestants of homestead entries until the Act of May 14, 1880. See CGLO to

most disheartening to many women was that none of the time during which they lived on and cultivated the land held under their husband's entry could be credited to them. Their five years of residence and cultivation began with their entry under the law.⁹¹

The situation prompted Commissioner Willis Drummond to suggest remedial legislation that would allow a deserted wife to prove up her husband's entry in her own name upon proof of her compliance with the law.⁹² A general homestead reform bill introduced in 1874 provided for such relief, and the General Land Office had great hopes the measure would be enacted, but Congress failed to pass it.⁹³

The interests of deserted wives were seriously jeopardized the following year by a ruling the commissioner of the General Land Office, Samuel Burdett, rendered. Reviewing the case of a deserted woman who had contested her husband's entry, Burdett held that the practice of allowing a deserted wife to contest her husband's entry for abandonment and then making entry in her own name was a "violation of the fundamental principles governing the relation of husband and wife in the matter of property rights." The commissioner ordered the practice to stop.⁹⁴

Burdett's successor, J.A. Williamson, asked Congress in 1876 to consider again remedial legislation that would allow a deserted wife to prove up her husband's entry in her own name.⁹⁵ Congress did not act on the recommendation, but that did not deter Williamson from finding some way of providing relief to the deserted wives of homesteaders. His solution was the Board of Equitable Adjudication.

The board, which consisted of the attorney-general, the secretary of the interior, and the commissioner of the General Land Office, had been created by Congress to deal with land entry cases that, because of some technical deficiency resulting

R&R, Falls St. Croix, Wis., August 3, 1869, GLO, Div. "C," LS R&Rs, RG 49; CGLO to R&R, Jackson, Minn., April 11, 1870, *ibid.*; CGLO to R&R, Bayfield, Wis., August 30, 1869, *ibid.*; *ARGLO* 1871, 31; and Act of May 14, 1880 [21 Stat. 140].

⁹¹CGLO to R&R, West Point, Neb., June 1, 1871, GLO, Div. "C," LS R&Rs, RG 49; *ARGLO* 1871, 31, *Larsen v. Pechierer et al.*, 9 CLO 97, 98 (1882); and *Bray v. Colby*, 2 LD 78, 82 (1884).

⁹²*ARGLO* 1871, 31.

⁹³U.S. Congress, House, Committee on Public Lands *Homesteads to Actual Settlers*, House Report 41, 43d Cong., 1st sess., 1874 (Serial 1623), 4; and CGLO to R&R, Topeka, Kans., February 4, 1874, GLO, Div. "C," LS R&Rs, RG 49.

⁹⁴*Mrs. Keziah Card*, 2 CLO 50 (1875); and *ARGLO* 1875, 87.

⁹⁵*ARGLO* 1876, 18.

from the actions of local land office officials or excusable neglect on the part of a claimant, could not pass to patent. Such cases were to be "decided upon principles of equity and justice," but cases that involved the rights of another claimant or that had an adverse claimant for the land at issue could not be brought before the board.⁹⁶

In 1877, Williamson got the board to adopt a rule that provided that "in all homestead entries where the husband had deserted the wife and children, if he have any, who have in good faith complied with the homestead law by residence upon and cultivation of the land, and final proof shall be made by the wife, or in case of her death by her heirs or their legal guardians, such entry shall be confirmed and patent shall issue to the parties entitled thereto."⁹⁷ This new rule, Rule 27,⁹⁸ was soon used to provide relief to a number of deserted women.⁹⁹ It also went further than curing a "technical defect" as to compliance with the provisions of the Homestead Act. It not only gave a deserted wife a "right" not conceded to her by law, but took away a husband's entry without affording him due process.¹⁰⁰

Secretary of the Interior Henry Teller recognized that fact in 1884. In the case of *Bray v. Colby*, he announced that, by law, "a deserted wife cannot make final proof or obtain patent in her own right by virtue of her husband's entry." He thus established new rules by which the interests of deserted women would be judged.

Teller first instructed that when an entryman had established residence and placed his wife on it, no one but the wife could be heard as to the allegation of his change of residence or abandonment of the entry. The deserted wife, if she should so choose, could then wait until her husband's proof

⁹⁶R.S. 2450-2457; *Suspended Entries: Rules and Regulations*, 4 CLO 52 (1877); McClintock, "Administrative Determinations," 430-31; and George L. Anderson, "The Board of Equitable Adjudication, 1846-1930," *Agricultural History* 29 (April 1955), 65-72.

⁹⁷*Suspended Entries: Rules and Regulations*, 4 CLO 52, 54 (1877).

⁹⁸The General Land Office did not give up on the idea of congressional relief after the adoption of the Board of Equitable Adjudication rule, but Congress again failed to pass the needed measure. See *Thompson v. Anderson*, 6 CLO 125 (1878).

⁹⁹In the General Land Office reports from 1878 to 1881, cases submitted to the Board of Equitable Adjudication are listed. Thirty-three cases were submitted for relief under Rule 27. All but one of those cases was confirmed by the board. See *ARGLO* 1878, 186-201; *ARGLO* 1879, 260-88; *ARGLO* 1880, 238-58; *ARGLO* 1881, 78-94. Also see *Thompson v. Anderson*, 6 CLO 125 (1878); *Bray v. Colby*, 9 CLO 116 (1882); and *Erik Thorsen Smithbak*, 10 CLO 92 (1883).

¹⁰⁰McClintock, "Administrative Determinations," 431.

was due and make proof for him as his agent. In that case, however, patent would issue in his name. Or a deserted woman could, during the life of the entry, allege her husband's abandonment. If she were successful, the husband's entry would be canceled and woman could make an entry as head of family or a *femme sole*.¹⁰¹

The basic rules laid out in the *Bray v. Colby* decision,¹⁰² along with the eventual ruling that a deserted wife could be credited for the time she spent on her husband's homestead before its cancellation and her own entry under the law,¹⁰³ remained in place for thirty years,¹⁰⁴ until, in 1914, Congress finally enacted legislation that gave better protection to the interests of deserted wives in their husbands' homestead entries.

The new legislation had been spurred by the register and the receiver at the Sacramento Land Office. In a letter to Congressman John Raker, these men addressed the issues on the rules in *Bray v. Colby* that worked an injustice on many women and their families.¹⁰⁵ A deserted woman, the two men explained, had the "exclusive right to contest [her husband's] abandonment. . . . But our experience has been that the majority of the deserted wives of entrymen are very poor and unable to defray the expense of contesting their husband's [*sic*] entry." Furthermore, even if a cancellation of the entry were secured, "many of these poor unfortunate women, some of whom have families

¹⁰¹*Bray v. Colby*, 2 LD 78 (1884).

¹⁰²*Mary Lewis*, 3 LD 187 (1884); *Meese v. Meese*, 3 LD 191 (1884); *Anna Oleson*, 14 CLO 257 (1888); *Tyler v. Emde*, 12 LD 94 (1891); *Havel v. Havel*, 12 LD 320 (1891); *O'Conner v. Stewart*, 15 LD 555 (1892); *Doyle v. Bender*, 24 LD 535 (1897); *Sinnett v. Cheek*, 28 LD 20 (1899); *Elliott v. Sears*, 28 LD 143, 146-47 (1899); *Herwig v. Cooper*, 28 LD 482 (1899); and *Inman v. McCain*, 42 LD 507 (1913).

¹⁰³After *Bray v. Colby*, the Land Department adopted the rule that a deserted woman could date her settlement to the date her husband had left her. In 1894 the rule was modified so that she could take date her settlement from the time she established residence on her husband's entry. See *Eliza A. Woodward*, 15 CLO 197 (1888), and *ARGLO* 1893, 91; *Maggie Adams*, 19 LD 242 (1894); *Jennie W. Lindsey*, 24 LD 557 (1897); *Elliott v. Sears*, 28 LD 143, 146-47 (1899); *Inman v. McCain*, 42 LD 507 (1913).

¹⁰⁴*Eliza A. Woodward*, 15 CLO 197 (1888); *Gates v. Gates*, 7 LD 35, 37-38 (1888); *Thrasher v. Mahoney*, 8 LD 626, 629 (1889); *Maggie Adams*, 19 LD 242 (1894); *Crosby v. Thompson*, 21 LD 152, 153 (1895); *Sugden v. Himsworth*, 22 LD 356, 359-60 (1896); *Jennie W. Lindsey*, 24 LD 557 (1897); *Massie v. Hamlet*, 28 LD 406, 411-12 (1899); *Elliott v. Sears*, 28 LD 143, 145, 146 (1899); *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 35 LD 187, 189 (1906); *Suggestions to Homesteaders and Other Persons Desiring to Make Homestead Entries*, 42 LD 35, 39 (1913).

¹⁰⁵R&R, Sacramento Land Office to Congressman John E. Raker, April 29, 1914, DOI, CCF 1907-1936, Legislation, 2-19, Homestead Entries, pt. 3, RG 48.

to rear are unable to pay the filing fee" necessary to make entry in their own name.

If a woman decided to act as her husband's agent, patent would issue in his name. "That means," the officials stated, "title rests with him and he can sell [the] improvements over-head of [his] wife and children." They urged that Congress consider "a law allowing deserted wives, where everything else is legal and regular and who are entitled to make final proof as the agents of their derelict husbands, to secure title in their own names instead of in the names of their husbands." The Act of October 22, 1914, did this by permitting a deserted wife who could establish that she had been abandoned for more than one year the right to prove up her husband's homestead in her own name, applying his time on the entry to her benefit.¹⁰⁶

The act failed to resolve all the issues involving deserted wives, including the question of whether a deserted wife could deduct her husband's military credit from the entry. As we have seen, Union veterans, as well as men who had served in the Spanish-American War and World War I, were allowed to deduct their enlistment time from their residence on the homestead.¹⁰⁷ Early on, the Land Department denied deserted wives the use of their husbands' military credit.¹⁰⁸ When asked the question in late 1920, the General Land Office issued an opinion that the deserted wife of a homesteader could use the military credit for her own benefit. Questioning the soundness of his office's own judgment, the commissioner asked the secretary of the interior for his thoughts on the matter.¹⁰⁹ Answering for the department, First Assistant Secretary Edward Finney said that no such provision of law gave a deserted wife the right to take a husband's military credit.¹¹⁰ In 1925, however, Assistant Secretary John H. Edwards reversed that position. In overruling a decision by the General Land Office, Edwards saw "no reason why" a woman whose husband had deserted his homestead entry and his wife could not use his military credit.¹¹¹

This new ruling caused confusion in the General Land Office. In rendering it, Edwards had failed to address Finney's

¹⁰⁶Act of October 22, 1914 [38 Stat. 766].

¹⁰⁷At least one year's residence, however, was required. See Act of June 8, 1872 [17 Stat. 333]; Act of June 6, 1898 [30 Stat. 473]; and Act of February 25, 1919 [40 Stat. 1161].

¹⁰⁸CGLO to R&R, Topeka, Kans., February 4, 1874, GLO, Div. "C," LS R&Rs, RG 49; and *Keziah Card*, 2 CLO 50 (1875).

¹⁰⁹CGLO to Secretary of the Interior, April 16, 1921, DOI, CCF 1907-1936, GLO, 2-19 Homestead Entries, General, pt. 46, RG 48.

¹¹⁰First Assistant Secretary of the Interior to CGLO, April 20, 1921, *ibid*.

¹¹¹*Elizabeth J. Vaughn*, 51 LD 189 (1925).

1921 opinion, on which the General Land Office had based its decision. The General Land Office, therefore, asked the department to look at the issue again and to establish a "fixed rule."¹¹² After rereading the applicable laws, Finney concluded that if a man with a right to a military credit made an entry and then abandoned both entry and wife, the wife had the right to use his military credit. If, however, the deserted woman made entry in their own right as a single woman, she had no rights under the Act of October 21, 1914, and could not claim her husband's military credit.¹¹³

CONCLUSION

These are only a few of the more prominent problems facing the Land Department over the question of a woman's eligibility to make and to hold a homestead entry. The cases illustrate how seemingly straightforward issues often had numerous twists to them. For almost every "general" rule, there were exceptions, and the settling of one issue often embroiled department officials in new controversies.

In deciding these matters, the department strove to follow "the most liberal policy possible under the Homestead Act for the protection of bona fide settlers." At the same time, it was compelled by American jurisprudence not to "set aside, or overlook the requirements of the law . . . , but [to] administer the same impartially . . . as justice and facts may seem to warrant in view of [the act's] provisions."¹¹⁴ Finding that balance was seldom easy for the Land Department as it confronted the question of the eligibility of women to make entry under the provisions of the Homestead Act.¹¹⁵

¹¹²Assistant CGLO to Secretary of the Interior, February 18, 1927, DOI, CCF 1907-1936, GLO, 2-39, Circulars and Instructions, Homestead Entries—Final Proof, pt. 2, RG 48.

¹¹³*Instructions*, 52 LD 43 (1927).

¹¹⁴CGLO to Albert E. Johnson, Flint, Mich., November 4, 1864, GLO, Div. "C," Misc. LS, M25.

¹¹⁵A recent article analyzing Land Department decisions involving women reached some erroneous conclusions. In many cases involving women, gender had minimal bearing on the decisions. At issue were points of law and the rules and regulations of the Land Department, such as what constituted a bona fide settlement, sufficient cultivation, and good faith. Similar issues raised in cases involving men reached similar results. Another source of confusion comes from the cases selected in the article, which are not, as the author contends, rulings by the General Land Office, but opinions rendered by the Land Department in the Department of the Interior. See Nancy J. Taniguchi, "Land, Laws, and Women: Decisions of the General Land Office, 1881-1920, A Preliminary Report," *Great Plains Quarterly* 13 (Fall 1993), 223-36.



Hermione Kopp Brown

HERMIONE K. BROWN: AN ORAL HISTORY

Hermione Kopp was born in Syracuse, New York, in 1915. As a child she threw away her dolls, preferring to climb trees with her brother. Graduating from Wellesley College at the age of eighteen, she joined her family in California, where they were living, and worked at a Hollywood studio as a reader.

In 1937 she married Louis Brown. During the Second World War, the couple moved to Washington, D.C., where Hermione Brown began taking courses at George Washington Law School. Returning to California near the war's end, she obtained her law degree at the University of Southern California and joined the entertainment law firm founded by Martin Gang (now Gang, Tyre, Ramer & Brown).

This oral history interview was conducted by Carole Hicke on May 29, 1991, in Los Angeles. The portions excerpted include Brown's early career in the law, and her recollection of Martin Gang's efforts to help his movie industry clients charged by the House Un-American Activities Committee.

Hicke: Tell me about your decision to go to law school.

Brown: [When we moved to Washington, D.C., in 1942, I was married and had a baby.] I said, "Louis, I've got to do something. I can't take a government job, because they work from 9 A.M. to 6 P.M., and I can't leave the baby that much." He agreed. I have the best, the most supportive, husband in the world, because, way ahead of his time, he recognized that I would be a disaster if I stayed home, and that I should be out doing something.

I had to go to school. Well, what could I go to school and do? I looked at the catalogs, and the only thing between 10:00 and 12:00 in the morning during wartime—the men were all gone, and the schools were closing down their daytime classes because they had no students—so the only thing I found was that the law school at George Washington [University] still had classes between 10:00 and 12:00. So I enrolled in law school.

It was a backward learning experience, in the sense that the first course I took was called "Conflict of Laws," which is a senior course, a review of everything you've learned throughout

law school. But that's what they offered at 10 in the morning. I took whatever was offered, and they only would offer one [morning] course for all the students in the school, because there were so few of them.

The minute I went to law school, I said, "This is what I really want to do." I had found my *métier*.

Then in 1944 we moved back to Los Angeles, and I started in again at the University of Southern California. I would take two hours a day of classes and be home when the baby got up from the afternoon nap. I was pregnant again, so I went to law school until I was six or seven months pregnant, and in those days that was regarded with something akin to impropriety. I finally finished law school in 1947; my second child was a year and a half when I graduated.

Now I had met Martin Gang earlier, because my college roommate was his youngest sister. When I started to talk about going to law school, during World War II, he said, "Hermione, if you ever want it, you've got a job here." Of course, that was quite an inducement in days when women were not offered professional jobs very readily.

The day I finished law school, I presented myself at his front door and said, "Here I am." And he said, "Sit down and draw a release."

I said, "What's a release?"

He said, "Just draw it."

I went to his secretary and said, "Pinky, what am I supposed to do now?"

She said, "I'll give you some forms." So I drew a release, and Martin said, "Fine, send it out."

I said, "Don't you want to read it?"

He said, "People who work here do their best work; they don't rely on me." That was the last instruction I ever got from him.

When I started to work, my husband at the time was a partner in a well-respected law firm on the west side of town. When they heard I was going to work for Mr. Gang, they got very excited and said, "She can't do that. We won't let her."

And Louis said, "What do you mean, you won't let her?"

They said, "We are all on the west side of town, and we are competitive with Mr. Gang's firm. There might be competition. It might be inconvenient. Besides, there is no confidentiality. How can you let her go to work for another firm?"

Well, they didn't offer me a job. Had they done so, I might have accepted it, because I hated to see him put in this position; but they weren't that smart, because no one would offer a woman a job in a private firm in those days. They didn't have women in the major law firms. So I said, "Well, Louis, what are

you going to do?" and my husband said, "I'm leaving there if they insist on that. I'm quitting."

So he called them in and he said, "Look, my wife is starting work next week. I just want you to know. If you don't like it, you tell me that you want me to resign and I will resign, but I don't want to hear any more about it." They had big caucuses and meetings, back and forth, and finally they said, "Yes, we think you should resign." So he left. He walked across the street to see Larry Irell, and Larry and Art Manella immediately hired him. He was the fourth person at Irell & Manella. It turned out to be the best thing that ever happened to him, because he was a partner there, and for twenty-five years worked there as a partner.

Hicke: Did you talk to any other firms?

Brown: No, I walked in here, and I said, "I'll leave at 5 o'clock every day, because I have two children at home." Of course, I have never yet left until 6:30. But Martin said, "We don't expect you to work late. We don't count hours; we count achievement."

Hicke: As a woman, did you have any sorts of difficulties with clients?

Brown: Not really. Martin was wonderful that way. When we had a new client, he would always have me in to the first meeting. He always praised me absolutely lavishly, far beyond my worth. He built me up to the client: "Don't call me, call her; she'll know all about it, and she'll discuss it with me if it's necessary." Pretty soon they were calling me. They had very little chance to object.

Hicke: Isn't it hard for a person to hand his clients off to someone else?

Brown: Martin didn't worry about losing clients.

Hicke: One of the things I particularly want to ask you about is people who have had influence on you.

Brown: Apart from my husband, who is a lawyer, and my brother, who was a lawyer, and my parents, of course, there is only one person that stands out, and that was Martin Gang. Martin is no longer practicing, but he was the senior partner in our firm from the day he founded it.

He went out on his own in 1931 in the middle of the Depression. As he tells it, he was working for [a prominent law firm] shortly before, and he was in the library working late. He heard a conference in the other room, [the head of the firm] and a client. He heard a buzzer and ran in very eagerly. "Martin, will

you go down to the corner and get a milkshake?" At that point, Martin left.

Hicke: Did he then become a solo practitioner?

Brown: He moved to Hollywood, opened an office in the Taft Building shared with somebody, and then he got enough practice to take over the office. Then five years later, my brother [Robert Kopp] came to work with him. They specialized in entertainment law. Then they engaged another fellow named Norman Tyre. I was the fourth person. We had three offices, two secretaries. When Milton Rudin came about nine months later, he and I had one office. When he talked on the phone, I was silent, and when I talked on the phone he was silent, and that's how we practiced until we finally got some more offices.

It's been a long, long career with these same people. The interesting thing about Martin was that he didn't want to grow big. He said, "I won't make more money; I won't be happier, and neither will you. Let's stay as small as we can." For years we stuck to four or five. Now we are up to fifteen, but he isn't around. The young people in the firm have picked up his philosophy. They don't want to grow big. They came to this firm because it is small.

Another thing Martin said, "I don't want associates. Everybody who works here has got to be a partner within a year or two, or they are no good. We don't have associates. That's not the way to live."

The third thing he said was, "I won't charge by the hour; I don't care about hours. If you know your business, you'll spend less hours, not more hours, so I'll charge by the job, not by the hour." He was an iconoclast, obviously. The other thing he said was, "When we get entertainment clientele, we've got to choose good ones. If they're successful, we'll be successful." And that was Martin. So he did associate with some of the most important personalities in Hollywood. He particularly loved writers and directors. He encouraged them.

This was a little man. You have to understand, Martin was five-foot-six, sandy-haired, lisped when he talked, had no oratorical manner, spoke so fast that the courthouse stenographers always said, "Slow down, Mr. Gang, I can't keep up with you." He had a wonderful wit. He had a great love of people, so that he never met a person he didn't like. He always found something that he liked about them. He'd say, "He's a terrible lawyer; isn't he charming?"

What I wanted to tell you about him, because it's the most important thing in his career, was about the Hollywood Un-American Activities Committee investigations. I always feel Martin has been badly maligned in that. In the last movie,

Guilty by Suspicion, he is portrayed as sort of a shyster, someone who is pushing these people. Martin never pushed anyone to do anything they didn't want to do. The way he got involved in this was that clients came to him, like Sterling Hayden, the first who came to him and said, "Martin, *do something*. Get me out of this; work with me."

Martin, being a very good lawyer, said, "Sure, I'll do what I can. I don't think you will win on a Fifth Amendment defense, and if I put that defense up, you will go to jail. Do you want to do that?" That was his approach to each client.

After many of these clients came to him, he then developed a rapport with an investigator for the House Un-American Activities Committee, and he got to see the files. He did what a good lawyer would do to protect a client. At the beginning, when Dalton Trumbo was first fired, he came to Martin, and we prepared a complaint for breach of contract, on the ground that the producer had no right to fire him. We thought he had a terrific case, because there was no morals clause in his contract. Every other person in Hollywood had a morals clause in his contract. He did not, and therefore there was no basis for this action. He had not been convicted of a crime, he hadn't been accused of a crime, he had done all of his work promptly and efficiently, he was a good writer.

We prepared the lawsuit and sent it over to him. He came in a few days later and said, "I'm sorry, the group [of actors and screenwriters] feels I shouldn't take this position. They all have morals clauses, and if you win this case on the absence of a morals clause, the group feels that that would weaken their position, so I have to get another lawyer."

Martin said, "Go. You won't win; you're weakening your position, but if that's your theoretical approach to life, be my guest."

Martin got involved by having done something for one client. Hollywood is a small town in terms of the number of lawyers and the positions they take; rumor gets around, even today. Pretty soon, everybody who wanted to get "cleared" so they could work, and who really wasn't a member of the [Communist] party, or had been but hadn't been active in ten or fifteen years, or had contributed during World War II when Russia was our ally and the party was a legal party in this country, all these people came to Martin, one after another. He took each one on and did the best he could for each of them. He has been accused of masterminding the sellout of all these people. He didn't mastermind a thing, except how to help his clients.

The Rand Corporation came to him in about 1952 or '53 and put him on retainer to get "Q" clearances, which were restricted clearances, for all of their personnel, because the army,

under the prodding of Senator [Joseph] McCarthy, was revoking the clearances for all of the people—one after another—of the scientists and engineers and mathematicians at the Rand Corporation. Martin was able to get almost all of them cleared. Now I feel that people portrayed him as sort of a Judas Iscariot, when all he was doing was what was best for each client.

Hicke: Tell me about some of your most interesting cases.

Brown: I didn't work on cases mostly; I worked on a long, long pull with each of our clients. But one day [in the early 1960s], Barbara Schlei, who was then the head of the local Equal Employment Opportunity Commission, called up: "Hermione, I want you to take a pro bono case."

I said, "What is it? You know I'm not a litigator."

She said, "I want a good firm for this case; it's very important."

So she came out, and Frank Wells [a young partner in the firm] and I listened to her story. She said, "We've got a lady who wants to be a stationmaster for the Southern Pacific Railroad in one of the little desert stations near Palm Springs. For years she has been turned down on the ground that the state law prohibits women from lifting more than twenty-five pounds, or from working more than forty-eight hours a week," or something like that. Apparently during melon season, at this station, they worked round the clock, loading melons onto these boxcars, and clamping the cars together so they could be hauled off. That was the business of this station.

She had the seniority, and she was in line for this job. If she'd been a man, there would have been no problem, but the Southern Pacific refused to hire her on the ground that it would violate state law. She wanted it, because the overtime for working round the clock was very good. The union refused to support her. The union was male-dominated, and they had urged Southern Pacific not to let her have this job.

She turned out to be a lady of about five feet, two inches. She had twelve children. She said it [the job] was nothing at all. "I haul watermelons around the farm all day long carrying a couple of kids in my arms. I can handle this job." So we said we would take it on condition that we could take it only through summary judgment. If we couldn't get summary judgment, we would not handle the trial. We were not set up to gather evidence, to go out and interview all the farmhands up and down the valley, and so on.

Frank did most of the work. I worked with him on the briefs and assembling it. My husband worked on certain aspects of it. We dragged in everybody we could, because it was just fascinating.

We were very lucky; the judge turned out to be very sympathetic to her—he thought the union was just dreadful. He said, “You haven’t represented this woman; how can you *claim* to think you’ve represented this woman?”

Anyway, we won the motion for summary judgment and the result of it was that the state changed the regulations. There are no longer male-oriented rules and female-oriented rules; there are single-sex rules. You may not work more than X hours a week, except under certain circumstances, but it’s the same for male and female.

Hicke: What’s the name of the case?

Brown: The case was called *Rosenfeld v. Southern Pacific* (519 F. 2d 527 [9th Cir. 1975]; 444 F. 2d 1219 [9th Cir. 1971]; 293 F. Supp. 1219 [C.D. Cal. 1968]). That case went up on appeal to the Ninth Circuit. It was sent back for a rehearing. The union was dismissed out of the case, because it hadn’t really done anything. It went up again, on appeal, was sent back again, and affirmed.

That was the most dramatic case that I was personally involved with, because basically what I do is not litigation, but estate planning or probate work.

BOOK REVIEWS

Carol Weiss King: Human Rights Lawyer, 1895-1920, by Ann Fagan Ginger. Niwot, Colo.: University Press of Colorado, 1993; 420 pp., illustrations, notes, bibliography, index; \$27.50, cloth.

Carol Weiss King was the youngest child of Samuel Weiss, a successful corporate lawyer in New York, and his wife, Carrie Stix Weiss. Her upbringing in this privileged, liberal, intellectual family was to shape her professional career. When she graduated in law from New York University in 1921, she began her practice by renting a room in the suite of Hale, Nelles and Shorr, a firm that was beginning to establish a reputation as a defender of the constitutional rights of the Left. An inheritance from her father tided her over until her practice could sustain her financially, as it marginally did most of her life. As Ann Fagan Ginger notes in her biography, King's economic privilege granted her, despite her gender, a room of her own. King remained a solo practitioner until 1948, when she founded King and Freedman, a two-woman firm.

In the intervening years, she had gained a national reputation as an eminent immigration lawyer. Practicing in every legal forum from administrative deportation hearings on Ellis Island to the United States Supreme Court, she represented the unknown, the notable, and the notorious. Her clients included Harry Bridges, president of the International Longshoremen's and Warehousemen's Union; Earl Browder, general secretary of the Communist party in the United States; and William Schneiderman, head of the Communist party in California. (While many of her clients belonged to the Communist party, she did not.) Throughout her career, she fought to ensure that constitutional due process was carried out in deportation proceedings.

King's influence extended beyond protecting individuals against deportation. As the editor and co-editor of bulletins for the International Juridical Association and the American Civil Liberties Union respectively, both of which collected and described administrative and state and federal cases relating to immigration law and constitutional rights, she helped turn isolated cases into a body of law. Intellectually, she was selfless, willingly sharing her theories and legal citations with

other lawyers and civil liberties activists while never claiming the spotlight.

Throughout her life, King flouted convention. She attended only minimally to her appearance; smoked, drank, and swore; and talked and laughed too loudly for a "lady." Ginger uses extensive quotations from King's private correspondence, coupled with the images others had of her, to capture the fullness of her life. But her book has a broader significance than telling the personal and professional life story of one woman lawyer. She charts the consistent connections between war, economic hard times, and the violation of constitutional liberties in America, and documents the unremitting hostility of many Americans to immigrants, the shameful role of the federal government in aiding American businesses to resist labor reform, and the tenuous commitment of Americans to the basic guarantees of the Bill of Rights.

However, Ginger does not make the reader's task easy. Her commitment to chronology continually forces the reader to jump from the personal to the professional, from one side of the globe to the next, and from one individual's crisis to a significant Supreme Court pronouncement. This results in a hectic account. One can only be thankful for the excellent index. Moreover, the author largely ignores historical causation. While noting that there was a war on, or a depression, or a cold war, she fails to assess the national mood that contributed to the human rights violations she so carefully documents. For those interested in preventing or curbing human rights abuses, it seems as essential to understand the factors leading to intolerance as to document the historical record of intolerance itself.

These criticisms are offered to prepare the reader for Ginger's biography of Carol Weiss King. King was a remarkable woman who grappled with the tensions between home and profession, raising her young son after her husband's early death; who committed her life to defending the Bill of Rights; and who remembered always that those she represented were individuals with real lives. She provides an example well worth emulating, and certainly worth getting to know.

Barbara Y. Welke
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Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890, edited by Virginia G. Drachman. Ann Arbor: University of Michigan Press, 1993; 290 pp., illustrations, index; \$49.50, cloth.

Virginia Drachman has done a great service to the legal and academic communities by publishing this compilation of letters exchanged by a group of women lawyers in the early years of their entrance into the profession. The Equity Club was begun in 1886 by a group of women graduates of the Law School of the University of Michigan to provide "mutual endorsement and support" as they embarked on their professional careers (p. 63). They were among the first generation of women lawyers in the United States, and it must have been a lonely place. In 1880 there were only seventy-five women lawyers in the country; by 1890 the number was still only 208. It is no wonder that the thirty-two women who were members of the Equity Club during the three years of its existence (about a third of them University of Michigan graduates) would "wish to clasp the hand and look into the eyes of someone who could understand, without a word, that isolated *Ergo*" shared only by others "impelled . . . to choose new paths" for themselves (p. 62).

Scattered throughout the country as they were, these professional women could more easily share such moments through a written medium. The Equity Club—the name chosen as a reflection of the more favorable position for women before the law of equity than before the common law—was a correspondence club, each of whose members agreed to write a yearly letter that would be circulated among the others. The letters that were exchanged provide a wonderfully intimate glimpse of what it was like for women lawyers in the early years—how they were received, what they did, what they cared about.

One of the startling aspects of these letters is the degree to which the concerns of women lawyers in the 1880s parallel the concerns of women lawyers in the 1990s, despite the differences in historical context. The Equity Club members discussed whether they would be better off focusing on "office work" or litigation, whether they should devote precious professional time to working for charitable and reformist ends, how to dress for courtroom appearances, and how to balance family and career. They debated the broader question of whether women lawyers should think of themselves as different or "simply be *lawyers*, and recognize no distinction . . . between [themselves] and the other members of the bar" (p. 66). The specifics, of course, are quite different from those of today: the debate about dress revolved around whether to wear a hat in the courtroom, for example, and the discussion of combining

family and career included responses to then current opinions doubting the physical capability of women for intensive intellectual labor. The letters give the reader a sense of the vast social changes since then; nonetheless, the conversation is remarkably familiar.

Drachman provides the reader with some historical context from her own observant reading of the letters. In her introduction, she gives a brief history of the entrance of women into the legal academy, particularly at the University of Michigan, and a portrait of the kinds of issues the women discuss in their letters. (In other articles deriving from her study of the Equity Club letters, she has further explored the challenge of entering such a "male domain" and the difficulties of combining career and marriage for women lawyers.*) She focuses perhaps a bit too much on the contents of the letters themselves, and might profitably have offered a more extensive discussion of the broader historical issues and a reference to related work on the history of women of that time, but, after all, the letters largely speak for themselves.

The book concludes with brief synopses of the lives and careers of the thirty-two members of the Equity Club. While some of them led private lives and were essentially unknown outside their small circle, many were remarkably active in political and social organizing. Perhaps that should not be surprising in the first generation of women lawyers, many of whom had to fight even to be admitted to the bar in their jurisdictions. These were exceptional women, and we should be grateful to Virginia Drachman for introducing them to us.

Carol Chomsky
University of Minnesota Law School

Feminist Legal Theory: Foundations, edited by D. Kelly Weisberg. Philadelphia: Temple University Press, 1993; 620 pp., table of cases, index; \$59.95, cloth, \$24.95, paper.

Within the last two years, the range of materials available for teaching courses and seminars on feminism and the law has grown considerably. Despite the explosion of feminist articles in law journals, until recently there was a paucity of suitable

*See especially "Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America," *Michigan Law Review* 88 (1990), 2414; "'My Partner' in Law and Life: Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America," *Law and Social Inquiry* 14 (1989), 221; "Entering the Male Domain: Women Lawyers in the Courtroom in Modern American History," *Massachusetts Law Review* 77 (1992), 44.

"new-generation" classroom texts. The casebooks of the 1970s and 1980s were all organized around the model of case analysis involving claims of gender-based discrimination in particular contexts. The emphasis was on legal doctrine, with only a light touch of theory.

With four new casebooks on "gender and the law" and four new anthologies on feminist legal theory, the field seems finally to have emerged from the outer margins of the curriculum, from photocopied course packets and supplemental readings to a more permanent place in the law school classroom.* This new generation of texts reaches beyond women's traditional concerns—family law, employment discrimination, equal protection, reproduction freedom—to confront broad practical and theoretical questions within the entire legal domain. The texts signal that a core feminist curriculum is being developed in the law that resembles the core curriculum constructed more than a decade ago in women's studies. The important substantive issues can be covered in a basic introduction course, leading to deeper study of feminist theoretical approaches in advanced offerings. The casebooks are designed for the basic course; the anthologies work better for an advanced course or seminar.

Feminist Legal Theory: Foundations, edited by D. Kelly Weisberg, serves as a good primary text for a course in feminist legal theory. The thirty-eight selections are well chosen and contain no surprises: almost all the essays in the volume have already attained "classic" status in this new field. The anthology includes a nice representative mix of the various schools of feminist thought. There are liberal feminist articles by Wendy Williams and Herma Hill Kay, a heavy dose of Catharine MacKinnon to introduce students to radical feminist thought, excerpts from Robin West and Leslie Bender for exposure to cultural (or relational) feminism, and post-modernist essays by Patricia Williams and Claire Dalton.

Weisberg is particularly adept at developing three critical themes that have figured prominently within contemporary feminist legal scholarship. The introductory notes to the three

*The four new casebooks are: Katherine T. Bartlett, *Gender and Law: Theory, Doctrine, Commentary* (New York, 1993); Mary Becker, Cynthia Grant Bowman, and Morrison Torrey, *Feminist Jurisprudence: Taking Women Seriously* (St. Paul, 1994); Mary Louise Fellows and Beverly Balos, *Law and Violence Against Women* (Durham, N.C., 1994); Mary Jo Frug, *Women and the Law* (Westbury, N.Y., 1992). The four new anthologies are: Katherine T. Bartlett and Rosanne Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder, Colo., 1991); Martha Albertson Fineman and Nancy Sweet Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (London, 1991); Patricia Smith, ed., *Feminist Jurisprudence* (Oxford, 1993); D. Kelly Weisberg, ed., *Feminist Legal Theory: Foundations* (Philadelphia, 1993).

internal chapters of the anthology offer lucid explanations of the "special treatment/equal treatment" debate over pregnancy leaves in the workplace; feminist responses to the "critique of rights" and the effort to reclaim rights discourse as part of a feminist strategy to transform law; and the internal struggle against "essentialism" led by women of color and lesbian scholars to expose and eliminate implicit biases and exclusions within feminist theory. These chapters should prove useful for scholars in disciplines outside the law, since they capture the preoccupations of legal feminists and demonstrate the intensity with which feminist legal scholars set about using theory to produce short-term and long-term social change. As lawyers, feminist legal theorists seem to have an unusual commitment to the practical: they demand that their theories work.

Weisberg's anthology discusses and presents several of the methodological approaches used by feminist legal scholars, including personal narratives by Marie Ashe and Patricia Williams. The editor's own chapter notes draw useful connections between legal feminism and allied intellectual movements—critical legal studies, post-modernism, and qualitative and interpretive research in the social sciences. The anthology is sufficiently interdisciplinary to be a good choice for a non-law seminar, an interdisciplinary workshop, or an enrichment course for judges or practitioners.

However, the book is not one-stop shopping for a course in feminist legal theory. Unfortunately, some of the selections are too heavily edited. Weisberg succumbs to the temptation to edit out many of the examples in the essays that are used to illustrate abstract theoretical points. I was disappointed that only the critique-of-rights portion of Frances Olsen's extraordinary article on statutory rape appears in the short excerpt; the application of her critique to statutory rape laws is deleted. Because it is always such a challenge to make feminist theory concrete for students and other readers without an extensive background in feminist or critical theory, it seems unwise to delete helpful illustrations in order to include a few more essays.

There is still a need to read whole texts, I believe, to gain a fluency in the subject. This year I assigned four books in my feminist legal theory course to supplement the anthology, and I set aside several weeks for substantive legal topics to give the class a chance to apply the theory we had studied. One great benefit of Weisberg's anthology is that it enables the instructor to make innovations to the feminist legal course without having to devise a complete set of class materials.

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Prisoner for Polygamy: The Memoirs and Letters of Rudger Clawson at the Utah Territorial Penitentiary, 1884-1887, edited by Stan Larson. Champaign, Ill.: University of Illinois Press, 1993; 256 pp., illustrations, appendices, bibliography, index; \$29.95, cloth.

In the 1880s, Rudger Clawson (1857-1943) was a leading official in the Church of Jesus Christ of Latter Day Saints in Salt Lake City. After settling in the Utah Territory in the 1840s, many orthodox Mormons, Clawson included, followed the lead of their founder, Joseph Smith, in practicing plural marriage. The United States, its collective morality affronted and a pretext for legitimizing anti-Mormon sentiment arising, passed the Morrill Antbigamy Act in 1862, outlawing bigamy and invalidating Utah's laws that both protected the practice and incorporated the Mormon church. In the face of Mormon deviance, in 1882 Congress subsequently passed the Edmunds Act (expanded by the Edmunds-Tucker Act in 1887), criminalizing unlawful cohabitation and revoking the civil rights of convicted polygamists.

Found guilty of unlawful cohabitation and of polygamy in 1884 and sentenced to three years in prison, Clawson became the first Mormon to be sentenced under the Edmunds Act. Approximately nine hundred other Mormon men followed him to prison between 1884 and 1890, most of them convicted of illegal cohabitation, the easier charge to prove in court. In September 1890, Mormon church officials desirous of Utah statehood renounced polygamy as an official church tenet. In 1893 President Benjamin Harrison declared amnesty to all polygamists, after which only a few were convicted and imprisoned.

Like many of his fellow prisoners, Clawson viewed his imprisonment as a form of political and religious protest and thus regarded himself as a political prisoner. While he was in prison, he kept an extensive diary and wrote numerous letters to his wife Lydia. (Clawson's other wife, Florence, divorced him while he was incarcerated. Told of his intention to take another wife when she had been married to him for only a few months and was already pregnant, Florence responded, "That's all right for you. Go ahead, but don't count on me!" [p. 4]) After his release Clawson wrote his memoirs, based on his prison diary, revising them several times. Stan Larson presents the various versions of the memoirs here, with critical emendations and a thorough annotation, as well as Clawson's prison letters to Lydia. He also includes an exhaustive list of all the Mormon polygamists in the Utah Penitentiary, an inventory of other polygamists' autobiographies and prison diaries, and a bibliography.

Clawson had an eye for detail, and the diary and memoirs—one of the few in published form for any territory or state from this period—offer valuable glimpses of daily life in a rough-and-tumble western territorial prison. Readers sense the monotony of the diet, the harsh disciplinary techniques (including the notorious sweat box), and the different prison hierarchies that developed. Clawson's bias against "gentiles" (non-Mormons) and African Americans, in particular, are especially revealing of the Mormon mentality, and, as Larson regretfully admits, "were probably shared by a majority of his fellow church members" (p. 23). It is difficult to determine whether these attitudes were a cause or an effect of decades of persecution—perhaps something of both. It should be remembered that Clawson viewed his imprisonment as a spiritual journey and trial by adversity, and embellished certain key events during later revisions; Larson notes that "Clawson is the hero throughout" and that his revisions demonstrate consistently his view of "the rightness of [his] position" (p. 23).

Prisoner for Polygamy represents much painstaking work by Larson. It will interest scholars in many fields—the history of polygamy, of the Mormon church, of the Utah Territory, and of imprisonment in the West. It also will appeal to those interested in autobiography as a literary genre, and the fashioning of a self-image over time.

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Family Law and the Pursuit of Intimacy, by Milton C. Regan, Jr. New York: New York University Press, 1993; 275 pp., notes, bibliography, index; \$40.00, cloth.

Social mores, psychology, philosophy, and the community's sense of morality all coalesce when rules of law are created; the rules of law, in turn, affect our behavior and self-definition. In an interdisciplinary effort, Milton C. Regan, Jr., in his book *Family Law and the Pursuit of Intimacy*, suggests that we in American society revise our approach to family law.

In order to support his suggestions, the author devotes the first half of his book to explaining how Americans have come to hold the beliefs that we do about familial obligations, and provides us with a fascinating history of American thought. Legal opinions play a minor role as he traces popular psychological and philosophical analyses of familial relationships and individual roles. The chapter on Victorian domestic rules—legal, social, moral, and religious—shows us how far we have

come, yet how close we remain to our great-grandparents. Proceeding through the book, readers may experience their own evolution of thought: in view of today's statistics on divorce and single mothers in poverty, the idea of societal intervention to prevent divorce seems oddly compelling, even if troublingly rigid. Why *not* have a waiting period before an adulterer or an abandoner can remarry?

The chapter on our current beliefs is written with disconcerting and illuminating distance. Regan's description of our pop-psych gospel reads like a history, and casts an uncomfortably bright light on the ramifications of our religions in this decade of self-actualization and self-determination.

Those of us who went through law school in the last fifteen years or so were raised on the Chicago school of freedom of contract. I found myself refreshed by the author's refusal to genuflect to the sanctity of contract as the prime directive in family law. While he advocates what Henry Maine would term a "return to status" in the governance of domestic relations, he does not call for a return to gender-bound Victoriana. But, like our ancestors, he refuses to shy away from words like duty, obligation, commitment, and trust.

Family Law and the Pursuit of Intimacy is highly readable. Regan uses a chatty, modern style, often interjecting the first person singular. He writes with caution, occasionally bordering on the apologetic, but is effective in forcing the reader to understand that he is seeking to create a new era, not return to an old one. The book is carefully researched, although I would have liked more detail in the notes. (I deplore the book's adoption of the anti-scholarly and mightily annoying practice of providing endnotes, rather than footnotes.)

This book jolts a reader into thought: What have we wrought, in the latter twentieth century, with our emphasis on freedom and our denigration of moral obligation? Regan provides a series of suggestions to improve on the future by borrowing from the past.

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Petticoats and Prejudice: Women and Law in Nineteenth Century Canada, by Constance Backhouse. Toronto: Women's Press, 1991; 480 pp., illustrations, index; \$24.95, paper.

Canadian legal history has come alive in the past twenty years. From a field sown with anecdotal and antiquarian descriptions of judges, lawyers, and courts, it has yielded a crop of

monographs and articles that explore diverse topics from a variety of viewpoints and relate legal development to its cultural contexts.

A leading contributor to this harvest is Constance Backhouse, who has worked tirelessly over some thirteen years to unearth and interpret the history of women and the law in Canada. After publishing a series of fine articles in legal and social history journals in the 1980s, she has written a book, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada*, one of the best researched and most engaging works on Canadian legal history to date.

Petticoats and Prejudice concentrates on women who were caught up, in one way or another, with the legal system. The author employs a technique that is increasingly common in feminist scholarship, allowing women's own voices to be heard (as far as that is possible) from the historical record. This mode of using storytelling as a means of relating history has obvious attractions because of the human interest it creates for the reader. Just as clearly, it contains potential dangers, in that in the wrong hands it can be used to idealize, or even romanticize, the historical record. Backhouse proceeds from an unashamedly feminist stance in explaining and interpreting women's place within the law and legal system, and her work is the result of painstaking and prodigious research, deftly woven in to provide a full sense of both context and change. As a result, her interpretation is highly persuasive.

Perhaps the most controversial part of *Petticoats and Prejudice* is the introductory chapter, in which Backhouse explains her choice of the women whose stories are told in terms of the "heroine," a word she uses "to describe many different kinds of women who showed resistance, courage, persistence, and fortitude in the face of oppression." This approach has been criticized for artificially elevating the lives of ordinary people. However, such criticism misses the point in that women were not simply victims, but were able in some instances to benefit from the law, in particular from reforms in it that took place in the nineteenth century. In some circumstances they were able, by their resistance to the law and its patriarchal assumptions, to produce legal, institutional, and social change. Backhouse does not idealize the lives of the women whose stories she treats, but is more than ready to recognize their human qualities and frailties.

The book ranges widely over aspects of the law that most closely affected women—marriage, seduction, rape, infanticide, abortion, divorce and separation, child custody, prostitution, protective labor legislation, and entry to the legal profession. By using the encounters of various women with the legal system,

the author demonstrates how the law evolved in the nineteenth century, largely because of the pressure for reform.

The extent to which the law developed to take women's interests into account depended in part on the class, ethnic group, and financial means of the woman in question. In the formalization of marriage, Backhouse shows how, as the nineteenth century wore on, Canada's legal system became increasingly intolerant of customary forms of marriage for Euro-Canadian men, in particular with women from different racial backgrounds. Her analysis of the law relating to seduction indicates that, in civil actions, the interests of the women in question were secondary to those of their fathers and husbands and that, with few exceptions, this remained the case until the turn of the century. It was also an area of law where judicial and lay opinion came into conflict, with trial juries finding regularly for the wronged menfolk, and appellate courts often overturning those decisions. When reformers turned their attention to the protection of women, as they did in the campaign for the criminalization of seduction toward the end of the century, reformist idealism outstripped the zeal of law enforcement authorities, and little protection was in fact afforded.

Backhouse uses cases of rape as the most blatant examples of judicial reaction to any recognition of women's rights. Here, in the context of the Sayer Street Outrage in Toronto in 1858, the author shows clearly how the stereotypical attitudes of judges, jurors, and lawyers harmed two victims of gang rape, Ellen Rogers and Mary Hunt. Their complaints against their attackers were denied, because of their "dubious character" as prostitutes. No calumny was attached to the young men in question, who had friends and family to vouch for their good character. By contrast, in the case of Euphemia Rabbit, a married woman who killed an assailant of notoriously bad character who had tried to rape her, Backhouse shows that the woman's good character caused the law to assume a benign countenance. Rabbit was acquitted.

In examining infanticide, the author demonstrates that patriarchal societies are capable of generosity toward those who transgress the code of sexual morality. Using the cases of Angélique Pilote, who was saved from the gallows by executive clemency in the early part of the century for killing her child in Upper Canada, and of Anna Balo, a Finnish mother who pleaded guilty to concealing the death of her newborn infant in Nanaimo, British Columbia, at the century's end, she indicates how ready the legal system was to show "understanding" to these women, and how the law was amended to effectively preclude a new mother's being charged with, or convicted of, her infant's murder if it had died in suspicious circumstances

after birth. Backhouse views male concern here as having less to do with any profound understanding of a woman's predicament than a perception that female deviance had no adverse effect on the male interest.

The situation with abortion was substantially different, as the author goes on to show. Here, the developing concern was that middle-class women were prone to use abortion as a means of birth control—a step seen as posing a significant threat to the preservation of an upright, intelligent, and virtuous community. Accordingly, those involved in any way with procuring an abortion or even administering drugs that could cause a miscarriage were likely to experience the full force of legal disapproval. To examine this attitude, Backhouse uses the prosecution of Dr. Emily Stowe in Toronto in 1879, on the charge of administering an agent calculated to cause miscarriage to Sarah Ann Lovell, who had died suddenly during an unwanted pregnancy. This case became a cause célèbre because Stowe was a leading feminist and the first Canadian woman to qualify to practice medicine, having been trained outside conventional medical practice. Stowe successfully fought the prosecution, with the aid of able counsel and sympathetic medical witnesses. In many ways her acquittal was the exception that proved the rule that doctors, quacks, and anyone else who sought to procure an abortion or assist a miscarriage were in danger of prosecution and conviction.

In a chapter on divorce and separation, Backhouse points to the enormous obstacles for women wanting to end their marriages to abusive spouses. Unlike the United States, where the divorce laws were progressively liberalized during the nineteenth century, Canada adhered to a policy of allowing divorce only in exceptional circumstances. The sole legal way in which a woman could end an unhappy and abusive marriage was by judicial separation. As in the case of rape, the law was administered by judges in a way that worked against women petitioners, who were stereotyped as "loose," "irresponsible," or, worse still, "adulterous." The author illustrates this highly discriminatory process with two examples. Esther Hawley Ham was a young Upper Canadian woman who reacted with earthy vigor to the physical attacks of her husband and the psychological assaults on her in-laws, but was considered an unworthy wife and mother by the judge, while, on the other hand, Alberta Abell of New Brunswick was successful in her application against the proven cruelty of her husband, Albert, who could neither hear nor speak and with whom she had run a home for the hearing-impaired.

In her chapter on protective labor legislation, Backhouse demonstrates how the invention of the "frail shop girl" became

the focus for the belated attention of legislators to the deplorable working conditions of many women, and investigates the split in feminist opinion during the late nineteenth century on the extent to which working women needed protection. In this respect she provides insights into the lives of Agnus Machar, who campaigned vigorously for protective legislation, and Carrie Derik, who assisted working women in need but was opposed to special legislative treatment for them. The book closes with an account of the attempts by Clara Brett Martin to gain admittance to the legal profession in Upper Canada in the 1890s. Recent scholarship has shown Martin to have been anti-Semitic; nevertheless, she showed great courage in the face of every possible barrier, both institutional and psychological, and succeeded with quiet dignity. At the same time she had a clear sense of the resistance she and other women would encounter in the legal profession for decades to come.

I find it hard to hide my enthusiasm for this book, which I have now used for two years in my Canadian Legal History course in the segment on law and gender. It has deservedly won praise from many quarters, including the Law and Society Association, which honored its author with the award of the Willard Hurst Prize in Legal History for 1992. *Petticoats and Prejudice* promises to be a seminal work that will inspire others to scholarship in women's legal history, not only in Canada but elsewhere in the common law world. Go forth and read!

John P.S. McLaren
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BRIEFLY NOTED

Women in American Law: The Struggle toward Equality from the New Deal to the Present, by Judith A. Baer. New York: Holmes and Meier, 1991; 350 pp., notes, index, index of cases; \$19.95, paper.

When Franklin Roosevelt became president, many laws still singled out women for treatment different from that of men. Laws restricted or prohibited birth control. Others defined a married woman's obligations, such as residing where her husband chose. "Protective" labor laws proscribed the types of jobs and the hours women could work. By the late 1980s, many of these laws had been changed, although, as the author of this study points out, women have yet to achieve full equality.

Judith A. Baer begins *Women in American Law* with the New Deal because she sees the improvement in women's

status as being linked to the federal government's expanding role in American life, a change ushered in during FDR's administration. She attributes the fact that women continue to experience injustice and inequality to the law itself and to society's division of labor by gender. The United States' patriarchy has assigned women a domestic role and then devalued that role.

Ultimately, social attitudes must change if women are to be fully equal to men, and Baer concludes that changes in law can lead, albeit slowly, to changes in those attitudes.

Bertha Knight Landes of Seattle: Big-City Mayor, by Sandra Haarsager. Norman: University of Oklahoma Press, 1994; 352 pp., illustrations, notes, bibliography, index; \$28.95, cloth.

Bertha Knight Landes' quick rise and quicker demise in Seattle politics is the focus of this carefully researched and thoughtful book by Sandra Haarsager. Developing her leadership abilities in women's clubs, Landes was elected to the Seattle city council in 1922. Four years later, she unseated the incumbent mayor by the largest vote margin the city had ever seen.

Landes eschewed the labels of reformer and feminist, but it is clear that she was both. To become mayor, she challenged Seattle's patriarchy, organizing the city's women to advance an agenda of city planning and zoning, improved public health and safety programs, and regulation of dance halls and clubs. Determined to be treated equally and aware of the symbolic value of her office, Mayor Landes opened baseball games, turned the first shovelful of dirt at ceremonial ground breakings, and hiked to sites of dams just as her male predecessors had.

The author draws on the theories of Michel Foucault and Victor Turner to explain Landes' success and her defeat in the reelection campaign that attacked her on the basis of class and gender.

There are important lessons to be drawn from Landes' life and from Haarsager's excellent account of it.

The Women's Movements in the United States and Britain from the 1790s to 1920s, by Christine Bolt. Amherst: University of Massachusetts Press, 1993; 390 pp., notes, index; \$45.00, cloth; \$15.95, paper.

The comparative approach in history can be most illuminating. Its greatest drawback, of course, is that it requires a much broader understanding from the historian. Fortunately, Christine Bolt, professor of history at the University of Kent, has a

firm grasp of the women's movements in both Britain and the United States—a remarkable achievement, given the proliferation of recent scholarship on the subject.

While the title advertises analysis of the struggle in the late eighteenth century, the introductory chapter does little more than set the stage for the book's main focus on the nineteenth and early twentieth centuries. In subsequent chapters, Bolt shows chronologically the parallels and divergences in organized feminism in both countries.

In Britain, the movement was complicated by the rigid class structure, an issue that did not impinge as strongly on feminists in the United States. Experiencing more freedom and respect than their British sisters, American feminists were often bolder and their movement garnered correspondingly greater strength. Both movements grew out of similar conditions, including the expansion of political rights and the spread of industrialization and urbanization.

This is an excellent synthesis whose comparative analysis provides new insights into the struggle for women's rights on both sides of the Atlantic.

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Ashe, Marie, "'Bad Mothers,' 'Good Lawyers,' and 'Legal Ethics,'" *Georgetown Law Journal* 81 (August 1993).

Cordell, Hon. LaDoris H., and Florence O. Keller, "Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge," *Indiana Law Journal* 68 (Fall 1993).

Davis, Peggy Cooper, "Neglected Stories and the Lawfulness of *Roe v. Wade*," *Harvard Civil Rights-Civil Liberties Law Review* 28 (Summer 1993).

Davis, Sue, "Do Women Judges Speak 'In a Different Voice?'—Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit," *Wisconsin Women's Law Journal* 143 (1992-93).

Evans, Monica J., "Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights," *Harvard Civil Rights-Civil Liberties Law Review* 28 (Summer 1993).

Farrow, Kenneth R., "*Roe v. Wade* and the Future of a Woman's Right to an Abortion," *Whittier Law Review* 14:3 (1993).

Gelman, Sheldon, "'Life' and 'Liberty': Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights," *Minnesota Law Review* 78 (February 1994).

Georgetown Law Journal 82 (November 1993). Symposium, "The Gender Gap in Compensation."

Haywood, C. Robert, "Unplighted Troths: Causes for Divorce in a Frontier Town toward the End of the Nineteenth Century," *Great Plains Quarterly* 13 (Fall 1993).

Johnson, Susan Lee, "'A Memory Sweet to Soldier': The Significance of Gender in the History of the American West," *Western Historical Quarterly* 24 (November 1993).

Journal of the West 32 (July 1993). Theme issue, "Gender in the West."

Madsen, Carol Cornwall, "'Sisters at the Bar': Utah Women in Law" *Utah Historical Quarterly* 61 (Summer 1993).

Meyer, Carlin, "Sex, Sin, and Women's Liberation: Against Porn-Suppression," *Texas Law Review* 72 (April 1994).

Northwest University Law Review 87 (Summer 1993). Symposium, "Can Feminists Use the Law to Effect Social Change in the 1990s?"

Ontiveros, Maria, L., "Three Perspectives on Workplace Harassment of Women of Color," *Golden Gate University Law Review* 23 (Summer 1993).

Rhode, Deborah L., "Missing Questions: Feminist Perspectives on Legal Education," *Stanford Law Review* 45 (July 1993).

Sanger, Carol, "Feminism and Disciplinary: The Curl of the Petals," *Loyola of Los Angeles Law Review* 27:1 (1993).

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

Southern California Law Review 67 (May 1994). Special Issue, "The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force."

Stacy, Susan, "'Our Ward Is Rather Small'," *Idaho Yesterdays* 38:2 (Summer 1994).

Stanford Law Review 43 (July 1991). Special Issue, "Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law."

Stanford Law Review 45 (July 1993). Special Section, "Report of the Ninth Circuit Gender Bias Task Force."

Taniguchi, Nancy J., "Lands, Laws, and Women: Decisions of the General Land Office, 1881-1920: A Preliminary Report," *Great Plains Quarterly* 13 (Fall 1993).

Treger, Tracy L., "The Reasonable Woman? Unreasonable!! *Ellison v. Brady*," *Whittier Law Review* 14:3 (1993).

Tyler, Tom R., and Gregory Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights," *Duke Law Journal* 43 (February 1994).

Walker, Kristyn M., "Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation," *Iowa Law Review* 78 (March 1993).

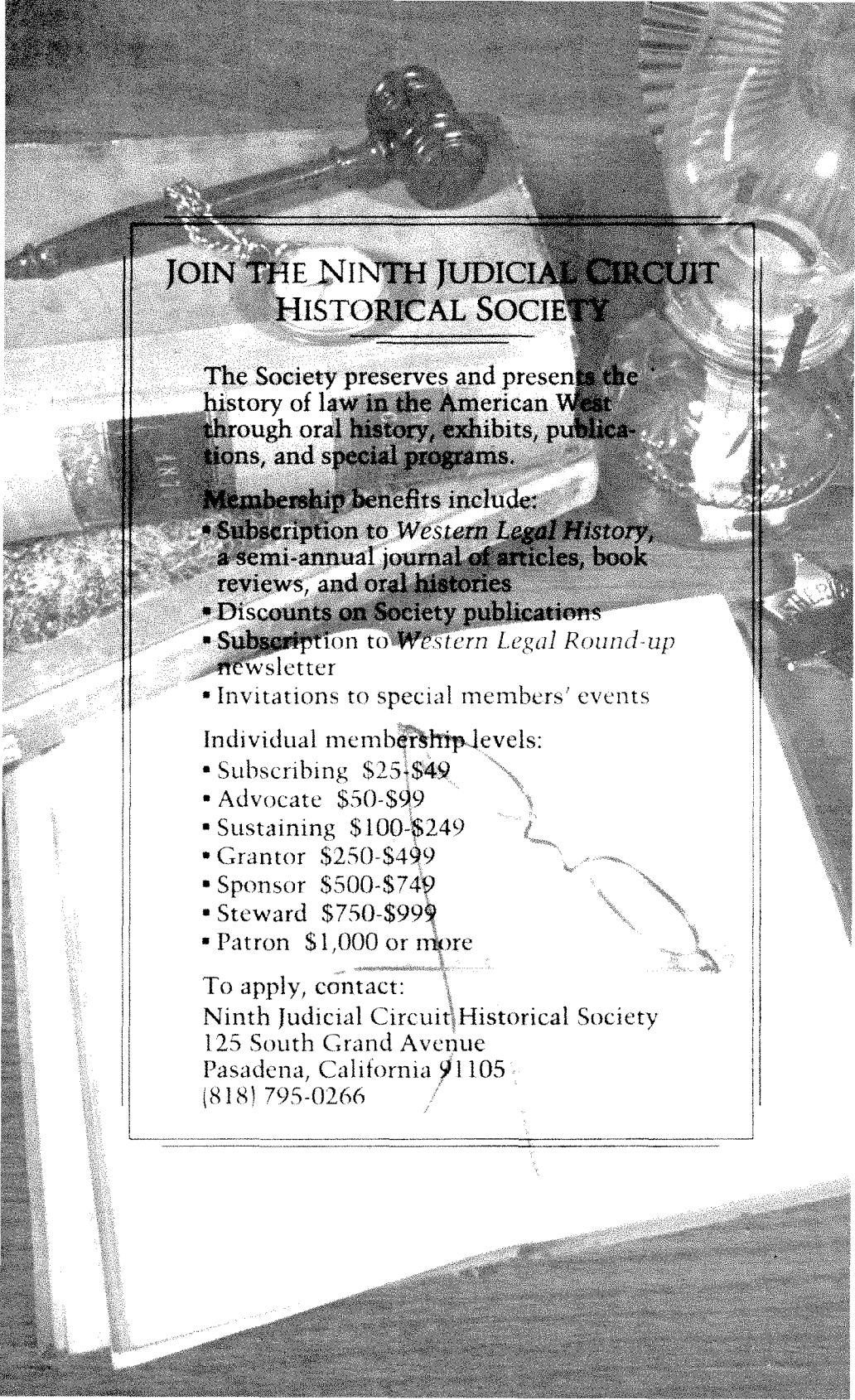
Wesson, Marianne, "'Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted': Pornography as Speech and Product," *University of Chicago Law Review* 60 (Summer/Fall 1993).

West, Robin L., "Legitimizing the Illegitimate: A Comment on *Beyond Rape*," *Columbia Law Review* 93 (October 1993).

Wimberly, Rosemary L., "'Menaces to Society': Sex, Adultery, and Abortion Crimes of Idaho Woman Prisoners, 1900-1960," *Idaho Yesterdays* 38:2 (Summer 1994).

Wunder, John R., "What's Old about the New Western History: Race and Gender, Part 1," *Pacific Northwest Quarterly* 85 (April 1994).

Compiled with the assistance of Helen Petersen.



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The Whitman Massacre Trial

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