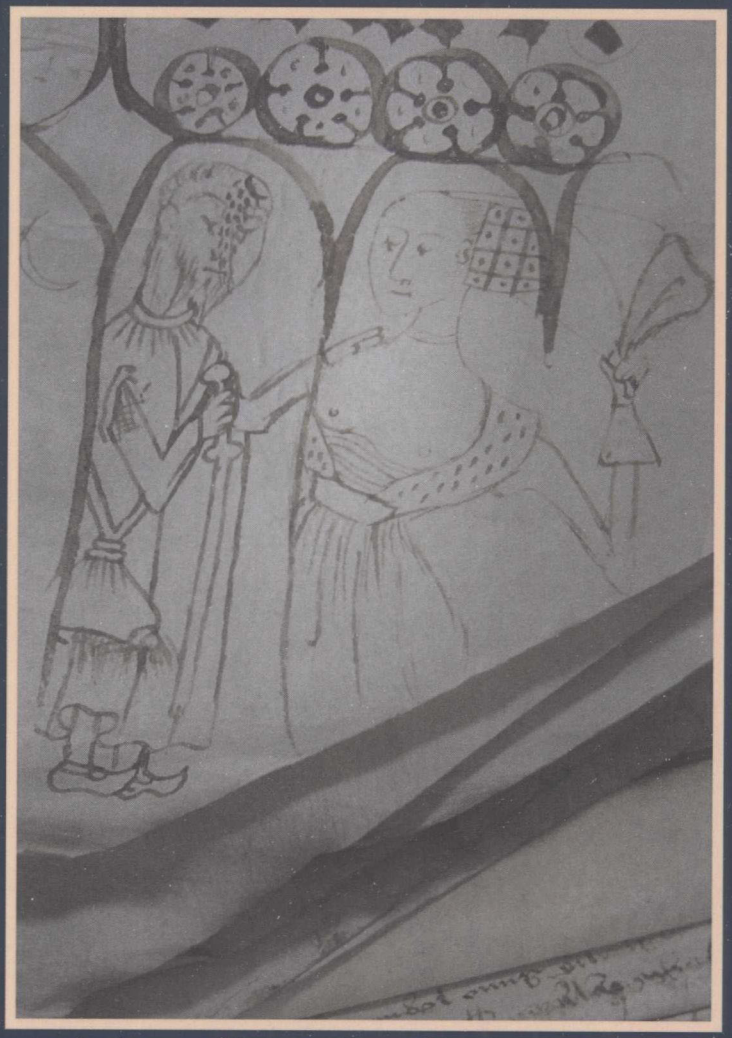
MARRIED WOMEN AND THE LAW IN PREMODERN NORTHWEST EUROPE

EDITED BY Cordelia Beattie and Matthew Frank Stevens



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Gender in the Middle Ages

Volume 8

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Gender in the Middle Ages

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This series investigates the representation and construction of masculinity and femininity in the Middle Ages from a variety of disciplinary and interdisciplinary perspectives. It aims in particular to explore the diversity of medieval genders, and such interrelated contexts and issues as sexuality, social class, race and ethnicity, and orthodoxy and heterodoxy.

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INTRODUCTION: UNCOVERING MARRIED WOMEN

Cordelia Beattie and Matthew Frank Stevens

Why Married Women?

As a number of our contributors comment, particularly those writing on pre-modern Britain, there has been a tendency in the historiography on women and the law to see married women as hidden from view, obscured by their husbands in the legal records. It is this tendency, which did not fit well with our own experiences of medieval legal material, that we were reacting against when we decided to put together this volume of essays. It is our intention that, by offering detailed studies of legal material from pre-modern England alongside those from other parts of northwest Europe (Wales, Scotland, Ireland, Ghent, Sweden, Norway and Germany), we will gain a better sense of how, when, and where the legal principle of coverture – which designated the husband as his wife's legal representative and in control of her property – was applied and what effect this had on the lives of married women. Key threads running through the book pertain to married women's rights regarding the possession of moveable and immovable property, marital property at the dissolution of marriage, married women's capacity to act as agents of their husbands and households in transacting business, and married women's interactions with the courts. In what follows, we will justify our focus on pre-modern northwest Europe with reference to existing scholarship, as well as highlighting some of the findings of this collection of essays.

The aforementioned view of married women's legal subjection can be, and has been, traced back to Sir William Blackstone's *Commentaries on the Laws of England* (1st edition, 1765), which became a standard legal textbook for nearly a century:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; ... Upon this principle, of an union of person

> in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.[1]

However, as Mary Beard has pointed out, Blackstone was referring to the wife's position under *common* law;[2] customary law, canon law and equity had different positions.[3] But, even in the context of English common law, there is the need for further caution. Frederick William Maitland warned about the perils of relying on 'unity of person' as 'a consistently operative principle':

> If we look for any one thought which governs the whole of this province of law [that which concerns the husband and wife], we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be.[4]

Maitland argues that 'the main idea which governs the law of husband and wife is not that of an "unity of person", but that of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property'.[5] By this he means that the husband controlled the property that the woman brought

1 7th edn (1775) as cited in M. R. Beard, *Woman as Force in History: A Study in Traditions and Realities* (New York, 1965), p. 89. For Blackstone's influence (and critiques), see ibid., esp. ch. 4; C. Cannon, 'The Rights of Medieval English Women: Crime and the Issue of Representation', *Medieval Crime and Social Control*, ed. B. A. Hanawalt and D. Wallace (Minneapolis, 1999), pp. 156–85, esp. pp. 158–60.

2 Beard, *Woman as Force in History*, p. 92.

3 On the married woman's position according to borough customs see, e.g., M. Bateson (ed.), *Borough Customs*, Selden Society 18 (London, 1904), pp. 222–8, many of which are discussed in B. W. Gastle, '"As if she were single": Working Wives and the Late Medieval English *Femme Sole*', *The Middle Ages at Work: Practicing Labor in Late Medieval England*, ed. K. Robertson and M. Uebel (New York, 2004), pp. 41–64. On ecclesiastical courts see, e.g., R. H. Helmholz, 'Married Women's Wills in Later Medieval England', *Wife and Widow in Medieval England*, ed. S. S. Walker (Ann Arbor, 1993); L. Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London* (Oxford, 1996), esp. pp. 30–58; T. Meldrum, 'A Women's Court in London: Defamation at the Bishop of London's Consistory Court, 1700–1745', *London Journal* 19 (1994), 1–20. On equity see, e.g., E. Hawkes, '"[S]he will ... protect and defend her rights boldly by law and reason ...": Women's Knowledge of Common Law and Equity Courts in Late-Medieval England', *Medieval Women and the Law*, ed. N. J. Menuge (Woodbridge, 2000), pp. 145–61; M. L. Cioni, 'The Elizabethan Chancery and Women's Rights', *Tudor Rule and Revolution: Essays for G.R. Elton from His American Friends*, ed. D. J. Guth and J. W. McKenna (Cambridge, 1982), pp. 159–82; T. Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998), esp. pp. 129–54, on the Court of Requests.

4 F. Pollock and F.W. Maitland, *The History of English Law before the Time of Edward I*, 2 vols, 2nd edn (Cambridge, 1911), II, pp. 405–6.

5 Pollock and Maitland, *History of English Law*, I, p. 485.

to the marriage but he did not own it ('*her* property') and so the common law position was that her assent for various acts was needed. She should, for example, appear in court alongside her husband for any litigation concerning her land and she retained certain rights over her dower.[6]

This picture does not apply to northwest Europe in general. Here *all* women, married or single, were under legal guardianship; in England single women of age and widows were legal individuals in their own right.[7] Beyond the English realm, upon marriage the husband would usually become a woman's legal representative.[8] He would thus control 'part or even all of the property that she brought to marriage, as well as the property that they jointly acquired after marriage'.[9] But again the husband did not own the property. The key difference here is the idea of a *community* of property between the husband and wife, whereas the English property pattern kept distinct what belonged to the wife as opposed to what belonged to the husband. A number of essays in this collection – Lars Hansen on medieval Norway, Mia Korpiola on late medieval Sweden, and Shennan Hutton on late medieval Ghent – will discuss further how this worked, but it is worth noting here the scholarship which has distinguished between the English system of marital property and that in the Franco-Belgian region (with which Korpiola aligns Sweden). Charles Donahue Junior was the first to follow up on Maitland's attempt to explain why France adopted communal marital property and England did not, although their conclusions differ.[10] More recent scholarship, by Donahue and others, distinguishes further between the north of France and the northern low countries – known as the *pays de droit coutumier*, the region of 'customary', unwritten law, but also described as the Franco-Belgian region – which allowed for communal marital property, and the south of France and the southern low countries (today a large part of Belgium) – known as the *pays de droit écrit*, the region of written law – where decisions about marital property regimes and succession were made in accordance with principles derived from Roman law, as they were in much of southern Europe.[11] Such differences, we feel, justify our concentration on northwest Europe.[12]

6 Pollock and Maitland, *History of English Law*, II, pp. 407–9, 422–5.

7 A. L. Erickson, 'Coverture and Capitalism', *History Workshop Journal* 59 (2005), 1–16, pp. 2–3. On the age of majority for women see K. M. Phillips, *Medieval Maidens: Young Women and Gender in England, 1270–1540* (Manchester, 2003), pp. 32–5.

8 For German examples of married women (or the courts on their behalf) appointing other males as their legal guardians see Ogilvie's essay in this volume.

9 Erickson, 'Coverture and Capitalism', p. 3.

10 C. Donahue Jr, 'What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century', *Michigan Law Review* 78 (1979), 59–88; Pollock and Maitland, *History of English Law*, II, pp. 402–3.

11 E.g. see C. Donahue Jr, *Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts* (New York, 2007), pp. 598–613; M. Vleeschouwers-Van Melkebeek, 'Separation and Marital Property in Late Medieval England and the Franco-Belgian Region', *Regional Variations in Matrimonial Law and Custom in Europe, 1150–1600*, ed. M. Korpiola (Leiden, 2011), pp. 77–97; M. C. Howell, *The Marriage Exchange: Property, Social Place, and Gender in Cities of the Low Countries, 1300–1550* (Chicago, 1998), pp. 196–217.

12 See also T. De Moor and J. L. Van Zanden, 'Girl Power: The European Marriage Pattern and La-

Why Medieval *and* Early Modern?

A long view of this topic seems logical for a number of reasons. For example, as discussed, there has been a tendency to see nothing as substantially changing in terms of married women's position under English common law between the medieval period and the end of the eighteenth century when Blackstone was writing, with the key change coming with the Married Women's Property Acts in the late nineteenth century. Also, as Judith Bennett famously argued in 1992, the sense of a 'great divide' between medieval and early modern is not borne out by studies of women's lives.[13] Similar points have been made for European society ever since Joan Kelly's classic essay 'Did Women Have a Renaissance?'[14] Indeed, Bennett, in a substantial and still influential 1988 review article of seven volumes on late medieval and early modern European women, applied the French historian Emmanuel Le Roy Ladurie's phrase 'history that stands still' to pre-modern women's history.[15]

Of course, the legal framework within which married women lived in the premodern era was not a static one. But its evolution followed a chronology in which the tectonic shifts in married women's legal position did not necessarily occur along other social and political fault lines in pre-modern society. There are few social institutions that evolve with such conservative lethargy as the law and marriage. For example, while countless volumes and articles have now established, sometimes in minute detail, profound short- and long-term economic and political (in the broad sense) effects of the Black Death of 1347–51, the persistent debate regarding post-plague women has been to what extent and why women delayed marriage and motherhood.[16] While debate continues regarding the extent to which women's pre-marital economic opportunities and lifecycles were affected, relative consensus now suggests that any plague-induced effects were short-term, most significant for unmarried women and overwhelmingly not reflected in the law. Perhaps the only clear exception to the immunity of married women's legal position to the varied effects of the Black Death was the compulsory service clause of the English Statute of Labours of 1351 which required unemployed men and women, including wives, when offered work, to either accept employment or endure imprisonment.[17]

bour Markets in the North Sea Region in the Late Medieval and Early Modern Period', *Economic History Review* 63 (2010), 1–33, esp. pp. 7–11.

13 J. M. Bennett, 'Medieval Women, Modern Women: Across the Great Divide', *Culture and History 1350–1600: Essays on English Communities, Identities, and Writing*, ed. D. Aers (London, 1992), pp. 147–75.

14 J. Kelly-Gadol, 'Did Women Have a Renaissance?', *Becoming Visible: Women in European History*, ed. R. Bridenthal and C. Koonz (Boston, 1977), pp. 137–64. See also M. E. Wiesner, *Gender, Church and State in Early Modern Germany* (London, 1998), pp. 63–78, 84–93, which asks if women had a Reformation and if the concepts 'Renaissance' and 'Early Modern' apply to women's experiences.

15 J. M. Bennett, '"History that Stands Still": Women's Work in the European Past', *Feminist Studies* 14 (1988), 269–83.

16 E.g. see S. H. Rigby, 'Gendering the Black Death: Women in Later Medieval England', *Gender and History* 12 (2000), 745–54.

17 J. M. Bennett, 'Compulsory Service in Late Medieval England', *Past and Present* 209 (2010), 7–51.

The essays in this volume span the period c.1200–1800, although there is a clustering around the middle of this period. Generally speaking, northwest European peoples showed, certainly from the latter half of the twelfth century, an increasing tendency to codify, circulate and refine the law, inclusive of elements touching upon the rights and activities of married women. Within the British Isles, for example, the influential jurists Ranulf de Glanville (d. 1190) and Henry de Bracton (d. 1268) commented upon and profoundly influenced the formation of legal practice in England, commenting on the property rights of married women.[18] Similarly, the earliest surviving redaction of the Welsh laws of Hywell Dda (the Cyfnerth redaction), including the law of married women, is thought to have been compiled in the late twelfth century, and elaborated through the thirteenth century.[19] And, further afield, in Norway for example, old regional law codes gave way to the first national law code, of Magnus the lawmender, in 1274, which carefully defined women's rights to property (see Hansen's essay). From at least the thirteenth century it is generally possible to discuss married women and the law with reference to surviving local or national legal custumals or treatises.

As some of the essays in the volume will discuss, lawmakers, jurists and courts constantly renegotiated these same very elaborate – but sometimes impractical or simply ignored – systems of law with respect to married women. We therefore need to be wary of seeing the law as something that evolves in a single direction, whether to married women's benefit or detriment. Shennan Hutton, for example, argues that – while Ghent's unwritten custom was redacted in 1563, stating that married women could not legally enter into contracts without the express permission of their husbands – the mid-fourteenth-century records of actual practice (contracts and lawsuit adjudications recorded in the aldermen's annual registers) show that there was widespread acceptance of married women's public performance of property management, with or without their husbands. Cordelia Beattie finds late medieval legal evidence that married women could make valid contracts for necessities in England, as suggested by an eighteenth-century treatise which claimed this was still the case, but also found that this ability was restricted over the course of the fifteenth century. Thus the long view enables us to assess change over time with respect to married women's legal position.

What Do We Mean by The Law?

As Sheilagh Ogilvie comments in her essay, it is important to examine what is meant by concepts that have largely been taken for granted such as 'the law'. We do not just use the term to refer to law codes, legal treatises and statutes, their

[18] Ranulph de Glanvill, *De Legibus et Consuetudinibus Regni Angliae*, ed. G. E. Woodbine (New Haven, 1932); Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G. E. Woodbine (New Haven, 1915). For Bracton on the property rights of married women, in translation, see C. McCarthy, ed., *Love, Sex and Marriage in the Middle Ages: A Sourcebook* (Abingdon, 2004), source 31, pp. 115–21.

[19] See D. Jenkins and M. E. Owen, eds, *The Welsh Law of Women* (Cardiff, 1980).

enforcement in law courts, and the legal personnel involved. We have adopted a broad approach, in common with the 'new legal history', which sees the law 'not simply as an external mechanism regulating daily life, but as an integral part of the way in which social relations were actually lived out and experienced'.[20] Ogilvie, for example, looks beyond the question of married women's legal autonomy (in the German-speaking world, the key issue here is that of *Geschlechtsvormundschaft* or 'gender guardianship') and argues that we must also examine other legal influences which circumscribed the economic options of married women, and thus their life chances and well-being in early modern Germany: the legal privileges of guilds and other occupational associations; and the legal powers of local communities, including local church courts' jurisdiction over the conduct of married life. Other essays presented here – those by Cathryn Spence and Alexandra Shepard – also use legal material (Scottish burgh court registers and English church court records respectively) to assess married women's economic activities.

'The law', then, is multi-dimensional. It is also possible to speak of many co-existing and competing systems of law. Little more can be done here than to sketch out a basic map of major spheres of law, highlighting areas where the treatment of married women was particularly distinctive, as a guide for the reader in exploring the following chapters.

The major divisions of law during the Middle Ages and much of the early modern period were different from those relative in modern society. In particular, in the pre-modern world, 'the law' was divided principally between secular law and ecclesiastical, or 'church', law. Secular law was concerned with one's temporal activities (such as trade), while ecclesiastical law was concerned with governing one's spiritual welfare (and thus with such matters as adultery). Generally speaking, transgressions of, or disputes under, secular and ecclesiastical law were dealt with in their respective courts, which had their own hierarchies. However, human activities were often governed by a combination of secular and ecclesiastical law. Particularly pertinent to this volume is the institution of marriage, which formed the basis of both a spiritual union and a union of property – moveable and immovable – between the families of the bride and groom, and was therefore carefully regulated under both secular and ecclesiastical law. Disputed marriages, or disputes within marriage – for example regarding consanguinity or adultery – might give rise to related litigation in both secular and ecclesiastical courts, with the judgments of each potentially resulting in equally potent financial, proprietary or corporal censure.[21] This is demonstrated in Korpiola's essay, which investigates the implications of marital dysfunction and breakdown for property possession.

The division between civil and criminal law, perhaps that which springs first to mind in the modern era, was less distinct in the pre-modern era, particularly

[20] A. Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester, 2001), p. 2. On 'new legal history', see ibid., p. 3; D. Sugarman, 'Writing "Law and Society" Histories', *The Modern Law Review* 55 (1992), 292–308, esp. pp. 298–9.

[21] On marriage disputes in ecclesiastical courts in five regions of northwest Europe see Donahue Jr, *Law, Marriage, and Society*.