Why Diamonds Really are a Girl's Best Friend: Another American Narrative

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Abstract: The old law of domestic relations and the system known as coverture have shaped marriage practices in the United States and have limited women's membership in the constitutional community. This system of law predates the Revolution, but it lingers in U.S. legal tradition even today. After describing coverture and the old law of domestic relations, this essay considers how the received narrative of women's place in U.S. history often obscures the story of women's and men's efforts to overthrow this oppressive regime, and also the story of the continuing efforts of men and some women to stabilize and protect it. The essay also questions the paradoxes built into American law: for example, how do we reconcile the strictures of coverture with the founders' care in defining rights-holders as "persons" rather than "men"? Citing a number of court cases from the early days of the republic to the present, the essay describes the 1960s and 1970s shift in legal interpretation of women's rights and obligations. However, recent developments – in abortion laws, for example – invite inquiry as to how full the change is that we have accomplished. The history of coverture and the way it affects legal, political, and cultural practice today is another American narrative that needs to be better understood.

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In the usual telling, women enter the narrative of U.S. history when they are executed: for witchcraft in Salem, for complicity in Lincoln's assassination, for treason in 1953. They appear when they have been helpful to famous men: Pocahontas, Sacagawea, presidents' wives. The general outlines of the history of women's experience in the United States are easily caricatured and superficially summarized.

Many folks know that Abigail Adams told John Adams to "remember the ladies." Then there's a gap of some seventy years. Not until after the Seneca Falls Convention of 1848 and the drafting of the Declaration of Sentiments, claiming for women the right to vote, do we encounter other familiar names like Elizabeth Cady Stanton and Susan B. Anthony. Abolitionists Sojourner Truth and Harriet Tubman, as well as the enslaved women who claimed freedom during the Civil War and struggled to make it meaningful during Reconstruction, also figure prominently in the mid-nineteenth-century narra-

tive. Perhaps some may know that this story includes the struggles that took place over including the word *male* in the Fourteenth Amendment (1868) and not including the word *sex* in the Fifteenth Amendment (1870). Some may have heard of the sex discrimination cases brought to the U.S. Supreme Court by Myra Bradwell and Virginia Minor in the early 1870s.

Another gap opens up between 1875 and the early twentieth century, interrupted only by awareness of Jane Addams and Florence Kelley, and Hull House, the great Chicago institution that they built. There are festivities in 1920, when the Nineteenth Amendment secured women's right to vote (although in vast areas of the country neither African American men nor women would be reasonably secure in their suffrage until passage of the Voting Rights Act of 1965). Then another fifty years lurch by, inhabited in popular consciousness by two women. One is Rosie the Riveter, who, most people do not realize, bitterly complained when she was forced out of industrial work after World War II.[1] The other is Eleanor Roosevelt, the great feminist who rarely called herself a feminist because the word had been so polluted in her time. It is unclear what most people know about her, except that she was not conventionally pretty and had a warm heart.[2] We then leap to the 1970s and the era of women's liberation and second-wave feminism, seemingly the result of Gloria Steinem's investigative reporting (while dressed as a Playboy bunny) and of Betty Friedan's book. Now boys take home economics and girls play soccer, and we can get on to other pressing matters.

Yet there is as much meaning and significance in the parts of this chronology that we skip over as in the parts we think we know. The inherited narrative largely ignores the deep structures of law that have defined, bounded, and often dictated the choices made by men and women, even as they have believed that they were choosing freely. There is another, unfamiliar American narrative that needs to be better understood. It lurks in the interstices of our daily lives.

Laws that purport to protect women's interests, but that in reality limit their autonomy and membership in the constitutional community, have permeated the U.S. legal tradition. These laws had their origin in the British legal regime that antedated the American Revolution and continued long after it. Throughout U.S. history, from the era of the founding to the present, men and women have chipped away at elements of this tradition – sometimes vigorously and productively, other times ineffectively and with frustration. The women's movement of our own time is the latest configuration of this attack. Many men have had a deep interest in maintaining a regime from which they benefit; some women have been lucky enough not to have endured the regime's harshest constraints, and so treasured it as the world that they had always known.

Recent campaigns in support of same-sex marriage have drawn public attention to certain practices and understandings that are now considered archaic. Against the claim that the definition of marriage is fixed and unchanging, supporters of change have argued that marriage is and always has been an evolving institution, and that marriage retains its relevance to modern society not by stasis but by change. Interracial marriage was once marked as miscegenation. In many states, for many years, marriages between whites and people of other races and ethnicities were illegal, unrecognized for purposes of child custody, property rights, or inheritance.[3] The U.S. Supreme Court did not rule such practices a denial of equal protection of the laws, and therefore uncon-

stitutional, until 1967, in the aptly named case *Loving v. Virginia*. (Mildred Loving died only a few years ago, in 2008.)

But a larger, more complex, and even more pervasive system of law has shaped marriage practices in the United States since long before the Revolution and continues deep into our own time. Abigail Adams had this system in mind when she issued her famous caution to her husband. He replied, "As to your extraordinary Code of Laws, I cannot but laugh.... Depend upon it, We know better than to repeal our Masculine systems." John Adams knew that the law of domestic relations (what we now call family law) was masculine, but these codes are not well known nowadays, even by otherwise well-informed historians and lawyers. They were not written into the U.S. Constitution of 1787; unlike the fugitive slave clause or the three-fifths compromise, they were not publicly debated. (White men – plantation owners, merchants, theologians, Northerners, Southerners – were differently situated in relation to slavery, so they had real reason to debate it. But all free men, rich or poor, whatever their race, benefited from the structures of family law; they had no need to debate it.) As a result, we find the details of the old law of domestic relations embedded in old state statutes, outdated treatises, and judges' reasoning in humdrum cases from state and local courts.

The old law of domestic relations began with the principle that at marriage the husband controlled the physical body of his wife. No provision for the punishment of marital rape existed in U.S. law until feminists put it there, beginning in the 1970s. Even then, it took decades before marital rape was classified as a crime in all fifty states and the District of Columbia. (In some states where rape is a felony, marital rape is not.) Abigail Adams had perfect pitch on this point: "Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could.... [P]ut it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity." That power provided a husband with "absolute title" to the personal property a wife brought to marriage as well as ownership of whatever she earned during it; he gained extensive authority over the real estate she brought to the marriage or inherited (perhaps from her father) once married. To let a married woman vote would have been to give two votes to her husband, who could easily coerce her into voting for his preferred choice. Wherever one looked, the husband's right to the body, property, and loyalty of his wife was embedded in the law; it even trumped her loyalty to the state: if an American wife sided with her loyalist husband, she was not thought of as a traitor. This system was known as *coverture*, whereby wives were understood to be "covered" under the civil identity of their husbands in much the same way as children were subject to their parents.[4]

By giving fathers responsibility for children born within marriage (that's why fathers in the early republic had custody of children in case of divorce, which was rare), but leaving to mothers the responsibility for children born outside marriage, the old law of domestic relations excused all fathers from serious responsibility for children born out of wedlock – a principle that was largely unquestioned in American law until the twentieth century.[5] It also ensured that children born to a free father and an enslaved mother followed the condition of the mother into slavery, not only binding enslaved men and women to labor but also making them permanently vulnerable to the sexual appetites of their masters. Thomas Jefferson's slave Sally Hemings inherited her slave status from her mother. By contrast, her father's

other daughter, Martha Wayles, became Jefferson's wife. The children Jefferson fathered with his own sister-in-law grew to adulthood in slavery.[6]

In return for submitting their bodies and property to their husbands, women were assured that, if widowed, they could expect an inheritance. If a man died without a will, the probate courts would ensure that his widow received her "thirds"; he could leave her more, but not less. The widow's dower right was grudging: it allowed her *to make use of* one-third of the real estate that her husband held at the time of his death. It was generally recognized that this could well be less than the property she had brought to the marriage. She usually could not sell it (or if woodland, could not cut down the trees to sell to support herself) and was required to pass it down, unscathed, to her husband's heirs. A widow was also usually entitled to claim outright one-third of the personal property her husband had owned, after debts were paid, and to claim outright her personal "paraphernalia" – her clothing and cooking pots – *suitable to her station, as judged by probate officers*.

And finally we get to diamonds. The jewelry a woman had been given was the last asset that the probate officers could touch, the last asset vulnerable to being seized as payment for her late husband's debts. The diamonds about which Carol Channing sings are a metonym for the jewelry of the old law; in the nineteenth and early twentieth centuries, valuable jewels came to carry an additional value when given as an engagement present. The jilted fiancée no longer needed to face the humiliation of soothing her aching heart with money awarded to her in a breach of promise lawsuit: she got to keep the diamonds.

The treatise on which many lawyers relied in the years before the Civil War was written by Tapping Reeve, founder of the nation's first law school. Published in New England in 1816, and in wide circulation until the eve of the Civil War, the treatise bears a revealing title: *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant*. Everyone knew that these relationships were not identical, but they also knew that they were, as historian Christopher Tomlins has put it, "relations of authorized power."[7] Note that Reeve's title begins not with "Husband and Wife" but with the old "law French" for "Lord and Woman."

Thus paradoxes were built into American law from the outset. Lawmakers in the founding period were deeply radical, creatively devising practices in which free people would be bound only by authority that they themselves had freely chosen. When they described holders of rights, they used the term *persons* more often than they did *men*, or even *citizens*, establishing the great expansive tradition of American law and practice. That tradition has repeatedly been challenged in times of national stress and fear, but it has proved to be one of the most resilient aspects of American political life.

The founders did not spend much energy explicitly excluding women from political space. Citizens could be constructed however state legislatures wished to define them. When the state of New Jersey wrote its suffrage statutes in terms of property-holding persons, and when the outcome was that women voted, no one said that New Jersey was not permitted to do so. (When the women used their votes effectively enough to shift the outcome of an election, the men of the losing party became angry and persuaded the legislature to change the statute. But no one said that they had not had the power to write it in the first place.)[8] Instead of basing representation in the lower house of Congress on free adult men or on "taxable polls"

(that is, male household heads) or electors, as many states did, the U.S. Constitution established a ratio of one representative for every thirty thousand free *people*. Equal ratios of representation for the free population were a step toward the rule of one person, one vote – though it took nearly two centuries to fully realize this ideal.

The generous new theory of representation, however, had a dark side. "You must remember . . . that you are one of my constituents," Senator Samuel Latham Mitchell wrote to his wife in 1804. "I am in some degree responsible to you for my public conduct. [Women] are numbered in the census of inhabitants to make up the amount of population, and the Representatives are apportioned among the people according to their numbers, reckoning the females as well as the males. Though, therefore, women do not vote, they are nevertheless represented in the national government to their full amount." Senator Mitchell did not acknowledge the irony of this form of representation in a nation that had justified a revolution partly over the issue of representation in British Parliament. Virtual representation for women made sense to Mitchell and many others because it was nested in a familiar understanding of society, one that authorized husbands to exercise expansive arbitrary power over their wives' bodies and property. Many of the legal infirmities of coverture extended to single women, who, though lacking a husband, were still viewed as unfit for civic responsibility. If a single woman were raped, for example, she had the best chance in a lawsuit if it were brought by her father, who could sue for damages for the loss of his daughter's labor and services.

Because a married woman lacked a civic identity distinct from her husband's, she was barred from acting as an independent legal agent. That meant, as Tapping Reeve put it in his treatise, that "the wife, by the marrige is entirely deprived of the use and disposal of her property, and can acquire none by her industry." A married woman could not make a contract because she had no property of her own by which to guarantee her word. Even after states grudgingly authorized married women to own property as individuals, nothing followed easily by implication. New York's first Married Women's Property Act, in 1848, authorized a married woman to hold property that had been *given* to her, but separate statutes – and separate legislative battles – were required to give married women the power to contract (1849); to hold savings deposits (1850); to vote as stockholders in elections (1851); to sue and be sued (1851); to keep their earnings from work *outside* the home (1860). For many decades after the Married Women's Property Acts gave nineteenth-century women control over their earnings outside the home they often had no claim to work performed at home, whether that be laboring on the family farm or taking in boarders.[9]

Coverture gave husbands property rights in their wives' "services," and state legislatures were reluctant to erase these rights. These services included the right to "consortium" – understood as not only housekeeping but also love, affection, companionship, and sexual relations. If a married woman was injured by the negligence of another person, her husband could sue for damages, which included a monetary estimate of his loss of consortium; if he was injured, she had no claim for the loss of his companionship and sexual relations. This imbalance between the sexes in marriage was rarely tested, but when it was, as in the event of major accidents, the impact was severe. Not until the early 1950s were married women successful in making such a claim – in Washington, D.C., in 1950; in

Iowa in 1951 – yet it took until the 1990s for all states to recognize the claim.

A married woman could demand no role in deciding where her family would live; as a law from the Oklahoma Territory put it in 1893: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." That law was not repealed until 1988, and only then after six years of vigorous debate, initiated when two state legislators married and Twyla Mason faced the official transfer of her place of residence and therefore the loss of her seat. Few of the many women who hesitated to claim advanced professional training before the 1970s knew explicitly of these laws, but it was common wisdom that an overly educated wife, who might not want to move her professional practice when her husband's job was moved, meant marital trouble. Far better for women to be trained in fields that easily allowed for relocation: a nurse could always find a hospital, a librarian a library.

A married woman could not have a nationality independent of her husband's. That is, a foreign woman who married an American man was "deemed a citizen" at marriage, but an American woman who married a foreign man lost her U.S. citizenship – marriage to a foreign man deemed "as voluntary and distinctive as expatriation," according to the U.S. Supreme Court during World War I.[10] Once the United States entered the war, hundreds of U.S. women who had married German men were forced to register as enemy aliens. (Decisions of the U.S. Supreme Court are among the easiest historical data to find, yet this 1915 decision – and its serious impact on both lived experience and democratic theory – remains unfamiliar to all but specialists.)

Although men long served on juries whether or not they were entitled to vote, women were generally barred from juries. Even after women claimed the right to vote, most states required new statutes specifying that the term *elector* encompassed women. After suffrage, special legislation was needed in many states to authorize women to hold office; in the state of Iowa, for example, even though women began to vote in 1920, no woman served in the legislature until 1929. Bitter struggles between men (who had the votes and the authority to make change) and women (who needed, despite their absence of voting leverage, to persuade men to make changes that were unlikely to benefit them, at least in the short run) have permeated politics and culture throughout U.S. history, but only episodically have they made their way into the narrative we have inherited.

Our textbooks often use the phrase "the era of the common man" to describe Andrew Jackson's presidency. In 1828, the year of his election, a Massachusetts wife complained that even though her husband was living in adultery, his creditors understood themselves to be entitled to the money that *she* earned. She did not think that she should have to pay his debts, but she lost her case.[11] A wife whose husband was in jail did not think that he should be entitled to her money, but she, too, lost.[12] A few years before, the New York Supreme Court of Judicature comfortably observed that "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife." The court never thought to ask any *woman* of wisdom and reflection about her feelings on "the propriety of the rule."

For more than a century after the passage of the first Married Women's Property Acts, most people continued to *think* as the rules of coverture had taught them; some perhaps even took pride (as lawyers and philosophers are trained to do) in the

complexity of adjusting old rules to new situations. A generation ago, the historian and philosopher of science Thomas Kuhn taught us how rare paradigm shifts are, and how long it can take for the evidence that undergirds one paradigm to be recognized as inadequate. "The human mind gets creased into ways of thinking," as one observer has put it.[13]

The disempowered are not dummies. They find ways to work within the interstices of an oppressive system. When benevolent women organized societies to sustain the desperately impoverished in the years after the Revolution, they shielded their work from interfering husbands. The largest of these groups, as historian Anne Boylan has found, took care to apply for articles of incorporation, which enabled them "to sue and be sued, [to] construct and manage institutions such as orphanages," to hold thousands of dollars in their own name, and to invest their financial resources. They ensured that their treasurers were unmarried women. When a group of men offered to act as trustees for the Boston Female Society, the women refused to trust them: "[We] could not have any legal control . . . nor prevent them transferring the property of the Society."[14]

Nor did all women submit reliably to the rules of coverture. For at least forty years, fresh generations of women historians have been retrieving their narratives – from diaries and letters, manifestos and newspapers. We can sneak into the courtrooms where they displayed their restiveness, sometimes in their own depositions, sometimes in the paraphrases of judges ruling against them. From the thousands of complaints by plaintiffs who must have known they were unlikely to win, we open up a fresh narrative of men and women arguing about power and authority. We find a contentious world in which the interests of men and women diverged far more than we have generally acknowledged. Slowly, painfully, and with many reversals, the common sense of one era became the harsh injustice of another. And women, most of whose names are unfamiliar to us today, were the driving force behind this change, putting their reputations and their resources on the line, insisting that familiar practices simply weren't fair.

In Worcester, Massachusetts, one Mr. Bradford abandoned his wife. She applied to the city for support as a pauper; the city refused. Since common law regarded husband and wife as a single person, the wife's legal residence was determined by where her husband lived. When Mr. Bradford left Worcester, Mrs. Bradford lost her claim on that city's charity. To be entitled to public support, she would need to find him and apply to the town where he now lived. This was standard practice in the eighteenth century, but Mrs. Bradford made her complaint in 1904. Only after losing in two lower courts and carrying her appeal to the Supreme Judicial Court of Massachusetts did Mrs. Bradford succeed in having the old practice overturned as a "harsh injustice." The city of Worcester was instructed to recognize Mrs. Bradford's residency.[15]

Because husband and wife were one, it followed that they could not sue each other, a situation known as "interspousal tort immunity." Thus, a husband could not be convicted of larceny for theft of his wife's property; to do so, explained one New York judge (presumably with a straight face), would be to sow "the seeds of perpetual discord and broil."

Interspousal tort immunity also meant that married women could not claim civil damages for assault and battery by their husbands or for which their husbands were at fault. Consider this example: In 1944, a wife was injured when the automobile her husband was driving, "due to [his] gross negligence," ran into a tree.

She filed a claim against him (in effect against his insurance company); because the policy was on his behalf, she was taken to be suing him. In 1948, the Massachusetts court found for the insurance company: "That no cause of action arises in favor of either husband or wife for a tort committed by the other during coverture is too well settled to require citation of authority. Recovery is denied in such a case not merely because of the disability of one spouse to sue the other during coverture, but for the more fundamental reason that because of the marital relationship no cause of action ever came into existence."[16] Not until 1976, when Blanche Lewis sued her husband (via his insurance company), would a Massachusetts appellate court reconsider the common law rule of interspousal tort immunity: "We believe this result is consistent with the general principle that if there is tortious injury there should be recovery." But the court was careful to limit its holding to motor vehicle accidents: "Conduct, tortious between two strangers, may not be tortious between spouses because of the mutual concessions implied in the marital relationship."[17]

The regime of coverture had long been justified as protective. "By marriage, the husband and wife are one person in law," the English jurist William Blackstone wrote in a treatise published as the American Revolution began. He continued: "[T]he 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 every thing."[18] Well into the twentieth century, it remained the conventional wisdom of legislatures and courts that women are too weak to act autonomously; that they need protection from the perils of public life; that women's need for protection justifies limitations on their control of their own bodies and their own lives; and that women's obligations as wives and mothers trump both their desire for autonomy and their obligations as citizens.

Just as Elizabeth Cady Stanton, Susan B. Anthony, and their many colleagues, allies, and political descendants were finding their voices, defenders of the status quo became ever more shrill. These attacks insisted on women's need for protection and emphasized women's weakness and vulnerability. The most paradoxical are the many judgments, like the one mentioned above, that refused women's suits against violent husbands because to do so would violate "the peace of the household." Anti-suffragist campaigns regularly claimed that women are too vulnerable to their husbands' coercion, and are so emotional and irrational that they need protection from civic responsibility (and the civic world needs protection from them). Not all the attacks came from men; here is Dr. Anna Moon Randolph of the Virginia Women's Constitutional League: "Some women are easily influenced by those they think have superior knowledge, instead of doing their own thinking. . . . It is an old, old story that women are used as dupes and tools for destructive work from the days of Sampson's [*sic*] Delilah." However, most of the insistence that women are incompetent came from men, including some very distinguished ones, such as the statesman Elihu Root, recipient of the 1912 Nobel Peace Prize and Secretary of State under President Theodore Roosevelt. Addressing the New York State Constitutional Convention in opposition to woman suffrage, Root said: "Put woman into the arena of [political] conflict and she . . . takes into her hands . . . weapons with which she is unfamiliar and which she is unable to wield. She becomes hard, harsh, unlovable, repulsive."[19]

Yet the "protections" for women were generally themselves coercive, exposing women to many grave harms. Women defendants were judged by juries on which no woman ever had a chance of serving; when, in 1961, Chief Justice Earl Warren asked just what were the "infirmities" that made it reasonable for the state of Florida to place barriers between women and responsibility for jury service, the state's assistant attorney general blurted out, "I just meant they have to cook the dinners!"[20]

Women rich and poor, white and black, were barred from pursuing many remunerative crafts and professions. Elizabeth Cady Stanton pointed out that discrimination in 1848: "He closes against her all the avenues to wealth and distinction which he considers most honorable to himself." In 1873, Justice Joseph Bradley spoke for the majority in the U.S. Supreme Court decision that denied Myra Bradwell the right to practice law: "It cannot be affirmed . . . that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life." Severe quotas for access to schools of law, engineering, and medicine were common until quashed in 1972 by Title IX of the Educational Amendments (but only when enforced by the Department of Education, whose record on this has been erratic).

Long after they had the right to vote, women faced skepticism of their ability to make responsible decisions. Even after women could run for the state legislature, the state of Oklahoma barred women from holding statewide office until 1942. After 1920, the history of most state legislatures reveals extended periods of time during which no women served; today, it is the rare legislature that is comprised of at least 20 percent women. Vestiges of coverture persist in many state law codes, among them the old "doctrine of necessaries," which required a husband to pay debts incurred by his wife for items essential to her sustenance, but does not give wives a reciprocal obligation.[21] The remarkable number of new barriers for women seeking abortions has recently led a *New York Times* reporter to conclude that women's ability to exercise the right recognized in *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) is "seriously imperiled." According to the legislators who backed these new restrictions, women would come to regret their decisions and therefore must be protected from making them. Mandatory pre-abortion sonogram laws, for example, require physicians to describe the fetus in detail; a woman's only recourse is to shut her eyes. (She cannot, of course, shut her ears.) These sorts of new statutes fail to trust the decision-making capacity of a woman in consultation with her physician.[22]

The 1960s and 1970s are distinctive for a shift in the way the law treats women's rights and obligations. Pressed by increasing public impatience with the ascriptive dependence of adult women and with laws that disempowered women, legislatures and courts began to acknowledge that laws embodying gendered stereotypes harm not only women, but also men and society as a whole.[23] Indeed, they recognized that it is possible (something not imagined in the coverture regime) for men to be dependent on women, and therefore that it could be in men's interest for women to be independent civic actors.

Air Force Captain Sharron Frontiero had to press her argument all the way to the U.S. Supreme Court before she was authorized to draw a dependent's allowance for her husband in 1973. In a landmark decision, Justice William Brennan wrote in support of Frontiero: "Our nation has

had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism,' which, in practical effect, put women, not on a pedestal but in a cage." In a now classic series of opinions issued in the 1970s, the U.S. Supreme Court established the principle that laws based on gender stereotypes about the way men and women behave are unfair and unconstitutional. Ruth Bader Ginsburg dazzlingly argued these cases as an attorney for the Women's Rights Project of the ACLU. Even when stereotypes about women's or men's behavior might accurately predict what a majority of people will do, those individuals whose behavior does not conform to the stereotype ought not to be penalized. In 1975, Ginsburg argued *Weinberger v. Wiesenfeld*, leading the Supreme Court to agree unanimously that a Social Security law providing benefits to widows with small children, but not to similarly situated widowers, was based on the stereotype that imagined only bereft mothers, not bereft fathers.

Laws that were once viewed as protective of women are now viewed as discriminating against them. It often startles people to learn that the Supreme Court did not regard discrimination on the basis of sex as a denial of the equal protection guarantee of the Fourteenth Amendment until 1971, and then only very narrowly, in a case involving a teenager's cornet and a bank account worth $200. Other decisions followed in legislatures and in state and federal courts, reshaping the rules by which men and women make life choices. It is no longer a reasonable defense against a charge of rape to claim that the victim dressed or acted provocatively (although criminal charges of rape remain notoriously hard to prosecute successfully; the old suspicion of women's word remains). Discrimination on the basis of pregnancy, sexual harassment on the job, and exclusion from jobs on the basis that they are too harsh or dangerous: any of these actions can count as a denial of equal protection.

It is now unreasonable to claim that women do not possess fully equal legal status, or that they lack the competence to make responsible choices. Nevertheless, while the legacy of coverture has been generally repudiated, it has not been eradicated. Distrust of women's claims to autonomy, cultural beliefs about the primacy of women's domestic obligations, and opinions about women's need to be protected from certain situations all reveal the lingering effects of coverture. As recently as the year 2000, dozens of state attorneys general called for passage of a new Violence Against Women Act, arguing that long-established laws against assault and battery have proven ineffective to protect women against assault. And then there is the redefinition of abortion, as discussed above; a belief that women are incapable of making responsible decisions about abortion suffuses the new statutes limiting access to it.

An antique story about how the world works, a story grounded in English legal practice and continued in the great narrative that Americans have told ourselves about how we came to be what we are, continues to lurk in American law and practice. In that story, a husband could not kill his wife – that would be murder – but the only other guarantee she had was that he could not thrust her out naked into the world; she had her paraphernalia: her petticoats and her cooking pots. And the last thing he could take from her in order to pay his debts was her jewels, the diamonds that she could keep as her best friend. Those diamonds still gleam, but few among us know quite why.

ENDNOTES

[1] More than thirty-five years ago, Sheila Tobias and Lisa Anderson established that Rosie was highly unhappy with her postwar fate; see Sheila Tobias and Lisa Anderson, "What Really Happened to Rosie the Riveter? Demobilization and the Female Labor Force, 1944–47," Module 9 (MSS Modular Publications, 1974), 1–36. See also Connie Field's classic documentary film, *The Life and Times of Rosie the Riveter* (1987).

[2] For an exploration of aspects of Eleanor Roosevelt's life and work that may be unfamiliar to most readers, see Blanche Wiesen Cook, *Eleanor Roosevelt*, vol. 2, *The Defining Years, 1933–1938* (New York: Viking, 1999).

[3] See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009).

[4] I have explored the implications of this system in *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), chap. 1.

[5] See *Miller v. Albright*, 523 U.S. 420 (1998), esp. the dissent from Justice Ruth Bader Ginsburg, and *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), esp. the dissent from Justice Sandra Day O'Connor. See also Kristin Collins, "When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in *Miller v. Albright*," *Yale Law Journal* 109 (2000): 1669; and Kristin Collins and Linda K. Kerber, "Sex and Citizenship at the Court, Again," *Dissent* magazine online, July 20, 2011.

[6] See Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* (New York: W.W. Norton, 2008).

[7] Christopher L. Tomlins, "Subordination, Authority, Law: Subjects in Labor History," *International Labor and Working-Class History* 47 (Spring 1995): 56–90.

[8] The most detailed treatment of this topic remains Judith Apter Klinghoffer and Lois Elkis, "'The Petticoat Electors': Women's Suffrage in New Jersey, 1776–1807," *Journal of the Early Republic* 12 (1992): 159–193.

[9] See Reva Siegel, "Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073–1217.

[10] *Mackenzie v. Hare*, 239 U.S. 299 (1915).

[11] *Russell v. Brooks*, Mass. (7 Pick.) 65 (1828); cited in *Goodridge et al. v. Department of Public Health of Massachusetts*, Amici Curiae Brief of Professors of the History of Marriage, Families and the Law, 2003 [hereafter referred to as MA brief], 13.

[12] *Casey v. Wiggin*, 74 Mass. (8 Gray) 231 (1857); cited in MA brief, 13.

[13] See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

[14] Anne M. Boylan, "Women and Politics in the Era before Seneca Falls," *Journal of the Early Republic* 10 (Autumn 1990): 364–366.

[15] *Bradford v. Worcester*, 184 Mass. 557 (1904); cited in MA brief, 14.

[16] *Callow v. Thomas*, 322 Mass. 550 (1948).

[17] *Lewis v. Lewis*, 370 Mass. 619, 622 (1976).

[18] Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (1770; Washington, D.C.: 1941), vol. 1, chap. 15, 443.

[19] Quoted in Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 978 n.81.

[20] Transcript of oral argument in *Hoyt v. Florida*, 368 U.S. 57 (1961).

[21] *Account Specialists v. Jackman et al.*, 970 P.2d 202 (1998) [Oklahoma].

[22] Dorothy Samuels, "The Landscape: Where Abortion Rights are Disappearing," *The New York Times,* September 25, 2011.

[23] Equal Pay Act (Pub. L. 88-38) (EPA), as amended, 29 United States Code, at sec. 206(d); Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), as amended, 42 United States Code, beginning at sec. 2000(e); *Reed v. Reed,* 404 U.S. 71 (1971); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Craig v. Boren,* 429 U.S. 190 (1976).