

# WOMEN, MARRIAGE, AND DIVORCE IN CALIFORNIA, 1849–1872

BONNIE L. FORD\*

## PREFACE

I wish to express my family's great appreciation to the California Supreme Court Historical Society, and to *California Legal History*, for publishing this portion of Dr. Bonnie L. Ford's "Women, Marriage, and Divorce in California, 1849–1872," a dissertation my mother completed in 1985 as part of her doctorate in history from the University of California, Davis. My mother's path to the Ph.D. was not without challenge, because of her gender.

She was inspired to study history by a female high school teacher; in college she was further encouraged by her advisor to pursue a Ph.D. With this strong example and support, my mom enrolled in Stanford University's graduate program in History in 1960. At that time, Stanford steered women into the M.A. degree rather than the Ph.D. for history. After earning her M.A., my mother taught at the junior and senior high school level.

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\* This selection from Bonnie L. Ford's Ph.D. dissertation (History, University of California, Davis, 1985) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

In the late 1960s, after I was born, my mom still yearned for her Ph.D. She applied to graduate programs, but was rejected, in one case with a stinging comment that the advanced study of history was not for “bored housewives.”

A dedicated feminist, my mom found a professional home at Sacramento City College, where she taught women’s studies and directed the Women’s Center, one of the earliest such affinity spaces. For nearly thirty years, my mother taught women’s history under the auspices of California’s American Institutions requirement for public university graduates of the UCs, CSUs, and community colleges. Her curricular innovation transformed a conventional course of study into a more inclusive and representative history of the United States.

Still, the advanced study of history called. While my brother and I were in elementary school, my mother applied to UC Davis’s Ph.D. program, and was accepted. My mom had the good fortune to work with Ruth Rosen and the late Roland Marchand, renowned scholars at UC Davis. While working full time as a professor and raising two children with her husband, Judge James T. Ford, of the Superior Court of California, she earned her doctorate.

Re-reading “Women, Marriage, and Divorce in California” today, at the invitation of *California Legal History*, I am struck by the exceptional quality of its scholarship, force of expression, and relevance. The work offers a veritable clinic in how to do legal history and how to read primary sources generated by lawyers, judges, and court rulings for the study of U.S. history, broadly and inclusively. “Women, Marriage, and Divorce” reveals how disfranchised Americans have routinely sought to use the courts to redress inequalities and injustices, as best they could, and, at times, successfully so — even where powerful and pervasive cultural beliefs, such as gendered “separate spheres,” operated.

Our California family has been dedicated to the intertwined study of US history and practice of law in this state. My mother’s example in completing her doctorate was a powerful one for me. I, too, earned my Ph.D. in history at UC Davis. I also studied the nineteenth century, including the ways Black Americans looked to the courts to pursue citizenship rights before the Civil War. My brother, Dylan Ford, and his wife, Kathy, are attorneys today in Los Angeles, and my husband, Bryan Lamb, is a trial

attorney in San Francisco. Following my father's death in 2004, my mom has provided care and boundless love for grandchildren Theo and Iris, as we have pursued our own careers in history and law.

My father enthusiastically supported my mother's scholarship; in turn, his own successful tenure on the Superior Court bench was informed by this history of women's experiences in California's courts, that my mother so sensitively and carefully recovered.

What follows is a superb example of legal history as a means to understand how the disempowered have sought a fuller ounce of justice in their lives through California's courts.

**DR. BRIDGET FORD**

Professor and Chair, Department of History  
California State University, East Bay

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## INTRODUCTION

Recent historical interpretations of women in the West have interpreted women's experience on the western frontier as proof of the acceptance of the ideology of woman's separate sphere by both middle-class and working-class women.<sup>1</sup> This separate sphere consisted of the following elements: women were seen as the moral superiors of men; they ruled the home and created its special tranquil atmosphere; they had notable instincts for parenting not granted to men; and they possessed sensitivity of feeling and delicacy of physique. In evaluating the acceptance of this model, Julie Roy Jeffrey writes in *Frontier Women*:

Women's participation in the Westward movement provided a test for the power of nineteenth century beliefs about woman's place. Although these conceptions seemed farfetched on the frontier, even counterproductive, they lost little potency, for they helped women hold on to their sexual identity and offered them hope of an ever-improving life. Ideology proved to be as pervasive as it was

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<sup>1</sup> Julie Roy Jeffrey, *Frontier Women "Civilizing" the West? 1840–1880* (New York: Hill and Wang, 1979); Robert Griswold, *Family and Divorce in California, 1850–1890* (Albany: State University of New York Press, 1982).

powerful. Pioneer women's records suggest the extent to which ideology seems to have crossed class and regional lines.<sup>2</sup>

Carrying this argument a step further, Robert Griswold, in his examination of family life in *Family and Divorce in California, 1850–1890*, theorizes that not only did women of the middle and working-classes accept the ideology of woman's separate culture and role, but that men and women together adhered to a new conception of marriage based on that ideal. The new marital ideology that emerged in the nineteenth century centered on the companionate marriage and family. Using divorce records from San Mateo and Santa Clara counties, Griswold found that the phenomenal rise in the divorce rate during the latter half of the nineteenth century represented the assumption of the ideal of the companionate marriage by both middle-class and working-class couples. He writes, "As the expectations and importance of marriage went up in the nineteenth century and as companionship, love, affection, and mutuality became the accepted norm, husbands and wives who fell short of such high standards found themselves vulnerable in divorce trials."<sup>3</sup>

He further defines the companionate marriage in the following manner: it was a partnership between husbands and wives founded on domestic equality; family relations were based on affective values; men respected women and treated their wives kindly; and parents conceived of childhood as a special stage of life demanding nurturance and care. Griswold shows how prescriptive themes changed from the patriarchal pattern of the seventeenth century to the companionate ideal of the nineteenth. He then attempts to prove that both middle-class and working-class people accepted the newer formula. "Men and women from all class backgrounds," he writes, "evinced concern about women's chastity, social respectability, domestic tranquility, and moral rectitude and with men's diligence, industriousness, sobriety, sexual decorum and kindness."<sup>4</sup>

The present work disagrees with these two interpretations and hypothesizes that evidence from divorce records in Sacramento County from 1849–1872 shows just the opposite — that working-class women did not,

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<sup>2</sup> Jeffrey, *Frontier Women*, xiii.

<sup>3</sup> Griswold, *Family*, 3.

<sup>4</sup> *Ibid.* 172.

in fact, demonstrate the absorption of the ideology of the special role of women nor did their marriages exemplify the acceptance of the companionate ideal. What accounts for these opposite conclusions?

In the case of Julie Jeffrey's work, the letters, journals and reminiscences of women in California that were her primary sources reflected the values of middle-class women. Not only were such women as Eliza Farnham, Sarah Royce and Louisa Amelia Knapp Clappe especially gifted observers, but they were also well educated for the time and decidedly middle-class in background. In contrast, the divorce records that I consulted were most notably the records of working-class women. Jeffrey admits that the women whose works she consulted were literate and frequently middle-class. Yet she asserts that "internal evidence suggests the lower-class origins of at least some of the women and almost all of the Mormon pioneers." I would submit that the fact these women were literate and articulate places them in a very different class from those women who are found in the divorce records I examined. The class composition of my study is the opposite of Jeffrey's. In the case of the divorce files that I examined, most of the women were working-class and only a few of the women were middle-class. I agree with Jeffrey that in the sources she relied upon, the women do indeed reveal an acceptance of the moral superiority of women as well as their belief in separate spheres. However, I believe that her sources represent the more visible and articulate segment of Western women while mine represent more of the inarticulate women of that time and place.

Griswold's sources are similar in nature to those upon which this work is based; therefore, the divergence between his conclusions and mine demands close analysis. In fact, though the two works ostensibly cover the same time period, they are not really contemporary. Sacramento was populated immediately at the beginning of the Gold Rush and experienced its greatest population growth by 1860. The growth of San Mateo and Santa Clara counties took off after 1860. All of the cases studied in this work were litigated from 1849 to 1872 with 90 percent occurring in the 1850s and 1860s. In contrast, the bulk of Griswold's cases (88 percent) were litigated in the 1870s and 1880s. In addition, the population of the two counties studied in the Griswold work were agricultural and rural, while Sacramento began as an "instant" commercial city, around which agriculture developed only gradually.

But equally important, the terms of the two analyses are vastly different. Whereas Griswold sees the importance of divorce litigation as the evidence of dashed expectations, I see the litigation as evidence of real behavior. He focusses on the prescriptions that are violated, while I concentrate on the standards that are revealed. Conduct resulting in divorce can be looked on as aberrant behavior — a departure from the norm — or it can be seen as an example of existing behavior — perhaps extreme or perhaps representative of many similar cases that did not reach the courts.

Since attorneys, judges and legislators were overwhelmingly middle-class, it is likely that considerable attention would be paid to middle-class conventions in divorce cases. It is important to sift behavior from homilies. Certainly, the formula with which each complaint was drafted showed an acceptance of the middle-class standard of behavior, but that acceptance was the result of the lawyer's beliefs and his determination of what might impress the court. The behavior itself shows that the realities of working-class marriages were far from the companionate ideal.

It seems appropriate at this point to discuss the uses and limitations of divorce records as historical sources. Given the nature of the documents contained within such records, questions may be raised about truthfulness, comprehensiveness and representativeness.

The question of truthfulness arises because claims in divorce cases are made to seek a favorable outcome in an adversarial process. Consequently, certain facts are emphasized or distorted to support a case, and information that is unfavorable is omitted. However, I looked for behavior, rather than ideals. The divorce laws of this period were strict when it came to issues of fact. Charges had to be corroborated by witnesses. Usually, the witnesses' testimony was believable. While I did see a few cases where the witnesses were obviously coached, for the most part, testimony seemed authentic in voice and detail. It is true that divorce became formulaic in later years, but in the first two decades of the divorce law's existence evidence was carefully taken. Clearly, the court's bias, especially in the first decade, was to deny divorces if charges of wrongdoing were not corroborated by witnesses. For this reason, I believe most of the charges that stood up in court were sufficiently verified to serve as historical evidence.

Second, there is a question of comprehensiveness. The only information required by the court to obtain a divorce at this time consisted of the

names of the spouses, the date and place of marriage and the charge of the plaintiff. Many facts about the marriage were omitted. On the other hand, many unsolicited facts were presented as well as details necessary to prove charges. By means of these other facts I was able to quantify many other characteristics. In none of the characteristics that I quantified did the data appear in less than 25 percent of the cases.

In regard to representativeness, I believe the difficulties placed in the path of a divorcing partner were so great that only the most persistent would prevail. For that reason, it seems likely that many others experienced similar situations but failed to obtain divorces.

Unlike Griswold, I do not give as much weight to the ideologies expressed in the divorce cases as I do to the behaviors they revealed. What was significant to me was the extent to which the women in these cases did not conform to the ideology of nineteenth-century womanhood rather than the extent to which they paid obeisance to it in their statements. In fact, some of the women appeared to have contempt for the conventions. Not all divorcing women showed these tendencies, but the women who had different standards of behavior were usually working-class women, while middle and upper-class women tended to respect the conventions.

In contrast to the behavior of working-class women, the marital law of California was harmonious with the companionate ideal and was influenced by the feminist movement in the East. It was also deliberately reformist. A constitutional provision perceived to be in the mainstream of this reform was included in the Constitution. From 1850 to 1872, the law included a community property system with such protections for married women's property as separate property registration, provision for antenuptial contracts and the availability of sole trader status. In addition, a liberal divorce law embodied the grounds of divorce common in the most progressive laws of the time. The basic outlines of marital law that were to govern California were developed during this period and at length summarized in the Civil Code of 1872. This code was a compilation of statutory and case law from the previous twenty-two years and combined to form a system whose essential principles governed California family law for over a century, until the feminist movement of the 1970s.

The laws governing marriage, while copied from the reforms of the East, had little relevance to the West. The eastern laws were incubated in



a developed society with a significant number of propertied, middle-class women. In the West in this early period, few women or married couples had acquired enough property to put the laws to any use. Few women saw any benefit to the separate property registers or the antenuptial agreements. Divisions of community property at divorce were uncommon because there was usually nothing to divide. Most of the marital reforms simply did not fit actual circumstances.

The divorce law was the most utilized of the reforms, and 70 percent of plaintiffs in divorce cases were women. This does not prove, however, that women expected companionate marriages as Griswold concluded. The absent husband whose whereabouts were unknown violated the companionate ideal. To expect the presence of a husband in marriage is hardly a high standard, and yet this is where most of the husbands failed. Cases litigated under this ground also showed the desperate circumstances of many women who were abandoned in a strange land with few friends or family to help them.

The duty of a husband to support his family so that his wife could pursue domesticity was a key part of the companionate ideal. Yet the court commonly refused to grant divorces on that basis. To grant a divorce wherever a wife contributed to the support of the family would have been folly in early California. Cases pursued under this provision of the law demonstrated the extent to which women supported the family rather than the extent to which they were keepers of the domestic hearth. Such cases also confirmed that it was immaterial to the court whether a husband supported his wife or not. That the wife supported the family was perfectly acceptable to the court, at least for working-class families.

If the court was reluctant to enforce the husband's unaided support of the family, it tried valiantly to compel female purity. Adultery was the most frequent and most successful charge made by male plaintiffs. That so many divorces were obtained by men on the basis of this charge illustrated that the courts believed in the purity of womanhood, but it also proved that women's behavior reflected something less than devotion to the ideal. In contrast to the tenets of Victorian morality, many working-class women evidenced a lack of concern for observing the confinements of marriage, given that over 50 percent of male plaintiffs alleged adulterous conduct on the part of their wives and that most of these men proved their cases in court.

The lie was also given to the commitment of husbands to a new ethic of gentleness and consideration to their wives. One of the most common images invoked by proponents of liberal divorce laws was the cruel husband, whose violence could be curbed by the woman's ability to seek divorce. However, cruelty was a difficult charge to prove at the beginning of this period. The court proved less than sympathetic unless a woman's life was in danger. Cases under this charge disclosed instances of serious physical cruelty in the lives of working-class women. I did note a trend toward higher expectations in the expanded definition of cruelty that was gradually broadened during this period to encompass mental suffering.

Like the charges of failure to provide support and extreme cruelty, the charge of habitual intemperance did not work to a working-class woman's advantage as reformers had expected that it would. Instead of relieving the married woman of her addicted spouse, the charge of drinking to excess was easier to prove against a woman than a man. A double standard emerged in judicial response to the charge of habitual intemperance; the seriousness of women's drunkenness far outweighed that of men in the eyes of court, witnesses and jury. Men could understand the drinking habits of other men, but found women's excessive drinking particularly obnoxious. The ample evidence in these court cases that working-class women did drink and did buy liquor at bars and saloons also suggests that lower-class women did not experience the domestic cloistering that was decreed by the ideal of true womanhood.

Not only did financial support during marriage prove illusory, but so did a husband's responsibility for support after marriage. Financial awards at divorce were so rare as to be nearly nonexistent.

Though courts had the power to award community property and make orders for support, less than 1 percent of women in the cases I studied received any form of support — child support, spousal support, or alimony. Less than 5 percent sought any of these forms of relief. Probably working-class women rightly suspected that awards, if granted, would in most instances be useless where husbands were absent or impecunious. That men frequently avoided equal division of any community property by using their control of property to sell it and abscond with the proceeds hardly shows great respect for the equality of women.

When a judgment for divorce was handed down, the court could also make an award of child custody. Neither the court nor the parties to the divorces seemed to believe that women had some special instinct toward motherhood. Usually, the woman did in fact get custody of the children, not because of her special qualities, but rather because the father was missing. Laws were vague and left child custody issues to the discretion of the court. At the trial court level, the custody of children was usually determined on the basis of the guilt or innocence of the party in the divorce suit. On the whole, few cases of child custody were contested. The major problem for children in the period was orphanhood, not custody.

This dissertation examines the enactment and actual enforcement of a system of marital law formulated on the bourgeois assumption of woman's separate sphere and moral superiority. Yet the women who came in contact with these laws were primarily working-class women whose behavior did not meet the criteria of the ideal standard. What is most noticeable about this conjunction is the inappropriateness of the legal system to these women's lives and the way in which their violations of middle-class standards had the ironic effect of sometimes turning the laws to their disadvantage.

In order to cogently analyze the data available in the divorce records, we must examine the legal context in which the litigation occurred. California's law of marriage and the family, to which we now turn, seemed to hold out significant promise for all women.

## MARITAL LAW IN CALIFORNIA 1849-1872

California's first marital law was based on the companionate ideal. Laws most consonant with women's equality in marriage at the time were part of the constitutional scheme and enacted by statute. Experience eventually showed, however, that the law was unsuited to the men and women expected to live under it. It was a system too advanced for the population to make use of or to accept. The new system was inspired by legal debates in New York and other eastern states. As the law impinged on people's lives, however, significant and steady change was required to adjust the law to popular mores and sentiments. This chapter will explore the innovations and the retrenchments and will set the legal scene, a critically important aid to our understanding of marriage and divorce in the new state.

On September 1, 1849, delegates to California's constitutional convention assembled at Monterey to write a constitution. Delegates were anxious to obtain statehood as gold-seekers swarmed into the state.<sup>5</sup> An important question for this convention was what form marital property law should take; the delegates had to choose between the common law and the civil law of marital property. They could also choose from a number of common law reforms then being advanced in other parts of the U.S.

By 1850, seventeen states had passed some form of a married women's property act to reform the common law.<sup>6</sup> The traditional system of common law merged the identity of wife with husband at marriage and declared the wife civilly dead. Its origins lay in feudal society and its main function was to prevent estates from being divided. The marriage settlements that wives brought with them to marriage became a part of their husbands' estate that would be handed down intact to the eldest sons under the system of primogeniture. Because the married woman had no property, she could not contract, sue or be sued, or make a will. In the event of dissolution of the marriage, her rights were limited. Divorce was almost unobtainable, and at the death of her husband she had only dower rights in his estate, which allowed her the use of one-third of her deceased husband's estate until her death. Even her earnings came under her husband's control.<sup>7</sup> This civil death at marriage was termed coverture.

The married women's property acts, which purported to mitigate the disabilities of the married woman under the common law, predated the organized women's movement. Though they embodied a powerful challenge to the subordinate status of women under the law, their main purpose was to reinstate rights of middle- and upper-class women who had lost the right to hold equitable trusts by reason of legal codifications that had taken place in order to simplify the law. Women who had customarily protected their property by means of a trust could no longer do so.

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<sup>5</sup> Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," *UCLA Law Review* 24 (October 1976): 10-12.

<sup>6</sup> Lawrence M. Friedman, *A History of American Law* (New York, Simon and Schuster, 1973), 186.

<sup>7</sup> Prager, "Community Property," 3.

In addition to reinstating a means by which married women could hold property, proponents of married women's property acts saw the possibility of aiding debtors by shielding that property. In an increasingly commercial economy, the hazards of the boom-and-bust cycle had plunged many families into want. By preserving the wife's property, some help for debtors could be enacted. In the process of dealing with these two problems, the disabilities of coverture were scrutinized and brought to public attention. This scrutiny led to women's consciousness of their legal position in marriage and gave the women's movement a powerful claim of victimization by the law. Perhaps the most important effect of the legislative debate and passage of women's property acts was the impetus given by the very process to the women's rights movement in general.<sup>8</sup>

The reform acts of the 1840s declared the right of a wife to the separate property she brought to the marriage and to the property she received by gift or inheritance during the marriage. More conservative separate property acts gave the husband the right to control and manage his wife's separate property. A more radical version of the married women's property act not only secured her separate property but also gave her the legal right to its management and control. Other provisions of these marital property acts provided a married woman with the right to her earnings as her separate property.<sup>9</sup>

Instead of the common law, or a reformed version of the common law, the delegates to the constitutional convention could choose the community property system of marital law that had come to California via Spain and Mexico. The community property system in the civil law significantly differed in theory from the common.

It emphasized the shared property of the marriage rather than separate property. All earnings of either spouse during the marriage became the property of both. Consequently, the housewife's contribution was theoretically equal to the wage-earner's. However, community property also recognized separate property and defined it in much the same manner as the married women's property acts did. Separate property was that property which a husband or wife brought to the marriage or that which they received as a gift or

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<sup>8</sup> Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982), 39-49.

<sup>9</sup> Prager, "Community Property," 4.

inheritance during the marriage.<sup>10</sup> The debate at the constitutional convention concerning marital property law devolved upon the issue of whether or not separate property for married women would be recognized. Both the married women's property acts and the community property system provided for separate property for married women, and little or no distinction was made between the two systems in the discussions. The more revolutionary aspect of community property law — the sharing of property in marriage — was ignored by the delegates in their debate.

The starting point for the argument over separate property was a proposed constitutional provision that stated:

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.<sup>11</sup>

This was taken verbatim from the Texas Constitution of the time.<sup>12</sup> The words "common property" meant community property in a civil law context.<sup>13</sup> The word "common" appeared in the provision and, while the debaters considered this a question of the civil law versus the common law, no one expressed concern about the possible ramifications of the sharing principles of community property law. It appears that the constitutional provision under discussion was recognized as enacting community property law but that the delegates' understanding of community property law was unclear.<sup>14</sup>

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<sup>10</sup> Elizabeth A. Cheadle, "The Development of Sharing Principles in Common Law Marital Property States," *UCLA Law Review* 28 (October 1981): 1276.

<sup>11</sup> Ross J. Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution* (Washington, D.C.: John T. Tower, 1850), 259–60.

<sup>12</sup> William A. Reppy, Jr., *Community Property in California* (New York: The Michie Co., 1980), 18.

<sup>13</sup> Peter Thomas Conmy, *The Historic Spanish Origin of California's Community Property Law and its Development and Adaptation to Meet the Needs of an American State* (San Francisco: Grand Parlor, Native Sons of the Golden West, 1957), 1.

<sup>14</sup> Prager, "Community Property," 10.

The forty-eight delegates to the convention, identified according to origin and recency of migration, comprised four groups: the native Californians of Mexican or Spanish descent; the old-line Americans who had resided in California for a long period of time (ten to twenty years); the more recent American immigrants, most of whom had come at the time of the Mexican-American War (three to ten years previous to the convention); and the very recent immigrants who had come fewer than three years previous to the convention.<sup>15</sup> Interestingly neither the native Californians nor the old-line residents participated in this debate. In Mexican California, marital property seldom became an issue because of the rarity of divorce and the conservative nature of the land-based rancho society that was not highly commercial.<sup>16</sup> The newer emigrants who had come to California from four months to three years previous to the convention played the leading roles on this issue.

Presumably these more recent immigrants were familiar with the debates concerning married women's property acts that had taken place during the last decade in the eastern states, while the natives and older residents were largely unaware of these developments. The seven men who took extensive part in the polemics, Henry Halleck, Kimball H. Dimmick, Frances Lippitt, Charles T. Botts, Myron Norton, John M. Jones, and Henry A. Tefft had a number of characteristics in common. First, they were all recent immigrants. Second, they were all lawyers.<sup>17</sup> Finally, five of the seven were born in or had lived most recently in New York.

The New York link is significant because New York had recently undergone major legal reforms, including marital property reform. From 1841 to 1848 eight bills were introduced in that legislature which provided for married women's separate property, four of which were considered in 1846 and 1847.<sup>18</sup> At the New York constitutional convention of 1846, a clause almost identical to the one proposed at the convention in California was put forward. It too was probably copied from the Texas Constitution but

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<sup>15</sup> *Biographical Sketches of the Delegates to the Convention to Frame a New Constitution for the State of California* (San Francisco: Francis and Valentine, Publishers, 1878), 8-9.

<sup>16</sup> Prager, "Community Property," 13.

<sup>17</sup> Of the forty-eight members of the convention, only fourteen were attorneys.

<sup>18</sup> Basch, *Eyes of the Law*, 138.

slightly modified to eliminate the phrase “common property.” This constitutional provision was not passed, but in 1848 a married woman’s property act was passed that was similar in content.<sup>19</sup> The controversy resulting from this lengthy process of reforming the New York law and the law of other common law states had resulted in a number of articles in national publications.<sup>20</sup>

New York was the previous residence of Dimmick, Halleck, Lippitt, and Norton. As lawyers, they were no doubt familiar with the arguments that had been advanced in the campaign. Many of their arguments were similar to those voiced in the New York debates. Jones had most recently been a resident of Louisiana where community property law governed. The remaining recent arrival was Charles T. Botts who took the conservative position championing the unreformed common law. Botts was born and raised in Virginia before coming to California eighteen months previously.

The content of the debates indicates that the issue paramount to the delegates was the economic condition of married women under the law. Subtopics of the debate included the ramifications for creditors’ rights and the disruption that would result to the native Californian tradition if the law were changed. The undesirability of the common law was mentioned because of its complexity. Delegates expressed a desire for a simple understandable law. The most important question, however, was that of women’s rights. The focus of the New York debate had shifted in California. The main questions in New York had been how to reinstate trusts for married women after they had been removed by changes made to simplify the law and how to relieve debtors. In California, the broader question of the legal position of married women was the major issue.

Botts argued for the traditional common law including coverture on the basis of the natural law:

In my opinion, there is no provision so beautiful in the common law, so admirable and beneficial as that which regulates this sacred contract between man and wife. Sir, the God of nature made woman frail, lovely, and dependant [sic]; and such the common law pronounces her. Nature did what the common law has done

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<sup>19</sup> *Ibid.*, 150.

<sup>20</sup> *Ibid.*, 138.



— put her under the protection of man; and it is the object of this clause to withdraw her from that protection, and put her under the protection of the law. I say, sir, 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 well trust him with her gold. You lose the substance in the shadow; by this provision you risk her happiness forever whilst you protect her property. Sir, in the marriage contract, the woman, in the language of your protestant ceremony, takes her husband for better, for worse; that is the position in which she voluntarily places herself, and it is not for you to withdraw her from it.<sup>21</sup>

Botts, was the most conservative of the debaters. It was his belief that a married woman should be totally dependent on her husband economically, that the husband should be the head of the family, and that a married woman's property act would destroy the harmony of the marital relationship and transform marriage into a battleground by placing the wife's interests in opposition to her husband's. Dimmick, who represented a large native Californian constituency in San Jose, was unimpressed by the dependency of women assumed by the common law.

We are told, Mr. Chairman, that woman is a frail being; that she is formed by nature to obey, and ought to be protected by her husband, who is her natural protector. That is true, sir; but is there anything in all this to impair her right of property which she possessed previous to entering into the marriage contract?<sup>22</sup>

In order to bolster his argument, Botts invoked Blackstone and the Bible. "By marriage," says Blackstone, "the husband and wife are one person in the law." Botts continued:

This is but another mode of repeating the declaration of the Holy Book, that they are flesh of one flesh, and bone of bone. It is a principle, Mr. Chairman, not only of poetry, but of wisdom, of truth, and of justice. Sir, it is supposed by the common law that the

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<sup>21</sup> Browne, *Debates*, 259–60.

<sup>22</sup> *Ibid.*, 263.

woman says to the man in the beautiful language of Ruth: “Whither thou goest I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God.”<sup>23</sup>

Jones, the representative of San Joaquin and the youngest of the debaters at twenty-five, pleaded the cause of reform by stating that the despotism of the husband had been the subject of reform in the eastern United States for the past forty or fifty years<sup>24</sup> and that he favored simplification of the common law.<sup>25</sup>

Botts replied that despotism was warranted in the case of husband and wife. He also blamed the woman’s rights movement for the married women’s property acts saying, “This doctrine of woman’s rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe.”<sup>26</sup>

Some delegates predicted a rise in the divorce rate if married women were allowed to hold property.<sup>27</sup> Dimmick replied that the community property system with its separate property provisions had been in effect in California since the coming of the Spanish without destroying marriage.

In addition, Dimmick voiced his concern for the native Californians who had operated under that system, stating:

Women now possess in this country the right which is proposed to be introduced in the Constitution. Blot it out, and introduce the common law, and what do you do? The wife who owns her separate property loses it the moment the common law prevails, and it is to avoid taking away that right of control over her property that I would wish to see this provision engrafted in the Constitution.<sup>28</sup>

Still professing doubts about the wisdom of the measure, Lippitt expressed his fears for creditors’ rights. He contended, “If the husband is a dishonest man, gets in debt, and cannot or will not pay his debts, he has only to

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<sup>23</sup> *Ibid.*, 267.

<sup>24</sup> This was clearly an overstatement, since the first Married Woman’s Property Act was passed in 1839.

<sup>25</sup> Browne, *Debates*, 264.

<sup>26</sup> *Ibid.*, 260.

<sup>27</sup> *Ibid.*, 267.

<sup>28</sup> *Ibid.*, 262.

pretend, when a bill or execution is sent against his property, that it belongs to his wife — that it is her separate property.”<sup>29</sup> Botts agreed arguing:

The husband and wife together may enjoy my property and yours, and become possessed of thousands and thousands, leaving us beggars; and then, sir, under this system, while they are indebted to us together for that which they have jointly used and occupied, under the pretence [sic] of this clause, they may leave us penniless while they revel in luxury.<sup>30</sup>

Several of the proponents of the measure saw the provision from the perspective of aiding debtors. It was a means of saving families from ruin when the hazards of speculation bankrupted a family.<sup>31</sup> Tefft foresaw a chaotic economy in California that would be characterized by “wildness of speculation.” As a means of preventing women and children from suffering from destitution because of the speculation of their husbands, Tefft wanted to offer them some security.<sup>32</sup> Returning to the question of woman’s rights, Lippitt finally said that the provision was simply not necessary because a woman’s separate property could be protected by an antenuptial agreement or marriage contract. The constitutional provision would not help those women who always yielded to their husbands — they would never use the provision. On the other hand, those women who wore the “breeches” in the family would only be stirred up by such a right and dissension would be increased, according to Lippitt.<sup>33</sup>

Jones admitted there were two kinds of women, those who wore the breeches and those who didn’t, but he drew the opposite conclusion. To him it was the latter woman who needed the constitutional provision because she would never suggest a marriage contract. The assertive woman would protect her property anyway, and “it is to those who do not wear the breeches — it is to those gentle and confiding creatures who do not think of contracts — that the protection of the law is designed to be given.”<sup>34</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid., 268.

<sup>31</sup> Ibid., 259.

<sup>32</sup> Ibid., 258.

<sup>33</sup> Ibid., 261.

<sup>34</sup> Ibid., 267.

In sum, the arguments advanced at the convention by the proponents of separate property rights for women were as follows: that the traditional common law annihilated the rights of the married woman and that in this enlightened age her separate property should be protected; that a provision for separate property would save families from want and deprivation when husbands speculated unwisely; that the system of law of the native Californians should be continued so that their property rights would not be disrupted. But, above all, the debate had been transformed from the emphasis in the eastern states on legal reforms and creditors' concerns to that of a debate on the "woman question."

It is clear from the debate that delegates did not foresee the full impact of the sharing principles of community property. They considered community property under the civil law to be similar to separate property provisions enacted in the eastern states under the heading of married women's property acts.<sup>35</sup> The section was approved as written and became a part of the first Constitution of the state of California. That Constitution mandated that "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."<sup>36</sup> The delegates, intending to erase the disabilities of married women under the law, at least so far as their separate property was concerned, had gone much further toward companionate marriage by unwittingly adopting the radical principles of community property. The separate property reform was well ahead of the circumstances of the people then involved in divorce, and it would not be until the twentieth century that the promise of community property would come to fruition.

The first legislature followed the mandate of the Constitution by enacting a law on April 17, 1850 entitled, "An act defining the rights of husband and wife."<sup>37</sup> According to Orrin K. McMurray, this law was substantially taken from Texas law governing husband and wife, just as the constitutional provision concerning separate property had been taken from the Texas Constitution.<sup>38</sup> Succeeding legislatures amended this measure and

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<sup>35</sup> Prager, "Community Property," 9.

<sup>36</sup> Browne, *Debates*, 259–60.

<sup>37</sup> *Laws of the State of California*, First Session, 1850, 254–55.

<sup>38</sup> Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," *California Law Review* 5 (June 1915): 377.

adopted other statutes that pertained to the married woman during the period at issue — 1849 to 1872. During this time amendments and additions overlaid a common law tradition upon the community property law in order to conform to the experience of what was now a predominantly American population with a common law heritage.<sup>39</sup>

The original act defined separate property as that property, both real and personal, owned by a spouse before marriage or obtained after marriage by gift or inheritance. Community property was simply defined as all property acquired after marriage by either husband or wife that was not separate property.

The husband was granted complete management of both the community property and the wife's separate property, though her separate property could not be sold without her consent in writing. In addition, she could be examined in private to determine if her signature had been obtained by coercion. If the wife believed that her husband was mismanaging her property she could go to court and ask the judge to appoint a trustee to manage the funds under the supervision of the court. This aspect of the law placed it in the category of the conservative reformed common law states. Under Mexican community property law, she would have had exclusive control of her separate property.<sup>40</sup>

In addition to the protection of the wife's separate property, eight out of twenty-three sections of the marriage law provided for the regulation of marriage contracts.<sup>41</sup> These provisions enabled wives to gain their husband's prenuptial consent to management and control of their own separate property.

While extensive protections for the wife's separate property were enacted, with regard to community property the husband had seemingly unlimited control. What then did community property mean to the married woman? The answer came in a California Supreme Court case in 1860. In *Van Maren v. Johnson*, Chief Justice Field characterized the wife's interest in the community property as a "mere expectancy." Ruling on whether the community property was liable for the husband's premarital debts, Field wrote,

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<sup>39</sup> Prager, "Community Property," 34.

<sup>40</sup> *Ibid.*, 7.

<sup>41</sup> *Laws of the State of California*, First Session, 1850, 254-55.

Yet the common [community] property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.<sup>42</sup>

In other words, the wife's half interest only materialized at the death of her spouse or at divorce. This lack of recognition of the sharing principles of community property is consistent with the constitutional convention's ignorance of the differences between common law and community property law. In reality, during the existence of the marriage, community property and the common law marital property systems were virtually indistinguishable.<sup>43</sup> If the "mere expectancy" could only be realized at death or divorce, what was the nature of the wife's interest in these two circumstances?

When a spouse died, one-half of the community property went to the survivor and the other half to the descendants of the deceased husband or wife. This was a radical departure from common law where the husband retained full rights to the property upon the death of the wife while the wife, upon the death of her husband, only received the use of one-third of the property until her death. In the 1850 act both parties were entirely equal. "The major problem with this approach was that it resulted in property, which those reared in the common law thought of as the husband's property, being passed on the wife's death to people other than the husband."<sup>44</sup> When this aspect of the law became clear — that men would lose half the community property at the death of their spouses — it was quickly challenged in the courts. In the case of *Panaud v. Jones*, the court ruled that the provision of the act that fixed such parity was unconstitutional. The Court stated, "It would be a startling doctrine to hold that, on the death of the wife, one half of the community property immediately vested in the children of the marriage, without reference to the payment of debts contracted by the husband for the benefit of the joint community."<sup>45</sup>

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<sup>42</sup> Van Maren v. Johnson, 15 Cal. 308, 311 (1860).

<sup>43</sup> Prager, "Community Property," 39.

<sup>44</sup> *Ibid.*, 36.

<sup>45</sup> *Panaud v. Jones*, 1 Cal. 488, 517 (1851).

Despite the plain language of the statute, the court refused to recognize the liberalized marriage laws. It was too “startling” to those reared and educated in a common law tradition.

In 1861, the legislature revised the provision to conform to the court decision and specified that if the wife died, all the property went to the husband. If the husband died, one-half of the property went to the wife and the other half to his descendants after his debts had been paid. In addition, it was provided that the husband could will one-half of the community property while granting no such testamentary rights to the wife.<sup>46</sup> Very quickly, the more radical aspects of community property law were being brought into conformity with common law doctrine.

The disposition of the community property upon divorce also necessitated revision. The original act of 1850 provided for the equal division of the property in the event of divorce. This meant that, in terms of property at least, a form of no-fault divorce existed. In practice, it galled victims of adultery and extreme cruelty to divide their property equally. In 1857 the provision was amended to state that, in those two causes for divorce, the court could divide the property at its discretion on the basis of what it considered just.<sup>47</sup> Still, in all other cases the marital property was to be divided evenly. In common law jurisdictions at this time, a wife was entitled to nothing upon divorce. In this one circumstance — that of divorce — the radical nature of the sharing principles of community property law were inescapable.

The laws concerning the rights of married women to make wills already conformed to the common law. Wives could make wills according to the legislation of 1850, but only with the consent of their husbands, unless they had a marriage contract that provided differently. Wills made by unmarried women were revoked upon marriage and were not revived upon the death of the husband.<sup>48</sup> In 1866, the legislature liberalized the will statutes by providing that a married woman could dispose of her separate estate without the consent of her husband, “in like manner as a person under no disability may do.”<sup>49</sup> This language, referring to the disability of being a married woman, was common law terminology.

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<sup>46</sup> *Statutes of California*, Twelfth Session, 1861, 310–11.

<sup>47</sup> *Laws of the State of California*, First Session, 1850, 254–55.

<sup>48</sup> *Ibid.*, 178–79.

<sup>49</sup> *Statutes of California*, Sixteenth Session, 1866, 316–17.

Just as statutes regarding the making of wills by married women showed the influence of the common law so also did a statute passed in 1852 that was taken directly from the common law. This statute was called “An Act to authorize Married Women to transact business in their own name as Sole Traders.” A reference to *femme sole* showed the common law heritage of this act. Under the common law, it had become customary to allow married women to provide for their own support in cases where husbands were absent or unable to work. Obviously, a woman operating under coverture, who could neither sue nor make contracts, could hardly enter into business. In order to make it possible for her to support her family, a special category was constructed that made a married woman single for certain purposes and under circumstances that were well regulated by law. According to the California act, a woman could designate herself as a sole trader by declaring her intention to carry on business in her own name before a notary public or other official and by recording that declaration in the County Recorder’s office. In addition, she was required to publish in the newspaper her intention to enter into business. Once she had fulfilled those requirements, the debts and credits of the business were hers alone. That her earnings as a sole trader should be her separate property offended community property principles and showed the inevitable contradictions that appeared when combining aspects of common law with civil law.<sup>50</sup>

Moreover, according to the sole trader statute, a married woman could sue and be sued and make contracts, but her liability would extend only to her separate property. She could not invest more than five thousand dollars in her business unless she took an oath that sums over five thousand dollars did not come from her husband.<sup>51</sup> The intent of this legislation was to enable a woman with a dissolute or absent husband to support herself. It was the one statute that working-class women found useful. Legislators had feared that a husband might shield his property from liability by placing it under his wife’s name under the sole trader enactment, and by 1862 they were convinced that fraud was common under the 1852 act. After that year a woman could be a sole trader only upon application to the district court where she had to explain why it was necessary for her to earn her

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<sup>50</sup> Prager, “Community Property,” 40.

<sup>51</sup> *Laws of the State of California*, Third Session, 1852, 102.



own livelihood. It also stated that “nothing contained in this Act shall be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended by her husband.”<sup>52</sup> A year later the legislature made it a felony for a woman to fraudulently represent herself as a sole trader.<sup>53</sup> After an initially bold move, again the legislature retrenched.

Other enactments during the period allowed a married woman to execute powers of attorney and to insure her husband’s life.<sup>54</sup> In 1870 an act was passed that protected her earnings from liability for the debts of her husband. If she were living apart from her husband her earnings were her separate property.<sup>55</sup> This was much less progressive than common law reforms of the time in eastern states that considered her earnings as her separate property even when she was still living with her husband.

The original work of the legislature defining the rights of husbands and wives conformed closely to the Spanish civil law and showed the legislature’s desire to fulfill the assumed constitutional mandate to adopt the community property law. But as the law was tried and tested, modifications were made in a common law direction. The legislature and the courts little by little transformed the concept of community property law into little more than a reformed version of the common law. By the enactment of the Civil Code of 1872, the constitutional provision was defined as follows: “The term ‘separate property’ . . . is used in its common law sense, and by that law ‘separate property’ means an estate held, both in its use and in its title, for the exclusive benefit of the wife.”<sup>56</sup> The writers of the code seemed unaware of the community property origins of the section. The true implications of the choice of community property at the constitutional convention of 1849 would not be manifest until well into the twentieth century except in the case of divorce, but in order for a divorce to take place it was first necessary to adopt a divorce law for California.

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<sup>52</sup> *Statutes of California*, Thirteenth Session, 1862, 108–9.

<sup>53</sup> *Statutes of California*, Fourteenth Session, 1863, Ch. 189.

<sup>54</sup> *Laws of California*, Fourth Session, 1854; *Statutes of California*, Fourteenth Session, 1863, 165.

<sup>55</sup> *Statutes of California*, Twentieth Session, 1870, 226.

<sup>56</sup> *The Civil Code of the State of California* (Sacramento: T.A. Springer, State Printer, 1872), 54.

Most northeastern states by this period had divorce statutes that provided for judicial divorce on grounds of adultery, desertion, extreme cruelty, and failure to provide support. The only restrictive state north of the Mason–Dixon line was New York, which allowed for divorce only in cases of adultery.<sup>57</sup> Most of these laws had been passed soon after the Revolution, and divorce was well established long before the Civil War. Divorce became a part of the antebellum reform movement in the 1840s with the attempt to enlarge the number of grounds on which a divorce in New York could be obtained. According to Max Rheinstein, the long argument for increased grounds for divorce in New York turned upon the plight of women in marriage: “The possibility of divorce was urged as a means of protection for women abused by tyrannical, profligate or abusive husbands.”<sup>58</sup> The reformers failed to liberalize the divorce law in New York.

When California legislators took up the question of divorce in 1851, a highly emotional struggle ensued. The Assembly sent a divorce bill to the Senate after a lengthy debate and a close vote of 17 ayes to 16 nays.<sup>59</sup> The bill was referred to a select committee of the Judiciary Committee, which in turn recommended that it be rejected because of concerns about its effect upon marriage and womanhood. The committee saw the marriage tie as sacred and “indissoluble except by death.” More importantly, the committee believed that divorce would

subvert the purity of woman and unloose the restraints which have accompanied and helped to construct a refined civilization. If marriage is only conventional, so is the chastity of woman, as is her modesty, her delicacy, her refinement, and if we desire that these qualities should remain unimpaired, it behooves us to look well to

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<sup>57</sup> Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* (New York: The Macmillan Co., 1962), 50.

<sup>58</sup> Max Rheinstein, *Marriage Stability, Divorce, and the Law*, (Chicago: University of Chicago, 1972), 37–39.

<sup>59</sup> Theodore H. Hittell, *History of California*, 4 vols. (San Francisco: N. J. Stone and Co., 1897), 4 (1897), 68.

the effect which our legislation will have in . . . relaxing those rules which have fixed a high standard of female excellence.<sup>60</sup>

Divorce was squarely faced as a woman's issue, and fears of woman's sexuality being "unloosed" were very much in evidence.

Finally, the committee believed that if divorce were allowed, people would enter into marriage impetuously, whereas if divorce were impossible, marriage would be approached cautiously.<sup>61</sup> Against this majority view, a minority of the committee issued a report supporting the divorce law. The members of this dissenting group argued that

when by the fault of either of these parties . . . respect and affection has ceased — when joy has departed from the family circle; when discord, and outrage, and violence have usurped the very inner temple of the household; when virtue itself has deserted the family altar; when children are trained up, both by precept and example, to indulgence in hatred, passion, and vice — the marital obligations become a distressing burden to the parties themselves, and a festering curse upon the community.<sup>62</sup>

The minority report also saw divorce as an issue of woman's right to the pursuit of happiness. The report clearly showed that the members of this group saw the husband as the menace to married happiness:

When a husband has forgot his duty to his God, his country, his family, and himself, and prostrates himself below the level of the brute — when he has become a miserable, wretched, loathsome drunkard, a living carcass, bringing naught but wretchedness and misery into the bosom of his family — he has violated every obligation of the marriage contract, and it becomes . . . the bounden duty of those who are watching over the interests of the innocent and the oppressed to interpose the shield of the law, and to rescue the suffering wife and children from their pitiable condition.

When he becomes a demon, and dares descend to the vile crime of cruelty to her whom he has sworn to cherish and protect,

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<sup>60</sup> Senate Committee on the Judiciary, "Divorce Report, 1851," California State Archives, Sacramento, 3–4.

<sup>61</sup> *Ibid.*, 5.

<sup>62</sup> *Journal of the Senate*, "Minority Report on Divorces," 1851, Appendix N, 667.

it would scarcely seem possible that any one could be found who would seek to arrest the sword of justice, when wielded to sever such abominable ties.<sup>63</sup>

Never did the committee write similar arguments intimating that the wife might be at fault. Divorce was clearly seen by the writers of this report as a reform to ameliorate the condition of women. The legislators, by means of the divorce law, would save women from cruel, drunken husbands. The final paragraph of the report amply illustrated the paternalistic motives of the committee's minority. "It appears to your committee," they wrote, "that the law should throw its protecting arm around the unfortunate, and rescue them from the abyss into which one false step has plunged them."<sup>64</sup>

The key assumption of the law according to this minority report was that divorce was a matter of guilt and innocence. The guilty party committed a wrong against the innocent, aggrieved party. These senators believed that a woman needed protection against the cruel, bestial, besotted male. She would, of course, be a morally upright and sympathetic victim.

The full Senate voted on the bill, passed it by a vote of seven-to-three and sent it to the governor for signature. The governor signed the divorce bill into law March 26, 1851.<sup>65</sup> According to the act, the District Courts (today the Superior Courts) had exclusive jurisdiction over divorce. This followed the constitutional convention's determination to avoid legislative divorce and to turn the process over to the courts. The act also authorized divorce from bed and board (legal separation) as well as divorce from the bonds of matrimony. Annulment was not available.

Grounds for divorce were similar to most other states at the time. Divorces could be granted for impotence and marriage contracted by force or fraud. In addition, six other grounds were available under which to file suit. They were adultery, extreme cruelty, habitual intemperance, willful desertion, failure to support, and conviction of a felony.<sup>66</sup>

Adultery was hedged in statements that prevented the ground from being used in a manner not intended by the legislature. It was specified that the party guilty of adultery could not initiate the proceedings, nor could the

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Hittell, *California*, 69.

<sup>66</sup> *Laws of the State of California*, Second Session, 1851, 186–87.

partners collude in the adultery, nor could adultery be considered a cause of divorce if the partners had lived and cohabited as man and wife after the victim's knowledge of the act of adultery. Adultery was considered a grave offense, but one that should not be manipulated so as to make divorce consensual.<sup>67</sup>

Extreme cruelty, habitual intemperance, willful desertion for three years, or neglect on the part of the husband to provide the common necessities of life for three years, assuming he had the ability, and imprisonment for a felony were next in order.<sup>68</sup> No stipulation required that wives must provide housework or sexual services comparable to the duty of the husband to support. These grounds reflect the assumption that the husband's duty was to provide support for his wife. All of these grounds relate to his neglect of that duty. It is not surprising that more women than men should file for divorce because the divorce law was implicitly designed to serve the needs of women.

The financial obligations of the parties were defined in the divorce act and in the act concerning the relation of husbands and wives. In the latter statute, the community property provisions were spelled out — that the property should be divided equally at the dissolution of the marriage.<sup>69</sup> This was to be later (1857) amended regarding cases of adultery and extreme cruelty. The divorce act itself provided for orders for support of the wife and children.<sup>70</sup> One interesting omission in the law was a section pertaining to the custody of children. No law during this period specified rules regarding the custody of children.

The divorce law of California was liberal in the sense that divorce was definitely obtainable, but it was strict in the sense that cause had to be shown and proved to the satisfaction of the court and that proper corroboration and legal forms had to be complied with. This divorce law in its essentials — the concept of fault and the grounds enumerated — were to remain the divorce law of California until 1970. With the major legislation concerning marriage and divorce in place, some critics were sure that California was on its way to perdition and others thought that the laws in California with regard to women were exceedingly progressive. Those laws were grounded

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> *Laws of the State of California*, First Session, 1850, 254–55.

<sup>70</sup> *Laws of the State of California*, Second Session, 1851, 186–87.

solidly in the ideology of companionate marriage. Women would have their own economic base in marriage; husbands and wives would be able to fashion a marriage contract according to their own wishes devoid of patriarchal common law strictures. Should the marriage fail, divorce was the ultimate remedy and a divorce law the ultimate security.

The remainder of this dissertation will consider the reality of the law rather than the theory of the law. How was it interpreted and enforced? How did women make use of it? The economic aspects of the law will be closely examined since the major point of all the legislation heretofore discussed was to ease the economic thralldom of women. We will investigate the use women made of such laws as separate property provisions, sole trader statutes and marriage contracts. The community property provisions will also be tested against the outcome of divorce cases and each major ground of divorce — failure to provide, desertion, adultery, extreme cruelty and intemperance — will be examined to see how it functioned for women. If the women of early Sacramento who took advantage of these laws were predominantly middle-class then the legal scheme should be found appropriate to their needs. If, on the other hand, they were largely working-class, we are more likely to find a system of marital law ill-suited to the real lives of women in this urban society. To put all of this in context, however, we should first examine the environment and social structure of early Sacramento, and particularly the class origins of California's new citizens. We must identify them and the circumstances of their daily lives in order to correctly analyze their behavior under the new legal system.

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## CONCLUSION

Sacramento was the second largest city in California in the period from 1849–72. It was typical of small cities throughout the United States in size and occupational structure, but it was unique in its sex ratio (in which men greatly outnumbered women) and the hardships its residents suffered. In addition, immigrants had to survive a rigorous journey even to reach California. Because of these conditions, I submit that women who lived in Sacramento from 1849–72 were either women of unusual boldness and adventurousness or women who did not have the option of remaining in the East while their husbands sought fortunes in the West. The data suggests that the latter predominated.

Recent works on the history of women in the West have concluded that women of all classes, especially the working class, accepted the ideology of separate spheres for the sexes and that the companionate marriage was adopted by most working-class families. In contrast, I have shown that divorce records indicate that, for most working-class families, the ideal was impractical and unrealistic. The behavior of the divorcing women of the working class was the contrary of the ideal of domesticity, purity, and modesty. Their husbands, too, failed to exhibit sobriety, conscientiousness, and gentle concern for their spouses. Marriages lacked domestic equality,

child-centeredness and a separation of spheres. But did these failing marriages show only unrealized expectations of the ideal? I think not. I believe that the deportment of the divorcing couples represented the behavior of many more couples who did not pursue legal redress. The divorce records give us a window into the private lives of an inarticulate class that is rarely scrutinized. The lack of economic security evidenced by the propertylessness of this class intimates that, for them, middle-class values were a luxury too lofty to achieve. The following examples give credibility to this position.

Life in California did not readily allow exclusive domesticity for wives. In order to support families in the boom-and-bust atmosphere, it was frequently necessary for women to work for wages. Some husbands had bad luck, some were irresponsible, and others became addicted to liquor, gambling and prostitutes. All of these circumstances made it difficult to embrace the domestic ideal. Fidelity to marital vows was also an impossible standard in many cases, and living with a man who was not one's lawful husband was tolerated. In contrast, for middle-class couples, adultery was the stuff of tragedy and suicide. The contrast between the classes stands out in high relief in the divorce records. Middle-class prohibitions for women such as walking alone on the streets were not observed by working-class women who had no choice but to go out in the streets. Forbidding women the solace of alcohol was to deny them an important palliative against harsh circumstances.

Men who felt no qualms about telling their wives to support themselves, even by prostitution if necessary, appear commonly in the divorce documents. Physical and mental cruelty abounded as did husbands who drank and visited brothels. Marriages did not reflect domestic equality, nor did child-centeredness appear in the legal actions of the period. This evidence suggests that the manners and mores of the working class during this period were distinct from those of the middle class. While working-class standards of behavior have been inaccessible to historians, middle-class norms have been well documented. It is these working-class mores that the divorce records reveal. Though Robert Griswold draws the opposite conclusion from divorce records, it is possible that his thesis and mine are reconcilable. Perhaps the trickling down of middle-class mores did occur from 1850–1890 as he has stated, but it happened after 1870 when the bulk of the divorce cases he examined were litigated. The other possibility is that the opposite conclusions of our respective investigations are due to



the contrast between the rural population of San Mateo and Santa Clara counties and the urban population of Sacramento County.

In juxtaposition to the working-class pattern of family behavior that I have delineated, early political leaders formulated a family law system that articulated the companionate ideal of marriage. The family law that governed this early population was derived from the more advanced middle-class reform movements of the East. The law reflected the expectations of the middle class and was largely irrelevant to the working class, which did not share the same prospects. Reform of the disabilities of married women under the common law was heavily weighted toward the regulation of property-holding in marriage. Such reforms were truly of little import to the propertyless. At times separate property laws and sole trader laws functioned to allow couples to avoid creditors and bankruptcy, but such loopholes were soon closed. The anomaly of a working-class population governed by laws formulated by middle-class reformers is amply demonstrated in the legal records.

In addition to the class bias of the law, there was also a sex bias that appeared in the litigation. Laws formulated with a view to the improvement of women's status were sometimes turned upside down in the courtroom. Male judges, lawyers and juries had difficulty enforcing the acceptable conduct for husbands that the reformers had envisioned. It was difficult to persuade the legal authorities to find a man guilty of not supporting his wife, drinking too much, or treating his wife cruelly. It was too easy for the men in the legal system to empathize with the man who had difficulty providing for a family. It was even harder to discriminate between husbandly authority and cruelty unless a woman's life was seriously endangered, and it was impossible to distinguish excessive drinking from normal male drinking habits. On the contrary, it was easy to find a woman's drunkenness repulsive and to find her adultery reprehensible.

Domestic relations law encompasses an intersection of class and sex that provides historians with invaluable insights into the past. I have considered the legal and social setting of this germinal period in frontier history. Against that background, I have analyzed not the expectations but the actions and deeds of an urban population. For the working class, the laws represented an ideal that was an unattainable luxury. Marriages of working-class women consisted in large measure of hard work, domestic

inequality, and sometimes brutality and intemperance, but little of kindness, respect or concern. There was no soft and special place for these women.

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