On the Development of Marital Law

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ABSTRACT

This issue of the *Journal of Legal History* results from a conference organized by Dr Jennifer Aston (Northumbria University) and Dr Frances Hamilton (University of Reading) held virtually at Northumbria University on 20th May 2021. At this event we explored the changing legal and cultural definitions of marriage in any geographical location or jurisdiction across the period *c.*1450 - present day, utilizing a range of historical, literary, artistic, and cultural perspectives. This issue ~~now~~ concentrates on the historical, legal, religious, and cultural perspectives on the development of marital law in England and Wales from the sixteenth to the early twentieth century. The interaction between legal, historical, and religious source materials serves to bring fresh insights, demonstrating how women and Dissenting religious groups experienced the laws relating to marriage and were important actors in driving forward legislative and social change.

I. Introduction

On Thursday 20th May 2021, Northumbria University hosted an online conference ‘A Sacred Covenant? Historic, Legal and Cultural Perspectives on the Development of Marital Law’. Organizers, Jennifer Aston (Northumbria University) and Frances Hamilton (University of Reading) conceived the idea for the conference through a series of conversations about their own research. Aston, a historian of nineteenth and early twentieth-century business and gender was beginning a new project on divorce in Victorian England and Wales, whilst Hamilton, a former solicitor turned legal scholar, was expanding her research within the area of Gender, Sexuality and the Law, specifically same-sex marriage in an international context. Through these conversations several things became quickly apparent:

- First, there were some marked differences in the approaches taken by historians and legal scholars researching marriage, particularly those utilizing doctrinal methodologies.
- Secondly, there were many exciting areas where understanding of marriage could be transformed if one borrowed from the other discipline.
- Finally, we realized that marriage is an area of law and a feature of society that many people think they understand. It is frequently taken as a stable part of society, underpinning many of our assumptions about adult life, and often acts as a default framework for academic historic research, particularly the study of women. However, what legally and culturally constitutes a marriage has changed dramatically in many ways over time.

This third aspect really captured our interest. The notion that marriage is one of the fundamental and founding principles of many societies is well known, but this disguises the fact that (as investigated by all four constituent pieces to this issue), marriage is also frequently

misunderstood, and its legal definition has changed significantly over time.[1] Marital status was, and arguably is, especially important to women. In many jurisdictions being married would substantially change the opportunities available to them, including literally removing their legal identity.[2] It is perhaps unsurprising therefore, that marriage and its associated life stages including betrothal, marriage and widowhood have created a framework of analysis that both historians and legal scholars use to structure their research. The process of marriage: the choosing of a spouse, the marriage settlement and dowry, and the legal requirements of the ceremony, are important not just for what they tell us about the legislation itself, but for how the wider society was established and maintained, and the values that it held dear.

Of course, for many centuries, the study of the marriage, particularly from a legal scholarship perspective, carried with it an assumption of hetero-normative unions, and one of the most important reforms to marital law in recent years has been the introduction of same-sex marriage and civil partnerships. For legal scholars adopting a doctrinal methodology, these changes were radical, fundamentally changing what the law understood 'marriage' to be. The reforms brought fresh material to pore over and debate, and in terms of the law they brought new ways for people in same-sex relationships to register and celebrate their union. For

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[1] See Stephen Cretney, *Family Law in the Twentieth Century*, Oxford, 2003; Rajnaara C. Akhtar, Patrick Nash and Rebecca Probert, eds., *Cohabitation and Religious Marriage: Status, Similarities and Solutions*, Bristol, 2020; Russell Sandberg, *Religion and Marriage Law: The Need for Reform*, Bristol, 2021.

[2] See Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* Princeton, 1989; Eileen Spring, *Law, Land and Family: Aristocratic Inheritance in England, 1300 to 1800*, Chapel Hill, 1993; Amy Erikson, *Women and Property in Early Modern England*, Oxford, 1993.

historians however, new laws are often less about the creation of something new and more about the law catching up and representing behaviours that have been observed for long periods of time.

A conversation about our application to the *Journal of Legal History*'s Conference Fund competition showed us how these differing perspectives can be as effective in changing our understanding of a subject as the turning of a kaleidoscope. In discussing the scope of our Call for Papers we immediately agreed that we wanted to include a section on same-sex marriage, however when we came to discuss the time scope for this, our disciplinary backgrounds led us to consider the topic in very different ways. Within the geographic context of our own research, same-sex marriage was (according to the letter of the law) a legal impossibility before 2014, and while there were obviously same-sex relationships before the date, they were not legal marriages and therefore any papers would be extremely modern and not the type of legal history the conference call demanded. Yet social and cultural historians would disagree. Take the case of eighteenth-century diarist and lesbian, Anne Lister and her union with Ann Walker.[3] On 30th March 1834, the two travelled the forty-three miles from their shared home at Shibden Hall near Halifax to the city of York. There, they visited the medieval Holy Trinity Church on Goodramgate, where they took sacrament together as part of the Easter service, the blessing of a decision the pair made previously, where they had committed to live together as a married couple:

> I really did feel rather in love with her in the hut & as we returned. I shall pay due court for the next few months, & after all I really think I can make her happy & myself

[3] Simon Joyce, 'The Perverse Presentism of Rainbow Plaques: Memorializing Anne Lister', 41(5) *Nineteenth-Century Contexts* (2019), 601.

> too...We laughed at the idea of the talk of our going abroad together would [produce]. She said it would be as good as marriage. 'Yes', said [I], 'quite as good or better.[4]
>
> Miss W- told me in the hut if she said 'yes' again it should be binding. It should be the same as a marriage & she would give me no cause to be jealous. [She] made no objection to what I proposed, that is, her de[c]laring it on the Bible & taking the sa[c]rament with me.[5]

Their union was based on shared interests, a mutually enjoyable physical relationship, and religious observation. Interestingly, it was (on Anne's side at least) also based on the convenience of having access to a stream of capital in the form of Ann Walker's inheritance, which she used to make improvements to her own estate, a phenomenon observed in many heterosexual marriages in the eighteenth century.[6] The couple also used the law (such as it was available to them) to legalize their partnership by making wills that bequeathed each other life interests in their substantial estates, with the important proviso that they did not (re)marry. This clause, designed to protect capital sums and estates against future relationships was common probate behaviour of married heterosexual couples.[7]

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[4] Jill Liddington, 'Anne Lister of Shibden Hall, Halifax (1791-1840): Her Diaries and the Historians', *History Workshop*, (1993), 45, at 69.

[5] Ibid., 70.

[6] Chris Roulston, 'The Revolting Anne Lister: The U.K.'s First Modern Lesbian', 17(3-4) *Journal of Lesbian Studies* (2013), 267 ~~-278~~ at 276; Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class 1780-1830*, London, 2013, ch. 6.

[7] Jennifer Aston, *Female Entrepreneurship in Nineteenth Century England: Engagement in the Urban Economy*, London, 2016, ch. 6; R. J. Morris, *Men, Women and Property in England,*

Anne and Ann were not the only same-sex couple to express their relationship in terms of marriage. Earlier records show an unconventional preacher in Wiltshire who had a relationship with other man that was solemnized as marriage.[8]

> This man [John Organ]', observed Edward Stokes in 1652, 'is taken by Tho. Webbe [sic], as men use to take their wives, for better for worse: so, I say this man is honoured with the title of Webb's wife, for so he calls him, My wife O[rgan]; and O owns Webb for a husband.[9]

Now, in the eyes of the law these relationships were not legally binding or enforceable marriages, but they were acknowledged as such (for a time, at least) by those people surrounding the couples. They also reflect the unique tension between marriage as a legal concept and marriage as a religious sacrament, an oath and legal agreement made not just before the law, but before God too. The dual meaning and associated symbolism of a marriage, not to mention the near impossibility in dissolving it prior to the twentieth century, positions it as the central structure around which the rest of society is organized. Therefore, adopting both a doctrinal and historical perspective opened the conference to the possibility of examining both the structure and the often-complex ways that this structure was experienced. This helped us to understand not only the *how* but the *why* and took the scope of the conference far beyond the limits of our individual fields.

1780–1870: A Social and Economic History of Family Strategies amongst the Leeds Middle Classes, Cambridge, 2005, chs. 4, 5, 7.

[8] Joanne M. Ferraro, *A Cultural History of Marriage in the Renaissance and Early Modern Age*, London, 2021, 136.

[9] See also the Victoria County History blog https://www.wiltshirehistory.org/news/the-man-and-the-man-wife-a-same-sex-relationship-in-seventeenth-century-langley-burrell?s=09

The Call for Papers made in January 2021, asked for submissions that would:

> explore the changing legal and cultural definitions of marriage across geographical locations or jurisdiction from the period *c.*1450 to present day, paying particular attention to the changing perspectives on age, same-sex marriage, polygamy, divorce, and remarriage. This conference will create an exciting space where historical, literary, medical, artistic, and cultural perspectives can be considered alongside real-world experiences, allowing the discovery and exploration of parallels and contrasts across borders and time.

Our own research interests focus on the legal systems of England and Wales, Scotland, and the European Union, however we wanted to go beyond this to make new connections and start new conversations. The response was overwhelming and we extended the programme to accommodate as many papers as possible. The day was organized into four parallel sessions on the following topics: The Evolution of Marriage; Women's Status in Marriage; Conversations between Marital and Criminal Law; Moving Beyond Heterosexual Marriage; Expectations and Definitions of Marriage; Reforming Marital Law; Religion, the State and Marriage.

Speakers from the UK, Europe, India, and Australia examined questions of property ownership and its intersection with criminal law; changes in marital practices and the law; civil, irregular, and polyamorous marriages; representations of marriage in literature; the intersection of marriage and belief systems; adultery and the issues with legislating behaviour within adult relationships; difficulties associated with dissolving a marriage; and the expectations and opportunities of widowhood. Research presented spanned from the fifteenth century to the

present day. These rich sessions more than fulfilled our original brief, and most sessions remain available to watch on the conference website.[10]

Originally scheduled to take place in person, the ongoing Covid-19 pandemic meant that the conference had to move online. Though this was initially disappointing, it turned out to be a blessing. Not only could we welcome speakers from across the world, but the audience was also international. Despite the difficulties associated with working in different time zones, 130 delegates joined us from more than sixteen countries, including the USA, Canada, Nigeria, Ghana, Iraq, Israel, and Japan. Academic delegates described themselves (perhaps unsurprisingly) as working in the fields of history, law, philosophy, and sociology. More than a quarter of conference delegates were however, drawn from outside the academy. They were barristers, solicitors, and paralegals; members of the judiciary from home and abroad; several members of the House of Lords; genealogists; archivists; civil servants; and interested members of the public. Participants responded enthusiastically to the online sessions, questioning, and challenging speakers, and bringing their multiple perspectives to bear on research.

The breadth of experience and expertise from both speakers and the audience more than met the ambitions we had when we began planning the conference in 2019. It did not however, make selecting the papers to publish here, in this issue, an easy process. We are pleased to report that several collaborative projects that fell outside of the scope of the *Journal* have emerged following the conference, meaning that the impact of the *Journal of Legal History*'s generous funding continues to be felt beyond its original remit.[11] We made a conscious decision

[10] See the conference website at https://asacredcovenant.com/

[11] For example: Alexander Maine presented 'Queer(y)ing Consummation: An Empirical Reflection on the Marriage (Same Sex Couples) Act 2013' in the *Moving Beyond Heterosexual*

to select papers that not only spoke to the *Journal of Legal History*'s core objectives, but that also spoke to each other.

Four articles were selected:

- Rebecca Probert, 'Secular or Sacred? The Ambiguity of 'Civil' Marriage in the Marriage Act 1836'
- Jennifer Aston, 'Petitions to the Court for Divorce and Matrimonial Causes: A New Methodological Approach to the History of Divorce, 1857-1923'
- Emily Ireland, 'Re-examining the Presumption: Coverture and 'Legal Impossibilities' in Early Modern English Criminal Law'
- Frances Hamilton, 'Equality, Citizenship, Contemporary Feminist Voice and the Matrimonial Causes Act 1923'

The articles work in conversation with each other to uncover and examine the role that marriage held as the organizing force of society in England and Wales from the 1500s through to the early twentieth century. Through exploring legal, historical, and religious source materials, these articles bring fresh insights, demonstrating particularly how women and Dissenting religious groups experienced the laws relating to marriage, how these laws interacted with other legislation, and how these frequently marginalized groups were important actors in driving forward change and reform to marital law.

II. Source Material

Marriage session. This paper was later published as, 'Queer(y)ing Consummation: An Empirical Reflection on the Marriage (Same Sex Couples) Act 2013 and the Role of Consummation', 33(2) *Child and Family Law Quarterly*, (2021), 143.

Typically, legal scholars have tended to focus on marriage as it appears in legislation and law reports[12] and social historians have analysed lived experiences,[13] however, the material in this issue examines the interaction between legal and historical materials. In doing so, it reveals important new insights into how contemporary actors understood marriage from differing perspectives of gender, religion, and class. The papers in this issue also explore how the 'digital turn' has transformed the way we carry out the research of legal history.

Several authors including Aston and Hamilton explore archival materials which have previously lacked detailed consideration. Aston's work analyses petitions made to the Court for Divorce and Matrimonial Causes (held at the National Archive J 77) which have received relatively little attention.[14] Not only had the 100 year embargo only recently expired, but other authors had mistakenly dismissed the importance of these sources and found them difficult to

[12] See for example Rebecca Probert, *Tying the Knot: the Formation of Marriage 1836 – 2020*, Cambridge, 2021 and Henry Kha and Warren Swain, 'The Enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates', 37(3), *Journal of Legal History* (2016), 303.

[13] Mary Lyndon Shanley, 'One Must Ride Behind!: Married Women's Rights and the Divorce Act of 1857', 25(3), *Victorian Studies* (1982), 355; Gail Savage, 'They Would if They Could: Class, Gender, and Popular Representation of English Divorce Litigation, 1858-1908', 36(2), *Journal of Family History* (2011), 173.

[14] Only two scholars have previously analysed these materials: Danaya C. Wright, 'Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866, 38 *University of Richmond Law Review* (2004) 38, and Savage, 'They Would If They Could'.

access due to the basic level index.[15] Aston's research has taken a new methodological approach combining data drawn from digitized and non-digitized sources to create a new data set.[16] Hamilton's piece also draws fresh insight from archival materials, namely the Records of the National Union of Society for Equal Citizenship 'NUSEC' archive held at the Women's Library. Although the NUSEC Moral Standards Committee were the ones who drafted the legislation in question, this archive had not heretofore been analysed in depth when regarding the importance of the equality argument prior to the introduction of the Matrimonial Causes Act 1923. [17]

Of course, statutes and judgments themselves can be vitally important source material. Probert employs a close textual examination of the Marriage Act 1836 to question whether the usual understanding of the Act as introducing 'civil marriage' in England and Wales is correct. The word 'civil' does not even appear in the Act itself and different campaigning groups at the time, and different scholars since,[18] have applied it in different ways. In order to interrogate

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[15] See Allan Horstman, *Victorian Divorce,* New York,1985, 182, quoted in .J. Hammerton, Cruelty and Companionship: Conflict in Nineteenth Century Married Life, Abingdon, 1992, at 173;

[16] Designed in collaboration with digital humanities scholars at the Institute of Historical Research, University of London.

[17] See NUSEC Annual Report National Union of Societies for Equal Citizenship 1923 at 8 referring to work of the NUSEC Moral Standards Committee.

[18] See for example Thomas Glyn Watkin, 'Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales', 2 *Ecclesiastical Law Journal* (1990-92), 110, at 111; Stephen Parker, *Informal Marriage, Cohabitation and the Law, 1750-1989,* Basingstoke, 1990, 48.

this thoroughly she has utilized a range of extensive and varied sources, including legal materials dating back to previous legislation, namely the Clandestine Marriages Act 1753.[19] As well as legal analysis of these developments[20] she has utilized a range of historical materials examining the practices of religious dissenting groups.[21] Her comparative law analysis demonstrates that France during this time period only recognized secular marriage[22] whereas Italy had 'religious control over marriage'[23] with universal civil marriage only being introduced more widely from the nineteenth century.[24] In examining the campaign for reform which preceded the 1836 Act she has considered relevant Hansard records[25] as well as numerous 'petitions' which poured into Parliament demanding varying reforms from different dissenting

[19] Clandestine Marriages Act 1753, 26 Geo. II, c. 33.

[20] For example Lawrence Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England*, Oxford, 1995, 133.

[21] For example Alan D. Gilbert, *Religion and Society in Industrial England: Church, Chapel and Social Change, 1740-1914*, London, 1976 and Robert Currie, Alan Gilbert and Lee Horsley, *Churches and Churchgoers: Patterns of Church Growth in the British Isles since 1700*, Oxford, 1977.

[22] For discussion see Mary Ann Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe*, Amsterdam, 1977; Suzanne Desan, *The Family on Trial in Revolutionary France*, Berkeley CA, 2004; Rebecca Probert, 'State and Law', in Paul Puschmann, ed., *A Cultural History of Marriage in the Age of Empires*, London, 2020.

[23] Probert, 'State and Law'.

[24] For example, see Mark Seymour, *Debating Divorce in Italy: Marriage and the Making of Modern Italians, 1860-1974*, Basingstoke, 2006

groups.[26] Her work has also examined religious sources including the canon law.[27] Interestingly she uses newspaper reports to reveal how weddings were carried out post reform as well as looking closely at the wording of relevant prayer books.[28]

Ireland's paper uses multiple original sources including the English Law Reports, the Old Bailey Sessions Papers, and legal treatises, together with many additional secondary commentaries, texts and articles, to examine the interaction between different areas of law. The digitization of Old Bailey Records was crucial to the success of this research. It enabled Ireland not only to access records during the Covid-19 pandemic when travel and access to many archives was severely disrupted, but also to carry out a broad search of the records using the search engine function. Searching for all references to 'coverture', 'feme covert', and 'coercion' between 1674 and 1885, created a sample that would otherwise have been impossible to compile. As Ireland points out, such methodologies have their own issues, not least the reliance of the researcher on the accuracy of the transcription and digital cataloguing. Yet, in an age where increasing time pressures and cost (both financial and environmental) of travel, are merging with decreasing research budgets, scholars need to think of creative and sustainable ways to work. With archives increasingly turning toward digitizing collections for reasons of preservation and access, this is something that will only become more important to the discipline.

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[27] See further Probert, *Marriage Law and Practice in the Long Eighteenth Century*, ch. 6.

[28] For example 'The Form of Solemnization of Matrimony' in the *Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church according to the use of the Church of England*, 1662.

Aston, Probert and Ireland's articles all stand as a 'testament to the increasing accessibility of historical records' as all three authors were able to complete the majority of their research using digitized records. Hamilton also accessed some of their original source material through use of digitized records for example when accessing Hansard, law reports and reference to original newspaper sources. Nicholson comments on how digitization of records means that '[a]dvances in digital technology have made the recent past seem like a foreign country'[29] realizing the predictions of historian Leary 'that the digitisation of press archives would become one of the most exciting and far-reaching developments in … the twenty first century.'[30] Yet issues remain with the use of digitized material, with most resources including major papers (for example) *The Times* and the *Illustrated London News* only gradually becoming available as digitization is completed.[31] There are also concerns that the concentration on digitization means that 'sources which are not digitized are overlooked'[32] and over-reliance on key word searches means the wider context is missed.[33] Ireland and Probert have mitigated these concerns by use of a 'broad array of sources' and implementing a 'qualitative approach' in order to understand the context of keyword searches.

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[29] Bob Nicholson, 'The Importance of the Digital Turn, Exploring the Methodological Possibility of Digital Newspaper Archives', 19(1) *Media History* (2013) 59.

[30] Ibid., at 59 referring to Patrick Leary 'Victorian Studies in the Digital Age' in Miles Taylor and Michael Wolf, eds., *The Victorians Since 1901: Histories, Representations and Revisions*, Manchester, 2004.

[31] Nicholson 'The Importance of the Digital Turn'.

[32] Patrick Leary 'Googling the Victorians', 10(1) *Journal of Victorian Culture* (2005),72 at 82.

[33] Adrian Bingham, 'The Digitization of Newspaper Archives: Opportunities and Challenges for Historians', 21(2) *Twentieth Century British History* (2010), 225.

Another issue relevant to the concentration on digitized sources is as Ireland states the 'lack of women's genuine 'voices' that plagues every type of legal treatise, report and record of the early modern period'.[34] This draws upon analysis by Rackley and Auchmuty who explain that legal scholarship has

> traditional[ly] refus[ed] to recognise sources outside of its own discipline… Thus the legal actors we read about are almost always male, upper / middle class, white and (usually) a member of the legal or political elite [meaning that] …the role women have played in law and law reform is patchy, and often non-existent…[35]

Several of the papers in this issue have sought to remedy this by focusing on female voices, for example in relation to Hamilton's research in the NUSEC archive. Ireland's article when examining the treatment of feme coverts in legal cases stresses the need to examine 'the content of cases beyond the successful arguments that became the substantive law'.[36] She argues that even the unsuccessful arguments 'inform us of the wider social and legal constraints experienced by femes coverts' during the period under her study.[37] Aston's research into the J77 petitions made to the divorce court also serves to showcase voices of women from the period 1857-1923.

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[34] Ireland referring to Joanne Bailey, 'Voices In Court: Lawyers' Or Litigants'?', 74(186) *Historical Research* (2001), 392.

[35] Rosemary Auchmuty and Erika Rackley, 'The Case for Feminist Legal History', 40(4) *Oxford Journal of Legal Studies* (2020), 878 at 881.

[36] Ireland referring to Auchmuty and Rackley 'The Case for Feminist Legal History'.

[37] Russell Sandberg, *Subversive Legal History A Manifesto for the Future of Legal Education,* Abingdon, 2021, 37-38.

All this reflects how interdisciplinary research, with a dual focus on both legislation and law reports together with historical materials, many of which are increasingly accessible with the impact of the digital turn, leads to new insights into how contemporary actors understood marriage from differing perspectives of gender, religion and class.

III. Developments in Marital Law

What constituted a marriage under the law of England and Wales changed in a legal, social, and religious sense between the sixteenth and early twentieth centuries. Yet, as Ireland states, until the late nineteenth century marriage remained a 'key indicator of a woman's legal status'. Furthermore, statistics demonstrate that in 1871 nearly ninety per cent of English women between the ages of forty-five and forty-nine were, or had been, married.[38] Whilst middle class women might become governesses, [39] the most common employment for women was casual and low paid, including jobs such as domestic service, laundry, working as a seamstress.[40] As women had limited access to education, [41] and were largely barred from the

[38] Shanley, *Feminism, Marriage and the Law* at 10.

[39] For discussion see Nora Gilbert 'A Servitude of One's Own: Isolation, Authorship and the Nineteenth-Century Governess', 69(4) *Nineteenth-Century Literature* (2015), 455.

[40] Pat Hudson, 'Women and Industrialisation in June Purvis, ed., *Women's History Britain 1850 – 1945*, London, 1995, 29

[41] For further discussion see Jane Lewis, *Women in England 1870 – 1950*, Brighton, 1984.

professions,[42] marriage was arguably the most obvious career.[43] Yet on marriage the concept of coverture denied women an independent legal status. Blackstone's dictum provided that 'the husband and wife are one person in law'.[44] Baroness Hale explains that '[e]verthing she owned or earned belonged to her husband or was controlled by him'.[45] This meant that women could not enter into contracts in their own name (unless her husband joined her), could not sue or be sued in her own name and could not make valid wills (without her husband's consent).[46] Whilst a wife retained the realty she brought into the marriage, her husband legally owned the income and legal protections such as recognition of dower[47] and the wife's right to be maintained according to the husband's estate or condition were often circumvented by husbands.[48] Husbands could not be found guilty of raping their wives because in law it was

[42] Until the Sex Disqualification (Removal) Act 1919 and even then 'marriage bars' continued to bar married women from many professions until the 1940s.

[43] For discussion see Shanley 'Feminism, Marriage and the Law in Victorian England, 1850 – 1895'.

[44] William Blackstone Sir William Blackstone, *Commentaries on the Laws of England, in Four Volumes,* Oxford, 1765, repr., New York, 1978 vol. 1 at 442.

[45] Brenda Hale, 'Equality and Autonomy in Family Law, 33 *Journal of Social Welfare & Family Law* (2011), 3, at 8.

[46] Shanley, *Feminism, Marriage and the Law in Victorian England, 1850 – 1895,* at 8 – 9.

[47] Dower understood as a life interest in one-third of a husband's real property.

[48] See Andy Hayward, 'Married Women's Property Act 1882', in Erika Rackley and Rosemary Auchmuty, eds., *Women's Legal Landmarks, Celebrating the History of Women and Law in UK and Ireland*, London, 2018, at 71.

considered that the wife consented on marriage and it was never possible to retract that consent.[49]

There was very limited access to divorce. Prior to the Matrimonial Causes Act 1857 divorce was prohibitively expensive, involved a lengthy tripartite procedure including going to the civil courts, ecclesiastical courts and via an Act of Parliament. This process discriminated against women as until further reform by the Matrimonial Causes Act 1923, a double standard applied. A wife, unlike a husband, had to prove aggravating factors to her husband's adultery to secure a divorce.[50]

During the period studied, legal changes to women's status in marriage included changes to divorce law including procedural changes and changes to the grounds for divorce including removal of the double standard.[51] This was accompanied by great societal changes including women obtaining the vote[52] and women starting to have greater access to education

[49] Per Sir Matthew Hale in *History of the Pleas of the Crown*, London, 1736, vol. 1, ch. 58 at p. 629. This did not change until the case of *R* v *R* [1991] UKHL 12.

[50] See for discussion Penelope Russell 'The Matrimonial Causes Act', in Rackley and Auchmuty, *Women's Legal Landmarks*, at 63.

[51] Begun by the Divorce and Matrimonial Causes Act 1857 and subsequently the Matrimonial Causes Act 1923.

[52] By the Representation of the People Act 1918 all women over the age of thirty got the vote. By the Representation of the People (Equal Franchise) Act 1928 the franchise for all votes was equalized to twenty-one.

and employment.[53] Legal changes can be seen as both reacting to external stimulus and proactive in initiating change. Hamilton's paper analyses the influence of equality arguments prior to the removal of the double standard in the Matrimonial Causes Act 1923. It could be argued that this was following a chain of developments which had increased the rights of women within marriage. For example following the Matrimonial Causes Act 1857 forty per cent (as compared to one per cent previously) of petitioners for divorce were female.[54] That Act (although retaining the double standard) for the first time made it possible to obtain divorce by civil court order,[55] as well as introducing new aggravations for divorce.[56]

Further pieces of legislation, namely the Married Women's Property Acts 1870 and 1882 had also begun to reform the system of coverture. The 1870 Act established specific categories of property (woman's earnings and investments and inheritances) that subsequently constituted a woman's separate property.[57] Reform went much further in the 1882 Act which reformed coverture by making 'married woman capable of holding and disposing of any real or personal property as her separate estate, as if she were a feme sole and without the

[53] For example, the Sex Disqualification (Removal) Act 1919 allowed women to enter the professions.

[54] Penelope Russell, referring to Roger Philips, *Untying the Knot*, Cambridge, 1991, 66 at 130.

[55] Thereby removing the pre-existing tri-partite system, involving resort to Parliament and the ecclesiastical courts.

[56] The 1857 Act included new aggravations of cruelty and desertion.

[57] See Mary Beth Combs, '"A Measure of Legal Independence": The 1870 Married Women's Property Act and the Portfolio Allocations of British Wives', 65(4) *The Journal of Economic History* (2005), 1028.

intervention of a trustee'.[58] The 1882 Act had to be amended on several subsequent occasions. It was only by the Law Reform (Married Women and Tortfeasors) Act 1935 that a married woman was finally given the ability to sue, or be sued, as if she were a single woman and that husbands were no longer tortiously liable for their wives.[59]

The 1923 Act could on one view be seen as continuing this chain of gradual change. Yet further analysis posits the Matrimonial Causes Act 1923 could be seen as proactive and initiating change. Hamilton concentrates on the emergence of the 'equality' argument in relation to this reform. Previous legislative reforms had not utilized this argument. For example, prior to the Married Women's Property Act 1882, women had not demanded the 'wild and ridiculous doctrine of equality'. Indeed, marriage was not 'widely conceptualised as a partnership of equals'.

Probert's analysis of the Marriage Act 1836 argues that reform was influenced by many different causes and can be considered as a reaction to these different stimuli. In contrast to previous legislation which had required all marriages (except those of Quakers and Jews) to be solemnized by the rights of the Anglican Church,[60] the 1836 Act in allowing people to get married 'in either a place of worship that had been registered for weddings or in the office of one of the new superintendent registrars' was responding to the increasing and varying demands of a multitude of dissenting groups who were critical of the requirement to have

[58] Section 1(1) Married Women's Property Act 1882.

[59] Law Reform (Married Women and Tortfeasors) Act 1935 as further amended by the Married Women Restraint upon Anticipation Act 1949, the Matrimonial Causes (Property and Maintenance) Act 1938, and the Law Reform (Husband and Wife) Act 1962. Discussed by Sandra Fredman, *Women and the Law*, Oxford, 1998.

[60] Clandestine Marriages Act 1753.

Anglican rites. The object of the 1836 Act was as leading Whig politician Lord John Russell said 'to allow every person to be married according to whatever form his conscience dictated'.[61]Probert's further analysis shows that the wording of the statute was ambiguous as well as flexible. Whilst weddings could take place now in an entirely civil manner with no religious content, 'there was nothing to preclude religious content from being included in either option'.

Several articles in this issue also demonstrate interesting contrasts between the letter of the law and the way it operated in practice. Probert's article shows that the flexibility and ambiguity of the 1836 Act in introducing civil ceremonies was also followed by the way it was implemented in practice. She concludes that when analysing the two forms of marriage introduced in the 1836 Act, previous distinctions drawn between 'sacred' ceremonies in registered places of worship and the 'secular' contract in the office of the superintendent register should not be overstated.[62] Whilst either could include religious content, neither was required to do so.

Ireland's article also analyses the differences between the letter of the law and the law in reality when focusing on the impact of coverture on women when prosecuted for a range of criminal offences. Although coverture covered 'every echelon' of women's married life in legal terms, in practice its use depended heavily upon the context in which it arose.[63] Married women

[61] *Parliamentary Debates*, series 2, vol. 34, col. 492, 13 June 1836 (HC).

[62] These previous distinctions were made by Stone, *Road to Divorce*, 133.

[63] See Ireland referring to Tim Stretton, 'Coverture and Unity of Person in Blackstone's Commentaries', in Wilfrid Prest, ed., *Blackstone and his Commentaries: Biography, Law, History*, London, 2014, at 111.

were ‘heavily involved in all areas of commerce’[64] and Ireland quotes from Stretton and Kesselring to explain that strict adherence to coverture ‘would have made ordinary life all but impossible’ for all.[65] In addition specifically in relation to criminal law, Ireland’s research demonstrates that despite the doctrine of coverture ‘married women were often “held fully accountable for their own criminal actions.”’[66]

In examining petitions to the Court for Divorce and Matrimonial Causes Act under the Matrimonial Causes Act 1857, Aston also demonstrates differences between the letter of the law and the way it operates in practice. For example even if the wife did prove adultery and one of the additional aggravations[67] ‘it was still not a certainty that the marriage would be dissolved’ as the court could choose not to grant a divorce if they ‘suspected that the couple had engaged in collusion or condonation…’[68] Aston argues that, in practice, where divorce was

[64] See for example Malcolm M. Feeley and Deborah L. Little, ‘The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912’, 25(4) *Law & Society Review* (1991), 719.

[65] Ireland referring to Tim Stretton and Krista J. Kesselring, ‘Introduction: Coverture and Continuity’, in Tim Stretton and Krista J. Kesselring, eds., *Married Women and the Law: Coverture in England and the Common Law World* **,** Montreal and Kingston, (2013), 3.

[66] Ireland referring to Marisha Caswell, ‘Coverture and the Criminal Law in England, 1640–1760’, in Stretton and Kesselring, eds., *Married Women and the Law*.

[67] Including incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality.

[68] See Henry Kha, ‘The Spectacle of Divorce Law in Evelyn Waugh's *A Handful of Dust* and A. P. Herbert’s Holy *Deadlock’*, 30 *Law & Literature* (2018), 2.

not available husbands and wives would instead apply for judicial separation, [69] or apply to their local police magistrate or Petty Sessions court for a protection order, which could in practice lead to a wife being treated as a feme sole even although not divorced.[70] Her proposed new methodological approach will also offer insight into allegations of cruelty made by husbands as well as wives in the J77 petitions and reveal the different types of cruelty alleged.[71] The approach will also cast a more accurate view onto the socio-economic class and geographical location of the petitioners.

IV. Conclusion

The conference itself ended with a plenary session: 'Is Equality the Death of Marriage?', given by former President of the Supreme Court and family law expert, The Rt Hon. the Baroness Hale of Richmond DBE. In her paper Baroness Hale drew on her extensive experience, not just in the English family court system, but as a female law student in the 1960s, and as the daughter of a mother forced to give up her profession when she married in 1936, to argue that although 'family law became 'sex-neutral', society continued to organize itself along gendered lines.[72] By this, she meant that when the Guardianship Act 1972 and Matrimonial Causes Act 1973

[69] Matrimonial Causes Act 1857, s.16

[70] Ibid., s.21

[71] See Aston referring to Jo Turner, 'A Shocking State of Domestic Unhappiness': Male Victims of Female Violence and the Courts in Late Nineteenth Century Stafford', 9 *Societies* (2019), 40.

[72] Brenda Hale, 'Is Equality The Death Of Marriage?', Plenary paper given at *A Sacred Covenant? Historic, Legal and Cultural Perspectives on the Development of Marital Law*, online conference held at Northumbria University, 21st May 2021.

were passed, 'the same rules and remedies applied to husbands and wives, fathers and mothers…the law could now contemplate, in theory at least, a female breadwinner and a male home-maker or the equal sharing of homemaking and breadwinning roles'.[73] In practice however, very few households organized themselves in this way, but theoretically at least, for the first time, the notion that a wife's treatment under the law should be tied to her (mis)behaviour was removed. Baroness Hale's observations about marriage, property ownership, the accumulation and division of assets, and the role of the couple as parents in the late twentieth century courts, drew striking parallels with presentations stretching back to the fifteenth century, heard earlier in the day. The key cases analysed by Baroness Hale also highlighted an important, but easily overlooked fact: marriages often become interesting to the historian, or visible to the legal scholar, at the point they are failing. This was something that speakers on the day addressed, consciously seeking to examine marriage outside of crisis points, as well as during them.

The four articles that make up this issue are only one of the strands of enquiry and scholarship that took place during 'A Sacred Covenant? Historic, Legal and Cultural Perspectives on the Development of Marital Law'. They extend the conversation begun by Baroness Hale in her keynote address, which sought to place the experiences of the men, women, and families whose lives and relationships were shaped by marriage, within a historical context, and to understand why and how this context was formed. Together, they highlight the often untidy and sometimes contradictory nature of marriage, and the struggle that historians and legal scholars can face in trying to uncover legal and social concept that is both central to society but also deeply intimate. In positioning interdisciplinarity at the centre of the *Journal of Legal History* funded one-day conference, we hope to have demonstrated the value in

[73] Ibid.

working across history and law, and sparked conversations leading to research that will cross fields and borders.