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Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State

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TABLE OF CONTENTS

I. Introduction 376
II. Five Narratives 390
Narrative 1—Property and the Development of Identity for Married Women 390
A. Common Law and Equity: Gendered Access to Property 390
B. Married Women's Property Acts: Degendered Access to Property 398
Narrative 2—Fault-Based Divorce and Its Reform 414
Narrative 3—Alimony: The Nexus of Property and Fault 428
Narrative 4—Divorce Law Reform: Property and Alimony Revisited 434
A. Developments of a Decade: The Shift from Strict Title to Equitable Distribution ... 434
B. The Language of Reform: Gendered and Degendered Levels 446
Narrative 5—Implementing Reform: Distributional Results . 458
III. Post-Partum Reflections 472

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How unpleasant it is to be locked out,
How unpleasant it is to be locked in.
—Virginia Woolfe

I. INTRODUCTION

On June 3, 1980 New York enacted a divorce law reform.[1] The old common law rules, which relied on title to divide marital property, were replaced with the currently fashionable[2] scheme of equitable distribution, which abandoned the use of title.[3] The new legislation was heralded as a major change, consistent with emerging norms of fairness. Its passage culminated more than a decade of serious efforts and bitter political battles, part of almost two hundred years of intermittent struggles to reform New York's rules for the dissolution of marriage.

This Article is concerned with those struggles on two levels. On one level, it is an account of what are said to be important changes in New York divorce law, documented in five historical narratives. It identifies and details the social, economic, and cultural experiences in New York which informed the political and legal choices[4] made in the name of divorce law reform. On another level, this Article is only incidentally about changes in the divorce law of New York. Rather, it uses a series of historical accounts and an analysis of the implementation of contemporary divorce law reform to explore continuities as well as discontinuities in law. More particularly, through the five narratives law reform is viewed as symbolic activity for the wider society and for specific constituencies said to be the beneficiaries of a specific reform.[5]

Situating law and law reform in its social context highlights the con-

1. Act of June 19, 1980, ch. 281, 1980 N.Y. Laws 1225, 1227-32 (codified as amended at N.Y. DOM. REL. LAW § 236 (McKinney 1986)).

2. *See generally Divorce in the Fifty States: An Overview as of August 1, 1980*, Fam. L. Rep. (BNA), No. 42 (Sept. 2, 1980). New York became the 38th state to institute a system of equitable distribution for marital property at divorce.

3. N.Y. DOM. REL. LAW § 236(B)(5) (McKinney 1977 & Supp. 1985).

4. An underlying theme in this Article is the role of language as "an integral facet of the political scene: not simply an instrument for describing events but itself a part of the events, shaping their meaning." M. EDELMAN, POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL 4 (1977).

5. "[D]iscourse and symbolization are themselves practices, which are structurally connected to other practices and have a great deal in common with other forms of practice. They too have to be analyzed with attention to context, institutionalization, and group formation." R. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS 242 (1987); *see also* Fineman, *Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WISC. L. REV. 789.

nection between law and ideology.[6] As ideology, law loses its garb of universality and objectivity. In context, law surrenders its aura of transcendence. Such recasting of law and law reform serves to demystify[7] the enterprise. It allows for the emergence and understanding of underlying assumptions regarding the nature of legal discourse and the construction of identity.[8]

The first narrative focuses on a key component in divorce law reform: the legal identity of a married woman. It recounts the struggle for the development of a separate legal identity for married women through statutory reform of the common law doctrine of marital unity, which denied married women a separate identity. The reform, known as the Married Women's Property Act, enabled married women to have title, and therefore access, to property. This elimination of sex specific barriers to property was cast as creating formal equality with men and was said to be a significant jurisprudential shift with profound consequences for women. But, as the story unfolds, it becomes apparent that the material and symbolic dimensions of such a reform must be distinguished. Symbolically, eliminating the appropriation of the legal identity of married women is a societal statement regarding the formal equalization and scope of personhood. Materially, such recognition may neither produce, activate, nor greatly facilitate a change in the condition of the group on whose behalf the reform is undertaken. In fact, a move to formal legal equality may be merely "a shift from a direct to an indirect mode of legitimating the subordination of women."[9]

Continuing with the theme of divorce law reform, the second narrative recounts the struggle over the expansion of grounds for divorce in New York. The narrative explores the use of narrow fault-based grounds for divorce and details their belated expansion in 1966. As this episode develops, it becomes apparent that reform of a statute which is facially gender neutral, but grounded in powerful cultural images of women and men as wives and husbands, does not change a cultural context for law.

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6. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1071 (1981); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983).

7. *See* THE POLITICS OF LAW (D. Kairys ed. 1979); Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981). *See generally* 130 U. PA. L. REV. 1289 (1982) (symposium issue discussing the public/private distinction); Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

8. *See* J. Grbich, Coming Face to Face With the Experience of Womanhood: The Body in Legal Theory (1987) (draft presented at Feminism and Legal Theory Conference, University of Wisconsin Law School) (discussing feminist legal theorists' use of discourse theory).

9. Olsen, *supra* note 6, at 1512.

Thus, formal or facial gender neutrality in a statute may be of little or modest relevance to its substantive impact.

The third narrative focuses on the payment of alimony to former wives. It traces the history of the sex specific provisions for alimony and explores the myths and realities identified with post-divorce maintenance for women. From this analysis, it becomes apparent that alimony is both a consequence and manifestation of a power dynamic underpinning the economic reality between husbands and wives. Alimony recasts the interdependence of marriage into the dependence of wives. It underscores the harsh reality of women's continuing economic vulnerability after divorce.

The fourth narrative documents the struggle for a major divorce law reform in New York from 1970 to 1980. Quite early in the decade, the parameters of the reform debate were established: at divorce, title to marital property should be set aside in favor of a distributional scheme which disregarded title; marital property should be divided either according to a rebuttable presumption of equal distribution or a flexible principle of equitable distribution. The remainder of the decade was taken up with political maneuvering through the legislative process. Part A of this narrative outlines the chronology of legislative reform efforts during the decade. Part B explores the ideological significance of the terms of the debate. The narrative emphasizes the relationship between the rhetoric of reform and conditions in the material world which the reform proposes to remedy or mitigate. As the story unfolds, it becomes apparent that the images and expectations evoked by formal legal terms deflect popular attention from key underlying social conditions which influence and even shape legal outcomes.

The fifth and final narrative reviews the implementation of the 1980 divorce law reform through litigated results and out-of-court settlements. Both types of legal outcomes impact in a differential and predictable manner on wives and husbands. Despite the reform, both types of legal outcomes are informed by norms reflecting pre-reform ideology.

Such a selection of narratives about divorce law reform raises a host of questions. Why this choice of narratives? What connects them? What makes them interesting? What do they tell us about our collective past and, of equal importance, about our contemporary situation and possible futures?

One response to these questions is to identify the fundamental themes which infuse each of the five narratives and establish a basic connection among them. These themes are: law operating as ideology; the sex/gender system manifested in divorce law and its reform; property as

a significant nexus of power in the sex/gender system; and the metatheme that I believe unites them all, the social construction of a gendered legal identity for women.

Theme 1: Law and Ideology

Each narrative is about the connection between law and ideology. More specifically, each story is about law operating as ideology. Broadly construed,

> [Ideology] is that aspect of the human condition under which human beings live their lives as conscious actors in a world that makes sense to them in varying degrees. Ideology is the medium through which consciousness and meaningfulness operate.
>
> . . . .
>
> [I]t includes both everyday notions and 'experience' and elaborate intellectual doctrines, both the 'consciousness' of social actors and the institutionalized thought-systems and discourses of a given society.[10]

Dominant power configurations rely upon ideology to reflect, refine, reinforce, and justify access to and distribution of resources in a society.

Law is one particular form for the articulation of the dominant beliefs and practices of a society.[11] It assists in the formulation and the rationalization of collective self-identity.[12] Through the articulation, interpretation, and implementation of rules, law contributes to and reinforces shared meanings and aspirations. In so doing, it tests the presuppositions of a culture.[13] For example, the "giveness" of a monetized contribution to a marriage almost always advantages a husband's contribution over a homemaker wife's and underscores the extent to which money is the legally and culturally privileged contribution to mar-

10. G. THERBORN, THE IDEOLOGY OF POWER AND THE POWER OF IDEOLOGY 2 (1980). For an excellent discussion of the relationship between law and multiple levels of ideology, see Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

11. *See* M. GROSSBERG, GOVERNING THE HEARTH (1985) (applying this argument to 19th century family law). "Legal practices are always enmeshed in ideology but their emergence as specific, institutionalized practices in a historical division of labour also involves a 'break' or 'rupture' with surrounding ideologies through the production of specific discourses geared to producing specific effects, separate from everyday experience and persuasion." G. THERBORN, *supra* note 10, at 2-3.

12. C. KELLER, FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF (1986); Gecas & Mortimer, *Stability and Change in the Self-Concept From Adolescence to Adulthood*, in SELF AND IDENTITY 265-86 (T. Honess & K. Yardley eds. 1987).

13. *See* White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 436 (1982) (analyzing law as a "culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning").

riage, panegyrics to home and family notwithstanding. Additionally, law is an instrument of power and politics. It attempts to achieve a vision of appropriate social arrangements.[14]

Each of the five episodes is a particularization of the general proposition that law operates as ideology. Reform of rules regarding legal identity in marriage, marital property distribution, the awarding of alimony, and fault-based grounds for divorce are discourses about our sense of self in a significant relationship. They are discourses about the meaning we attach to that relationship, and about the power of the state to regulate the dissolution of that relationship.

Theme 2: The Sex/Gender System and Identity in Marriage and Divorce

Each narrative also focuses on one of the most fundamental and powerful socially constructed[15] categories of classification and differentiation in society—sex and gender. "Sex" refers to the bipolar categories male and female, said to be biologically distinguishable.[16] "Gender" refers to the roles and behaviors identified with each biologically deter-

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14. J. WHITE, WHEN WORDS LOSE THEIR MEANING 267-74 (1984). "The relations and structures of power produce and are accompanied by forms of knowledge and truth that sustain them and make them seem natural. Forms of truth conceal the domination and violence inherent in power formations." M. FOUCAULT, POWER AND KNOWLEDGE 112 (1980); *see also* Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987). "From a feminist perspective, legal discourses are problem-solving approaches that reflect the ideology of the powerful and ignore the realities of the powerless." *Id.* at 423.

15. *See* P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 49 (1966). Some of the most thought-provoking scholarship using this theoretical approach focuses on the social construction of sexuality. *See, e.g.*, 1 M. FOUCAULT, THE HISTORY OF SEXUALITY (1978); S. KRIEGER, THE MIRROR DANCE: IDENTITY IN A WOMEN'S COMMUNITY (1983); J. WEEKS, COMING OUT (1977); Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER (C. Vance ed. 1984). For an analysis of the social construction of reproduction, see M. O'BRIAN, THE POLITICS OF REPRODUCTION (1981). For a critical analysis of social construction theory, see Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, SOC. REV., May-Aug. 1987, at 9; *see also* Vance & Snitow, *Toward a Conversation about Sex in Feminism: A Modest Proposal*, 10 SIGNS 126 (1984).

16. *See* H. BARBIN, HERCULINE BARBIN: BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH CENTURY FRENCH HERMAPHRODITE (1980). In his introduction to the text, Michel Foucault asks:

> Do we truly need a true sex? With a persistence that borders on stubbornness modern western societies have answered the question in the affirmative . . . . Everybody was to have one and only one sex. Everybody was to have his or her primary, profound, determined and determining sexual identity; as for the elements of the other sex that might appear, they could only be accidental, superficial, or even quite simply illusory.

Foucault, *Introduction* to *id.* at vii-viii; *see also* Marcus, *Reflections on the Significance of the Sex/Gender System, Divorce Law Reform in New York*, 42 U. OF MIAMI L. REV. 55 (1987).

mined sex, allegedly based and constructed upon sex-identified attributes.[17] Gender, like sex, is understood and experienced as bipolar.[18] Together, these two socially constructed, interconnected categories of sex and gender form the sex/gender system.[19]

At birth each person is assigned a sex category which is a socially significant classification. Each person interprets received gender norms based on sex identification in a way that both reproduces gender and organizes it anew.[20] This societal classification of individuals as female or male includes attendant appropriate behaviors and activities which constitute markers and boundaries[21] for each sex/gender identity. It underpins and informs knowledge and symbolization. Representations of biological and social differentiation between the sexes are at its core.[22] In

17. Peplau, *Roles and Gender*, in CLOSE RELATIONSHIPS (H. Kelly ed. 1983); *see also* Berger & Kellner, *Marriage and the Construction of Reality*, in THE FAMILY: ITS STRUCTURE AND FUNCTIONS 157-74 (R. Coser ed. 1974). For a review of issues regarding the use of the term "gender roles," see Atkinson, *Gender Roles in Marriage: A Critique and Some Proposals*, 8 J. FAM. ISSUES 5 (1987); *see also* J. GAGNON & W. SIMON, SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY 42-45, 290-95 (1973).

18. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

> Given the luxuriant diversity among individuals both male and female, the traits associated with gender—with masculinity and femininity—are multidimensional; they are not to be found in a bipolar distribution with men at one pole and women at the other. Nevertheless, we largely *experience* the idea of gender as bipolar.

Id. at 454.

19. For an argument regarding the interchangeability of the terms, see MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 n.1 (1982).

20. Butler, *Variations on Sex and Gender: Beauvoir, Wittig, and Foucault*, 5 PRAXIS 506, 508 (1986). Within a society, the sex/gender system varies across time and among classes in its impact on the individual or on social units, especially family or kinship units. *See* M. BARRETT & M. MCINTOSH, THE ANTI-SOCIAL FAMILY (1982).

21. Ortner & Whitehead, *Introduction: Accounting for Sexual Meanings*, in SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 1 (S. Ortner & H. Whitehead eds. 1981) (analysis of gender systems as prestige structures); *see also* R. CONNELL, *supra* note 5, at 41-65; D. GITTINS, THE FAMILY IN QUESTION: CHANGING HOUSEHOLDS AND FAMILIAR IDEOLOGIES (1985); Kelly, *The Doubled Vision of Feminist Theory*, in WOMEN HISTORY AND THEORY 51-64 (1984) (discussing major frameworks for the social analysis of gender). For an analysis of the power of sex marking and sex announcing behavior patterns, see M. FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 19-33 (1983).

22. "One cannot speak of *woman* or of *man* without being taken inside an ideological theatre where representations of images, reflections, myths, identifications transform, deform, alter ceaselessly everyone's imaginary." V. CONLEY, HELENE CIXOUS: WRITING THE FEMININE 58 (1984); *see also* Whitford, *Luce Irigaray and the Female Imaginary: Speaking as a Woman*, 43 RADICAL PHIL. 3, 5 (1986) ("Women are not engulfed in an economy of the same, but have available to them symbolizations of their otherness and difference which can become objects of exchange in the culture at large.").

> [W]hen we think about the sexual, nearly our entire imagery is drawn from the physical activities of bodies. Our sense of normalcy derives from organs being placed in legitimate orifices. We have allowed the organs, the orifices, and the gender of the actors to person-

so marking, bounding, and differentiating human activities, the sex/gender system acts as a major vehicle of social organization and control. Sex/gender identities channel and control behavior, not just because deviation from socially prescribed identity provokes harsh sanctions, but because acceptance of identity bestows social recognition and a sense of self. In a gendered society, people need their gendered social identities to be "normal."

As a vehicle for social control, sex/gender differentiation is also one of the bases for political and economic privileging in a society.[23] In the United States, hierarchical sex structuring through law and ideology has historically and contemporaneously used male morphology and metaphoricity as its referent.[24] Male is the referent; differences from the male referent identify the female. The female becomes "other," i.e. other than male. Her difference can be valued equally with the male referent or it can be valued differentially.[25]

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ify or embody or exhaust nearly all of the meanings that exist in the sexual situation. Rarely do we turn from consideration of the organs themselves to the sources of the meaning that are attached to them, the ways in which the physical activities of sex are learned, and the ways in which these activities are integrated into larger social scripts and social arrangements where meaning and sexual behavior come together to create sexual conduct.

J. GAGNON & W. SIMON, *supra* note 17, at 5.

23. This appears to be a cross-cultural phenomenon:

Even anthropologists who are critical of feminist tendencies to universalize what are really only culturally-specific features of the sex/gender system argue that male-dominance, in the form of men's direct control of women's productive and reproductive labor through control of a broad array of social institutions, appears to be an *organic* feature of most recorded social life.

Harding, *Why Has the Sex/Gender System Become Visible Only Now?* in DISCOVERING REALITY 313 (S. Harding & G. Hintikka ed. 1983); *see* J. CHAFETZ, SEX AND ADVANTAGE: A COMPARATIVE MACRO-STRUCTURAL THEORY OF SEX STRATIFICATION (1984) (acknowledging that females are never more advantaged than males, though comparative female disadvantage varies); K. YOUNG, C. WOLKOWITZ & R. MCCULLAGH, OF MARRIAGE AND THE MARKET: WOMEN'S SUBORDINATION INTERNATIONALLY AND ITS LESSONS (1984); MacKinnon, *supra* note 19, at 635-58; *see also* C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Crompton & Mann, *Introduction*, in GENDER AND STRATIFICATION 1-10 (1986) (critiquing class and stratification theory for its failure to address or its obscuring of gender); Rosaldo, *The Use and Abuse of Anthropology: Reflections on Feminism and Cross Cultural Understanding*, 5 SIGNS 389, 394 (1980) (arguing that male domination is universal though its content or shape is not).

24. Jane Flax illustrates her claim that adult single male behavior is viewed as constitutive of human nature and experience by exploring classical political theory's identification of the state of nature with unattached adult males. Flax, *Mother-Daughter Relationships: Psychodynamics, Politics and Gender*, in THE FUTURE OF DIFFERENCE 29-31 (H. Eisenstein & A. Jardine eds. 1980); *see also* Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA 146 (1984).

25. Martha Minow identifies unstated assumptions characterizing the inquiry into difference: Difference is intrinsic, not relational. The norm is unstated. The observer can see without a perspective. Other perspectives are irrelevant. The status quo is natural, uncoerced, and good. Minow, *Fore-*

Sex/gender categories are central to our thinking and exert a compelling power to structure consciousness of the world around us.[26] "The sex/gender system appears to be a fundamental variable organizing social life . . . . It may be that there has only rarely, anywhere been a *human* act performed, or a *human* thought produced, for acts and thoughts have to occur within the differential opportunities and limits set by the sex/gender system."[27]

Each narrative is about one of the primary institutions of the sex/gender system—marriage. Marriage is the legitimate form of heterosexual[28] connection in American society. Dominant cultural norms have identified marriage as both an economic arrangement[29] and a particularly

word: Justice Engendered, 101 HARV. L. REV. 10, 32-33 (1987); *see* L. NICHOLSON, GENDER AND HISTORY: THE LIMITS OF SOCIAL THEORY IN THE AGE OF THE FAMILY 3 (1986) (discussing the connection between the market economy, the individualization of social life, and the different consequences for men and women according to class at different points since the 19th century); *see also* D. GITTENS, *supra* note 21, at 2; Davidoff, *The Rationalization of Housework*, in DEPENDENCE AND EXPLOITATION IN WORK AND MARRIAGE 121 (D. Bauer & S. Allen eds. 1976).

26. Olsen, *supra* note 6, at 1498 (characterizing a structure of consciousness as "a shared vision of the social universe that underlies a society's culture and also shapes the society's view of what social relations are 'natural' and, therefore, what social reforms are possible"). More particularly, see Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Materialism*, in DISCOVERING REALITY, *supra* note 24, at 283-310; Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 n.10 (1987). For a contemporary illustration of this proposition, see *Poll Shows Bias Against Women in High Offices*, N.Y. Times, Aug. 13, 1987, at A14, col. 3.

27. Kelly, *supra* note 21, at 52; *see also* Harding, *supra* note 23, at 312.

28. Marriage is defined as "the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." BLACK'S LAW DICTIONARY 876 (5th ed. 1979). In all cases, marriage has been considered the union of a man and woman. *See, e.g.*, B v. B, 78 Misc. 2d 112, 116-17, 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974); *see also* Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 311-12, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972). New York neither specifically prohibits marriage between persons of the same sex nor authorizes issuance of marriage licenses to such persons. However, marriage is and always has been a contract between a man and a woman. Morris v. Morris, 31 Misc. 2d 548, 549, 220 N.Y.S.2d 590, 591 (1961). Provision for annulment on the grounds of physical incapacity for a sexual relationship supports the public policy that the marriage relationship exists with the result and for the purpose of begetting offspring. *See* Mirizio v. Mirizio, 242 N.Y. 74, 81, 150 N.E. 605, 607 (1926); B. v. B., 78 Misc. 2d at 117, 355 N.Y.S.2d at 717; Anonymous v. Anonymous, 67 Misc. 2d 982, 984, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971).

29. "Modern society is built about the home. Its perpetuation is essential to the welfare of the community." *In re* Hughes' Will, 225 A.D. 29, 31, 232 N.Y.S. 84, 86 (4th Dep't 1928), *aff'd*, 251 N.Y. 529, 168 N.E. 415 (1929). "The policy of this State has always been in favor of the preservation of the marriage relation, and contracts which have a direct tendency to promote a divorce have always been condemned as contrary to public policy." *In re* Estate of Fleischmann, 64 Misc. 2d 924, 926, 316 N.Y.S.2d 272, 275 (Sur. Ct. 1970); *see In re* Estate of Rhinelander, 290 N.Y. 31, 47 N.E.2d 681 (1943); Hettich v. Hettich, 276 A.D. 953, 95 N.Y.S.2d 215, *aff'd*, 301 N.Y. 447, 95 N.E.2d 40

desirable form of connection[30] for the formation and maintenance of family.[31] Legally acknowledged failures of marriage result in divorce or the reorganization and restructuring of families. Historically, divorce has been viewed as shameful for individuals and harmful to society;[32] today, it is often considered an undesirable but necessary form of relief.[33]

Each of the five narratives addresses the reform of the rules gov-

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(1950); Schley v. Andrews, 225 N.Y. 110, 121 N.E. 812 (1919); Lake v. Lake, 136 A.D. 47, 119 N.Y.S. 686 (1909).

This policy has been incorporated into various statutes governing domestic relations. *See* Married Women's Act, ch. 381, 1884 N.Y. Laws 465 (later incorporated into the Domestic Relations Law at Act of Apr. 17, 1896, ch. 272, § 21, 1896 N.Y. Laws 215; Domestic Relations Act, ch. 19, § 51, 1909 N.Y. Laws 14; and now in N.Y. GEN. OBLIG. LAW § 5-311, *amended by* Act of Apr. 27, 1966, ch. 254, § 12. 1966 N.Y. Laws 833).

Faced with the realities of the separation as an accomplished fact, however, courts recognize the advisability of voluntary accommodations and uphold agreements where the parties themselves delineate the measure of the obligation of support and, indeed, encourage such agreements where possible, in preference to litigation. *See* Galusha v. Galusha, 116 N.Y. 653, 22 N.E. 1114 (1889); Pettit v. Pettit, 107 N.Y. 677, 14 N.E. 500 (1887); Shapiro v. Shapiro, 8 A.D.2d 341, 188 N.Y.S.2d 455 (1st Dep't 1959).

30. *See* C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980); M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN 19TH CENTURY AMERICA (1985); C. LASCH, HAVEN IN A HEARTLESS WORLD (1977); M. RYAN, THE CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1815 (1981); A. SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY (1978). *But see* M. BARRETT & M. MCINTOSH, THE ANTI-SOCIAL FAMILY (1982); S. STEINMETZ, THE CYCLE OF VIOLENCE: ASSERTIVE, AGGRESSIVE, AND ABUSIVE FAMILY INTERACTION (1977) (traditional family structure at root of gendered subjectivity and domestic violence).

L. de Mause suggests that social historians have helped to perpetuate the myth of nonviolence in the family by either denying its existence or assuming that violence only occurs in "other" families—ghetto families or families characterized by some pathology such as drugs, alcohol, mental illness—thus meshing the socially desirable view with reality. L. DE MAUSE, THE HISTORY OF CHILDHOOD (1974).

31. *See* Collier, Rosaldo & Yanisako, *Is There A Family? New Anthropological Views*, Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*; and Zaretsky, *The Place of the Family in the Origins of the Welfare State*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS (B. Thorne & M. Yalom eds. 1982).

32. *See* L. HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980); *see also* E. FISHER, HELP FOR TODAY'S TROUBLED MARRIAGES (1968).

> Divorce, like sex, is much talked about and has an aura that everybody's doing it; but, like sex, it is an area where there are discrepancies between attitudes, feelings, and behavior, and there is widespread ignorance. Nowhere is it more evident than in the area of divorce how much we tend to say one thing and then proceed to do another. We say we accept divorce but as a society we are just not ready yet to accept and help those who do divorce.

Id. at 207. Wilcox argues that the increasing numbers of divorces are due in part to the "popularization" of the law. "Many a man would live in ignorance that such a thing as divorce existed, were it not for the conspicuous mention of trials in his morning paper." W. WILCOX, THE DIVORCE PROBLEM: A STUDY IN STATISTICS 64 (1969).

33. L. HALEM, *supra* note 32.

erning marital dissolution as an aspect of the sex/gender system. By focusing on the values[34] underlying the rules governing the dissolution of marriage, as well as changes in these rules during the past two centuries, each episode connects law as ideology to the sex/gender system.

Theme 3: Property and Power

Each narrative is about property or the social construction of resources. But it would be inaccurate to assume that because each story is about property, it simply concerns physical objects or papers signifying assets. Ultimately, each story is about property as a relationship of power[35]—the ability to make a claim to exclude another person from enjoyment, use, or access to something, and to have that claim recognized and enforced by law.[36]

In American society, the culturally, socially, and legally recognized ability and competence to own property is said to be a fundamental

34. "There is perhaps more resistance to introspection and self awareness in this area of law [family law] than in others." E. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES 8 (1986).

35. *See* Freeman, *Anti-Discrimination Law: A Critical Review*, in THE POLITICS OF LAW 96 (D. Kairys ed. 1979) (analyzing the creation of wealth and privilege through distributive mechanisms which, in turn, are legitimated through an ideology of individual merit); *see also* Macpherson, *Human Rights as Property Rights*, and Macpherson, *Property as Means or End*, in THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS (1985).

36. Blackstone explained that

> [the right of property] is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only for the laws of the land.

2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 15 (15th ed. 1809). *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); P. GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY: COLLECTIVE PROPERTY IN THE JURIDICAL CONSCIOUSNESS OF THE 19TH CENTURY (1981) (analysis of the cult of "having"); A. JONES, LIFE, LIBERTY AND PROPERTY: A STORY OF CONFLICT AND A MEASUREMENT OF CONFLICTING RIGHTS (1964) (study of people's attitudes toward corporate property in Akron, Ohio and the resulting competing property interests in a one-industry town); Cribbet, *Concepts in Transition: The Search for a New Definition of Property to Include Individuals Rights*, 1986 U. ILL. L. REV. 1; Dowling, *General Propositions and Concrete Cases: The Search for a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353-83 (1985); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For a discussion of rights as property, see Lynd, *Communal Rights*, 61 TEX. L. REV. 1417 (1984); *see also* Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635 (1982). For a discussion of the connection between property and identity when property is viewed as sustaining autonomy, see Salter, *Inherent Bias In Liberal Thought*, in EQUALITY AND JUDICIAL NEUTRALITY 55 (S. Martin & K. Mahoney eds. 1987).

source of identity.[37] Such ownership is a major vehicle for private self-expression, for the realization of individuality, and ultimately, for the ability to exercise autonomy. It is a significant aspect of many liberal conceptions of freedom.[38]

In each of the five stories, the power of the connections among formal access to property, actual access to property, and identity for women in the divorce process is explored. The disparity between formal and actual access to property has a pronounced impact on married women's identity. Such a disparity is culturally defined as a wife's dependence on her husband rather than understood as systematically produced economic vulnerability reinforced by her gendered role.

Each of the five divorce law reform narratives incorporates these three common themes: law as ideology, the sex/gender system as manifested in divorce law and its reform, and property as a nexus of power in the sex/gender system. Together they explore the complexities arising from one fundamental issue—legal identity in its social context. This relationship between legal identity and social context is essential to understanding the complexities and limitations of undertaking reform in family law.

* * * *

Legal identity is a personification in law of values and roles attributed to individuals, groups, or organizations by courts or legislatures. The express purpose for this acknowledgment is connected with formal access to the legal system. The legal identity of parties determines whether they have standing in a legal contest.[39]

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37. *See* A. RYAN, PROPERTY AND POLITICAL THEORY (1984) (analyzing instrumental and self-developmental views of property in Western political and social theory). Note the contrast between this mode of self-realization and an alternative mode, which connects self-realization and the formation of identity to relationships with others. *See, e.g.*, L. HYDE, THE GIFT: IMAGINATION AND THE ETHIC LIFE OF PROPERTY (1979).

38. *See* J. LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY 1890-1920 (1982) (applying this argument to the transformation of Lockean to corporate liberalism). "Classical liberalism . . . embraced the individual's right to a material basis for liberty, and the right to communicate with others through the market device of contract." *Id.* at 2; *see also* A. GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1984); A. HIRSCHMAN, THE PASSIONS AND THE INTERESTS (1977). "The claim to the citizenship value of participation is a claim to an opportunity for individualist achievement." Karst, *supra* note 18, at 470.

39. J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 62-63 (1978). Though Vining devotes his attention to legal identity in administrative law, his analysis is relevant in other areas. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES AND WYTHE AS MAKERS OF THE MASKS (1976); O. PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

In fact, legal identity is a social construct—a set of categories[40] reflecting a socially constructed reality. It is premised upon a multitude of cultural choices regarding accepted societal arrangements, including a determination regarding the competence[41] of persons or entities to operate in civil society. It is underpinned by a set of cultural beliefs regarding the autonomy of persons in a category and a social assessment of their capacity to make meaningful choices. This competence or capacity is identified with the ability to recognize and to assume responsibility for morally differentiable acts, including those acts subject to legal sanctions.

Legal identity is far more than a technical device of the law; it reflects an exercise in social recognition and denial. Because the distribution of resources may turn on legal recognition or denial and because courts and legislatures have a monopoly to create, refine, or change legal identity, the definition of legal identity is a particularly dramatic and important arena for ideological struggles.

Legal identity also demarcates the categorization of claims to participate in the ordering of rights and obligations in a society. Conse-

40. The use of such categories rests on several implicit or explicit assumptions. First is the belief that these categories reflect differences. *See* Z. EISENSTEIN, *supra* note 24; Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 84 (1980). *But see* Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 127-31 (1987) (discussing the "social relations" approach to difference). "If one assumes that people are related to each other, then assertion of differences are actually statements of relationships, since they express a comparison between the one doing the asserting and the one about whom the assertion is made." *Id.* at 128. In the context of racism, see A. MEMMI, DOMINATED MAN: NOTES TOWARDS A PORTRAIT (1968). "[I]t is not the difference which always entails racism; it is racism which makes use of the difference." *Id.* at 187. Second is the belief that these differences are coherent and clear—at least sufficiently clear to serve as a basis for categorizing significant segments of a population. Third is the belief that these distinctions are meaningful and that some socially desirable good or end informs the particular distinction and supports its perpetuation. In turn, the assumption of meaningfulness is based on an assignment of values to these differences manifested as a broad based attribution of a measure of "competence" to perform in civil society. *Id.* at 188-89; *see also* D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND THE HUMAN MALAISE 108 (1976) (for the "under-personification" of women). Such circular reasoning operates to create a self-fulfilling prophecy. Finally, there is the belief that the difference is "totalized." All members of the group are characterized by the difference which appears to be enduring if not unchangeable, and perceived variations in the category are less important than perceived similarities within it.

41. *See* M. DALY, BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION (1973); M. DALY, GYNECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978). See also the writings of such French feminists as Helene Cixous, Julia Kristeva, Catherine Clement, Luce Irigaray, and Monique Wittig, whose works share the conclusion that "[o]nly one sex has been represented in Western discourse and the projection of male libidinal economy in all patriarchical systems—language, capitalism, socialism, monotheism—has been total; women have been absent." NEW FRENCH FEMINISMS: AN ANTHOLOGY xii (E. Marks & I. de Courtirran eds. 1980); *see also* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1191 (1985).

quently, a particular construction of legal identity serves as a privileging mechanism in society.

Legal identities developed and used for the recognition of classes of human beings[42] tend to rely on such socially constructed categories as age,[43] race,[44] mental ability,[45] sex,[46] and marital status.[47] To the extent

42. But note that legal identity has been tailored to meet the needs of such commercial structures as corporations by creating a fiction of personhood for them. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (G. Simpson trans. 1964); O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 67-73 (1900); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 486-526, 634-88 (2d ed. reissued 1968); Maitland, *Moral Personality and Legal Personality*, in COLLECTED PAPERS 304-12 (H. Fisher ed. 1911).

> A corporation comes into existence when it is needed and dies when its usefulness is done. It can own property and money... and buy and sell rather eminent men.... It can make binding contracts, expand, contract, manufacture all goods, perform all services. It needs no sleep and takes no vacations. It can borrow and steal and even beg.... If you prick it, it does not bleed; if you tickle it, it does not laugh. It can scream however if taxed or otherwise annoyed.

M. MAYER, WALL STREET: THE INSIDE STORY OF AMERICAN FINANCE 31 (1959). Recently it has been suggested that legal identity be extended to entities, such as trees. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

43. Concerning age as a category, it has been written:

> Age distinctions pervade our society. They are commonly employed in statutes and regulations as criteria for the distribution of public resources and for the imposition or relaxation of legal responsibilities. They are utilized in a less formal, but no less substantively significant, sense as mechanisms and reflect normative values about the proper roles and rights of individuals whether the individual is a dependent infant or a fully-employed adult or a frail older person.

Eglit & Neugarten, *Introduction: National Conference on Constitutional and Legal Issues Relating to Age Discrimination and the Age Discrimination Act*, 57 CHI[-]KENT L. REV. 805 (1981); *see also* Eglit, *Of Age and the Constitution*, 57 CHI[-]KENT L. REV. 859, 861 (1981) ("Age lines adopted in statutes and regulations also serve to translate social attitudes into legal norms, thereby satisfying more intangible, but nonetheless, societal needs."). Most age discrimination litigation has involved employment bars against the elderly. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979) (using rational basis review to uphold federal law mandating foreign service personnel to rehire at age sixty). *See generally* Smith & Leggett, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 OHIO ST. L.J. 349 (1980).

44. In the United States, legal identity at times has been constructed to define millions of human beings (both male and female) as a "subcategory of human proprietary objects," in other words, slaves. O. PATTERSON, *supra* note 39, at 21 (referring to M. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY 73-75 (1980)); *see* E. GENOVESE, ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE (1974).

45. Minow, *supra* note 40.

46. Consider the language used by the court in *United States v. St. Clair*:

> In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning. Moreover, Congress recognized that in modern times there are certain duties in the Armed Forces which may be performed by women volunteers. For these reasons, the distinction between men and women with respect to service in the Armed forces is not arbitrary unreasonable or capricious.

that these socially constructed categories are visible or ascertainable with relatively minimal effort, they are treated as self-evident or natural.[48] This apparent self-evidentness reinforces the sense of the cultural appropriateness of the category and the boundaries embodied in the category. And so, the fact that each of these categories is socially constructed and reinforces existing power relationships is easy to ignore. At best, a particular argument about a hard case involving the margin of a socially constructed category[49] may be left for the judge or scholar. Lost, forgotten, suppressed, or unavailable to cultural consciousness is the recognition that these categories, have as their point of reference the dominant group in American society: white heterosexual men.[50]

The five naratives detail the formal transformation of the legal identity of married women in New York and place this transformation in its social context. They are narratives about changes in the legal identity of women which have been celebrated as progress.[51] As these stories suggest, however, a focus on changes in rules may avoid, evade, or distort any assessment of the relationship between formal legal change and its

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291 F. Supp. 122, 125 (S.D.N.Y. 1908); *see also* United States v. Cook, 311 F. Supp 618 (W.D. Pa. 1970).

47. *See* United States v. Dege, 364 U.S. 51 (1960) (concerning the presumption against the existence of a conspiracy between a husband and wife. Justice Frankfurter argued for the majority that the presumption of "oneness" was simply a legal fiction. In dissent, Chief Justice Warren contended that the presumption should be upheld to protect the confidential relationship of marriage.).

48. Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 205 (1979).

49. For a "hard case" involving race, see Trillin, *American Chronicles: Black or White,* THE NEW YORKER, Apr. 14, 1986, at 62 (story of Susie Guillory Phipps, a Louisiana woman, who considered herself white but discovered that her birth certificate identified both her parents as "colored"). For hard cases involving sex, see Anonymous v. Mellon, 91 Misc. 2d 375, 398 N.Y.S.2d 99 (Sup. Ct. 1977) (gender is not merely anatomy, but includes psychological identity, acceptability by others, chromosomal make up, reproductive capacity, and endocrine levels); Richards v. U.S. Tennis Ass'n, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. 1977) (requirement of passage of a sex-chromatin test to participate in a tennis tournament grossly unfair, discriminatory, inequitable, and violative of New York Human Rights Law); B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974) (annulment granted because defendant, a female to male transsexual, did not disclose inability to consummate marriage); Hartin v. Director of Records & Statistics, 75 Misc. 2d 229, 347 N.Y.S.2d 515 (Sup. Ct. 1973); (upholding board ruling preventing the inclusion of gender on birth certificates issued to transsexuals). Note that in *Hartin* the board minutes indicate that surgery for the transsexual is viewed as an experimental form of psychotherapy by which "mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality." *Id.* at 518. *See generally* Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma,* 7 CONN. L. REV. 288 (1974-75).

50. *See* Karst, *supra* note 18, at 452. "The social definition of woman has been constructed around the needs of men." For an interesting fictional account of one woman's realization of the effect of social construction on her roles as woman, wife, and mother, see D. LESSING, THE SUMMER BEFORE THE DARK (1973).

51. *See* Marcus, *supra* note 16, at 57 n.10.

impact on social identity and economic power. An "egalitarian" reform may produce contrary results if it ignores either the economic or cultural context. In the instance of divorce law reform, the socially objectified and individually internalized roles of woman and man, wife and husband, mother and father have limited the extent of meaningful change between women and men. The individual identities compelled and enabled by these roles generate a collective unwillingness to disturb power relationships in which men dominate women. Changing categories fails to change the lived reality of gender in our culture.

II. FIVE NARRATIVES

Narrative 1—Property and The Development of Legal Identity for Married Women

A. *Common Law and Equity: Gendered Access to Property*

Historically in American society, heterosexual[52] monogamous[53] marriage has been the legally and socially privileged[54] form of sexual, intimate connection. Marriage created a recognized social unit. As par-

52. *See supra* note 28.

53. The Edmunds Act, ch. 47, 225 Stat. 30 (1882) made polygamy illegal and punishable by imprisonment, disenfranchisement, and the declaration of children born to such marriages as illegitimate. The Act was revised by The Anti-Polygamy Act, ch. 397, 24 Stat. 635 (1887), in which Congress annulled the Mormon Church for its refusal to adhere to the ban on polygamy. *Id.* § 17, ch. 397, 24 Stat. 635, 638; *see also* Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890) (Congress has power to repeal the charter of the Mormon Church and to dispose of the church's property if the church does not adhere to the Edmunds Act); Reynolds v. United States, 98 U.S. 145 (1878) (religious belief does not justify overt criminal act; statute proscribing bigamy does not contravene religious scruples of those practicing bigamist marriage). *But see* Miller, *A Critique of the Reynolds Decision*, 11 W. ST. U.L. REV. 165 (1984); *see also* Hallowell v. Commons, 210 F. 793 (8th Cir. 1914), *aff'd*, 239 U.S. 506 (1915) (upholding plural marriages entered by Native American living in tribal relations); La Framboise v. Day, 136 Minn. 239, 161 N.W. 529 (1917); Buck v. Branson, 34 Okla. 807, 127 P. 436 (1912) (Native American marriages valid according to custom and law of tribe to which the parties belong).

See N.Y. PENAL LAW, § 255.15 (McKinney 1980) (making multiple simultaneous marriages illegal). A person is guilty of bigamy when either party contracts or purports to contract a marriage with another person at a time when either party has a living spouse.

54. Marriage was viewed as an "exclusive sanctioned form of cohabitation, a divine, monogamous lifelong institution designed to produce and nurture children." Younger, *Marital Regimes: A Story of Compromise and Demoralization Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 46 (1981).

> [W]hilst marriage is often termed . . . a civil contract— generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. It is . . . the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

ties to a marriage, men and women were assigned a new status[55]—husbands and wives. Embodied in this status relationship was formal recognition of a societally acceptable assessment of civil capacity. This recognition was manifested in the legal identity accorded each party.

The assignment of legal identity in marriage was informed by sex and was structured by the prevailing sex/gender system. Men and women were husbands and wives. For women and men who married (the overwhelming preponderance of all adults),[56] the connection between the sex/gender system and legal identity in marriage under the common law was dramatic and clear. While the legal and social identity of married men was expanded, the legal identity of married women was appropriated through coverture. For legal purposes, a married woman had no separate self.

From the period of British colonial rule[57] until 1848,[58] New York used the common law doctrines and rules regarding marriage and its dissolution[59] to structure the appropriation of married women's legal identity. As a matter of law and public policy, a complex, intimate, social and economic relationship involving both production and reproduction was reduced to a seemingly simple coercive legal fiction—the unity[60] of hus-

55. *See generally* Land v. State, 71 Fla. 270, 71 So. 279 (1916) (One permitted to enjoy the privileges of the marital status must be held to the responsibilities belonging to that status.); Haas v. Haas, 298 N.Y. 69, 80 N.E.2d 337 (1948); Mirizo v. Mirizo, 242 N.Y. 74, 150 N.E. 605 (1926) (Before a wife can demand benefits under the marriage contract, the burden is on her to show that she is willing to discharge the obligations under it.); Coleman v. Burr, 93 N.Y. 17 (1883) (Wife's care of her husband's sick mother is just service rendered in the discharge of a duty husband owed mother and in rendering it wife was simply discharging the marital duty owed her husband.).

56. Married women have been the majority of women for the past century, with 59.4% of all women married in 1890, 60.4% in 1920, 67.4% in 1955, and 60.4% in 1985. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 15 (1960); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 38 (107th ed. 1987).

57. Prior to the permanent conquest of New Netherlands by the English in 1674, both Dutch and English women living under Roman-Dutch law were permitted to retain their own real and personal property, own and operate their own businesses without the permission or cosignature of their husbands, engage in trade on their own, and sue and be sued in court. L. BIEMER, WOMEN AND PROPERTY IN COLONIAL NEW YORK: THE TRANSITION FROM DUTCH TO ENGLISH LAW, 1643-1727, at 6-9 (1983).

58. Married Women's Property Act, ch. 200, 1848 N.Y. Laws 307, *repealed by* Domestic Relations Law of 1896, ch. 272, art. III, 1896 N.Y. Laws 215, 219-22.

59. *See* N.Y. CONST. of 1777, art. XXXV (1797) (adopting common law and statutes as they formed the law of the colony of New York as of 1775); *see also* Dean, *Economic Relations Between Husband and Wife in New York*, 41 CORNELL L.Q. 175 (1955-56).

60. According to Blackstone, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything." 1 W. BLACKSTONE, COMMENTARIES

band and wife in one person, the husband. Culturally, this socially constructed rule was identified as part of the "natural order of things."[61] Legally, this unity entailed a sex/gendered differential assessment of competence and capacity to operate in the world. One party in the marriage, the husband, enjoyed heightened social, civil, and commercial capacity and competence. As a corollary, the wife became the other[62]

*430 (Oxford 1765). In the common law a married woman was identified as a feme covert. Feme covert is defined as: "A woman under cover or protection of her husband; a married woman. . . . A feme couert cannot make a contract. . . . An infant, lunatic, *feme covert*, or [etc.]. humorously: Wife." 4 OXFORD ENGLISH DICTIONARY 151 (1961) (citations omitted).

61. *See* N. BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK 42-69 (1982) (discussing power of the metaphor of marital unity). *But see* Rowe, *Femes Covert and Criminal Prosecution in Eighteenth Century Pennsylvania*, 32 AM. J. OF LEGAL HIST. 138 (1988) (discussing actual dispositional patterns in prosecutions involving married women).

62. The legal options were framed as autonomy or dependence. The dichotomous nature of this approach did not capture the variety and complexity of mental competence or interpersonal dependencies. Neither did it recognize the historic and culturally contingent nature of the categories, or that the rules regarding the dichotomy might vary within a culture, thereby allowing for manipulation rather than absolute closure. Minow, *supra* note 25, at 27-28. Moreover, and perhaps most importantly, the dichotomy violated experience. Autonomy might have no point without interpersonal connection and interpersonal connection need not mean dependency or domination. *Id.* at 17. For discussions of dependency and autonomy, see R. BELLAH, R. MADISON, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985) [hereinafter R. BELLAH]; M. DALY, PURE LUST: ELEMENTAL FEMINIST PHILOSOPHY (1984); S. DE BEAUVOIR, THE SECOND SEX (1952); D. DINNERSTEIN, *supra* note 40.

Earlier feminist works sought to place women on the autonomy side of the dichotomy with arguments that a woman was an independent human being capable of rational thought, deserving of education, and able to earn a living. *A Vindication of the Rights of Woman* underscores Mary Wollstonecraft's concern that women should have power over themselves, to use their own reason and, thereby, to live up to their potential as human beings. *See* M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (London 1792).

Elizabeth Cady Stanton argued that society would be better off if women were allowed the freedom of individual choice enjoyed by men. When "husbands and wives do not own each other as property, but are bound together only by affection, marriage will be a lifelong friendship and not a heavy yoke, from which both may sometimes long for deliverance. The freer the relations are between human beings, the happier . . . ." Stanton, *Speech to the McFarland-Richardson Protest Meeting*, in ELIZABETH CADY STANTON, SUSAN B. ANTHONY: CORRESPONDENCE, WRITINGS, SPEECHES 134-35 (E. DuBois ed. 1981) [hereinafter STANTON, ANTHONY: CORRESPONDENCE]. In Stanton's most impassioned plea for women's political equality, she argued that society required the same duties and sacrifices of both men and women. Each was ultimately required to make life's journey alone; therefore, every human soul should be fitted for survival, for independent action. A dependent woman was "[r]obbed of her natural rights, handicapped by law and custom at every turn, yet compelled to fight her own battles, and in the emergencies of life to fall back on herself for protection . . . ." Stanton, *The Solitude of Self*, in STANTON, ANTHONY: CORRESPONDENCE, *supra*, at 249.

Charlotte Perkins Gilman identified women's problems as rooted in women's economic dependence on men.

[But] all that she may wish to have, all that she may wish to do, must come through a

party in the marriage. Her capacity or competence was denied and eliminated by law. Moreover, her "civil disabilities and limitations were mirrored by a loss of economic autonomy and sexual integrity."[63]

For legal purposes, married women were virtually invisible.[64] Their lack of legal capacity, derived from the unity in marriage doctrine, was particularized as a set of disabilities[65] which separated women from the

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single channel and a single choice. Wealth, power, social distinction, fame,—not only these, but home and happiness, reputation, ease and pleasure, her bread and butter,—all, must come to her through a small gold ring.

C. GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATIONS BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION 71 (1898). Ironically, the new emphasis on equating work with economic and emotional self-sufficiency or autonomy kept many middle-class women from recognizing that most working women were not independent laborers but part of a family economic unit in which work did not lead to financial independence. *See* Pye, *Creating a Feminist Alliance: Sisterhood and Class Conflict in the New York Women's Trade Union League 1903-1914*, 2 FEMINIST STUD. 24-38 (1975).

63. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction or Revolution?* in 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69 (D. Weisberg ed. 1982); *see* M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 195-97 nn.3-4 (1986) (review of revisionist and feminist shift in historical interpretation regarding the status of women during the colonial and early national periods); Gundersen, *Independence, Citizenship, and The American Revolution*, 13 SIGNS 59, 74 (1987) (discussing the changing definitions and uses of Revolutionary rhetoric: "independence," "dependence," "liberty," and "slavery," and the effect of these changes on the status of women).

64. The Seneca Falls Declaration of Sentiments and Resolutions described married women as civilly dead. *Declaration of Sentiments and Resolutions, 1848*, in THE AMERICAN SISTERHOOD 42-46 (W. Martin ed. 1972).

65. *See* M. SALMON, *supra* note 63. Married women acting alone

could not execute a valid contract. Nor could they convey the property they brought to their marriages or earned with their husbands. They also lost the power to act as executors or administrators of estates and as legal guardians . . . . Men. . . possessed the legal right to devise their estates, whereas women could do so only with the express consent of their husbands. Even then their right extended only to personal property.

Id. at 14-15. Tangible personal property belonged to the husband and could be reached by his creditors. Choses in action, when reduced to the husband's possession, also became his property. Title to land remained in the wife, but the husband was entitled to manage or rent her land during the marriage and could retain any profits. A husband, however, could not sell or mortgage his wife's real estate without her consent. The common law permitted conveyances only when wives freely agreed to them, although "free" consent might be difficult to determine in court despite the protection of a private examination of a wife by the judge. *Id.* at 15, 28-30. Moreover, courts in New York adopted loose, informal standards for conveyancing. *Id.* at 30. The husband's interest lasted only during his wife's life unless an issue of the marriage was born alive, in which event the husband's interest extended during his life under the doctrine of curtesy. The husband could alienate and his creditors could reach his wife's land to the extent of his interest.

A married woman was unable to enter into a contract with her husband, Winter v. Winter, 191 N.Y. 462, 84 N.E. 382 (1908), or with third parties, Dickerson v. Rogers, 114 N.Y. 405, 21 N.E. 992 (1889). She could not convey either real or personal property to or from her husband or acquire or dispose of property from third parties without her husband's consent. Hunt v. Johnson, 44 N.Y. 27 (1870). She could not engage in trade or business, Abbey v. Deyo, 44 Barb. 374 (1863), *aff'd*, 44

mainstream of civil—and particularly, commercial—society. The preponderance of a married woman's disabilities stemmed from the lack of capacity to own, manage, buy, or sell property, and hence, to contract. In turn, these disabilities reinforced the economic dependence of most married women upon their husbands without regard to the wife's social class.[66]

The common law legal fiction was that marriage transformed a duality into a unity. The context in which the doctrine of marital unity operated—the highly differentiated sex/gender structure of marriage—meant recognition and retention of duality. Wives and husbands as women and men were said to be identifiably different, and this recognition of difference appeared in law as well as in social practices and conventions. Married men had no need to call upon their wives to assert and legally act upon their socially recognized capacities. In contrast, married women were required by law to need and depend upon their husbands.

The denial of married women's separate legal identity and the legally sanctioned and reinforced dependency for married women that resulted was justified and rationalized by religious,[67] historic,[68] and

N.Y. 343 (1871), unless she had the consent of her husband, Cropsey v. McKinney, 30 Barb. 47 (1859), or sue or be sued without joinder of her husband, Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889); *see* Reynolds v. Robinson, 64 N.Y. 589, 593 (1876) (absent special agreement all married woman's services and earnings belong to husband who converts his house into hospital); Porter v. Dunn, 16 N.Y.S. 77, 30 N.E. 122 (1892) (husband entitled to recover value of wife's services as nurse to invalid renter when wife, acting in service of and subordinate to her husband, makes no claim for compensation). *But see* N. BASCH, *supra* note 61, at 20 (for situations in which the common law removed or erased the wife's disabilities).

66. While the common law structured and encouraged gendered economic dependency, it claimed to remain uninvolved in family affairs—the realm of domestic privacy. In contrast, the family law of the poor attempted to control dependency through forms of public relief which respected neither domestic privacy or individual rights. M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 99-104, 122-35 (1976). *See generally* C. STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK 1789-1860, at 3-38 (1986). Stansell notes that widowhood was a common road to female proprietorship. *Id.* at 14; *see also* E. ROSEN, BITTER CHOICES: BLUE COLLAR WOMEN IN AND OUT OF WORK (1987).

67. 2 H. DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (S. Thorne trans. 1968) attributed this unity to the biblical teaching that the husband and wife become "one flesh." *Genesis* 2:24. The biblical demand that wives obey their husbands was used to justify placing sole control of the marital unit in the husband. *Genesis* 3:16. Bracton advanced the argument that the husband is the wife's guardian. "Women differ from men in many respects, for their position is inferior to that of men." 2 H. DE BRACTON, *supra*, at 31.

68. Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 NEB. L. REV. 120, 123-25 (1986) explores the argument that English common law marital property reflects a strong movement to unify property in one person and is in part attributable to the consolidation of power in the English king and the development of the common law courts. The system of primogeniture appears to have been propelled by similar concerns. However, there is a crucial difference—primogeniture did not deprive younger sons of their separate legal identity.

pragmatic[69] assertions which tended to emphasize the differences between men and women. Separately and collectively, these assertions were used to demonstrate either the intrinsic or contingent nature of women's intellectual, physical, and emotional weakness. In turn, these overinclusive claims reinforced the argument that, given the hierarchically ordered and legally reinforced power relationships in marriage, women would not be able to muster or demonstrate the requisite autonomous will to contract,[70] or to act in other civil or criminal situations. Capacity and competence were interchangeable. Whether considered singly or paired, they formed the rationale for denying married women a separate legal identity. With this last twist of reasoning, the ideological circularity was complete. Nature or history each produced the same result, a result which was presumed to be socially, culturally, and politically desirable.

The consequences of the appropriation of a married woman's legal identity were increased legal and economic prerogatives for her husband. As a married woman's legally designated protector, her husband acquired an expansive legal identity as head of household with financial power.[71]

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69. According to Blackstone, the rationale for female coverture is the creation of lawful heirs for the properties and identification of a responsible party for the care, maintenance, protection, and education of children in the lower ranks. 1 W. BLACKSTONE, *supra* note 60, at 358, 394-95, 402. Kent attributed the legal incapacity of married women to their dependent relationship with their protective husbands, rather than any intrinsic inferiority. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 129 n.(b) (1884); *see also* W. PAGE III, THE LAW OF CONTRACTS § 1658, at 2853 (2d ed. 1920) (acknowledging the power differential in marriage relationship and relying on a "rational basis" for it—the husband's liability for his wife's obligations which thereby removes autonomous responsibility from her). For a discussion of these various rationales, see Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1044-52 (1972); *see also* M. SALMON, *supra* note 63, at 40 (In colonies settled by Puritans and Quakers, the reduction of women's autonomy was viewed as part of the goal of strengthening the family.).

70. See M. SALMON, *supra* note 63, at 41-57, for a discussion of the express concern of courts regarding male coercion of women in contract situations. Salmon details the accommodations made for married women who were designated as sole traders.

71. P. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 19 (1980). The husband had the status of master and head of the household. The wife was obligated to render obedience, domestic service, and submission to her husband. He was entitled to possession, use, and income from her estate for the duration of their marriage. Hiles v. Fisher, 144 N.Y. 306 (1895); Bradley v. Walker, 138 N.Y. 291, 33 N.E. 1079 (1893). He could bind the property for the duration of his estate. He could grant, convey, or mortgage this interest. Jones v. Patterson, 11 Barb. 572 (1852). All personal property owned before the marriage or acquired after the marriage was placed in her husband's possession. DeBrauwere v. DeBrauwere, 203 N.Y. 460, 96 N.E. 722 (1911); Whiton v. Snyder, 88 N.Y. 299 (1882). While the wife acquired the legal right of dower (one-third of the value of the lands her husband owned during the marriage), the husband acquired the legal right of curtesy, a life estate in the real property owned by his wife during the marriage, provided they had children capable of inheriting the estate.

Accompanying the psychological and material benefits connected with this identity was the formal legal obligation that a husband provide undefined support for his wife and children during the marriage.[72] While New York law declared it a crime for a husband to fail to provide support,[73] cases underscored the fundamental unwillingness of the courts to intervene in the private financial ordering of the marriage.[74] The actual standard was minimal. As legal head of household, a husband could decide the appropriate level of support, so long as he prevented his wife and children from becoming public charges.[75] That support obligation might

72. "Although a man was morally obligated to cherish and support his wife, the common law permitted him to squander her property with impunity, to deprive her at will of creature comforts, and if she complained to 'chastise' her roundly." M. BLOOMFIELD, *supra* note 66, at 95. Minow notes the conflict between the legal rules depriving the wife of property and capacity to contract, and the language of religious marriage ceremonies in which the husband pledged his new wife all his worldly goods. Minow, *supra* note 25, at 45. *But see* J. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN 680 (1873) (describing marriage as bargain that freed women from toil and the burden of care for future support).

The doctrine of necessaries, developed by the English courts, was used as a means of enforcing a husband's duty to support his wife during an ongoing marriage. *See e.g.*, Mott v. Comstock, 8 Wend. 544 (1832) (A feme covert while living with her husband, can make no contract binding upon him in her capacity of wife, except for reasonable necessaries having due regard to her condition and quality in life, and the ability of her husband to pay; nor can she bind him even to this extent, provided he furnishes the necessaries himself for her and the family.). *But see* McCutchen v. McGahay, 11 Johns. 281 (Sup. Ct. 1814) (duty existed only when the wife was cohabiting with her husband). Thus, "[h]e is bound to provide for her in his family; and while he is guilty of no cruelty towards her, and is willing to provide her a home, and all the necessaries there, he is not bound to furnish them elsewhere." *Id.* at 282. If a woman left her husband without sufficient cause or committed adultery, the husband was discharged from his obligation to furnish her with necessaries. As one astute observer pointed out, this limitation, in addition to guarding some innocent husbands against irresponsible or adulterous wives, surely must have deterred women from leaving their husbands. J. KELLY, CONTRACTS OF MARRIED WOMEN 167 (1882). *See generally* Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767 (1984).

73. Domestic Relations Law, ch. 19, 1909 N.Y. Laws 14 (originally enacted as Act of Apr. 17, 1896, ch. 272, § 21, 1896 N.Y. Laws 220) (later codified as N.Y. DOM. REL. LAW § 51) (repealed 1964). The subject matter is now covered in N.Y. GEN. OBLIG. LAW §§ 19-101, 3-301, 5-311 (Consol. 1977 & Supp. 1988); *see also* Family Court Act, ch. 6, § 6, 1962 N.Y. Laws 3043 (as amended Sept. 1, 1983); Law of Apr. 24, 1962, ch. 686, art. 4, pt. 1, § 412, 1962 N.Y. Laws 3079, *amended by* Law of June 19, 1980, ch. 281, § 27, 1980 N.Y. Laws 1237.

74. McGuire v. McGuire, 37 Misc. 259, 75 N.Y.S. 302, (Sup. Ct. 1902), *aff'd*, 81 A.D. 636, 81 N.Y.S. 1134 (1903).

75. Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956); *see* Keller v. Phillips, 40 Barb. 390, *aff'd*, 39 N.Y. 351 (1868) (husband bound to provide for his wife and children whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. Ordinarily, he will be presumed to assent to her making, upon his credit, such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision. But, if he sees fit to destroy such presumption by an express prohibition, no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that supplies become necessary. In such case, the party seeking to recover in the

continue upon dissolution of a marriage, depending on a court's assessment of his wife's conduct during the marriage.[76]

In limited instances, colonial and post-revolution New York courts of equity[77] tempered the harshness of the common law doctrine of marital unity with its clear appropriation of married women's legal identity. Equity recognized a limited separate legal identity for a married woman derived from and contingent upon the actions of a male who was either her father or husband.[78] Either male could provide her with a separate estate.

Through the recognition of a separate estate for married women, equity appears to have played some role[79] in allowing access to real property. However, it was availabile only to a few economically privileged married women.[80] Equity addressed claims for an exception to the pre-

face of such prohibition, takes the burden of proving the neglect of the husband to supply such necessaries.)

76. *See infra* notes 214-15 and accompanying text.

77. F. MAITLAND, EQUITY 19 (1926). The distinction between law and equity did not exist under the Dutch civil law code which was used in New Netherlands. Post-independence revisers of New York state law also claimed that feudal tenures did not exist while the colony was under Dutch administration. P. RABKIN, *supra* note 71, at 100-01 (citing Redfield, *English Colonial Polity and Judicial Administration 1664-1776*, in 1 HISTORY OF THE BENCH AND BAR OF NEW YORK 35, 69 (1897)).

78. Equity recognized the antenuptial contract, under which married women from wealthy families whose fathers preferred to endow their daughters rather than their sons-in-law, held their property in a trust separate from the husband's control and managed for the wife's benefit; in some cases, postnuptial agreements reserved a separate estate for the wife. *See* Johnston, *supra* note 69, at 1052-57 (discussing development of equity doctrines relating to married women). For example, a married woman could dispose of an estate by sale, gift, or devise, or encumber it unless constrained by the trust instrument. Yale v. Dederer, 18 N.Y. 265 (1858). She was entitled to the sale, exclusive use, rents, and profits from the estate. Martin v. Martin, 1 N.Y. 473 (1848). Her property was secure from her husband's creditors. Westervelt v. Gregg, 12 N.Y. 202 (1854); Shirley v. Shirley, 9 Paige Ch. 363 (1841); Smith v. Kane, 2 Paige Ch. 303 (1830). Transactions between husband and wife were enforceable. Hendricks v. Isaacs, 117 N.Y. 411, 22 N.E. 1029 (1899). Each could be sued by the other. Moore v. Moore, 47 N.Y. 467 (1872). Contracts with third parties which benefited or charged the estate and which did not conflict with the trust instrument were valid and enforceable. *Yale*, 18 N.Y. at 265; *see* N. BASCH, *supra* note 61, at 89 (for situations involving postnuptial agreements). Basch notes, "If the common law disabilities of married women were restrictive, the economic opportunities open to unmarried women were even more restrictive. Marriage was a partnership that promised support by the husband in return for the lifelong services of the wife." *Id.* at 111.

79. *See* M. SALMON, *supra* note 63, at 81-119. Evidence suggests that the creation of a separate estate was used in early 19th century New York, although precise data are not available. N. BASCH, *supra* note 61, at 73-74, 108-09. A study of marriage settlements in South Carolina concluded that no more than two percent of wives created a separate estate in equity in the years 1730 to 1830. Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 to 1830*, 39 WM. & MARY Q. 655 (1982).

80. Equitable instruments which permitted the carving out of limited individual exceptions for elite married women were unwieldy and costly. Johnston, *supra* note 69, at 1059. They required legal

vailing common law rule of marital unity. It was not a vehicle for a direct challenge to the common law.

As equity identified some of the limitations in the application of the common law fiction of marital unity, the common law, infused with prevailing cultural norms and expectations of married women's submission and subservience, set the parameters for equity's results. Equity's dealings with married women were informed and framed by the *in loco parentis* doctrine which classified women in the same category as idiots and children.[81] Thus, while courts of equity might be inclined to secure to privileged married women needing support the benefits of their own assets, judges were less responsive to claims which might vindicate the rights of married women to power or independence.[82]

B. *The Married Women's Property Acts: Degendered Access to Property*

In the period following the American Revolution, it became apparent that major aspects of the legal system, largely imported from Britain, were unsatisfactory.[83] Attacks were mounted on both the common law and equity. The common law was viewed as rigid and constraining; equity, especially when applied to the transmission of property, was confusing.[84] Between 1782 and 1848, New York legislators passed a series of

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sophistication and care in their drafting, lest they be declared invalid and the common law rules prevail. N. BASCH, *supra* note 61, at 25-26. Nor were the rules readily available in statutes governing the formation of such estates. M. SALMON, *supra* note 63, at 86.

81. L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 39-40 (1969).

82. N. BASCH, *supra* note 61, at 76-77, 82.

83. The codification movement of the 1820s and 1830s envisioned the creation of a body of indigenous American law. It identified legislatures, rather than judges exercising their discretion and prerogatives in either courts of common law or equity, as the source of law. P. RABKIN, *supra* note 71, at 52-60. Allied with the codifiers were those who were concerned with debtor/creditor issues in the unstable Jacksonian era economy. In addition, pressure for significant revision of the laws was generated by changes in the technology of commerce—the development and the treatment by the law of new property forms such as savings accounts and life insurance. (I am indebted to my colleague Tom Headrick for this insight as part of the larger issue of the relationship between technologically based change and social consciousness.) Advocates of women's rights also were identified with law reform efforts. *See* B. TAYLOR, EVE AND THE NEW JERUSALEM: SOCIALISM AND FEMINISM IN THE NINETEENTH CENTURY (1983) (arguing that reform of marital property laws was a strong element in the utopian socialist program of the Owenites in both the United States and England and influenced the thinking of 19th century American advocates of women's rights); *see also* STANTON, ANTHONY: CORRESPONDENCE, *supra* note 62.

84. Thomas Jefferson characterized chancery as "a chaos, irreducible to a system, insusceptible to final rules and incapable of definition and explanation." J. NOONAN, *supra* note 39, at 16. Moreover, equity was viewed as advantaging a small segment of the population. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 292-93 (1969). For a general discussion of the

important property law reforms. These reforms were directed toward the commercialization and simplification of property law, including the free alienation of land.[85] Initially, efforts to reform both the common law and equity were unconnected with the issue of access of married women to property.[86] However, while not intended to degender access to property, the enacted legislation served to lay the ground and to facilitate the demand for such access.[87]

In the spring of 1837, Assemblyman Thomas Hertell from New

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relationship between equity and codification, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 210-11 (1973).

85. The Revised Statutes of 1828 abolished passive or formal trusts in which the trustee had no active duty to perform. Such trusts were converted to the legal estate of the beneficial owner, thereby making assets available to creditors. N.Y. REV. STAT. vol. 1, pt. II, ch. 1, § 48 (1828); *see also* P. RABKIN, *supra* note 71, at 77.

86. For married women in New York who relied upon such trusts for access to their family assets, thereby avoiding the common law marital unity doctrine, the impact of a "progressive" reform for men did not create a legal breakthrough for married women. Although a married woman, as prior equitable owner or the beneficiary of the use of a trust, became the legal owner under the reform, prior to 1848, under the common law, married women could have no separate legal estate. It belonged to her husband. N. BASCH, *supra* note 61, at 81-88. Under the reform, the equitable estate became a legal estate. With the execution of the equitable estate into a legal estate, the wife would lose her equitable or beneficial ownership without gaining a corresponding legal estate. Thus, the unintended consequence of the reform was to recreate the precise situation which the trust sought to avoid, namely control by a husband over a married woman's property. P. RABKIN, *supra* note 71, at 75. Moreover, the 1828 Revised Statutes permitted the creation of trusts in real estate only.

> § 23 All provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

N.Y. REV. STAT., pt. II, ch. 1, tit. II § 5. According to Speth, a father who wished to transfer other types of wealth (personal property) was unable to do so. Speth, *supra* note 63, at 77.

87. From 1832 to 1848, support for further reforms—identified as a married women's property bill—was garnered from a shifting coalition of forces with differing agendas. Proponents included those who favored more lenient debtor laws in an unstable antebellum economy, those who advocated more legislative and less judicial control of the legal system, and those who wanted to improve the status of women. More conservative opponents sought only to restore the trust to its former position as the legal device to hold married women's property separate from their husbands. *See* Basch, *The Emerging Legal History of Women in the United States*, 12 SIGNS 99 (1986) (review of scholarly literature on the legal status of American women between the Revolution and the passage of the Married Women's Property Acts); *see also* P. RABKIN, *supra* note 71, at 86-87.

> If one were to identify a single smoldering issue that symbolized the subordinate status of women in the wake of the Revolution and sparked the rise of the women's movement in the antebellum years, it would have to be the inability of married women to control their property. . . . By launching a series of impassioned attacks on coverture, the common law term for the restricted legal status of married women, and by sustaining voluble campaigns for legislative reform, feminists attached their own political agenda to a legal-reform trend that was already underway.

Basch, *supra*, at 97, 99; *see also* L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN THE AMERICAN REVOLUTION (1980). Once the common law disabilities for married wo-

York City introduced a bill to protect and preserve the rights and property of married women.[88] Although his bill never emerged from the Judiciary Committee, it generated widespread public discussion which structured many of the arguments that surfaced in the next ten years.[89]

Between 1840 and 1848, several bills proposing changes in the legal status of married women were introduced in the New York legislature. "Unlike clashes over banks, canals, and rent . . . clashes over the legal status of married women were relegated to the private recesses of successive judiciary committees."[90] Women who petitioned the legislature argued that the status quo fostered a dependency relationship which destroyed household harmony.[91] The bills failed to emerge from the Judiciary Committee, though occasional reports issued by the committee revealed a level of internal controversy.[92] Nor did advocates of access for

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men's property rights had been removed, it was a logical step to demand the suffrage. P. RABKIN, *supra* note 71, at 10. *But see* Johnston, *supra* note 69, at 1062 n.120.

88. N. BASCH, *supra* note 61, at 115; N.Y. ASSEM. J., Apr. 24, 1837, at 121. Hertell characterized the law giving a married woman's property to her husband as "a law which originated in the dark ages, in a foreign country, in which an absolute and despotic king, and an intolerant and persecuting clergy, ruled a people oppressed, demoralized and degraded, by an unhallowed combination of political and ecclesiastical tyranny . . . ." P. RABKIN, *supra* note 71, at 87.

89. P. RABKIN, *supra* note 71, at 85-90; *see also* N. BASCH, *supra* note 61, at 115-19. Hertell's bill contained provisions which went beyond the Married Women's Property Act (MWPA) of 1848 and anticipated the provisions of the 1860 amendments to the MWPA. *See infra* notes 103-06 and accompanying text. It recognized a married woman's legal title to property acquired by her own industry and management. This could be interpreted to include wages, and obliterated the distinction between dower and curtesy by equalizing the entitlement of either surviving spouse upon the demise of a spouse. P. RABKIN, *supra* note 71, at 85. Hertell argued that his proposals would reinforce rather than weaken traditional notions of good family relationships by increasing the likelihood of harmony, rather than fueling the resentment generated by the wife's legal obligation to submit. *Id.* at 89 (citing T. HERTELL, THE RIGHT OF MARRIED WOMEN TO HOLD AND CONTRACT PROPERTY SUSTAINED BY THE CONSTITUTION OF THE STATE OF NEW YORK 67, 71 (1839)); *see also* S. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN 74-83 (1838) (identifying "husband" as synonymous with tyranny).

90. N. BASCH, *supra* note 61, at 136. In the New York debates, there is no evidence or acknowledgment of the developments occurring in other states. For example, in 1839, Mississippi had become the first common law state to enact legislation permitting married women to hold property as a separate estate. *See* Comment, *Husband and Wife—Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110 (1944). Feminists hailed New York as the "first State to emancipate wives from the slavery of the old common law of England, and to secure to them equal property rights." 1 HISTORY OF WOMEN SUFFRAGE 63-64 (E. Stanton, S. Anthony & M. Gage eds. reprint 1970). One commentator suggests that this view may simply reflect an exaggerated perception of New York's place in 19th century legal culture. Ely, Book Review, 31 UCLA L. REV. 294, 295 n.4 (1983) (reviewing N. BASCH, *supra* note 61.)

91. P. RABKIN, *supra* note 71, at 89 (citing N.Y. ASS. DOC. NO. 96, at 3 (Feb. 26, 1844)).

92. N. BASCH, *supra* note 61, at 144-48. In 1842, the Judiciary Committee issued a report favoring the liberal extension and protection of the rights and property of married women. N.Y. ASS. DOC. NO. 189 (Apr. 12, 1842). In 1844, the Judiciary Committee issued a report indicating a prefer-

married women to property enjoy success during the 1846 convention called to consider revisions of the New York State Constitution.[93]

Failing in their efforts to achieve a constitutional guarantee for at least some rights of women, proponents of the married women's property reform, spurred by feminist pressure, rallied for the 1848 session of the New York legislature.[94] Within four months the bill was enacted into law.[95]

There is little evidence that many partisans of the Married Women's Property Act sought to alter traditional marriage patterns or to produce a major shift in gendered roles, although such women as Elizabeth Cady Stanton, Ernestine Rose, and Fanny Wright were important excep-

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ence for the trust over a married women's property act. N.Y. ASSEM. DOC. NO. 96 (Feb. 26, 1844); *see* P. RABKIN, *supra* note 71, at 78-82.

93. Concerned with improved administration and greater simplification of the law, the delegates, of whom one third were lawyers, voted mostly on administrative and procedural reforms. N. BASCH, *supra* note 61, at 149. The courts of chancery were abolished by failing to provide for their existence in article VI. Law and equity were merged in article VI (§ 3). P. RABKIN, *supra* note 71, at 91. In addition, after strenuous debate, the convention first voted to insert and, then, three days later to rescind, a constitutional clause recognizing a separate legal identity for married women by allowing them to own property in their own name. *See* N. BASCH, *supra* note 61, at 150-55 (summary of the debates).

94. None of the measure's opponents from the 1846 convention sat in the session. N. BASCH, *supra* note 61, at 156. Debate pitted opponents of the reform—who argued for the maintenance of domestic tranquillity and the Anglo-American common law in part by attacking France, French women, and French civil law—against proponents—who identified the common law as feudal, irrational, and barbarous in its treatment of women. P. RABKIN, *supra* note 71, at 97. Rabkin argues that minimal resistance to the legislation is explained by the identification of the measure with defeudalization, rather than with feminist arguments regarding dependency and equality in the home. *Id.* at 89. The legislation was introduced by a conservative judge from St. Lawrence who wanted to safeguard his wife's property from his creditors. Speth, *supra* note 63, at 78.

95. Law of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307-08 (codified as N.Y. DOM. REL. LAW § 50 (McKinney 1988)).

> § 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.
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> § 2. The real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted.
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> § 3. It shall be lawful for any female to receive by gift, grant, devise or bequest, from any person other than her husband and hold to her own and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.
>
> § 4 All contracts made between persons in contemplation of marriage shall remain in full force after the marriage takes place.

N.Y. DOM. REL. LAW § 50 (McKinney 1988).

tions.[96] The reform obliterated the formal legal distinction between single and married women in terms of access to inherited wealth in real property, but it failed to give married women owning the legal estate any contractual powers.[97] It codified the equitable rights in real property that wealthy daughters had enjoyed for centuries,[98] and protected the real property of those married women whose debtor husbands sought protection from the reach of creditors.[99]

Thus, the impact of the Act was limited to a small segment of married women in New York who were the daughters of the landed elite. The statutory emphasis on access to inherited property ignored the larger number of married women whose property consisted of an interest in such commercial activities as boarding houses or retail stores, as well as married women whose property consisted of earnings from household manufactures or wages from labor outside the home. Such exclusion accelerated feminist efforts at further reform.

Given the narrow scope of the Married Women's Property Act of 1848, incremental legislative activity was needed to completely degender access for married women to various forms of property in an expanding and changing commercial economy. Between 1849 and 1860, recognition of women's separate legal identity in marriage was extended to the conveying and devising of real and personal property,[100] as well as to the protecting of married women's savings deposits[101] and their right to vote as stockholders in elections.[102]

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96. *See* E. DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869 (1978).

97. N. BASCH, *supra* note 61, at 161. Chused notes that the similarity of the statute's "sale and separate use" phraseology to typical language in equitable instruments, and its presence in sections dealing with debt, made narrow construction almost inevitable. Chused, *Married Women's Property Law 1800-1850*, 71 GEO. L.J. 1359, 1411 (1983).

98. The legislature which passed the Act also abolished feudal common law forms of actions and pleadings, and the distinction between equitable and legal remedies, in favor of a uniform course of proceedings in all cases. P. RABKIN, *supra* note 71, at 103; *see also* N. BASCH, *supra* note 61, at 157-58.

99. M. SALMON, *supra* note 63, at 93-97; N. BASCH, *supra* note 61, at 122-26.

100. Law of Apr. 11, 1849, ch. 375 § 1, 1849 N.Y. Laws 528 (codified as N.Y. DOM. REL. LAW § 50 (McKinney 1988)).

> Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts.

Id.

101. Act of Mar. 25, 1850, ch. 91, 1850 N.Y. Laws 142.

102. Law of Apr. 17, 1858, ch. 321, 1858 N.Y. Laws 515.

The second major step in the campaign to develop a full legal identity for married women was taken in 1860. The 1860 amendments to the Married Women's Property Act of 1848[103] contained a series of provisions designed to expand the separate legal identity of married women. Married women were allowed to bring actions in their own names for damages or personal injury. Husbands' rights in intestacy cases were reduced. Women were permitted to be joint guardians of their children along with their husbands. Of greatest importance, however, were provisions recognizing married women's right to conduct a separate business, to contract with respect to it,[104] and to keep their own earnings.[105] (By 1878 it was apparent that middle class women owning their own businesses were more likely to benefit from this provision than working class women.)[106]

In contrast to the reforms of 1828 and 1848, passage of the 1860 amendment, as well as later amendments,[107] reflected the impact of femi-

103. Law of Mar. 20, 1860, ch. 90, 1860 N.Y. Laws 157 (codified as N.Y. DOM. REL. LAW § 50) (McKinney 1988)).

104. *Id.*

105. *See* Birbeck v. Ackroyd, 74 N.Y. 356 (1878) (presumption that all services of a wife belonged to her husband could be rebutted only by evidence of an election on her part to labor on her sole and separate account); *see also* Holcomb v. Harris, 166 N.Y. 257; 59 N.E. 820 (1901); Klapper v. Metropolitan St. Ry., 34 Misc. 528, 69 N.Y.S. 955 (Sup. Ct. 1901). In 1902, the legislature reversed the presumption by providing that the married woman alone is entitled to earnings resulting from her services unless evidence to the contrary appears. Act of Apr. 2, 1902, ch. 289, 1902 N.Y. Laws ch. 844 (codified as N.Y. GEN. OBLIG. LAW § 3-315).

106. A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES 46 (1982) (estimates that in 1860 15% of all married women worked in the wage labor force). Working class women participated in the wage labor market and as a partner in the marriage market to survive economically. D. GITTINS, *supra* note 21, at 28. After marriage, poor women shuttled between the formal economy and the informal one, which relied upon links among households and included such work as taking in lodgers, laundress, and charwoman. *Id.* at 27; *see also* L. WEINER, FROM WORKING GIRL TO WORKING MOTHER (1985); C. STANSELL, *supra* note 66.

Emphasis on the gendered roles of women as mother and on the dignity and self-reliance of the man as bread winner was buttressed by the move for the "family wage" adequate to support a man and his dependent wife and children. The idea of a family wage gained popularity during the struggle to shore up/maintain family life during the Progressive era. W. LAUCK, THE NEW INDUSTRIAL REVOLUTION AND WAGES 19 (1929). At a time when it took the wages of an entire household to support a family and when a woman's lifespan could be gauged by pregnancy and child-bearing, the thought of the husband earning enough to support a family had a certain appeal. The slogan of the Woman's Trade Union League, the primary working women's association, was: "The eight hour day; a living wage, to guard the home." L. WOODCOCK TENTLER, WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900-1930 (1979); *see also* Zaretsky, *supra* note 31, at 215-18. The emphasis on the father/husband as the sole earner was a powerful factor in the development of modern notions of masculinity and coincided with middle class notions of family structure. *See* D. GITTINS, *supra* note 25, at 27.

107. Legislation passed in the late 1800s erased the formal legal barriers remaining for married

nist mobilization and an organized women's movement concerned with the legal and cultural identity of women. Pronounced differences in political rhetoric began to appear. Feminists began to talk about women's and men's interests as not only distinct [108] but even antagonistic.[109] In the shift from the issue of gender-free access to real property to broader woman-oriented goals of autonomy and dignity which culminated in demands for suffrage, the issue of married women's legal identity became part of the larger issue of the legal identity and status of all women in American society.[110]

Feminists tended to regard the Married Women's Property Acts of 1848 and 1860, which created a separate legal identity for married women, as constituting a legal and social revolution. Ownership of property and civil capacity were severed from their gendered linkage. In developing this separate legal identity, the Acts were an ideological challenge to patriarchy and paternalism. The appealing quality of a legal doctrine speaking to separateness and individuation is readily understandable where the alternative was coercive unity and subordination enforced by law.

Virtually excluded from the legal profession,[111] women hoped to achieve their goals of changing the status of women in American society through legislation.[112] While not incorrect as a basic tactical choice, this

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women's separate legal identity. Law of May 28, 1884, ch. 381, 1884 N.Y. Laws 465 (freedom to contract extended to all of a married woman's property acts); *see* Speth, *supra* note 63, at 70.

108. "The mass of people commence life with no other capital than the union of heads, hearts and hands. To the benefit of this best capital, the wife has no right. If they are unsuccessful in married life who suffers more the bitter consequences of poverty than the wife? But, if successful, she cannot call a dollar her own." I HISTORY OF WOMAN SUFFRAGE 240-41 (E. Stanton, S. Anthony & M. Gage eds. reprint 1970) (speech of Ernestine Rose).

109. "The care and protection" that men give women is "such as the wolf gives the lamb, the eagle the hare he carries to his eyrie." Stanton, *Address at Seneca Falls*, in STANTON, ANTHONY: CORRESPONDENCE, *supra* note 62, at 33.

110. N. BASCH, *supra* note 61, at 174-83. Stanton raised the issue in 1854 at the New York State Women's Rights convention "What is property without the right to protect that property by law? . . . The right to property will, of necessity, compel us in due time to the exercise of our right to the elective franchise, and then naturally follows the right to hold office." Address by E. Stanton to the Legislature of New York, adopted by the State Women's Rights Convention (Albany, N.Y. Feb. 14, 1854) (quoted in P. RABKIN, *supra* note 71, at 113).

111. In denying Myra Bradwell admission to the Illinois bar in 1870, the Illinois Supreme Court paid lip service to the existence of a wider sphere of activities for women but felt that for a woman "to engage in the hot strifes of the Bar, the presence of the public, and with momentous verdicts the prizes of struggle, would [not] tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her." *In re* Bradwell, 55 Ill. 535, 542 (1869); *see also* II HISTORY OF WOMAN SUFFRAGE 611-12 (E. Stanton, S. Anthony & M. Gage eds. 1881).

112. Elizabeth Cady Stanton referred in her autobiography to the passage of the 1848 Act. "This encouraged action of the part of women, as the reflection naturally arose that, if the men who

posture tended to ignore the role of the courts[113] as crucial political actors in the interpretation of statutes. Courts could become the articulators of deep social ambivalence and resistance to change regarding the role of women, especially married women, in American society.[114]

Shielded from popular scrutiny, judges clearly exploited the weakness of the statutes relative to the strengths of the common law by interpreting the New York reform legislation as narrowly as possible.[115] Most litigation under the acts involved debtor-creditor relations rather than husband-wife relations. In most cases, the family property was safeguarded from creditors by recognizing the separateness of the wife's property.

Fears that the creation of a separate legal identity for married women would foster the decline of family[116] proved to be unfounded.[117] The

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make the laws were ready for some onward step, surely the women themselves should express some interest in the legislation." E. STANTON, EIGHTY YEARS AND MORE: REMINISCENCES OF 1815-1897, at 150 (1898 & reprint 1971).

113. N. BASCH, *supra* note 61, at 208.

114. Grossberg argues that during the 19th century, the rigid segregation of worldly males and homebound females assisted courts in maintaining power over families. Judicial hegemony over domestic relations perpetuated patriarchal authority for the production of stable families and male governance within republican society. M. GROSSBERG, *supra* note 11, at 300-01.

115. P. RABKIN, *supra* note 71, at 126. Courts often wrote dicta into their opinions indicating that the Married Women's Property Act did not destroy the common law unity of husband and wife. *See id.* at 129-37 (for a review of the cases); *see also* BLOOMFIELD, *supra* note 66, at 113-17 (reviewing conservative interpretations of the statute in New York and comparable trends in other jurisdictions).

See Nash v. Mitchell, 71 N.Y. 199, 204 (1877) ("The disabilities of a married woman are general and exist at common law. The capabilities are created by statute, and are few in number, and exceptional."). In *Bradwell*, Justice Bradley wrote that it had never been the case that women could engage in any and every enjoyment of civil life.

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring). Acknowledging that there were some unmarried women not affected by the incapacities arising out of the married state, Bradley viewed them as exceptions to the general rule and noted that "[t]he rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." *Id.* at 141.

116. For an eloquent expression of this fear, see Schindel v. Schindel, 12 Md. 294 (1858):

> For let it once be understood that a wife, whenever she may become tired of her hus-

expansion of the category of persons deemed competent to own and manage property constituted acknowledgment of the separate legal identity of each party to a marriage, and therefore was legally significant for some purposes. But this reclassification of married women was not paralleled by a shift in cultural norms and expectations for such women. Courts strengthened and reinforced the family as an economic unit when confronted with the possibility of married women as separate providers of tangible resources for their families. They did not, however, reject Victorian notions of a separate sphere for married women.[118] Instead, they relied upon notions of a male-dominated, unequal marital partnership to replace notions of marriage as a formal unity with the appropriation of a woman's legal identity. Each partner had a separate, formally equal, gender neutral identity for legal purposes. Culturally, marriage was understood to be a hierarchically ordered, gendered duality.

Interestingly, changes such as the creation of a separate legal identity for married women and the recasting of marriage as a partnership did not necessitate the substitution of a different marital property regime in New York. The new legal separateness of husband's and wife's assets

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band, or moved by any whim or caprice, may leave him, and take with her the whole property that she ever owned, and enjoy it exclusively, and thus become independent of that superiority and controlling power which the law has wisely recognized in the husband, what incentive would there be for such a wife ever to reconcile differences with her husband, to act in submission to his wishes, and perform the many onerous duties pertaining to her sphere? Would not every wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home?

Id. at 307-08 (R. Alvey for the appellee).

117. P. RABKIN, *supra* note 71, at 156. Chused finds a partial explanation for the rash of Married Women's Property Acts in the 1840s in the economic climate following the Panic of 1837. During that era, protection of debtors was sought at state and national levels. The Acts provided husbands and families with access to assets, despite harsh economic times. Chused, *Married Women's Property Law 1800-1850*, 71 GEO. L.J. 1359, 1400-04 (1983).

118. Chused, *supra* note 117, at 1414. The stress on the self-reliant individual male was complemented by a new emphasis on the woman's responsibility to maintain the ties of dependency in the context of a wage economy. In interpreting the Married Women's Property Act of 1860, the New York Court of Appeals noted that it was not the purpose of the Act

to absolve a married woman from the duties which she owes her husband, to render him service in his household, to care for him and their common children with dutiful affection when he or they need her care, and to render all the services in her household which are commonly expected of a married woman, according to her station in life. Nor was it the purpose of the statute to absolve her from due obedience and submission to her husband as head and master of his household, or to depose him from the headship of his family, which the common law gave him.

Coleman v. Burr, 93 N.Y. 17, 24 (1883).

acquired during a marriage was easily accommodated within the prevailing New York common law marital rule of strict title. Strict title governed the ownership of property brought to or acquired during a marriage, as well as distributed at divorce.[119] Strict title as a distributional rule presented the appearance of formal fairness. The degendering of access to marital property through the Married Women's Property Acts meant that no legal barriers existed to placing either or both spouses's names on the title to marital assets. In fact, strict title appealed to the same abstract notions of individuation and autonomy which made the Married Women's Property Acts philosophically consistent with late nineteenth century jurisprudence.[120] Not only could such a seemingly major reform as the development of a separate legal identity for married women be readily incorporated into New York's existing ordering of marital property arrangements, it could also be acknowledged without undermining the economic vulnerability of married women, their dependence on their husbands.[121]

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119. Under the common law, title established ownership; ownership determined the distribution of assets at the dissolution of a marriage. Property which was not designated as jointly owned through title, even if it was accumulated during the marriage, was awarded to the titleholder. Unlike other jurisdictions, New York did not experience a flurry of legislative efforts to establish community property regimes in response to Poe v. Seaborn, 282 U.S. 101 (1930). *Poe* raised the issue of the rights of spouses in community property states to file separate income tax returns, with each spouse reporting one half the community income even when it was attributable to the husband. *Id.* at 108-09, 111, 112. The court permitted income splitting and, as a consequence, permitted taxpayers in community property jurisdictions to avail themselves of lower federal income tax brackets. As Younger points out, spouses in community property states acquired a clear advantage over those in common law states. Younger, *supra* note 54, at 69.

Subsequent to *Poe* but prior to the Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114-15 (codified at 26 U.S.C. § 1(a)(1986)), which permitted wife and husband to be taxed on family income as if they were members of a marital partnership regardless of their state's marital property regime, six common law jurisdictions adopted the community property system (the territory of Hawaii and the states of Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania). *See* Laughrey, *supra* note 68, at 129 n.48. Upon passage of the 1948 legislation, five of the jurisdictions repealed their community property laws and the Pennsylvania statute was declared unconstitutional. *Id.*

120. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1979); D. SPEAK, THE TRANSFORMATION OF AMERICAN JURISPRUDENCE IN THE EARLY 20TH CENTURY (1987); Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 18 (D. Kairys ed. 1979); *see also* H. JAMES, H. GREELY & S. ANDREWS, LOVE, MARRIAGE, AND DIVORCE, AND THE SOVEREIGNTY OF THE INDIVIDUAL (1889). For works on individualism and its connection to American political theory and beliefs, see Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); *see also* R. BELLAH, *supra* note 62; R. WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 136 (1976).

121. Zaretsky observes:

> The spread of a society organized around self reliance, the market, and wage labor marked a great advance, perhaps especially for women, but we should also mark its costs and limits. By the time our nation reached the twentieth century, the attempt to shore up

Formal legal access to property and wages appears to have had little impact on the economic status of most married women. In part, this lack of impact was a reflection of the prevailing image of married women's work—biological and social reproduction inside the home. Such work was viewed as wageless activity, a constant factor of nature[122] rather than activity with a rich, largely unexplored, social history.[123] Married women were identified as rendering their contributions to their family in service, a dependent status.[124] This cultural image was reinforced by the common law which placed no economic value on an unwaged wife's contribution to the assets of a marriage.[125] It permitted a wife's entire economic worth to be absorbed into the marital unit.[126] In effect, abolition of the formal common law doctrine of the unity of husband and wife

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> independence through economic individualism largely betrays the promise it once held out. Neither the attempt to extend the traditionally male idea of individual independence to women nor the attempt to extend the traditionally female idea of nurturance to men can be based on an economic system that fosters a one-sided ideal of economic independence and correspondingly hollow collectivity.

Zaretsky, *supra* note 31, at 218-19.

122. *See* Bock & Duden, *Labor of Love—Love As Labor: On the Genesis of Housework in Capitalism*, in FROM FEMINISM TO LIBERATION 155 (E. Altbach ed., rev. ed. 1980). As traditional imagery would have it, the married woman's activity originates in love and is rewarded by love. In reality, the essence of this work is the production and maintenance of the social labor force—physically, emotionally and sexually. *Id.* at 156. "If a mother dominates the home, however, she does not do it by right or by legal position but because of the power of love." E. RUBIN, *supra* note 34, at 19.

123. *See* Farajher & Stansell, *Women and Their Families on the Overland Trail to California and Oregon 1842-1867* and Genovese, *Life in the Big House*, in A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN (N. Cott & E. Pleck eds. 1979) [hereinafter A HERITAGE OF HER OWN]; *see also* N. COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND 1780-1835 (1977); A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977); D. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRALIZING AMERICA (1978); A. SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS 1830-1930 (1970).

124. In feudal times, rendering service was the corollary of dependence. D. GITTINS, *supra* note 21, at 38. While men and women performed service and the work of both was economically essential, a man could always claim service from a woman or a child, even if he served others. Authority was implicitly patriarchal. The ideological conflict between spiritual equality and the need for authority was resolved by elevating the status of women within the household. For men, marriage was a crucial status passage from dependence or semi-dependence to independence and authority, an explicit part of which was being able to command the services and deference of a wife and children. *Id.* at 44. Women, however, were, by definition, always dependent.

125. L. HOLCOMBE, WIVES AND PROPERTY: THE REFORM OF THE MARRIED WOMEN'S PROPERTY ACT IN NINETEENTH CENTURY ENGLAND 7-8 (1983). The classification of women's work as nonproductive is institutionalized; housework is not considered in the gross national product. Bock & Duden, *supra* note 122, at 154; *see also* Hauserman, *Homemakers and Divorce: The Problem of the Invisible Occupation*, 17 FAM. L.Q. 41 (1983). Homemakers are not eligible for unemployment or workers compensation and are considered unskilled when hired outside the home. *Id.* at 57-58.

126. Krauskopf, *A Theory for 'Just' Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 168 (1978).

was replaced by a less formal state of perpetual economic dependence[127] for wives working as homemakers.

While the economic significance and the constancy of women's unwaged labor was denied, the fact that women worked outside the home to contribute to their family's survival, both before and during marriage,[128] was accorded at best modest cultural significance. Consonant with this image were the sex-stereotyped occupations available to women. Women were paid to do women's work outside the home[129] in the service sector. Historically, wages for this work were only sufficient to allow unmarried women to contribute to their family before marriage, but too low to be the basis of or provide an incentive for an independent way of life.[130] In

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> The common law system is based on the assumption that the wife's place is in the home. Although it fosters the homemaker's role as proper and necessary, the common law provides no economic reward for the wife's contributions to the family assets or for her lost opportunity to develop earning power outside the home.

Id. It has been suggested that the role of the housewife is helpful to an economy which depends on increasing consumption. "The conversion of women into a crypto-servant class was an economic accomplishment of the first importance. . . . The servant role of women is critical for the expansion of consumption in the modern economy." J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 35 (1973).

127. The possibility that this dependence is historically contingent is obscured by such ideological devices as religious figures representing gendered virtues as well as unacceptable gendered behavior. *See* IMMACULATE & POWERFUL: THE FEMALE IN SACRED IMAGE AND SOCIAL REALITY (C. Atkinson, C. Buchanan & M. Miles eds. 1985). "The religious myth of the Christian West insists that Eve, the innovator, can lead her followers only to evil; Mary, the passive, submissive, obedient woman is urged as the model." *Id.* at 2.

128. *See* Lewis, *This Work Had an End: African-American Domestic Workers in Washington D.C., 1910-1940*; Palmer, *Housewife and Household Worker: Employer-Employee Relationships in the Home, 1928-1941*; Plewett, *The Sexual Division of Labor and the Artisan Tradition in Early Industrial Capitalism: The Case of New England Shoemaking, 1780-1860*; and Ruiz, *By the Day or Week: Mexicana Domestic Workers in El Paso*, in TO TOIL THE LIVELONG DAY (C. Groneman & M. Norton eds. 1987).

Kessler-Harris contends that proposals to get unmarried women to emigrate west in search of husbands in the latter half of the 19th century were premised on the belief that, once married, they would remove themselves from the workforce. This would create more openings for men and, ostensibly, a return to traditional notions of "family." A. KESSLER-HARRIS, *supra* note 106, at 71-72, 98-99; *see also* AMERICA'S WORKING WOMEN 245 (R. Baxandall, L. Gordon & S. Reverby eds. 1976).

129. A. KESSLER-HARRIS, *supra* note 106, at 128.

130. *Id.* The wage is an expression of a multi-dimensional power relationship. It performs different functions in different settings. In the market, it serves to identify buyers and sellers of labor. It is also often a vehicle for mobility, though a highly gendered one. Marriage offers a chance of upward mobility for women. For men, mobility is less affected by marriage, unless a wife's wealth or earnings mean additional capital or support while getting a degree. Men depend on the labor market for mobility. D. GITTINS, *supra* note 21, at 78. In fact, the lack of opportunity and of social mobility for women is one way in which men and boys are able to achieve mobility for themselves. *Id.* at 120. In the single wage home, the wage serves to identify those who have and those who lack external resources; in dual wage households, it determines differential sex-based social importance and prestige or status.

effect, cultural continuities were at least as powerful and significant as a major law reform.[131]

Despite degendered access to property, the gendered hierarchical relationship between spouses and the dependent status of women, in reality a sex-based division of labor with implicit economic meaning, was not only culturally endorsed, it also was legitimated by law. As a matter of law, a husband was head of the household.[132] He was responsible for and capable of its support.[133] The wife was the provider of domestic services and companionship.[134] She was the upholder of the social fabric by her caring for and about others.[135]

Since the passage of the Married Women's Property Acts, access to property, including wages, does not appear to have served as an incentive for married middle and working class women to acquire sole or joint title to many of the assets accumulated during marriage. Under the common law strict title marital property regime, a married woman's name might appear on the title to the the family home (or at a later point in time to the family automobile), if it appeared at all.[136] Both in the nineteenth and

131. A. DOUGLAS, *supra* note 123; *see also* S. EISENSTEIN, GIVE US BREAD BUT GIVE US ROSES: WORKING WOMEN'S CONSCIOUSNESS IN THE UNITED STATES (1983); E. SHORTER, THE MAKING OF THE MODERN FAMILY (1975).

132. *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976) (discussing rules governing domicile and name involving wife's assumption of husband's identity).

133. McGuire v. McGuire, 37 Misc. 259, 75 N.Y.S. 302 (Sup. Ct. 1902), *aff'd*, 81 N.Y.S. 1134 (1st Dep't 1903). Teitlebaum suggests that the emphasis on the family makes Mrs. Maguire invisible. L. Teitlebaum, Family History and Family Law Working Paper #1, at 64 Institute for Legal Studies, U. Wisc. (n.d.).

134. A wife's duty was

> to be his [her husband's] helpmeet, to love and care for him in such a role, to afford him her society and her person, to protect and care for him in sickness, and to labor faithfully to advance his interests . . . [and to] perform her household . . . duties. . . . A husband is entitled to the benefit of his wife's industry and economy.

Rucci v. Rucci, 23 Conn. Supp. 221, 181 A.2d 125, 127 (1962) (quoting 26 AM. JUR. 637, § 9); *see also* Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1872) (Bradley, J., concurring) (finding in the female role the "noble and benign office of wife and mother").

135. Weitzman & Dixon, *The Alimony Myth: Does No Fault Make A Difference?* 14 FAM. L.Q. 141 (1980); *see also* OFFICE OF COURT ADMINISTRATION, NEW YORK, NEW YORK TASK FORCE ON WOMEN IN THE COURTS (Mar. 1986) [hereinafter REPORT OF THE NEW YORK TASK FORCE] (cultural stereotypes of women distort courts' application of substantive law.)

136. Although abundant information exists analyzing the Married Women's Property Act, which gave women unrestricted disposition and title to their own earnings and whatever property they might own through inheritance or other forms of transfer, the practical consequences of the reform for individual women have not been adequately addressed. The author has not been able to uncover any direct data regarding the percentage of women who actually held title to marital property after passage of MWPA. Despite the absence of direct data, less obvious sources may shed some light on this matter. For example, the Intergenerational Wealth Study, prepared by the IRS, ana-

twentieth centuries, title to the overwhelming preponderance of liquid assets and businesses was held solely by husbands.[137] In fact, women were more likely to acquire title through bequest or devise, or taking an elective share upon the death of their spouse,[138] than through access to title as contemplated in the Married Women's Property Acts.

The persistence of this pattern over the 140 years since the passage of the first Married Women's Property Act demands explanation. Three alternatives, by no means mutually exclusive, suggest themselves. All three underscore the power of sex/gender ideology.

One explanation is connected to class-based differences in the rate of

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lyzes social trends of work among the nation's top wealthholders. The intergenerational data base, derived from estate tax returns filed from 1916 to the present after the death of a relatively wealthy individual, contains information on the composition of assets and holdings as well as demographic characteristics of the decedent. These returns reveal that, "the percentage of male millionaire estate tax decedents was about 70% in 1931 contrasting to 61 percent in 1982. For all years men were wealthier than women; indeed, the difference remained fairly constant, at about 14 percent for the 1916-31 period as well as for 1982." DEPT. OF TREASURY, IRS STATISTICS OF INCOME BULLETIN, VOL. 6, NO. 4, REV. 4-87 (1987).

Nevertheless the absence of hard data on what is to all appearances a crucial issue is a striking one. One may well conclude that such absence is an indicator of the self-evident nature of the patterns of title to marital property—women's names have not been included on the title to most marital property.

137. Collateral support for this claim may be found in the court's seeking to avoid unjust enrichment or unjust deprivation of one spouse by the imposition of a constructive trust upon the property. Elements of a constructive trust are: an express or implied promise to share in the benefits of the property, transfer of the property in reliance thereon, a confidential relationship, and unjust enrichment. *See* Janke v. Janke, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4th Dep't 1975); *see also* Liamari v. Liamari, 40 A.D.2d 845, 337 N.Y.S.2d 463-64 (2d Dep't 1972), *aff'd*, 33 N.Y.2d 572, 347 N.Y.S.2d 448 (1973); Marks v. Marks, 250 A.D. 289, 291, 294 N.Y.S. 70 (1937). *Contra Saff v. Saff*, 61 A.D.2d 452, 458, 402 N.Y.S.2d 690, 694 (4th Dep't 1978), *appeal dismissed*, 46 N.Y.2d 969, 389 N.E.2d 142, 415 N.Y.S.2d 829 (1979); Fischer v. Wirth, 38 A.D.2d 611, 612, 326 N.Y.S.2d 308, 311 (3d Dep't 1971).

Where the parties held property as cotenants, the court could award the property to the deserving spouse as justice required. N.Y. DOM. REL. LAW § 234 (McKinney 1986); *see* Biven v. Biven, 62 A.D.2d 1145, 404 N.Y.S. 2d 185 (4th Dep't 1978); *Weseley v. Weseley*, 58 A.D.2d 829, 830, 396 N.Y.S.2d 455, 456 (2d Dep't 1977).

138. *See* M. SALMON, *supra* note 63, at 141-84 (discussing provisions for widows in the colonial and early national period). In response to criticism of common law dower, which allowed a widow to acquire lifetime protection as a dependent by entitling her to a life estate in one-third of the real property of which her husband had been seized during the marriage, New York enacted an elective share statute which allowed a widow to take a statutory share of one-half of the real and personal property in lieu of the devise. *See* Act of Apr. 1, 1929, ch. 229, § 4, 1929 N.Y. Laws 499, 500-02. *See generally* 2 R. POWELL, THE LAW OF REAL PROPERTY §§ 209, 213 (1984) (discussing common law dower). In 1966, New York strengthened the partnership notion for the survivor's elective share through the inclusion of an augmented estate when determining the surviving spouse's elective share. Inter vivos transfers of property over which the deceased spouse had retained substantial control were included in the deceased spouse's estate. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981).

wage labor force participation among married women. Whereas working class wives of all races have always worked outside the home,[139] the participation of significant numbers of middle class married women in the wage labor force and their wage contribution to families is a relatively recent phenomenon.[140] A middle class couple with only one wage earner was more likely to accumulate marital assets than working class couples in which both spouses worked outside the home or the husband worked for a family wage.[141] Since middle and upper class married women worked inside rather than outside the home, they may well have perceived themselves as not entitled to title to marital property, despite the rubric of marriage as a partnership.

Another explanation identifies the persistence of the pattern with sex/gender system cultural norms regarding femininity—characterized either as "a nostalgic tradition of imposed limitations"[142] or as an adaptive response to the recognition that anatomical differences have profound social consequences.[143] "The feminine principle is composed of vulnerability, the need for protection, the formalities of compliance, the avoidance of conflict—in short an appeal of dependence and good will . . . ."[144] Such behavioral norms, combined with the normative masculine principle of mastery and competence in the wider world,[145] impose constraints on the range of behaviors, interests, and ambitions of many women. The gendered cultural prescription of vulnerability and the consequent need for protection translate into a series of culturally approved behaviors for wives, especially in the middle class where subsistence was not and is not an issue.

Women's acceptance of the social and legal structuring of their dependence included the demonstration of deference to their husband's knowledge and expertise in financial matters outside the home.[146] This deference was and is sometimes manifested as a professed lack of interest

139. *See* T. DUBLIN, WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS, 1826-1860 (1979); C. STANSELL, *supra* note 66; B. WERTHEINER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA (1977).

140. *See* A. KESSLER-HARRIS, *supra* note 106; *see also* L. WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820-1980 (1985).

141. *See* Zaretsky, *supra* note 31, at 215-18. *See generally* E. ZARETSKY, CAPITALISM, THE FAMILY AND PERSONAL LIFE (rev. ed. 1986).

142. S. BROWNMILLER, FEMININITY 14 (1984).

143. Willis, *The Politics of Dependency*, Ms., July/Aug. 1982, at 182.

144. S. BROWNMILLER, *supra* note 142, at 16.

145. Willis, *supra* note 143, at 182.

146. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124-60 (1974).

in or knowledge of financial matters, or an unwillingness to insist upon the inclusion of a wife's name on the title to property or assets accumulated during a marriage.[147]

Mindful of the risk of fallaciously relying on contemporary behavior to illuminate the past, it appears that the heightened conflict between wives and husbands over such marital assets as businesses[148] under the 1980 New York divorce reform (in which title to marital assets is set aside for divorce distribution purposes) marks a continuation of earlier behavior responses. It suggests the power of resistance by husbands to what they perceive as their wives' overreaching.

Yet a third explanation suggests that, despite the elimination of the Blackstonian doctrine of marital unity and identity appropriation, the idea of a wife separating herself as a self from her husband is threatening to women who are not conscious feminists. Such separation undermines romantic love, which women are taught to identify as the basis for marriage.[149] Separation can be interpreted as a limitation on trust—a crucial component of marital success and happiness. Such trust feeds back into sex/gender norms. The cultural prescription is that wives should trust their husbands as providers.[150] A demand for legal title to all marital

147. *See* Fisher v. Wirth, 38 A.D.2d 611, 326 N.Y.S.2d 308 (1971). Respondent used part of his salary for a crash savings program "for the two of us." *Id.* at 612. Though the appellant, who divorced the respondent in 1970, complained of lack of funds and used her funds for household purposes, she evidenced no interest in the title to the savings until 1967. The court characterized the appellant's claims as an attempt to get a community property division under the guise of equitable relief.

148. *See infra* notes 318-61 and accompanying text.

149. For analyses of romantic love, see Snitow, *Mass Market Romance: Pornography For Women Is Different*; and Thompson, *Search for Tomorrow: On Feminism and the Reconstruction of Teen Romance*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY (A. Snitow, C. Stansell & S. Thompson eds.) (1983) [hereinafter POWERS OF DESIRE]. But note that the proliferation of prenuptial decrees can be interpreted as the growing lack of prenuptial trust among previously divorced women and men planning to remarry and among first time newlyweds whose parents were divorced. N.Y. Times, Nov. 19, 1985, at 16, col. 1.

150. *See* B. EHRENREICH, FLIGHT FROM COMMITMENT (1983) (analyzing post-WWII moves toward the breakdown of this norm). But note the persistence of the connection between money and the ideology of gendered roles in family life.

> 'It's a fact that the higher the woman's earnings, the higher the chance for divorce' says David E. Bloom, an economist at Harvard University. 'We don't know exactly why'. . . . Most experts agree, that when a wife earns more than her husband, the marriage is bound to be altered permanently . . . Adds Rosann Hertz, Assistant Professor of Sociology at Wellesley College 'Money is the key to understanding authority in the family'. . . Many breadwinner wives say they also succeed in masking the salary difference by filling traditional roles at home. For example, Mrs. Stephens (a 28 year old manager for Bell of Pennsylvania who earns $46,000 while her husband Carl, a Pennsylvania State trooper earns $31,000) makes a point of washing dishes and ironing her husband's shirts.

assets is easily construed as the absence of trust.

Legislative abrogation of the common law appropriation of married women's identity was the necessary condition for the beginning of the development of women's formal equal legal identity with men. During the nineteenth century, such formal legal individuation within the complex relationship of connection which is marriage was enacted by New York legislators. Unity was replaced by partnership. But the deeply gendered context in which formal legal individuation and partnership were embedded reveals the power of sex/gender system ideology to minimize the impact of law reform. The elimination by statute of formal legal barriers for access to property was not translated by the courts of the culture into material results empowering women in their marriages or at divorce.

Narrative 2—Fault-Based Divorce

In American society, the historical identification of divorce as a moral pathology[151] rests on the assumption that marriage and the family unit which it creates and fosters are essential for society.[152] By dissolving

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> 'I want to make him realize that even though I make more money, I can do all those womanly things,' she says. 'I don't mind treating him like a man'. . . One 31 year old corporate manager who out earns her husband says she rises at 5 a.m. to fold laundry, finish the previous nights dishes and do housecleaning. She also shops, cooks dinner, bathes their younger daughter and puts her to bed. 'Dollars and cents have no value there,' she explains. 'It's the same old chauvinism. Trying to change him is too much trouble. It's easier if I do it myself.'

Hayes, *Pay Problems: How Couples React When Wives Out-Earn Husbands*, Wall St. J., June 19, 1987, § 2, at 23, col. 4. While the article does indicate that some wage-earner reversal arrangements are successful, without conflict and resentment, its tenor makes clear that this is far less likely to occur than traditional gendered wage earner arrangements.

151. L. HALEM, *supra* note 32, at 9; *see* Younger, *supra* note 54, at 46 n.4. *But see* T. STOEHR, FREE LOVE IN AMERICA (1979) (analyzing the anti-marriage political tradition).

152. As the New York Court of Appeals explained it:

> Marriage is more than a personal relation between a man and a woman. It is a status founded on a contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based on principles of public policy affecting the welfare of the people of the state.

Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936); *see also* Pierone v. Pierone, 57 Misc. 2d 516, 293 N.Y.S.2d 256 (Sup. Ct. 1968); Helford v. Helford, 53 Misc. 2d 974, 280 N.Y.S.2d 990 (Sup. Ct. 1907); Morris v. Morris, 31 Misc. 2d 548, 220 N.Y.S.2d 590 (Sup. Ct. 1961). Rubin summarizes the ideology of the family which informed many Supreme Court decisions in these terms: "The family is monogamous, marital, a sacred private relationship, a small government within the larger social unit of the state, paternalistic, patrilineal, justified by its primary function of procreation and the raising, socializing and education of the children." E. RUBIN, *supra* note 34, at 20; *see also* J. FLIEGELMAN, PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800 (1982). Fliegelman maintains that marriage served sex-differ-

the family unit, divorce was said to jeopardize fundamental values essential to the well being of the individual and the preservation of society. Given these beliefs, it is not surprising that, as a matter of public policy, marriage was viewed historically as either indissoluble or dissoluble only under very limited circumstances.[153]

In colonial America, civil authorities responded to the message and mandate of Christian doctrine, that divorce was a possible but shameful act, by limiting its availability.[154] Marital dissolution proceedings required a detailing of the socially, culturally, and morally unacceptable conduct of a blameworthy spouse. Such conduct was evaluated to determine whether there was sufficient basis for the state to grant permission to sever the marital bond.[155] Fault was viewed as essential to the dissolu-

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entiated functions. For a woman, a happy marriage served the function that education did for men. It protected her from corruption and ensured personal happiness. *Id.* at 126; *see also* Laslett, *The Significance of Family Membership*, in CHANGING IMAGES OF THE FAMILY 231 (B. Myerhoff & V. Tufte eds. 1979); Teitlebaum, *supra* note 133, at 32-40 (for a succinct analysis of the broadened involvement of the state in domestic relations, especially marriage).

153. *See* P. GRIB, DIVORCE LAWS AND MORALITY: A NEW CATHOLIC JURISPRUDENCE (1985); J. NOONAN, THE POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA (1972); W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967). Historically, this position has been identified with either the Catholic adherence to the principle of complete indissolubility or the Protestant guilt principle as the basis for dissolution. Both churches relied on Old and New Testament sources for their positions. Codified in *Deuteronomy*, traditional Mosaic law provided that if a wife found no favor in her husband's eyes because of something unseemly, he could give her a bill of divorce and send her from the house, after which she was free to marry another man. *Deut.* 24:1-2. Broad constructionists held this power to be unlimited; strict constructionists argued that the husband could do so only on grounds of the wife's adultery. In the New Testament, various passages allowed for different interpretations *Matthew* 19:4-9, 31-32; *Mark* 9: 2-9; *Luke* 16:18; 1 *Cor.* 7:15.

Efforts at maintaining the principle of indissolubility were more successful in theory than in practice. Over time, ecclesiastical courts—initially of the Catholic and later of the Anglican churches—responded to pressures for annulment which allowed for remarriage, or for judicial separation for causes arising after marriage, which precluded remarriage. Other Protestant churches which limited the grounds for dissolution to adultery allowed only the innocent partner to remarry. Institutional oversight of dissolution was identified with churches until 1669 when Parliament granted its first legislative divorce by passing a bill permitting Lord Roos, to whom an ecclesiastical court had already granted a judicial separation, to marry again. J. MACQUEEN, A PRACTICAL TREATISE ON THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS & PRIVY COUNCIL 554 (1842). Between 1668 and 1715, five parliamentary divorces were granted. From 1715 to 1775 there were 60 and from 1776 to 1800 there were 74. Lord St. Helier, VIII ENCYCLOPEDIA BRITANNICA, *Divorce* 339 (11th ed. 1910), *noted in* N. BLAKE, THE ROAD TO RENO 32 (1962). Three trials were required for absolute divorce: one in church court; one in civil court where the husband sued the wife's lover; and one in the House of Lords. MACQUEEN, *supra*, at 496, 505-06. For a wife seeking divorce there was an additional evidentiary burden; she had to demonstrate that her husband had aggravated his offense of adultery by extreme cruelty. *Id.* at 474-82.

154. L. HALEM, *supra* note 32, at 11-12.

155. "Statutes were never simple facilitative laws . . . . The law recognized no such thing as consensual divorce. Divorce was a privilege granted to an innocent spouse." Friedman, *Rights of*

tion process.

During the colonial period, divorces were granted occasionally in New Netherlands[156] and later in New York.[157] However, commencing with the struggle over its first general divorce bill in 1787,[158] New York

Passage: Divorce Law in Historical Perspective, 63 OR. L. REV. 649, 653 (1984). Note that fault incorporated gender-differentiated norms. In Puritan New England, adultery alone was not sufficient ground for a woman to be granted a divorce, although it was sufficient for a man. For a woman to prevail, the act of adultery had to be compounded by desertion, cruelty, or failure to provide. Weisberg, *Under Great Temptations Here: Women and Divorce Law in Puritan Massachusetts*, in 2 WOMEN AND THE LAW 122 (1982). On marital norms revealed in divorce records, see Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586, 611-14 (1976); Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 JOUR. SOC. HIST. 30-31 (1976); *see also* M. BEARD, WOMEN AS A FORCE IN HISTORY (1962); Morris, *Women's Rights in Early American Law*, in STUDIES IN THE HISTORY OF AMERICAN LAW 126-200 (1930).

For an excellent compilation of the divorce requirements and proceedings in colonial New York, see Spelleta, *Divorce in Colonial New York*, 39 N.Y. HIST. SOC. Q. 442 (1955). Spellata notes that prior to 1665, while the Dutch were in control of New Netherlands, the colonial government conformed generally to the jurisprudence of Holland including its liberal divorce laws. When the English conquered the colony in 1664, the Duke of York's laws were adopted, including the provision that "in all cases of adultery, all proceedings shall be according to the laws of England, which was by divorce from bed and board (a *mensa et thoro*) if sued, corporal punishment and fine or imprisonment." However from 1665 to 1675, the English governors still proceeded to grant divorces on the theory that the granting of divorces by the Dutch had established a common law of the colony. For example, divorces were granted to men on the grounds of their having committed, "carnall copulacion with a stranger," "defiling the marriage bed and committing adultery with several persons." A woman was granted a divorce after her husband had been convicted of "rape, incest, and adultery perpetrated on his daughter." Spellata notes that when the English King and his council learned of these divorces, some time after 1675, the practice of granting divorces in New York seems to have come to an abrupt stop.

156. N. BLAKE, *supra* note 153, at 42. Three divorces are recorded.

157. Blake claims that at least six divorces are known. Clues regarding others barely survived the New York State Capitol fire of 1911 which badly damaged the colonial records. N. BLAKE, *supra* note 153, at 42. Foster and Freed fix the number at four. Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972). In 1675, New York reversed its policy regarding absolute divorce (*a vinculo matrimonii*) to allow remarriage after absolute divorce. Spelletta, *supra* note 155. After 1675, there is no evidence of absolute divorces being granted. N. BLAKE, *supra* note 153, at 42. In 1773, the British government issued an instruction to all royal governors to withhold their assent to any divorces granted by the colonial legislatures. NEW YORK COLONIAL DOCUMENTS VIII, at 402, *noted in* L. HALEM, *supra* note 32, at 17.

158. The stimulus for the bill was a petition by community notable Isaac Gouverneur to the New York legislature for a divorce from his adulterous wife. The special committee, chaired by Assemblyman Alexander Hamilton, to which the matter was assigned, reported out a general bill with provisions permitting remarriage only for an innocent spouse. L. HALEM, *supra* note 32, at 19; N. BLAKE, *supra* note 153, at 64-65. The proposal was vetoed by the Council of Revision, whose objection to the proposed legislation was premised on the belief that application of the prohibition to the adulterous spouse would have a powerful negative effect on public morality because it allowed for only two unsatisfactory options: renunciation of connection between the sexes or encouraging open violation of the rules of chastity and decency. N. BLAKE, *supra* note 153, at 65 (citing Minutes of the New York Council of Revision, Mar. 19, 1787) (microfilm copy of original ms. in Records of

demonstrated notable resistance[159] to the divorce law liberalization trends in other states.[160]

Between 1787 and the advent of the Civil War, despite swirls of legislative activity in New York to expand the grounds of divorce,[161] adultery remained the sole ground for the dissolution of a marriage[162] and the number of divorces was few. For the period following the Civil War and until 1966, New York continued to allow divorce on only one formally gender neutral fault ground—adultery.[163]

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the States). In response, both houses of the legislature overrode the veto by substantial majorities. N. BLAKE, *supra* note 153, at 65.

159. New York was the last state to move toward liberalizing its divorce laws. Since the New York divorce statute of 1787, the only major modification before the 1966 reform occurred in 1879, when the prohibition on remarriage was repealed. It would seem that resistance to liberalization was a manifestation of the legislature's desire to avoid dealing with such a controversial topic. *See* L. HALEM, *supra* note 32, at 254-60. New York's resistance to reform meant that the law on the books satisfied those who wanted a deterrent to divorce, recognition of the sanctity of marriage, and the preservation of the traditional norms of the nuclear family.

160. *See* N. BLAKE, *supra* note 153, at 48-63; L. HALEM, *supra* note 32, at 18-21. Liberalization trends included expansion of the grounds for dissolution beyond the English common law to include acts other than adultery and the entrusting of courts rather than legislatures with sole jurisdiction over divorce. The New York legislature did not grant the court sole jurisdiction over divorce until the state constitutional convention of 1846.

> No law shall be passed, abridging the right of the people peaceably to assemble and to petition the government, or any department thereof, nor shall any divorce be granted, otherwise than by due judicial proceedings, nor shall any lottery hereafter be authorized or any sale of lottery tickets allowed within the state.

N.Y. CONST. of 1846, art. I, § 10.

161. In 1813, an amendment to broaden the basis for divorce, by adding desertion for five years, failed. N. BLAKE, *supra* note 153, at 66. The revised divorce law contained only one significant innovation—the empowering of the court of chancery to grant judicial separation and separate maintenance in cases where the husband had been guilty of cruel and inhuman treatment, had conducted himself in such a manner as to render it unsafe for the wife to cohabit with him, or had abandoned her and refused to provide for her. Act of Apr. 13, 1813, ch. 102, 1813 N.Y. Laws 200. Judicial separation on the same grounds was extended to husbands in 1824. Act of Apr. 10, 1824, ch. 105, 1824 N.Y. Laws 249. In 1827 habitual drunkenness was proposed unsuccessfully as a ground for divorce or for judicial separation. N. BLAKE, *supra* note 153, at 66. For the first time, however, the legislature did define the five grounds for annulment. Domestic Relations Act, ch. VII, § 20, 1 N.Y. REV. STAT. 138, 142 (1828); *see also* N. BLAKE, *supra* note 153, at 76-79 (for an account of the legislative maneuvers surrounding attempted reform efforts in 1840, 1849, 1850, 1852, 1855, and 1860-61).

162. *See* N. BLAKE, *supra* note 153, at 67-75 (describing major cases which resulted in passage of private bills between 1802 and 1846).

163. Adultery was a violation of the Seventh Commandment. The American colonies passed draconian measures against its violation. For an excellent discussion of these measures, see G. HOWARD, 2 A HISTORY OF MATRIMONIAL INSTITUTIONS 121-327 (1904). Initially in all the New England colonies except Rhode Island and Plymouth, the death penalty was prescribed for adultery with a married or espoused wife. In Plymouth, the punishment was the wearing of the "scarlet letter," a permanent badge proclaiming one's adulterous behavior. In Rhode Island, the adulterer was to be

> publickly set on the Gallows in the Day Time, with a Rope about his or her neck, for the

As a matter of law, the substantive ground for fault divorce was ostensibly fair and formally gender neutral. It paralleled the formal gender neutrality of title to marital property after the passage of the Married Women's Property Acts.[164] As a matter of fact, gender neutral fault in a gender differentiated cultural, social, and economic context for marriage had gender specific outcomes. It paralleled the impact of the Married Women's Property Act on actual title to marital property, which in turn reflected the power of the sex/gender system.

Like couples seeking divorce in other jurisdictions, couples seeking divorce in New York would tailor their claims to meet the state's single fault ground for divorce. In so doing, they would tell a story of sexual lapse in which husband or wife could be either sinner or victim. Such tales can be viewed as "morality scripts"[165]—formulaic story lines[166] in which culturally acceptable images of behavior were evoked. Given marriage as a gendered institution and divorce as a gendered process, images were gender specific. Though either husband or wife might be the sinner or adulterer, the most common pair of images in such proceedings were the wayward husband and the long-suffering, virtuous wife.

In part, this choice of culturally acceptable images may have been the consequence of the gender specific statutory provisions for alimony which existed in New York from 1789 to 1980.[167] In part, these images reflected the prevailing gendered double standard of sexual morality.

Adultery was a far more serious accusation when made against a

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> Space of One Hour; and on his or her Return from the Gallows to the Gaol, shall be publickly whipped on his or her naked Back not exceeding Thirty Stripes; and shall stand committed to the Gaol of the County wherein convicted until he or she shall pay all Costs of Prosecution.

Act of 1749, in ACTS AND LAWS OF RHODE ISLAND (Newport 1767), *cited in* G. HOWARD, *supra*, at 173. In colonial New York, sexual transgressions were severely dealt with, although not with the same rigor as in New England. Illustrations from the judicial records in adultery cases reveal that among the punishments were the whipping and banishment of Yutie Jansen

> for living in adultery with Jan Parcel, and also the sentence of Laurens Dutys who, for selling his wife, Yutie Jansen, and forcing her to live in adultery was "to have a rope" tied around his neck and to be severely flogged, to have his right ear cut off, and to be banished for fifty years.

NEW YORK COLONIAL MS. 1630-1664, *cited in* G. HOWARD, *supra*, at 280.

164. *See supra* notes 86-157 and accompanying text.

165. Fault-based divorce, viewed as a morality script, is an excellent illustration of Foucault's thesis that power's hold on sex is maintained through the act of discourse which creates a rule of law. *See* M. FOUCAULT, *supra* note 15. However, the absence of reference to gender in Foucault's analysis limits its utility when the scripts evidence reliance on gender-based dualities.

166. These ideas were generated in discussions during July 1984 at the University of Wisconsin (Madison) Legal History Program, at which the author was a fellow.

167. *See infra* notes 205-09 and accompanying text.

married woman than a married man. As loss of virginity was interpreted as the loss of virtue for an unmarried woman, so the commission of adultery was interpreted as the loss of virtue for a married woman. In a society in which virtue was considered a form of sexual currency or measure of worth for women, such a loss entailed a significant downward shift in status. To the extent that a husband had an absolute property right in his wife's body, adultery represented the violation of that right.[168] Moreover, absent the availability of birth control,[169] there was no guarantee that a child was biologically the husband's if his wife committed adultery.

In addition to the long-suffering, virtuous wife, the other prevailing gender specific image for women in such formulaic sexual morality scripts was the other woman of loose morals with whom the wayward husband consorted. Such a woman served two functions symbolically. She was a threat to all wives who, no matter how good and dutiful they were, might fail to satisfy their husbands; she was also the female outcast who assisted in setting the boundaries for control of female sexuality.[170]

For husbands the morality script implied far fewer costs. The sinner did not bear his burden. Adulterous husbands might have been driven to such behavior by their wives' failures and limitations. Or, as the double standard suggested, male sexuality might not be containable and, therefore, responsibility in some sense might be diluted. Wives need guard their sexuality;[171] husbands need not; boys would be boys. Adulterous husbands might be ordered to pay alimony to economically vulnerable wives but, as the discussion of alimony below[172] suggests, payments were low, enforcement procedures for alimony arrearages were costly, and judges often were lenient with delinquent men.

During the nineteenth century, debate regarding divorce law reform in New York as well as in other jurisdictions was ostensibly a struggle

168. According to Elizabeth Cady Stanton, conventional sexual morality was one of the means by which women were kept in their place. Stanton, *Patriotism and Chastity*, 135 WESTMINSTER REV. 3 (1891).

169. *See* L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL (1978).

170. *See* Sigsworth & Wyke, *A Study of Victorian Prostitution and Veneral Disease*, in SUFFER AND BE STILL: WOMEN IN THE VICTORIAN AGE 77-99 (M. Vincinus ed. 1972) (discussing the Victorian debate about prostitution, specifically the necessity for prostitutes if the premarital virtue of upper-class females was to be preserved).

171. *See* Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, in A HERITAGE OF HER OWN, *supra* note 123, at 162 (discussing the cultural prescription and women's consciousness).

172. *See infra* notes 205-29 and accompanying text.

over the desirability of expanding the grounds for divorce.[173] Of particular importance in these debates were the roles of the organized women's movement[174] and organized religion.[175] Underpinning the debates were several explosive, value-laden questions. What would be the impact of legislation upon competing gender specific notions of human nature? What type of society would such a reform produce and was this anticipated society a good one? While differences between liberal reformers and conservatives were deep, both the liberal reformers, who argued for greater access to marital dissolution by an expansion of the grounds for divorce, and their conservative opponents, who argued for strict limits on divorce and the retention of permanent separation from bed and board[176] as an alternative to dissolution, came to similar self-serving conclusions. Each proclaimed with equal fervor that domestic felicity and purity, matrimonial concord, virtue, and unblemished morals would be fostered and preserved by their respective proposals.[177]

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173. L. HALEM, *supra* note 32, at 27-30; *see* C. DEGLER, *supra* note 30, at 165-66 (for an historical comparison of the number of permanent separations and divorces). For an example of the tenor of the debate, consider this statement of E.D. Leach from West Virginia at the National Congress on Uniform Divorce Laws:

> It does not make any difference how high you make the ground for divorce, people are going to meet it, if they cannot live together by the laws of nature. You cannot suspend those laws by any Act of Legislature; and until we come in this country to understand that the main duty, the chief purpose, and the end of an organization of this kind is to increase the sum total of human happiness in the country, I think we are searching after false gods. If we can do so by increasing the standard of divorce, well and good; if we cannot, better lower it.

N. BLAKE, *supra* note 153, at 143 (citing Proceedings of the National Congress on Uniform Divorce Laws, held at Washington, D.C., Feb. 19, 1906, at 75-76 (Harrisburg 1906)). Friedman notes the paradox that "[t]he immorality of divorce depends on the sacredness of marriage, but this can only increase the demand for divorce—to legitimate any second arrangement, and thus avoid an even greater immorality." Friedman, *supra* note 155, at 658-59.

174. L. HALEM, *supra* note 32, at 32-33.

175. *See* W. O'NEILL, *supra* note 153, at 198-230.

176. *See* N. BLAKE, *supra* note 153, at 80-96 (reviewing major interventions in the debate).

177. Elizabeth Cady Stanton, articulating the connection between family, law reform, and equality, wrote to Susan B. Anthony:

> It is vain to look for the elevation of woman so long as she is degraded in marriage. I say it is a sin, an outrage on our liberal feelings, to pretend that anything but deep and fervent love and sympathy constitute marriage. The right idea of marriage is at the foundation of all reforms.

Letter from E. Stanton to S. Anthony (Mar. 1, 1853), *reprinted in* N. BLAKE, *supra* note 153, at 88.

In 1860, Stanton attacked restrictive divorce laws on the ground that they violated the right of all to be happy. Marriage had no moral supremacy over the rights of individuals who entered into it. *See* Debates on Marriage and Divorce, Tenth National Woman's Rights Convention, May 10-11 1860, in THE CONCISE HISTORY OF WOMAN SUFFRAGE 170-89 (J. & P. Buhle eds. 1978). Stanton's proposals included a resolution

> that an unfortunate or ill assorted marriage is ever a calamity, but not ever, perhaps

Conservatives held up New York as a model state, whereas liberal reformers questioned the impact of the state's rigid law on domestic morals.[178] Reformers recognized that a statute designed to prevent divorce in New York did not suppress the desire of New Yorkers for divorce. A rigid statute had the effect of encouraging New Yorkers to rely on migratory divorces[179] in more liberal jurisdictions with expanded

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never a crime—and when a society or government compels its continuance, always to the grief of one of the parties, and the actual loss and damage of both, it usurps an authority never delegated to man, nor exercised by God himself.

Id. at 171. In the same debate Stanton is reported to have said, "There is one kind of marriage that has not been tried and that is a contract, made by equal parties to live an equal life with equal restraints and privileges on either side. Thus far we have had the man marriage and nothing more." *Id.* at 176.

Feminist perceptions that New York's divorce law was intolerable were fueled by the McFarland-Richardson affair of December 1869. The defendant, a known alcoholic, killed the man his former wife intended to marry after she moved to Indiana, fulfilled the temporary residence requirements, and obtained a divorce from him. The defendant was acquitted and granted custody of the elder son. *See* N. BLAKE, *supra* note 153, at 101-04. *See generally* W. O'NEILL, *supra* note 153.

178. One writer reflected:

> It would be truly instructive to know what the influence of such laws is on the frequent seductions, developments, and other crimes in the metropolis. It would be equally instructive to know what proportion of the applications for divorce in Connecticut, Indiana, and other States are made by those who, not willing to avail themselves of the fraudulent divorces so common in New York where they reside, temporarily remove to some other State to obtain a legal release from bondage which they cannot obtain at home.

J. POWER, MARRIAGE AND DIVORCE 111-12 (1870), *cited in* N. BLAKE, *supra* note 153, at 189; *see also* Larremore, *American Divorce Law*, 183 N. AM. REV. 73-74 (1906), *cited in* N. BLAKE, *supra* note 153, at 189-90.

179. Early in the 19th century, Chancellor Kent noted the problem:

> [F]or many years after New York became an independent state, there was not any lawful mode of dissolving a marriage in the lifetimes of the parties but by a special act of the legislature. This strictness was productive of public inconvenience, and often forced the parties, in cases which rendered a separation fit and necessary to some other state, to avail themselves of a more easy and certain remedy.

2 J. KENT, COMMENTARIES ON AMERICAN LAW 98 (2d ed. 1832), *cited in* N. BLAKE, *supra* note 153, at 117. Initially, nearby Atlantic and New England states were refuges for the party seeking the divorce. Liberal grounds for divorce, which included desertion and extreme cruelty, with modest residency requirements, were the attraction. N. BLAKE, *supra* note 153, at 117.

After 1840, divorce seekers began the move westward—initially to Ohio, Illinois, and Indiana. As conservative pressures against corruption in the family, said to be manifested by easy divorce, forced state legislatures to pass more restrictive legislation, divorce seekers sought relief further west in Nevada and California and in Mexico. 3 G. HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS 136-43 (1904). By 1935 it was estimated that transients from New York and New Jersey were parties to approximately three-fifths of Nevada's divorce cases. Ingram & Ballard, *The Business of Migratory Divorce in Nevada*, 2 LAW & CONTEMP. PROB. 302, 305 (1935), *noted in* N. BLAKE, *supra* note 153, at 171. In 1959, estimates of the number of New York marriages dissolved each year were probably one-third to one-half greater than the number recorded in the state. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 116 (1959), *cited in* N. BLAKE, *supra* note 153, at 171.

fault-based grounds for divorce. It also encouraged the seeking of mail order divorces.[180] Both consequences were seen as unsavory practices. At the same time, the possibility of migratory divorce, acting as it did as a safety valve, encouraged the retention of rigid legislation in conservative states like New York.[181]

Not only did the New York statute encourage evasion of the law, it fostered widespread collusion to procure a divorce,[182] the sale of bogus decrees, and ingenious developments in the area of fraud[183] leading to an annulment,[184] even when no alimony was legally available.[185] "Formal law bore little relation to law in action; moreover the latter was frankly engaged in nullifying the former."[186] In effect, New York developed a

180. Lawyers procured mail order out-of-state divorces for New Yorkers as well as other clients. For example, newspaper advertisements appeared promising: "Absolute divorces obtained in any state without publicity or exposure; good anywhere. No fee charged until divorce is obtained." N.Y. Herald, Sept. 18, 1870, *quoted in* N. BLAKE, *supra* note 153, at 118. The New York Times reported that "the divorce lawyer keeps his standing card in papers of large circulation . . . and a considerable share of his business is transacted on behalf of parties whom he never sees and never expects to see." N.Y. Times, Nov. 13, 1870, at 8, col. 2, *quoted in* N. BLAKE, *supra* note 153, at 119.

181. "The easier it is made for those who through affluence are able to exercise disproportionately large influence on legislation to obtain migratory divorces, the less likely it is that the divorce laws of their home States will be liberalized insofar as that is deemed desirable." Sherrer v. Sherrer, 334 U.S. 343, 370 n.18 (1947) (Frankfurter, J., dissenting).

182. In 1869 the New York Times reported:

> The husband or wife who wishes to get rid of a disagreeable partner has only to go to some sharper calling himself an attorney . . . . If there is no evidence he forges or invents as much as he wants. If the man or woman against whom he is employed is innocent, he finds someone to lay all sorts of crime to their charge.

N.Y. Times, Oct. 10, 1869, at 4, col. 2, *quoted in* N. BLAKE, *supra* note 153, at 190. The following year, a professional perjurer in divorce cases was sentenced to a nine year prison term. N.Y. Times, Oct. 20, 1870, at 2, col. 5, *cited in* N. BLAKE, *supra* note 153, at 191. In 1934 the New York Mirror featured a series entitled "I Was the 'Unknown Blonde' in 100 New York Divorces." N.Y. Mirror (Sunday Magazine), Feb. 18, 25, Mar. 4, 1934, *quoted in* N. BLAKE, *supra* note 153, at 193-94.

183. N. BLAKE, *supra* note 153, at 191-92 (citing New York newspaper articles, 1884-90).

184. JOINT LEGISLATIVE COMM. ON MATRIMONIAL AND FAMILY LAWS, REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK, 189th Sess., at 42 (1966). The report included a typical annulment script:

> [A] week before they were married, . . . the young man and the young lady, who he is going to marry, have talked it over in the presence of other members of the family and he said to her, "Yes, I love children. I want at least two children." Then they get married. Then he uses contraceptives. After a lapse of time she protests and says "Stop it. You said we'd have two children." He said "I didn't mean it. I'm not going to have any children. I hate little brats." Fraud. Annulment granted.

In the same report, Buffalo was described as the "Little Reno in the East." *Id.* at 43.

185. Though no statute providing for alimony in an annulment existed in New York until 1940, Act of Mar. 21, 1940, ch. 226, § 1140-a, 1940 N.Y. Laws 821, New York courts exercising their discretionary authority did grant alimony in limited types of annulment cases. *See* Note, *Legislation: Right to Alimony in Action for Annulment*, 10 BROOKLYN L. REV. 96 (1940).

186. L. Teitelbaum, *supra* note 133, at 9. Note also the willingness of the bench to judge possible

system of consensual divorce despite the statutory prohibition against such an action.[187]

The social consequences of this extreme bifurcation between law-as-statute and law-in-action bred cynicism and contempt for the law among the wealthy and encouraged the creation of "irregular" social relationships by persons too poor and/or upright to secure a divorce through fraud or perjury. It likewise invited economic warfare by the spouse apparently less eager to terminate the marriage as a condition for cooperation in a foreign or collusive New York action.

Despite repeated exposés of the sordidness of proceedings in the New York courts and the continuing problem of migratory divorce,[188]

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incriminating evidence against husbands and wives according to class-based standards such as status and social position, occupation, and character of places of cohabitation. Pollock v. Pollock, 71 N.Y. 137 (1877); *see also* N. BLAKE, *supra* note 153, at 194-98. Although state figures are lacking, in New York City courts approximately 18% percent of all dissolutions were annulments in 1932. By 1946 the number rose to 35. Note, *Annulments for Fraud—New York's Answer to Reno?* 48 COLUM. L. REV. 900, 900-04 (1948). According to one commentator, marriages in New York might be annulled "for misrepresentations as to age, business or profession, civil or ceremonial marriage, character, chastity or purity, citizenship, disease or disability, drug addiction, epilepsy, education, love and loyalty, marital relations, mental incapacity, and property." Moreover, each category was subject to almost indefinite subdivision.

In addition to fraud, some 50 other particular grounds for annulment were available. N. BLAKE, *supra* note 153, at 197 (citing J. CLEVENGER, ANNULMENTS OF MARRIAGE BEING A TREATISE COVERING NEW YORK LAW AND PRACTICE WITH COMPOSITE FORMS 27 (1946)). Blake notes the paradox that, when called "divorce," the dissolution of marriage was restricted to the narrowest of grounds, but when called by any other name, marriage dissolution was regarded with "easygoing tolerance." *Id.* at 198-99; *see also* L. HALEM, *supra* note 32, at 255 ("Owing to the remarkable ingenuity of the legal profession, the laxity of their judiciary, and the tacit approval of the clergy, the causes for granting annulments multiplied geometrically along with the number of marriages terminated under this contingency.").

For scholarly articulations of the law on the books v. the law in action approach to legal analysis, see McCaulay, *Changing a Contemporary Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers and the Legal System* (pts. I & II), 1965 WIS. L. REV. 483, 740; *see also* McNeil, Nevin, Trubeck & Miller, *Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 LAW & SOC'Y REV. 695 (1979).

187. Mutual consent was not adopted as a ground for divorce in New York. Act of Apr. 27, 1966, ch. 254, 1966 N.Y. Laws 833. Husbands and wives cannot contract away the marriage or the support obligations each owes to the other. N.Y. GEN. OBLIG. LAW § 5-311 (Consol. 1987) (formerly N.Y. DOM. REL. LAW § 51). However, there has been some attempt to argue that a mutually agreed-upon separation agreement (part of the 1966 reform) is close to the spirit, if not the letter, of consensual divorce. *See* Comment, *Old Wine in New Wineskins or Mutual Consent Divorces for New Yorkers*, 18 SYRACUSE L. REV. 71 (1966).

188. In 1889, Governor David B. Hill, prompted in part by the migratory divorce problem, began a drive for interstate cooperation in the planning of uniform legislation for a range of issues, including marriage and divorce. Disagreement among the state representatives regarding the kind and number of grounds for divorce undermined the commitment to uniformity. L. HALEM, *supra* note 32, at 30, 37-38.

the New York legislature remained responsive to heightened conservative pressure.[189] Initially, it enacted several statutes designed to increase the difficulty of obtaining a divorce. Between 1900 and 1933, bills expanding the grounds for divorce were proposed by at least fifteen different legislators; almost without exception they were buried in committee.[190] Nor were the proponents of liberalization successful in a major 1934 floor battle.[191]

During the period following World War II, the marital dissolution trend soared,[192] abetted by such factors as efforts to push women back

189. In 1877 courts were empowered to deny divorces even when adultery had been proved if the plaintiff condoned the offense, had connived at the procurement of evidence, or was guilty of similar misconduct. Act of Apr. 20, 1877, ch. 168, 1877 N.Y. Laws 179, *noted in* N. BLAKE, *supra* note 153, at 200. In 1899, stricter proof of plaintiff's charges was required. Act of May 25, 1899, ch. 661, 1899 N.Y. Laws 1471, *noted in* N. BLAKE, *supra* note 153, at 200. In 1902, advertising for the procurement of divorces became a misdemeanor and a three-month waiting period between the granting of a divorce and the issuance of a final decree was imposed. Act of Mar. 21, 1902, ch. 203, 1902 N.Y. Laws 536, Act of Apr. 3, 1902, ch. 364, 1902 N.Y. Laws 951, *noted in* N. BLAKE, *supra* note 153, at 200. The only significant liberalization during the period 1877-1919 was to permit remarriage of an adulterous defendant. N. BLAKE, *supra* note 153, at 200-02.

190. Blake attributes this situation to the fact that the impetus came from Jewish lawyers who were Democratic legislators from New York City. Despite reformers' efforts, the combination of the apportionment of representation which discriminated against New York City and the Democratic party's dependence on the urban Catholic vote meant that many Democrats were unlikely to propose or support fundamental changes in the law. And many Republicans "preferred to duck the issue." N. BLAKE, *supra* note 153, at 203. Even the more modest and novel route of proposing legislation authorizing the creation of a temporary state commission to study the issue was unsuccessful. N. BLAKE, *supra* note 153, at 202.

191. Two proposals sponsored by a New York City Republican recognized one new ground for divorce, willful desertion, and hedged it with restrictions—such as occurring without reasonable cause and extending over the three years immediately preceding the commencement of the action. N. BLAKE, *supra* note 153, at 204. The proposal received support from various bar associations and distinguished religious leaders. But it did not get massive endorsement from Protestant and Jewish quarters to counter formidable Catholic opposition. That opposition framed the issue in terms of the family as the basis of stability for the state and noted that divorce was "directly contrary to the religious faith of more than a third of our people." C. TOBIN, MEMORANDUM IN REGARD TO ASSEMBLYMAN ROSS'S BILL ALLOWING DESERTION FOR THREE YEARS AS AN ADDITIONAL GROUND FOR DIVORCE IN THIS STATE 8 (Apr. 9, 1934), *quoted in* N. BLAKE, *supra* note 153, at 207. The opposition defeated a Republican attempt to revive the desertion bill two years later. On the day of the vote each Assembly member found in their mail a warning that 400,000 Catholics in the state were opposed to the bill's passage. N.Y. Times, Apr. 5, 1936, at 9, col. 4, *noted in* N. BLAKE, *supra* note 153, at 211; *see* H. JACOB, SILENT REVOLUTION, THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 36-37 (1988) (discussing the opposition of the Catholic Church to divorce reform in New York during the 1950s and '60s).

192. Although there are no accurate records, it was estimated that New York courts were granting 1000 divorces per month and that 99 out of 100 suits were undefended. N. BLAKE, *supra* note 153, at 211. It was estimated that 30% of New York divorces were secured out of state. Jacobsen, *Marital Dissolutions in New York State in Relation to their Trend in the United States,* 28 MILBANK MEM. FUND Q. 25, 38 (Jan. 1950). From 1940 to 1948, annulments averaged 4,000 annually, almost

into traditional roles.[193] Amidst increasing evidence of widespread corruption and abuse in the procuring of divorces,[194] "conscientious judges and lawyers believed that reform was essential, lest growing public cynicism toward divorce and annulment laws undermine respect for the whole judicial process."[195]

By 1966 it was apparent that New York's 1787 statute was neither a deterrent to divorce nor a reflection of the norms and attitudes of many state residents.[196] Public hearings regarding reform proposals included a number of speakers recounting a parade of horribles fostered or condoned by the status quo. The dominant image in their testimony was a gendered one—wife as innocent victim of the harsh one-ground statute.[197] Expanded grounds for divorce would provide freedom for such deserving sufferers.

In 1966 political, social, and professional pressure produced a legislative compromise which converted New York into a fault-option jurisdiction.[198] The historic objection that the expansion of grounds would increase the number of divorces was accorded little significance. In all

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one third of the total number in the United States. W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 274 (1954); *see also* Note, *Divorce Reform in New York*, 4 HARV. J. ON LEGIS. 149 n.2 (1966-67). "Easier access to divorce . . . both redefined women's legal relationship to the family and provided women with some form of limited relief." N. BASCH, *supra* note 61, at 106.

193. *See* A. FERRISS, INDICATORS OF THE TRENDS IN THE STATUS OF AMERICAN WOMEN (1971); V. KINCADE, OPPENHEIMER, THE FEMALE LABOR FORCE IN THE UNITED STATES: DEMOGRAPHIC AND ECONOMIC FACTORS GOVERNING ITS GROWTH AND CHANGING COMPOSITION (1970).

194. In 1947 it was estimated that at least 75% of New York divorces were based on phony raids. JOINT LEGISLATIVE COMMITTEE OF NEW YORK STATE, REPORT TO THE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS OF 1966, at 19 (Mar. 31, 1966). A 1951 grand jury investigation and presentment affirmed the widespread nature of fraud, collusion, and perjury in matrimonial actions. N. BLAKE, *supra* note 153, at 216; *see also* W. GELLHORN, *supra* note 192, at 285-90; Foster, *Common Law Divorce*, 46 MINN. L. REV. 43 (1961) (describing the "where there's a will, there's a way" phenomena as applied to divorce: a married couple, or an individual partner to a marriage, desirous of dissolving the relationship, will find a way of doing so). If the formalities of the law make divorce expensive and/or difficult—desertion or other "self-help" provided the solution.

195. N. BLAKE, *supra* note 153, at 212. Despite this concern, even modest measures—such as a proposal to make fraud or collusion in matrimonial actions a misdemeanor—were rejected by the legislature. 181 ASS. JOURN. 2897 (Mar. 18, 1958).

196. L. HALEM, *supra* note 32, at 264.

197. JOINT COMMITTEE REPORT, *supra* note 194, at 24-47. Like California, there is no evidence of participation in the reform debates by an identifiable woman's group or organization. Kay attributes this to the fact that the modern women's movement was just emerging in 1963. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 56 (1987).

198. *See* H. JACOB, *supra* note 191, at 37-42 (discussing legislative activities and actors involved in the 1966 reform).

likelihood a combination of factors, including sordid tales of fraud and perjury connected with the status quo, and the growing recognition that marital stability was not achieved or enhanced by making divorce an exceptionally difficult and punitive legal proceeding, led to the compromise. The new statute expanded the number of fault grounds to include cruel and inhuman treatment, abandonment, and imprisonment, as well as adultery.[199] It also added a no-fault option: a no-fault separation by agreement which could be converted, after a designated waiting period, into a divorce.[200]

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199. Act of Apr. 27, 1966, ch. 254, 1966 N.Y. Law 833 (codified in N.Y. DOM. REL. LAW § 170 (McKinney 1966)).

> An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:
>
> (1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.
>
> (2) The abandonment of the plaintiff by the defendant for a period of two or more years.
>
> (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.

In 1968 the Legislature amended Section 170 to read:

> (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. *Deviate sexual intercourse includes, but not limited to, sexual conduct as defined in subdivision two of Section 130.00 and subdivision three of Section 130.20 of the penal law.*

Act of June 16, 1968, ch. 700, 1968 N.Y. Laws 2314.

In 1970, Section 170 was amended to read:

> Section 1. Subdivision two of section one hundred seventy of the domestic relations law, as added by chapter two hundred fifty-four of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:
>
> (2) The abandonment of the plaintiff by the defendant for a period of . . . *one* or more years.

Act of May 18, 1970, ch. 835, 1970 N.Y. Laws 2653.

There are very few reported cases in which divorce has not been granted. *See* Kennedy v. Kennedy, 91 A.D. 2d 1200, 459 N.Y.S.2d 188 (4th Dep't 1983). *But see* Math v. Math, 31 N.Y.2d 693, 289 N.E.2d 549, 337 N.Y.S.2d 505 (1972); Pfeil v. Pfeil, 100 A.D.2d 725, 473 N.Y.S.2d 629 (4th Dep't 1984). New York courts have held the parties to a higher standard of proof where a marriage is of long duration. Johnson v. Johnson, 103 A.D.2d 820, 478 N.Y.S.2d 54 (2d Dep't 1984); Passantino v. Passantino, 87 A.D.2d 973, 450 N.Y.S.2d 98 (4th Dep't 1982).

200. It provides:

> (5) The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree, and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such decree.
>
> (6) The husband and wife have lived separate and apart pursuant to a written agree-

With the 1966 expansion of the grounds for divorce and the availability of a no-fault separation leading to a divorce, it became unnecessary to resort to the traditional gendered morality scripts associated with the one-ground statute. Accusations of adultery, which often evoked gendered images of husband as agent and wife as victim, became only one of a number of options for couples seeking dissolution. It is undeniable that such a law reform was desirable and, in fact, long overdue.

Nevertheless, acknowledgement of the need for reform ought not be confused with its impact. Facilitating access to divorce with an expansive gender neutral statute speaks symbolically to yet another aspect of formal equality. There is no evidence that the reform was connected to a desire to facilitate, assist, or ensure substantial equality in family life or economic justice for women.[201] Nor is there evidence that women actually received larger property settlements under the reform between 1966 and 1980 than under the one-ground statute. In most instances, they

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ment of separation, subscribed and acknowledged by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county where in either party resides within thirty days after the execution thereof.

N.Y. DOM. REL. LAW § 170 (McKinney 1966).

Subsequent to 1966, N.Y. DOM. REL. LAW § 170 was amended in 1967, 1968, 1969, 1970, 1971, 1972, 1974, and 1975. The current provision reads:

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

N.Y. DOM. REL. LAW § 170 (McKinney 1988).

201. *See* Kay, *An Appraisal of California's No Fault Divorce Law*, 75 CAL. L. REV. 291 (1987) (claiming a developing connection between no-fault law in California and efforts to ensure substantial equality in family life). *But see* Kay, *supra* note 197, at 26-27 (arguing that initially no-fault reformers did not identify equality between men and women as the goal of the reform effort).

were unlikely to have title to marital property[202] and under the prevailing strict title regime were forced to rely on the uncertainties of alimony.[203] Nor does the retention of fault grounds as an option in the statute appear to have created opportunities for wives to obtain more favorable treatment than they had in the past, or in comparison with in-court or out-of-court settlements in pure no-fault jurisdictions.[204] In sum, if it does not affect the context in which divorce occurs, formal gender neutrality in the rules regarding grounds for the dissolution of a marriage fails to have a measurable impact on the outcome.

Narrative 3—Alimony: The Nexus of Property and Fault

Prior to 1980, fault was said to have no bearing on the distribution of marital property under New York's strict title regime. Proven allegations of fault notwithstanding, title was dispositive for the distribution of marital assets. But fault was integrally connected to and had a dramatic impact upon the awarding of continuing maintenance or alimony—a private financial transfer between the parties.

Historically, alimony has been connected to the support obligation of a husband during a marriage and the obligations incurred by a wife in return for such support. Under New York law, a husband was required to support his wife during marriage[205] and was forbidden from relieving

202. *See supra* note 136 accompanying text.

203. *See infra* notes 213-26 and accompanying text.

204. *See* Kay, *supra* note 197, at 70-71.

205. A husband's obligation to support his wife has a long common law tradition in which a husband's duty is said to "spring from the marital relationship itself." Haas v. Haas, 298 N.Y. 69, 80 N.E.2d 337 (1948). This obligation was not affected by the creation of a separate legal identity for married women in the Married Women's Property Acts. "These acts were not intended to relieve husband and wife of their mutual responsibilities and disabilities toward one another." Coleman v. Burr, 93 N.Y. 17, 20 (1883). "[The husband] remains liable to support and protect his wife and [is] responsible to society for good order and decency of household." *Id.* at 24; *see also* DeBrauwere v. De Brauwere, 203 N.Y. 460, 464, 96 N.E. 722, 725 (1911) (wife who has applied her separate estate to the purpose of support obligation resting primarily on her husband may recover amounts expended); Ruhl v. Heintz, 97 A.D. 442, 446, 89 N.Y.S. 1031, 1033 (2d Dep't 1904); Little v. Willetts, 37 How. Pr. 481, 493 (Sup. Ct. 1869).

Even though the husband had the primary duty to support his family by his labor, the wife had the duty to assist him in that obligation to the extent of any property she owned. Comment, *Marital Property: A New Look at Old Inequities,* 39 ALB. L. REV. 52 (1974). "The obligation to support a wife is principally statutory in New York and the statutes are scattered confusingly and illogically in the Civil Practice Act, in various of the Consolidated Laws, and in the Unconsolidated Laws." Dean, *supra* note 59, at 196; *see id.* at 199-203 (summarizing the different New York courts with jurisdiction to address the need of wives for support). The failure to support a wife was criminalized. 1833 N.Y. Laws 11, § 7, and was later compiled into the N.Y. CODE CRIM. PROC. § 899 subd. 1 (1881). There were no fines or penalties unless repeated requests for compliance went unanswered. *But see* Kane v. Kane, 101 Misc. 2d 143, 420 N.Y.S.2d 627 (Sup. Ct. 1979) (N.Y. GEN. OBLIG. LAW

himself of this responsibility by contract.[206] As a condition of her support, a wife was required to cohabit with her husband[207] and to avoid misconduct[208] which would constitute grounds for separation or divorce.

Under the common law, a wife who was separated from her husband and was not guilty of such misconduct as adultery was permitted to invoke the law of agency[209] in her efforts to secure support for herself. But practical difficulties[210] and legal hurdles[211] limited the use of this

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§ 5-311 unconstitutionally denies equal protection since it advances gender-based discrimination and is incapable of 'gender neutral' interpretation.")

This support obligation was recognized as continuing after a husband's demise through the common law provision of dower for widows. At the death of her husband, a widow was entitled to one third of the real property owned by her husband at any time during the marriage. If the marriage was childless, the widow could claim one half of the real property. She could also claim her paraphernalia (clothing and other personal items appropriate to her status). This dower right however represented only a life interest. If a husband died testate and left specific property to his widow, she could choose between the devises and dower. *See* M. SALMON, *supra* note 63, at 141-84 (for further discussion of provisions for widows). It is clear that widows who lacked independent income or wealth could experience by operation of the law an enforced reduction in their standard of living unless their husbands chose to be generous. In effect, law protected a woman's interest only in a small way if she was forced to rely on it.

206. Belaustegui v. Belaustegui, 85 Misc. 2d 1015, 380 N.Y.S.2d 950 (Sup. Ct. 1976).

207. An aspect of women's "otherness" in the prevailing sex/gender system is men's insistence on the sexual functioning of women in relation to them. 3 H. ELLIS, STUDIES IN THE PSYCHOLOGY OF SEX 152-202 (1908) (describes women as interested in sex, a novel idea at the time). However, a woman was clearly in need of a man to initiate any sexual activity and therefore was dependent on him for pleasure. *See* Freud, *Some Physical Consequences of the Anatomical Distinction Between the Sexes*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 248 (J. Strachey ed. 1963); *see also* Gordon & Shankweiler, *Different Equals Less: Female Sexuality in Recent Marriage Manuals*, 33 J. MARRIAGE & FAM. 459-66 (1971).

208. "Married women should so live that the electric light of truth, when turned upon them, will reveal nothing but honor and purity." Auld v. Auld, 16 N.Y.S. 803, 806 (Sup. Ct. 1891). While courts were willing to examine the character of a married woman when she was the plaintiff in a divorce action, the importance of a presumption of innocence for married women should not be underestimated. The stakes were very high for women whose husbands questioned their fidelity.

209. In addition to being the legal representative and moral guardian of his wife, the common law presumed the husband to be the family breadwinner. While ownership and control of his wife's property might assist him in fulfilling that responsibility, no direct effective means was provided for ensuring that he met those obligations since the common law doctrine of unity in marriage precluded spouses from suing each other. Nor was the common law's indirect cumbersome and limited means of attempting to ensure that the husband met his responsibility by his wife's invoking the law of agency (permitting her to pledge her husband's credit for her support) likely to be successful. In so doing she was acting as her husband's agent only with his express consent or with his consent implied by their living together and by her responsibility for management of the household. Despite the formal existence of this remedy, obtaining supplies on credit was probably a practice more prevalent among the prosperous classes. L. HOLCOMBE, *supra* note 125, at 31.

210. A married woman had to find tradespeople willing to supply her with necessaries and who if necessary were willing to sue her husband to recover debts she had incurred in his name. *Id.* at 32.

211. A husband could rebut the presumption that his wife acted as his agent of necessity by claiming that she had left him without good cause, that she had committed adultery after their

device. Two alternatives were available to ensure the support of spouses in New York. The chancery courts were prepared to recognize voluntary private separation agreements made through the medium of trustees[212] in which provision was made for the support of a wife. In the alternative, the courts were prepared to award permanent alimony in an absolute divorce.

The first statutory authority for such an allowance of permanent alimony in New York was enacted in 1813.[213] It provided for an award of alimony only to divorced non-adulterous wives. Not only did the provisions identify gender-based statutory disparities, they underscored the gender-based differential risks of divorce. A defendant husband might commit flagrant adultery, but the court would fix his financial responsibility only on the basis of his income. Despite the court's power and discretion to determine the amount of the allowance in each individual case, general rules were developed to allow a plaintiff wife a quarter or possibly a third of the defendant husband's annual income from real estate.[214] A defendant wife, on the other hand, might lose her rights to support if she committed one indiscretion.[215] Moreover, even if she were the com-

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separation, that he had paid her an adequate allowance or an allowance that they had agreed upon however inadequate it was, that she had other means of support, that he had warned suppliers not to give her credit, that the debts she incurred were extravagant, and that she had refused his offer to return to cohabitation. In each case the burden of proof rested on the creditor. *Id.*

212. Salmon points out the contradiction between allowing a voluntary private post-nuptial agreement to live apart and divide the property, which virtually constituted a divorce *a mensa et thoro* and the courts' insistence, as a matter of public policy, that it scrutinize all separations to prevent the parties from consenting to a divorce without an allocation of fault. M. SALMON, *supra* note 63, at 71-72.

213. The statute provided:

> [I]f wife is the complainant . . . it shall be lawful for the court of chancery to make a further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage . . . and to provide a suitable allowance to the complainant for her support as to the said court shall seem reasonable and just, having regard to the circumstances of the parties respectively . . . ."

An Act Concerning Divorces, and for other Purposes, ch. 102, 1813 N.Y. Laws 197, 199 [hereinafter Act Concerning Divorces].

214. *See* Miller v. Miller, 6 Johns. Ch. 91, 93 (1822).

215. Act Concerning Divorces, *supra* note 213.

Cultural images connected with an adulterous married woman reveal its connection to patriarchal ideology. *See, e.g.*, Pacheco v. Pacheco, 246 So. 2d 778 (Fla. 1971), *dismissed*, 404 U.S. 804 (1971) (upholding a Florida statute denying adulterous wives alimony). The court saw adultery as a source of domestic discord, family disruption, and social scorn. These results were particularly the products of the conduct of an adulterous wife and mother. The court also noted that no other breach of the marital contract has received such universal condemnation. In fact, of all the fault-based grounds for divorce, adultery is the only one that has ever been criminalized. *See e.g.*, N.Y. PENAL LAW § 255.17 (McKinney 1985) (adultery is a class B misdemeanor); *see also* Tinker v. Colwell, 193 U.S. 473 (1904) (for a discussion of a husband's rights to his wife's sexual services).

plainant in a divorce action, the courts were prepared to review her conduct in determining her worthiness for an award.[216]

Viewed as a substitution for a husband's duty to support his wife, alimony was considered legally distinguishable from a property settlement. It provided a divorced woman with no meaningful assets to which she had title. It was neither the separate property nor the estate of the wife.[217] In addition, alimony served other overlapping functions. An alimony award could prevent a nonadulterous former wife who remained unmarried[218] from becoming a public charge. And by virtue of its judgment regarding the moral character of both wife and husband, alimony justified the state's severance of the marital relationship.

There appears to have been a fairly widespread concensus during the late nineteenth and most of the twentieth centuries on the need, at least in theory, to provide alimony for morally deserving, economically vulnerable, divorced women.[219] Nevertheless, critics of the system of permanent alimony remained vocal, virulent, and misogynistic in their condemnation. Though they acknowledged the need for alimony for some deserving women, they characterized most women who were awarded permanent alimony as "parasitic," "exploiters," or "[a]limoniacs." "[S]hameless greed" and "hateful malice" became such

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> We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act
> . . . .

Id. at 481.

216. Peckford v. Peckford, 1 Paige Ch. 274 (1828). Despite the conduct of the adulterous husband, the judge noted that the wife—by traveling to England against her husband's wishes—had exposed him to temptation. Her failure to be "perfectly discreet, prudent and submissive to her husband" provided the judge with the rationale for awarding her a life annuity of one third rather than one half of their property. *Id.*

217. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 441 (1968); *see also* Comment, *supra* note 205, at 57.

218. Courts interpreted the statute to recognize a wife's entitlement to alimony notwithstanding her misconduct, unless it would constitute grounds for separation and divorce. *See* Mann v. Wasserberger, 65 A.D.2d 717, 718, 410 N.Y.S.2d 590, 591 (1st Dep't 1978), *appeal denied*, 46 N.Y.2d 709, 386 N.E.2d 1338, 414 N.Y.S.2d 1026 (1979); Schwartzman v. Schwartzman, 62 A.D.2d 988; 403 N.Y.S.2d 317, 318-19 (2d Dep't 1978); Math v. Math, 39 A.D.2d 583, 331 N.Y.S.2d 964, 965 (2d Dep't 1972), *aff'd*, 31 N.Y.2d 693, 289 N.E.2d 549 (1972), 337 N.Y.S.2d 505. Such a response may well have been prompted by the desire to prevent former wives from going on welfare. Moreover, the court had the discretion not to award alimony where the wife was self-supporting. *See* Kover v. Kover, 29 N.Y.2d 408, 416, 278 N.E.2d 886, 889, 328 N.Y.S.2d 641, 645 (1972) (couple was childless, wife was in her 30s, marriage of short duration, and income of spouses was almost equal).

219. *But see* N.Y. Times, Nov. 13, 1922, at 14, col. 8 (for official recommendation of the National Women's Party Conference that alimony be available for men as well as women).

women's motives. Alimony itself had become "perverted, either as graft for those who do not need it, or as a weapon for the satisfaction of female spitefulness." For men, marriage could become a "life sentence to alimony." Alimony often meant "man's servitude under female tyranny."[220]

Although no systematically gathered statistics exist regarding the amount of alimony awarded before or after the 1966 expansion of grounds for divorce, some evidence suggests that assertions of large sums of money frequently awarded were highly inaccurate.[221] Sparse data indicate that alimony may not have been granted or possibly even requested in many cases, despite what can be assumed to be married women's widespread economic vulnerability.[222] Moreover, it appears that numerous undocumented claims of extravagant alimony awards were fueled by an occasional highly publicized struggle in a wealthy household.[223] In fact, when alimony was granted, it was likely to be meager.[224] Additionally, limited evidence indicates that, whatever the amount awarded, the likelihood of arrearages was high and that attorneys were reluctant to pursue contempt actions against a debtor husband.[225]

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220. C. WILNER, ALIMONY: THE AMERICAN TRAGEDY 6-15 (1952) (quoting newspaper reports in the 1930s and '40s).

221. *See* W. GELLHORN, J. HYMAN & S. ASCH, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 340-43 (1953) [hereinafter W. GELLHORN].

222. Relying on Census Bureau data, one study estimated that alimony was requested in 13.4% of divorce cases from 1887 to 1903, but was awarded in 9.3% of the cases. In 1916, 20.3% petitioned for alimony, but awards were granted in 15.4% of the cases. *Id.* There is no class or income breakdown for these statistics. *See also* P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 127-28 (1959).

223. S. HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 60 (1986); C. WILNER, *supra* note 220, at 49-56; Norman, *Miss Golddigger of 1953,* PLAYBOY, Dec. 1953, at 6; *see also* Weitzman & Dixon, *supra* note 135.

224. In New York County, 60% of the temporary awards reported for the year ending June 30, 1962 were for less than $40 per week and 14% were for less than $20 per week. W. GELLHORN, *supra* note 221, at 341. The authors comment, "There can be no wholly satisfactory solution to the problem of dividing up inadequate funding." *Id.* Although these data were gathered for temporary alimony awards, "there seems to be a tendency for the trial judge, when he fixes the final figure, to give very considerable weight to the temporary alimony award." *Id.* at 343; *see also id.* at 344. For other jurisdictions see 1 L. MARSHALL & G. MAY, THE DIVORCE COURT 312 (1932) (Maryland) (Approximately 50% of the payments for alimony and child support totaled $33 per month or less.); 2 L. MARSHALL & G. MAY, THE DIVORCE COURT (1933) (Ohio). Although statistics are difficult to obtain because court records are sealed for the protection of the family, a study by the Tax Foundation indicated that the average alimony received by divorced wives in New York in 1975 was $2,932. This average does not include women who were awarded no money and those who were unable to collect what they were awarded.

225. "During the year ended June 30, 1952, in New York County, when about 400 applications for temporary alimony were submitted to the Court, 271 applications were made in matrimonial actions to punish for contempt." W. GELLHORN, *supra* note 221, at 343. A wide range of reasons

In sum, there is little evidence that the narrow New York fault ground of adultery, combined with the irrebutable legal presumption that only a wife was eligible for alimony, benefited divorced women in a significant economic manner. The system of gender specific alimony revealed the seeming paradox of formal societal recognition of women's economic vulnerability coupled with substantive societal failure to act upon that recognition. Prevailing cultural norms prescribed dependency[226] for women and reinforced women's economic vulnerability.

From 1966 until 1980, when alimony became bilateral, the availability of less restrictive fault grounds and the option of converting a consensual separation to divorce were said by some members of the legal profession to alter the bargaining power of the parties. Whereas previously women tended not to be the defendants, after the 1966 reform there was a marked increase in the appearance of men as plaintiffs in divorce litigation.[227] The significance of this development is more complicated than some commentators would suggest. To assume that women prior to 1966 had more meaningful bargaining power requires acceptance of the tenuous assumption that pre-1966 alimony awards to wives were common, adequate, and collected.[228] Despite the reassurance proffered by ideology and legal identity, the actual existence of a likelihood of obedience to law was and is a matter of contingent fact.[229]

While loss of respectability, that powerful Victorian bar to many women considering divorce, has virtually disappeared, the prospect of significant material deprivation after divorce was and is a reality. Until

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have been given for failure to enforce alimony awards. *See, e.g.*, Kover v. Kover, 29 N.Y.2d 408, 414, 278 N.E. 886, 888, 328 N.Y.S.2d 641, 644 (1972) ("The times have changed owing not alone to the coequal status which a married woman today shares with her husband but also to the increase in the number of married women working in gainful occupations."); Phillips v. Phillips, 1 A.D.2d 393, 150 N.Y.S.2d 646 (1st Dep't 1956), *aff'd*, 2 N.Y. 2d 742, 138 N.E. 738, 157 N.Y.S.2d 378 (1956); Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 LAW & CONTEMP. PROB. 283 (1939) ("Alimony . . . continues and even increases former antagonism."). Data from other jurisdictions at other points in history also reveals the same pattern of nonpayment. *See* Cott, *Eighteenth Century Family and Social Life Revealed in Massachusetts Divorce Records*, in A HERITAGE OF HER OWN, *supra* note 123, at 121 (discussing allegations of failure to pay alimony in New England).

226. *See* Harth, *How the Angel Got Into the House*, 4 WOMEN'S REV. BOOKS, Oct. 1986, at 18-19 (domesticity promoting the companionate marriage did not displace patriarchy); *see also* M. GROSSBERG, *supra* note 11 (law was interested in stable families and male governance); L. KERBER, *supra* note 87 (women were always the recipients of justice, men the dispensers); Olsen, *supra* note 6 (analyzing the simultaneous glorification and downgrading of home and market).

227. Conversations with attorneys in author's pilot study.

228. *See supra* note 225.

229. *See* H. HART, THE CONCEPT OF LAW (1961); *see also* H. HART, LAW, LIBERTY AND MORALITY (1963) (nature and boundaries of compliance with law).

1980 women incurred economic risks connected with divorce regardless of the change in rules governing the grounds for dissolution and despite the theoretical availability of alimony for innocent wives.

Narrative 4—Divorce Law Reform: Property and Alimony Revisited

A. *Developments of a Decade: The Shift from Strict Title to Equitable Distribution*

During the seventies, large numbers of American women began rediscovering, reemphasizing, and identifying a range of systematically based disadvantages operating to exclude or constrain them from full and equal participation in American society.[230] This enterprise was a manifestation of long-term historical continuities within American culture,[231] as well as a response to shorter-term historical events which often create experiential discontinuities between generations.[232]

Central to the undertaking was the issue of access to politics and the market. Such access was identified as a prerequisite to the achievement of formal, if not substantive, equality in American society.[233] The agenda for achieving this access was a broad one.[234] It included passage of an Equal Rights Amendment to both the federal[235] and state constitu-

230. P. CONOVER & V. GRAY, FEMINISM AND THE NEW RIGHT: CONFLICT OVER THE AMERICAN FAMILY 1 (1983) ("The decade of the 1970s was the women's decade.").

231. Newman, *Symbolic Dialects and Generations of Women: Variation in the Meaning of Post Divorce Downward Mobility*, 13 AM. ETHNOLOGIST 230, 232 (1986) (identifying long-term continuities as symbolic systems).

232. Newman identifies discontinuities as symbolic dialects emerging from the historically bound experiences of a particular group. Discontinuities can produce any or all of the following effects: introduce symbols unique to one group, thereby demarking its cultural repertoire from that of other groups with whom it shares many parts of its symbolic system; interpret or construct a symbol differently from another generation or highlight the significance of some symbols for one group while the same symbols remain less salient for others not affected by the historical events. *Id.* at 232. Contemporary discontinuities may stem from experience in civil rights and anti-war movements as well as liberal politics. *See* S. EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT (1979).

233. H. JACOB, *supra* note 191.

234. *See* R. COBB & C. ELDER, PARTICIPATION IN AMERICAN POLITICS (1972). For an issue to become part of a legislative agenda, Cobb and Elder list several prerequisites: widespread attention, shared concern of a sizable portion of the public that some type of action is required, and shared perception that the matter is appropriate for governmental intervention. *Id.* at 86.

235. The proposed Equal Rights Amendment reads:

> § 1 Equality of rights under law shall not be denied or abridged by the United States or by any state on account of sex. § 2 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article. § 3 This Amendment shall take effect two years after the date of ratification.

H.R. REP. No. 359, 92nd Cong., 1st Sess. (1971); S. REP. No. 689, 92nd Cong., 2nd Sess. (1972). The proposed federal amendment was ratified by Hawaii, New Hampshire, Delaware, Iowa, Idaho,

tions,[236] as well as a host of specific measures designed to change the status of women in American society.[237] These measures and the strategies to achieve them were formulated by liberal feminists within the context of traditional institutions; their moderate presentation of issues allowed liberal feminists to be influential in law reform campaigns.[238]

Despite the sharp increase in the divorce rate during the decade,[239] which in part reflected the impact of feminism,[240] feminists tended to be occupied intensely with worthwhile and pressing issues other than family

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Kansas, Nebraska, Texas, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, California, Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, Washington, Maine, Montana, Ohio, North Dakota, and Indiana. Kentucky, Nebraska, Idaho, and Tennessee later voted to rescind. *See also* J. MANSBRIDGE, WHY WE LOST THE ERA (1980). *See generally* THE EQUAL RIGHTS AMENDMENT: AN ANNOTATED BIBLIOGRAPHY OF THE ISSUES, 1976-1985 (R. Feinberg comp. 1986).

236. Sixteen states have their own equal rights amendments: ALASKA CONST. art. 1 § 3 (1956, amended 1972); COLO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20 (1965, amended 1974); HAW. CONST. art. 1, § 21; ILL. CONST. art. 1, § 18; MD. CONST. art. 46; MASS. CONST. part I, art. 1; MONT. CONST. art. 2, § 4; N.H. CONST., part I, art. 2; N.M. CONST. art 2, § 18; PA. CONST. art. 1, § 28; TEX. CONST. art 1, § 3a; UTAH CONST. art. 4 § 1; VA. CONST. art 1, § 11; WASH. CONST. art. 31, § 1; WYO. CONST. art. 1, §§ 2, 3 & art. 6, § 1. Wyoming and Utah adopted equality provisions in the 1890s as part of their original constitutions apparently as a means of attracting women settlers in an attempt to increase the number of registered voters. *See* Note, *State Equal Rights Amendments: Legislative Reform and Judicial Activisim*, 4 WOMEN'S RTS. L. REP. 227, 230 n.51 (1978); *see also* Avner & Greene, *State ERA Impact On Family Law*, 8 Fam. L. Rep. (BNA) 4023, 4025 (1982).

237. During the 1970s women demanded equal representation in state party delegations at presidential nomination conventions as well as the inclusion of issues with which women were particularly concerned in Democratic and Republican party platforms. "The 1972 conventions of both major parties had a higher proportion of women in their delegations than in any previous years; almost 40 percent of the Democratic delegates and nearly 30 percent of the Republicans were women." S. BAXTER & M. LANSING, WOMEN AND POLITICS 132 (1981). This period also witnessed the development and financing of such organizations as in the National Women's Political Caucus devoted to encouraging the election of female candidates at every level of government. On July 10th, 1971 more than 200 women—Republicans, Democrats and independents from 27 states—met to inaugurate a new organization aimed at increasing the number of women holding public office. *See* Shanahan, *Women Organize for Political Power*, N.Y. Times, July 11, 1971, at 1, col. 1. *See generally* B. BURRELL, A NEW DIMENSION IN POLITICAL PARTICIPATION: THE WOMEN'S POLITICAL CAUCUS, A PORTRAIT OF MARGINALITY: THE POLITICAL BEHAVIOR OF THE AMERICAN WOMAN (M. Githens & J. Prestage ed. 1977).

238. *See* Fineman, *supra* note 5, at 813-14 (analyzing the role of liberal feminism in Wisconsin divorce law reform).

239. The number of households headed by divorced women rose dramatically from 1,259,000 in 1970 to 2,807,000 in 1979. By 1981, an additional 470,000 households were headed by divorced women, bringing the figure to 3,277,000. USBC, STATISTICAL ABSTRACT OF UNITED STATES 62 (1972); *id.* at 80 (1985).

240. As a far-reaching social movement, feminism has impacted on the ways in which people view marriage and divorce. Early feminists advocated divorce as a means of freeing women from undesirable unions. *See* I HISTORY OF WOMAN SUFFRAGE, *supra* note 90. For a recent analysis of the critique of the feminist position, see P. CONOVER, FEMINISM AND THE NEW RIGHT (1983).

law reform. Initially, feminists made little concerted effort to anticipate the multiplicity of problems for women generated by the reorganization and restructuring of families through divorce.[241] The explanations for this lacuna are many; they reflect the complexity of undertaking actions designed to lead to social change.

Historically, in political theory and jurisprudence as well as in the practice of law, family issues including divorce have been considered "private" matters, best left to governance and ordering within a family unit.[242] Feminist reformers, perhaps not fully immunized from this culturally prevailing characterization of issues, may have tended to view divorce law reform as less significant than issues identified with the "public" arenas of politics and the market.[243] Prevailing wisdom suggested that money and political power were the key to meaningful social change[244] despite feminist recognition that the "personal is the political."[245]

Not only did "private" family law reforms appear to pale in importance besides "public" issues of workforce participation and political representation, they also presented complex issues not subject to dynamic civil rights or constitutional litigation. Such recognition significantly diminished the symbolic vitality and appeal of these issues. The hallmarks of liberation—change, expansive growth, autonomy—were not to be found in the revision of marital property distribution statutes and the reeducation of lawyers and judges. In addition, the likelihood of having to

241. "Most of these [divorce reform laws] were enacted after 1965. No party platform or social protest spurred legislators to accept them. Neither national politicians nor congress played a part in their adoption. No Bureaucracy or national interest group promoted them. Little political conflict accompanied them." H. JACOB, *supra* note 191, at 3; *see also id.* at 33 (discussing New York reform). However, some organizations did focus on legal issues of concern to women, for instance, "Women in Transition," an effort undertaken by the Women's Law Project in Philadelphia in 1970. (I am indebted to Nadine Taub for this observation.) *See also* G. STEINER, THE FUTILITY OF FAMILY POLICY 8-13 (1981) (pessimistic assessment of the prospect for improved policies designed to assist what the author characterizes as "dysfunctional families").

242. *See* L. CLARK & L. LANGE, THE SEXISM OF SOCIAL AND POLITICAL THEORY: WOMEN AND REPRODUCTION FROM PLATO TO NIETZSCHE (1979); J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 12 (1981); Olsen, *supra* note 6.

243. *See* Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987); *see also* J. ELSHTAIN, *supra* note 242; G. MATTHEWS, JUST A HOUSEWIFE: THE RISE AND FALL OF DOMESTICITY IN AMERICA 32 (1987).

244. *See* I. MARCUS, DOLLARS FOR REFORM: THE OEO NEIGHBORHOOD HEALTH CENTERS (1981) (discussing perceived connection between money and power in capital war on capital poverty programs).

245. S. EVANS, *supra* note 232, at 105; J. FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE SOCIAL POLICY PROCESS 12-43 (1975).

wage legislative and/or judicial struggles over the web of connected issues (property distribution, alimony, and child support) in each of the fifty states was a daunting prospect.[246]

Finally, feminist activists in the seventies held a wide variety of attitudes toward marriage. While some of these attitudes echoed the sentiments and concerns of the nineteenth century women's movement,[247] the change in material conditions for twentieth century feminists permitted a critique based on the availability of a wider range of options for women. Some women challenged the cultural, social, and economic prioritization of marriage as a privileged form of family life. They identified the heterosexual nuclear family as an institution of patriarchal oppression buttressed by the state which was virtually unreformable from within.[248] For these women, law was a vehicle for reproducing an oppressive, hierarchical family structure; divorce law reform was irrelevant; their energies were directed toward the establishment of other forms of social connection. For heterosexual women, the availability of contraceptives[249] and abortion[250] made both casual sex and cohabitation possible alternatives to marriage.[251] For lesbians, the critique of marriage was an opening for public acknowledgment of intimate relationships between women.[252]

Mostly young and often unmarried or without children, educated and relatively privileged, these feminists possessed credentials and skills

246. *See* N. HARWOOD, A WOMAN'S LEGAL GUIDE TO SEPARATION AND DIVORCE IN ALL 50 STATES 3-7 (1985).

247. *See supra* note 177 and accompanying text.

248. *See* A. RICH, OF WOMAN BORN (1976); S. STEINMETZ, THE CYCLE OF VIOLENCE: ASSERTIVE, AGGRESSIVE AND ABUSIVE FAMILY INTERACTION (1977). For an analysis of this relationship in Europe, see J. DONZELOT, THE POLICING OF FAMILIES (1979).

249. L. GORDON, *supra* note 169; *see also* B. HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND CONTRACEPTIVE CHOICE 286-89 (1987); J. REED, FROM PRIVATE VICE TO PUBLIC VIRTUE: THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY 128-31 (1983).

250. *See* N. DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA (1985); C. FRANCOME, ABORTION FREEDOM: A WORLDWIDE MOVEMENT (1984); R. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE CHOICE (1984).

251. Macklin, *Heterosexual Cohabitation Among Unmarried College Students*, and T. Wells, L. Wells & S. Christie, *Living Together: An Alternative to Marriage*, in INTIMATE LIFESTYLES 291 (J.R. & J.S. Delora eds. 1972); *see also* RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFESTYLES (R. Libby & R. Whitenhurts eds. 1973) (exploring ideas and research on the role of sex after marriage and emerging sexual lifestyles including the reevaluation of monogamous marriage).

252. *See* L. FADERMAN, SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM RENAISSANCE TO THE PRESENT (1981); *see also* Lord, *Uses of the Erotic as Power*, in SISTER OUTSIDER 53 (1984); Rich, *Compulsing Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE, *supra* note 149, at 177.

which permitted them to be economically self-sufficient.[253] In their critique of marriage, they failed to recognize that divorce was an economic risk for many less privileged, economically vulnerable women. Inadvertently perhaps, "they threw away their mothers for their dreams."[254]

By the 1970s, most jurisdictions which followed common law strict title marital property and marital dissolution rules had already modified them to avoid their harsh effects at divorce. These jurisdictions, relying on contemporary notions of mariage as a partnership,[255] adopted rules of equitable distribution for marital property which bypassed title for divorce distribution purposes.[256] Feminists in New York, however, contin-

253. For middle class aspects of the Women's Movement, see Blackwell, *On Marriage and Work*, in ROOT OF BITTERNESS 351 (N. Cott ed. 1972) (calling on women of the "leisured" classes to use their time to test themselves and their capacities through work); *see also* C. EPSTEIN, WOMEN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS (1970). For criticism of the centrality of middle class concerns within the women's movement, see B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

254. Interview with Lillian Kozak, lobbyist for New York chapter of the National Organization for Women (June 1985) [hereinafter Interview].

255. *See, e.g.*, COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION THE STATUS OF WOMEN (1963) (recommending a full reappraisal of marital property rules):

> Marriage is a partnership in which each spouse makes a different but equally important contribution . . . . During marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings as well as in the management of such earnings and property. Such a right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce or death.

Id. at 16; *see* UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 147 (1973) [hereinafter UMDA] (applying notions of partnership). According to Robert Levy,

> [T]he recommendations made in the text are designed to permit the court to recognize what most members of families would recognize—that husband and wife are partners in an enterprise which produces income (the husband's wages), maintains a household and nurtures children (the wife's tasks as housewife and mother).

R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1969) (prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws); *see also id.* at app. B (summary of property division statutes).

It is instructive to contrast these conceptualizations with the view of partnership in the commercial context. The latter relies upon notions of equal contribution, risk, and benefit, and is characterized by equal obligations, rights to possession of property, free entry and exit, and equal rights to a return of contribution upon dissolution with equal division of profits and losses regardless of the form or amount of the contributions. N.Y. PARTNERSHIP LAW art. 4 § 40 (McKinney 1988) (rules determining rights and duties of partners); *id.* at art. 6 § 71 (rules for distribution); *see also* Bayer v. Bayer, 215 A.D. 454, 214 N.Y.S. 322 (1st Dep't 1926) (partnership-at-will dissolved at the moment when either of the partners expresses an intent not to continue longer.); Application of Lester, 87 Misc. 2d 717, 386 N.Y.S.2d 509 (Sup. Ct. 1976) ("A partnership is fiduciary in character. . . . Where one partner takes on the role of a 'manager' or 'director' of a partnership his obligation to deal fairly and openly and disclose completely is heightened.").

256. Prior to the enactment of the 1980 Equitable Distribution Law, New York was one of the

ued to confront the traditional common law, strict title, divorce distribution rule.[257]

In 1971, the Women's Strike for Equality Coalition (a New York group composed of a broad base of women's organizations) added to its priority list the need for legislation creating more equitable divorce settlements.[258] The group was aided by widespread recognition in legal and legislative circles that major problems existed in New York divorce law. More specifically, criticisms were made regarding the fairness of marital

six "title" states in which marital property was limited to jointly owned property, unless a constructive trust could be imposed to prevent unjust enrichment. Act of July 19, 1980, ch. 281, 1980 N.Y. Laws 1225. Pennsylvania left this group just before New York on Apr. 2, 1980 when its equitable distribution statute was signed into law. PA. STAT. ANN. tit. 23 § 102(a)(6) & 401 (Purdon Supp. 1986). Only Florida, Mississippi, South Carolina, Virginia, and West Virginia remained in the strict title category. Of this group, the latter three have passed equitable distribution statutes: S.C. CODE ANN. § 20-7-471 (Supp. 1986); VA. CODE ANN. § 20-107.1 (1982); W. VA. CODE § 48-2-1 & 48-2-32 (Supp. 1984). Florida has no statutory provision for dividing marital property; however, by judicial fiat courts can equitably distribute property regardless of how title in such property is held. *See* Canakaris v. Canakaris, 6 Fla. 2296, 382 So. 2d 1197 (1980). Only Mississippi remains a title state but there are doubts as to whether it may truly be considered an exclusively title state. The Mississippi Supreme Court in *Reeves* found the lower court award so low as to shock the conscious of the court. Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982). The state supreme court compensated the wife not only for her economic contributions to the marriage, but also for homemaker services. The court noted that its holding and similar rulings do not make Mississippi a community property state, but "further delineates the serious responsibility of a chancellor to make intelligent and fair provisions for a wife." *Id.* at 1303.

For an overview of the diversity among the states regarding marital property distribution, see Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417 (1988); *see also* Greene, *Comparison of the Property Aspects of Community Property and Common Law Marital Property Systems and Their Relative Compatibility With the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979).

257. Although New York courts could not transfer title prior to the revision of N.Y. DOM. REL. LAW § 236, they were granted some discretionary authority in the distribution of marital property. *See* N.Y. DOM. REL. LAW § 234 (McKinney 1977). The court could (1) determine any question as to the title to property arising between the parties, and (2) make such direction between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. *See* Weseley v. Weseley, 58 A.D.2d 829, 396 N.Y.S.2d 455 (2d Dep't 1977) (exclusive possession of marital residence until children reach age 21 or marry awarded to wife). Moreover, a court using its equitable powers in situations of grave injustice could grant relief in the form of a constructive trust. If the court failed to find fraud or concealment, it would not impose this remedy unless the four elements of a constructive trust were present. Janke v. Janke, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4th Dep't 1975), *aff'd*, 39 N.Y.2d 786, 350 N.E.2d 617, 385 N.Y.S.2d 286 (1976); Liammari v. Liammari, 40 A.D.2d 845, 337 N.Y.S.2d 463 (2d Dep't 1972), *aff'd*, 33 N.Y.2d 572, 301 N.E.2d 432, 347 N.Y.S.2d 448 (1973); *see* Saff v. Saff, 61 A.D.2d 452, 402 N.Y.S.2d 690, 692 (4th Dep't 1978), *appeal dismissed by* 46 N.Y.2d 969, 389 N.E.2d 142, 415 N.Y.S.2d 829 (1979) (for express concern by the court that it was not undertaking the creation of a judicial version of community property law).

258. Representatives from the Coalition met with 20 state legislators to discuss legislation which would accomplish this end. N.Y. Times, Aug. 22, 1971, at 47, col. 1.

property distribution awards based on title, the amount of both alimony and child support awards, and the failure of courts to ensure their payment.

Between 1972, when legislation was introduced proposing revisions in the New York Domestic Relations Law governing the distribution on divorce of marital property,[259] and 1980, when a reform was enacted, marital property reform proposals were introduced in every session of the New York State legislature.[260] The bills were designed to give effect to sharing principles in marriage.[261] They addressed both the objective and normative aspects of a marital relationship.[262] One set of proposals identified such sharing principles with flexible equitable distribution of marital property.[263] Another set of proposals connected sharing principles with a rebuttable presumption of equal distribution of marital

259. Recent Developments, 45 ALB. L. REV. 483 (1981). The original bill proposed by Assemblyman Blumenthal never left committee. It contained a presumption that property of a marriage should be divided equally between divorcing parties unless circumstances dictated otherwise. Foster, *Family Law*, N.Y.L.J., Mar. 8, 1973, at 1.

260. Recent Developments, *supra* note 259, at 483 n.3. The major difference among the bills introduced was the inclusion or absence of a rebuttable presumption of equal distribution. *Id.* at 483 n.2. From 1974 to 1980, most proposed legislation supported equitable distribution, rather than a presumption of equal distribution.

261. *See* Praeger, *Sharing Principles and The Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269 (1981). An express application of the sharing principle is found in NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF EQUITABLE DISTRIBUTION BILL (LAWS 1980, CH. 281), *reprinted in* 11c N.Y. CIV. PRAC. L. & R. app. B-8 (1988) [hereinafter ASSEMBLY MEMORANDUM IN SUPPORT OF EQUITABLE DISTRIBUTION] ("The basic premise for the marital property and alimony (now maintenance) reforms of this legislation (¶ 236) is that modern marriage should be viewed as a partnership of co-equals.").

262. Hollinger uses "objective" to mean the reflection of actual behavior and "normative" as expressing a view of how such relationships ought to be lived. Hollinger, Book Review, 81 MICH. L. REV. 1065, 1077 (1983).

263. The drafters of the flexible equitable distribution bills relied, in part, on the language of the Uniform Marriage and Divorce Act. UMDA § 307, 9A U.L.A. 238 (1973). The UMDA lists two alternatives for the disposition of property. Alternative A provides that a court, making a distribution, should consider the following factors:

> the duration of the marriage, any prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

Id. at § 307.

Alternative B proposes the following guidelines concerning the distribution of marital property:

assets.[264]

By 1974, the proposal for flexible equitable distribution of marital assets had emerged as the viable political compromise.[265] The New York State Assembly passed various versions of this measure between 1976 and 1978. Despite significant public pressure and support for some form of equitable distribution,[266] however, the legislation remained bottled up in the Senate Judiciary Committee, lacking the votes to be reported out until 1980.[267]

> [The Court] shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
>
> (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
>
> (2) value of the property set apart to each spouse;
>
> (3) duration of the marriage; and
>
> (4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

Id. at § 307.

264. "Marital property shall be divided equally between the parties unless the court shall expressly declare that justice and equity require a different division." S.597L, 204th Sess., 1981 N.Y. Laws 300 (introduced by Senator Linda Winikow).

265. "As a matter of politics (that dirty word) there is just no possibility of passing an equality of distribution bill." *Divorce Reform Bills Cause Controversy*, Vesey St. Letter, Apr. 1980, at 3, col. 2 (quoting New York State Assemblymember G. Burrows). "The bill represents an equitable compromise between the equality presumption in the Winikow bill and the status quo." Letter from Alfred H. Blumenthal to Richard A. Brown (July 20, 1979), *reprinted in* BILL JACKET OF THE N.Y. EQUITABLE DISTRIBUTION LAW, 1980 N.Y. Laws ch. 281.

266. In 1978 and 1979, an ad hoc committee of representatives from various bar groups formed a united front to push for enactment of the equitable distribution law. Several groups actively opposed the reform proposals. Both the Family Law Committee of the Brooklyn Bar Association and the National Organization for Women (NOW) raised objections to the extensiveness of judicial discretion provided by the proposed statute. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1 n.1 (1981). The Family Law Committee of the Brooklyn Bar Association maintained

> that there was no need for equitable distribution because the property arrangements determined by title reflected the desire of the parties and that if the social theory of partnership in a marriage was the motivating factor for the legislation, then a community property regime should be adopted to provide advance certainty regarding the rights and obligations of the parties.

Letter from the Family Committee of the Brooklyn Bar Association to Members of the Senate Judiciary Committee (May 13, 1977). Other groups, such as Operation Wake-Up, the Organization of Women's Groups United to Defeat ERA and Defend Existing Rights, and the Committee for Fair Divorce and Alimony Laws opposed any change in the existing divorce law. Recent Developments, *supra* note 259, at 489 n.22.

267. In March 1976, when sponsors introduced the equitable distribution bill in the New York Senate, they were optimistic about the bill's passage. Recent Developments, *supra* note 259, at 483 n.2. The bill was supported by important religious groups and by numerous television, newspaper, and radio commentators, as well as the New York Times and the New York Post. It was endorsed in principle by virtually every major bar association in the state. It was drafted by a bipartisan group of legislators and counsel for both the Senate and Assembly Committees working with legislative draft-

The Supreme Court ruling in *Orr v. Orr*,[268] which declared unconstitutional an Alabama statute providing alimony only to wives, helped to break the legislative impasse. New York's gendered provision for alimony suffered from the same constitutional infirmity.[269] Still, New York could have cured it by substituting the word "spouse" for "wife," thereby

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ing specialists and bar associations. Yet, only five of fifteen members of the Senate Judiciary Committee voted to report the bill out to the full Senate. Smothers, *Fiscal Equity in Divorce Dies in Albany*, N.Y. Times, June 3, 1976 at 1, col. 5; *see also* Recent Developments, *supra* note 259, at 483 n.2. Some concern was expressed that the discretion of judges would be the the law of tyrants (Sen. Abraham Bernstein, Bx.-Demo.).

The pattern was repeated in 1977 when Senate Committee members were reluctant to report out the bill. Some committee members objected to various portions of the bill; others speculated that the passage of the bill would encourage divorce; others worried whether the legislation granted excessive discretionary power to the courts. Gupta, *Legislators Get Opposing Opinions on Proposed Divorce Law Change*, N.Y. Times, Feb. 5, 1977, at 23, col 1; *see also* Dileo & Model, *A Survey of the Law of Property Disposition Upon Divorce in the TriState Area*, 56 ST. JOHN'S L. REV. 219, 221 (1982); Recent Developments, *supra* note 259, at 483 n.2. Arguments in the Senate included claims that the proposals would encourage divorce, judge shopping, a view of marriage as a business contract, and a religious backlash. Smothers, *When a Marriage Breaks Up, Who Gets What?* N.Y. Times, May 29, 1976, at 12, col. 3; Smothers, *Divorce Reforms Gaining in Albany*, N.Y. Times, May 20, 1976, at 1, col. 5. To complicate matters, the Assembly attempted to tie the reporting out of the proposals from the Senate Judiciary Committee to the pending appointment of judges to the New York Court of Appeals.

268. 440 U.S. 268 (1979).

269. A portion of the statute had been unsuccessfully challenged. Steinberg v. Steinberg, 46 A.D.2d 684, 685, 360 N.Y.S.2d 75, 76 (2d Dep't 1974) (statutory classification on the basis of sex has a rational basis); Trask v. Trask, 85 Misc. 2d 980, 982, 381 N.Y.S.2d 584, 584 (Sup. Ct. 1976) (gender-based statute reflected legislature's judgment that classification is reasonable). *But see* Thaler v. Thaler, 89 Misc. 2d 315, 318, 391 N.Y.S.2d 331, 340 (Sup. Ct. 1977), *rev'd on other grounds*, 58 A.D.2d 890, 396 N.Y.S.2d 815 (1977) (statutory provision facially violative of equal protection, but construed to be gender neutral). In *Thaler*, the court noted that

> the movement to raise the consciousness of women to an appreciation of their true rights and their potential as functioning individuals has been distinctive and is comprehensive. Interestingly, part of the thrust of its intellectual vanguard has been the assertion that the liberation of women implicitly carries with it the liberation of men. The apparent theory is that feminine emancipation eases the pressures on men to fulfill idealized and artificially imposed roles of masculine capability and expectation. It would appear that prohibitions against sexual discrimination mean what they say. You may not lawfully discriminate against women, but by the same token, you may not discriminate against men either. The edge of sex discrimination has two sides. And, there is more to it than that. Philosophically, a benevolent grant to women of legal rights unreasonably denied to men may help the women immediately affected but the implicit condescension and maintenance of a protective stance in the end produces the attitude that somehow women are not equal to men. The plain language of the streets is that in the long run "women will not have it both ways."

Id. at 316-17, 391 N.Y.S.2d at 33; *see also* Lissner, *Payment of Alimony by Women Proposed by Legislative Panel*, N.Y. Times, Dec. 9, 1967, at 43, col. 4. The Joint Legislative Committee on Matrimonial and Family Law stated that women should be liable for alimony: "Equality under the law of women has reached such a level that there is and should be an equal obligation to share their means when one encounters misfortune."

creating a system of bilateral alimony.[270] But the pressing need to revise the alimony section of the Domestic Relations Law accelerated the drive for a more extensive reform than *Orr* required. In turn, this pressure created the possibility for greater legislative compromise.

The substantive issue informing the compromise regarding alimony was clear: how much would divorcing wives be awarded? Provision for gender neutral alimony, while remedying a legal deficiency, would, in fact, be of little benefit to husbands. The more significant benefit would accrue from legislative intent indicating a shift in emphasis from long-term or permanent alimony to short-term maintenance aimed at assisting or providing an incentive for a homemaker spouse to "rehabilitate" herself.[271] Such legislative intent would be a signal to judges to curtail alimony awards and to attorneys representing wives not to rely on alimony as a bargaining chip. In return for the statutory shift in alimony, title would be eliminated as the crucial factor in the division and distribution of marital assets.[272]

Legislators supporting the equitable distribution compromise argued

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270. *See* N.Y. GEN. OBLIG. LAW § 5-311 (McKinney Supp. 1980); *see also* Greschler v. Greschler, 71 A.D.2d 322, 422 N.Y.S.2d 718 (2d Dep't 1979), *modified by* 51 N.Y.2d 368, 434 N.Y.S.2d 194, 414 N.E.2d 694 (1980) (former section 5-311 violative of equal protection because wife had sufficient means to contribute to the support of husband on welfare).

271. An Assembly memorandum elaborates on the role of rehabilitative alimony:

> The objective of the maintenance provision is to award the recipient spouse an opportunity to achieve independence. However, in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and homemaker, "maintenance" on a permanent basis may be necessary. In recognition of these facts the non-monetary contribution of a spouse is a factor for consideration.

ASSEMBLY MEMORANDUM IN SUPPORT OF EQUITABLE DISTRIBUTION, *supra* note 261, at app. B-8; *see, e.g.*, Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. 1975) (New York trial court justified the use of "rehabilitative" alimony by finding that the wife had a duty to mitigate the economic damages caused by the marriage and that the husband should subsidize her in her efforts to mitigate).

Concern for coercion in the drafting of prenuptial agreements regarding alimony led to the inclusion of a remedial provision when the terms of the agreement are found unreasonable or unconscionable. Act of June 19, 1982, ch. 281, § 7, 1980 N.Y. Laws 1225, 1227-32 (amending N.Y. DOM. REL LAW § 236 (1977) by the addition of paragraph (B)(3)).

272. *Hearings on S.6174, A.6200 Before the Joint N.Y. State Senate & Assembly Committees* (Mar. 4, 1980) (testimony of Lillian Kozak, chair, Marriage & Divorce Task Force, NOW/NYS) [hereinafter Kozak Testimony]. Kozak explained:

> Mr. Burrows. . .told us that this bill was never intended for the $400-$500 a week wage earner. I then asked Mr. Burrows, "Why, then, did you provide that alimony be awarded for a limited period of time when that provision will be most harmful to just those families?" And Mr. Burrows replied, "Don't you see? That was the trade off."

Id. at 3; *see also* Brown, *The Uncertain Duration of Rehabilitation Alimony*, FAIRSHARE, Aug. 1984, at 5.

that wives would fare better under the reform than under the status quo. Under the reform, wives surrendered the possibility of long term or permanent alimony for an immediate equitable share of marital assets as determined by a judge or negotiated by attorneys. Presented as a trade, the reform package involved problematic choices, especially for women working in the home as homemakers.

Nothwithstanding the emphasis on factors other than title in determining a property settlement, the new flexible property distribution scheme[273] identified homemaker contribution as only one of a number of unprioritized factors to be considered in distributing marital property. Moreover, reliance on equitable distribution only of marital property[274] could provide a windfall for a wage earning spouse whose separate property had appreciated as a result of the contribution of a homemaker spouse. Given prior history, reliance on alimony was unsound. Alimony was awarded far less frequently prior to 1980 than popular culture or the statute suggested. Arrearages were significant. Court awards or settlements were largely unenforced. Yet, symbolically, alimony was important. It articulated societal recognition of a homemaker's contribution and status as well as her vulnerability. On the other hand, in marriages where present and future wage earning capacity was the significant asset in the marriage, alimony theoretically was a greater possible benefit than a modest property settlement.

At bottom, the political compromise revealed the centrality of the sex/gender system as inextricably bound up with the property distribution aspects of divorce law reform. Ostensibly the issue was: what is fair for divorced women? At another level the question was: what could prevent women, especially homemakers, from "getting too much?" The evaluation of a wife's contribution was key; left untouched and undiscussed was the evaluation of a husband's contribution—presumably an

273. Marital property is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part." Act of June 19, 1980, ch. 281 § 9, 1980 N.Y. Laws 1225, 1227-1232 (amending N.Y. DOM. REL. LAW § 236 (1977). *See* Pincus, *How Equitable Is New York's Equitable Distribution Law?* 14 COLUM. HUM. RTS. L. REV. 433 (1982-83) (for the argument that the most significant characteristic of the new law is its flexibility).

274. *See* Act of June 19, 1980, ch. 281 § 9(6) 1980 N.Y. Laws 1225, 1229 (any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party).

income, in all likelihood a higher one, than his spouse's. The referent in the reform was undeniably male.

In 1980 an equitable distribution bill containing the viable political compromise was reintroduced in both houses of the New York State legislature. Negotiations between the Assembly and Senate produced agreement regarding the passage of the proposed bill. In their respective chambers, however, Senator Linda Winikow and Assemblywoman May Newburger reintroduced a proposal for a rebuttable presumption of equal distribution. Formally, the ensuing fierce battle[275] appeared to be concerned with the desired degree of judicial discretion in property distribution. In fact, "Everybody [was] putting himself or herself in the shoes of those faced with a divorce action."[276] On June 3, 1980, the New York Senate, following the lead of the Assembly, defeated the presumption of equal distribution and passed the equitable distribution proposal.[277]

Thus two statutory provisions, strict title which was almost 200 years old and sex specific alimony which was 167 years old, were superseded by legislation identified with contemporary norms of fairness. The goals of the legislation were twofold: the elimination of unconstitutional sex discrimination[278] and the reform of New York alimony and marital property law. Marriage was to be viewed as a partnership, which supporters of the reform noted was not fully recognized under existing New York domestic relations law.[279]

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275. N.Y. Times, Mar. 9, 1980, at 24, col 3; *see also* Recent Developments, *supra* note 259, at 483 n.3. Many of Winikow's supporters preferred no reform to passage of the equitable distribution bill without the presumption. *See* N.Y. STATE SEN. REC. 3997 (1980); *see also* Recent Developments, *supra* note 259, at 489 n.21.

276. N.Y. Times, May 30, 1980, at 22, col. 1.

277. *See* N.Y. STATE SEN. REC., *supra* note 275. "The characterization of marital property is exclusively for dissolution of a marriage. There has been no change in Estates, Powers and Trust Law; for testamentary and inheritance purposes, separate and jointly owned property is treated the same as before the enactment of equitable distribution." Freed & Foster, *Family Law*, 32 SYRACUSE L. REV. 335, 342 (1981).

278. But note the Times editorial which characterized the bill as a half reform. New York Times, *supra* note 275 ("Equitable distribution does not erase the bias against women in contested divorces."); *see also* Memorandum from Lillian Kozak, chair, Marriage & Divorce Task Force, NOW/NYS to New York State Legislators Barclay & Burrows in Opposition to S.6174/A.6200 (May 6, 1980) (on file with author) (for concerns that the proposed equitable distribution reform would not address the economic plight of divorced women).

279. *See* Governor's Memorandum On Approval of ch. 281, *Husband and Wife—Equal Treatment In Support Obligations, Matrimonial Actions, reprinted in* 1980 N.Y. Laws 1863 (McKinney 1980) (which views the marital union as an "economic partnership"); *see also* G. BURROWS, ASSEMBLY MEMORANDUM, *reprinted in* 1980 N.Y. LEGIS. ANN. 129, 130. The term has been the subject of judicial confusion. O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985),

B. *The Language of Reform: Gendered and Degendered Levels*

Divorce law reform, as well as divorce itself, is a prime example of gender conflict marked by disproportionate systemic aggregations of power and advantage along sex/gender lines. The deeply gendered structure of family is neither eliminated nor submerged in public policy debates and policy formulations involving divorce law reform. More particularly, since dissolution and reorganization of family involve resource allocation, the struggle in the legislature or the courts regarding such allocation inevitably focuses on contending assumptions regarding gendered contributions to family.

During the New York divorce law reform debates of the 1970s, it was clear that the rules for distribution of assets had serious economic consequences for women. Gendered social and cultural issues appeared in the reassuring legal garb of gender neutral terms. They were said to refer neither to women nor to men. But, given the nature of heterosexual marriage, they referred inextricably to both women and men. Ultimately,

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illustrates this point most clearly. The memorandum accompanying the 1980 reform signed by the Assembly, Senate, and Governor stated:

> the basic premise for this marital property and alimony (now maintenance) reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should not rest on the economic basis of reasonable needs and the ability to pay. From this point of view, the contributions of each partner should ordinarily be regarded as equal and there should be an equal division of family assets unless such divisions would be inequitable under the circumstances of the particular case.

ASSEMBLY MEMORANDUM IN SUPPORT OF EQUITABLE DISTRIBUTION, *supra* note 261, at app. B-8; *see also* N.Y.L.J., Mar. 4, 1986, at 2, col. 6. On July 1, 1980, this memorandum was amended by Assemblyman Burrows. G. BURROWS, ASSEMBLY NEMORANDUM, *reprinted* in 1980 N.Y. LEGIS. ANN. 129-30. The amended memorandum deleted all references to a presumption of equality. It states, "The basic premise . . . is that modern marriage should be viewed as a partnership. Upon dissolution of a marriage there should an equitable distribution of all family assets accumulated during the marriage." The amended memorandum appears in full in 11c N.Y. CIV. PRAC. L & R. app. B1. This latter memorandum was not widely circulated, and the slip opinion in *O'Brien* relied on the original memorandum, stating: "Equitable Distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker and that these respective contributions should ordinarily be regarded as equal." N.Y.L.J., Dec. 30, 1985, at 4 (quoting *O'Brien* slip op.); *see also* J. Casilio, *O'Brien v. O'Brien*, New York Property Distribution and the Complete Collapse of the Co-Equal Spouse Doctrine (student paper, SUNY at Buffalo Law School, on file with the author).

This dictum was widely circulated and interpreted as supportive of the court's liberal philosophy regarding marriage until the court was informed that the improper memorandum was cited. The corrected version of the opinion was published in it's official reprinting, 66 N.Y.2d 576 (1985), with all cites to the original memorandum changed to the amended memorandum with its different theory. J. Casilio, *supra*, at 22.

they were connected to distinctive gendered assumptions for women and men as wives and husbands.

Two major issues said to be separate or at least separable were, in fact, inextricably linked. One issue concerned reform of the rules for the distribution of property designated as marital at divorce. The other issue focused on the role of alimony in a proposed marital property dissolution reform. Facially, they involved an assessment of the contribution of each party to the marriage. In fact, they became an assessment of a woman's contribution to a marriage.

During the 1970s the marital property distribution debate focused on the choice between alternative rules: equitable distribution or a presumption of equal distribution. Both rules shared a common feature: the setting aside of New York's common law, strict title, marital property rule at divorce. Both rules, like strict title, were facially gender neutral. Consequently, it appeared that both would structure gender neutral marital property distributions.

Beyond these commonalities, each legal rule was said to embody a distinctive philosophical/jurisprudential approach to distributive justice[280] at marital dissolution. The language of one spoke to judicial discretion on the determination of distribution, while the terms of the other spoke to an equalitarian partnership at divorce through a significant curtailment of judicial discretion. But what appears at first reading as abstract legal difference may, on further analysis, reveal predictable similarities. Reforms which seem to be different may be committed to

280. *See* J. HOCHSCHILD, WHAT'S FAIR: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE (1981) (discussing various theories of distributive justice: strict equality, proportional investments or results, and ascription); *see also* M. DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL PSYCHOLOGICAL PERSPECTIVE (1985); Deutsch, *Equity, Equality and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?* 131 J. SOC. ISSUES 137-50 (1975) (discussing differing predominant values of distributive justice-based on type of relational context, *e.g.* family, friendship, or competitive). While Deutsch's work is a critique of the development of equity theory through social psychology experiments, which rely on questionable assumptions regarding human behavior, his comments have a wider applicability. Deutsch argues that equity theory assumes a common currency underlying diverse rewards and costs. It assumes that it makes no difference how one is rewarded but rather only how much and that equitable rewards increase productivity. Equity theory is premised on a set of cognitive assumptions identified with economic rationality which presumes sufficiently accurate knowledge of self and the others with whom there is an exchange relationship so that an accurate appraisal of the parties' interests and contributions to their relationship can be made. Moreover, equity theory assumes a universal value underlying systems of distributive justice: that outcomes should be distributed among individuals in proportion to their inputs or contributions. *Id.* at 25-29.

For a discussion of the relationship between capitalism and various principles of equity, see E. SAMPSON, JUSTICE AND THE CRITIQUE OF PURE PSYCHOLOGY (1983).

the same values.[281]

Proponents of equitable distribution began with the prima facie assumption that people legitimately may make varying claims on resources based on their differing life situations. Equity requires that each claim receive an individualized determination on the merits.[282] Like other life situations, each marriage situation was said to be different.[283] From this assumption of differences among marriages, it followed that marital property ought not be divided according to a preconceived or designated formula. But the nature of these differences and, more importantly, the legal significance to be attached to them for the distribution of marital property, were not specified. Rather, a set of unprioritized factors which presumably identified a range of differences were included in the reform as statutory guidelines to assist judges in rendering awards or parties in negotiating a settlement.[284]

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281. I am indebted to Martha Fineman for this observation.

282. *See* Major, *Gender, Justice, and the Psychology of Entitlement*, in 7 SEX AND GENDER, REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 124 (P. Shaver & C. Hendrick eds. 1987).

283. During the Senate floor debate on June 3, 1980, Senator May B. Goodhue, a supporter of equitable distribution, summed up the opposition to the presumption of equality with the comment: "If there was no difference in the various marriages around this state, then we should have equal distribution, but I suggest to you that there are not two marriages alike." Recent Developments, *supra* note 259, at 488 n.20 (quoting N.Y. SEN. REC., June 3, 1980, at 4061).

284. N.Y. DOM. REL. LAW § 236(B)(5)(d)(1)-(10) (McKinney 1977 & Supp. 1985). These ten factors are:

> (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
>
> (2) the duration of the marriage and the age and health of both parties;
>
> (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
>
> (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
>
> (5) any award of maintenance under the Act;
>
> (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
>
> (7) the liquid or non-liquid character of all marital property;
>
> (8) the probable future financial circumstances of each party;
>
> (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic claim or interference by the other party;
>
> (10) any other factor which the court shall expressly find to be just and proper.

It should be noted that the factors are not prioritized or weighted. The tenth factor, known as the "wild card," allows marital fault to be considered in property distribution. In 1986 § 236(b)(5)(d) was amended to add subsection (10)—the tax consequences of each party; (11) the wasteful dissipation of assets by either spouse; (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration and to redesignate former subsection (10) as subsection

Support for the reform rested on a belief that it would provide equal access for both parties, the opportunity to present the case for their interests, and equitable consideration of those interests. That the context was one of broad, systemic, social and economic inequality[285] was downplayed or ignored. The claim of partisans of equitable distribution was said to possess symbolic intuitive appeal. At bottom, however, what was designated as intuitive coincided with the ideological presumption of respect for the private ordering of a marital relationship.

Equitable distribution was identified as the tempering of harsh or unjust outcomes under common law strict title. Whereas the common law spoke to form through title, equitable distribution spoke to substance by reviewing the contributions of both spouses to a marriage. The reform's ambiguities and elusiveness were presented as the embodiment of flexibility. In turn, flexibility was said to be likely to lead to fair dissolution outcomes.[286] Judges and attorneys could tailor the distributional outcomes situationally or, in other words, constrict appropriate division of property for different marriages.

The beauty of equitable distribution for reform-coalition purposes was that it could be interpreted to please a wide range of constituents. For persons concerned with the implementation of sharing principles, the reform invoked sharing and partnership.[287] For persons concerned with the need to bring economic fairness into traditional marriages, the reform listed in the statutory guidelines a homemaker's nonmonetary contributions to a marriage, such as nonmonetary contributions to the career or career potential of the other spouse.[288] For persons troubled by the possibility of a windfall award to one spouse, the reform included the duration of marriage in the statutory guidelines.[289] For persons concerned with

(13). Act of Sept. 1, 1986, ch. 884, 1986 N.Y. Laws 2172 (codified as amended at N.Y. DOM. REL LAW § 236(b)(5)(d)(1)-(13) (McKinney 1988). All references to this subdivision will be prior to its 1986 changes unless otherwise noted. Lord v. Lord, 124 A.D.2d 930, 508 N.Y.S.2d 676 (3d Dep't 1986); Melnik v. Melnik, 118 A.D. 2d 902, 499 N.Y.S.2d 470 (3d Dep't 1986); Wilbur v. Wilbur, 116 A.D.2d 953, 498 N.Y.S.2d 525 (3d Dep't 1986), *appeal after remand*, 130 A.D.2d 853, 515 N.Y.S.2d 636 (3d Dep't 1987); Pacifico v. Pacifico, 101 A.D.2d 709, 475 N.Y.S.2d 952 (4th Dep't 1984); *see also supra* note 214.

285. *See* J. FISHKIN, JUSTICE EQUAL OPPORTUNITY AND THE FAMILY 47-51 (1983).

286. *But see* Kozak Testimony, *supra* note 272, at 2 (quoting N. SHERESKY, UNCOUPLING 14 (1973) ("Judges are harried and unpredictable. Their decisions reflect their own experiences in marriage. Judges in different courts and different judges in the same court very often render entirely disparate decisions on almost identical sets of facts.").

287. *See* Comment, *supra* note 261, at 1308.

288. N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1977 & Supp. 1985); *see also supra* note 284 (providing text of statute).

289. N.Y. DOM. REL. LAW § 236(b)(5)(d)(2) (McKinney 1977 & Supp. 1985).

foregone opportunity costs, the reform was sufficiently flexible to consider the years of each spouse under the catchall final factor in the statutory guidelines.[290] For persons preferring that the parties and the bench develop a mindset favoring (if not implicitly presuming) a fifty/fifty distribution, supporters could point to the guidance offered by the Uniform Marriage and Divorce Act; it indicated the policy underlying equitable distribution "is that the distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."[291]

Equitable distribution was framed to appeal to all and to appeal in gender neutral language. Nevertheless, it could not escape a paradox. Equitable distribution was identified as a facially gender neutral rule which allowed for recognition and reward of a broad range of claims of contribution to a marriage. But marriage itself is a gendered structure and divorce is gendered conflict. Appearance notwithstanding, gender neutral equitable distribution could not be other than contextually gendered.

For many feminists, the rebuttable presumption of equal distribution was a far more attractive reform proposal. Unlike the sex-based discriminatory presumptions which courts had struck down as violative of the fourteenth amendment, the rebuttable presumption of equal distribution was consistent with the emerging trend in constitutional law aimed at institutionalizing gender-free norms of equality and justice.

Identifying and balancing the different aspects of equality has been and is a significant ongoing component of American political and jurisprudential discourse. The complexity of the discourse reveals the ambivalent nature of equality in the United States. While the principle of equality starts from a prime facie assumption that all people may legitimately make the same claims on resources and requires that differences in treatment be justified, that principle is compromised by a commitment to the market economy which creates wide disparities in income, a feeble government commitment to welfare, especially redistribution, and a long history of race and sex inequality. Moreover, Americans distinguish spheres in which equality claims are cognizable; culturally, there is a stronger taste for political than economic equality.[292]

290. *See id.* § 236(B)(5)(d)(10).

291. UMDA § 307 n.93, 9A U.L.A. 238 (1973).

292. S. VERBA & G. ORREN, EQUALITY IN AMERICA: THE VIEW FROM THE TOP 2 (1985); *see id.* at 10 (comparative analysis of government commitment to policies fostering economic equality); *id.* at 148-80 (data indicating widespread acceptance of significant income inequality); *see also* D. RAE, EQUALITIES 64-81 (1981) (equal opportunity can be distinguished from equal results); Scharr, *Equality of Opportunity and Beyond*, in EQUALITY 228 (J. Pennock & J. Chapman eds. 1967) (dis-

Such equality norms could be made palatable because they were identified with liberal ideology and jurisprudence which sought to create and reinforce an abstract representation of an individual without sex or gender participating in a society committed to formal equality. Symbolically, the equal distribution presumption was said to constitute significant, meaningful, legal recognition of marriage as a partnership.[293] Marriage was presumed to be a partnership of contributors who were economic equals, at least for property distribution purposes.[294]

Of course, new marital property distribution rules could neither remedy the entire range of inequalities generated by gender-based role differentiation nor reform deeply rooted cultural patterns. The harsh social realities are likely to be that a married woman's role is horizontally diffuse because women, including married women, work both inside and outside the home in low wage, sex-stereotyped jobs[295] which cross class, race, and in many cases, age cohort lines, and that women's work outside the home is hierarchically defined by men.[296]

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cussion of the distinguishability and inconsistency of opportunity and results). Once heralded as a "weapon for changing a vast social system, the principle of equality of opportunity, is now seen as leading to a new hierarchy . . ." Bell, *On Meritocracy and Equality*, 1972 PUB. INTEREST 40 (Fall). Dissatisfaction with the outcomes of the equality of opportunity principle has encouraged demands for the reduction of all inequality or the creation of equality of result. *Id.* at 46-48. For an explication of the equality issue in the divorce law reform context, see Fineman, *supra* note 5, at 789.

293. The rebuttable presumption of equal distribution, tagged as suspect by some because it appeared to incorporate a rule identified with community property, was in fact a far cry from such a system. Unlike the community property system in which the non-acquiring spouse has a vested present interest in one half of the marital property, the proposed New York reform did not address either issue of ownership during the marriage or the issue of management and control of marital property. In effect a non-acquiring spouse's interest in any property remained an inchoate expectancy until divorce from the property acquiring spouse.

294. *See* Mario Cuomo's 1985 State of the State Message at 52, *reprinted* in *Joint Public Hearings on N.Y. Equitable Distribution Law (Dom. Rel. Law § 236) Hearing Before the New York State Assembly* (Mar. 6 & 15, 1985) [hereinafter *Joint Public Hearings on Equitable Distribution* (app. C to statement of Judith Avner, Ass. Dir. of N.Y. State Div. for Women); *see also* Statement in Support of a Presumption of Equality in the Distribution of Marital Assets by D. Sassower, in connnection with Women's Lobby Day Convocation Albany, N.Y. (May 6, 1980), at 5, *cited in* Recent Developments, *supra* note 259, at 488 n.21.

295. Despite the changes of recent years, the U.S. labor market is still largely segregated by sex. *See* NATIONAL COMMITTEE ON PAY EQUITY, THE WAGE GAP: MYTH AND FACTS (1982). In 1982, 50% of employed women worked in only 20 occupations, out of the 427 occupations detailed by the U.S. Dept. of Labor. More than half of all employed women worked in occupations which were 75% female and 22% of employed women were in jobs that were more than 95% female. *See Experts Say Job Bias Against Women Persists*, N.Y. Times, Nov. 25, 1984, at A1, col. 2. The article notes that women still account for 99% of secretaries, 97% of typists, and 96% of all registered nurses.

296. *See generally* Z. EISENSTEIN, *supra* note 24. Eisenstein argues that the priorities of patriarchy, as a system of power, are to keep the choices limited for women so that their role as mother remains primary. "The capitalist need for women workers has developed along with the not always

Notwithstanding these realities, the new rules could be more or less consistent with the contemporary struggle to encourage images and norms of formal, if not substantive, equality for women and men as individuals in families. At the moment of divorce, the marriage relationship could be recast and presumed to be a partnership involving equal reciprocity, obligation, investment, and risk taking. The assertion and implementation of notions of equality were thought to possess the potential for relieving the harsh consequences attendant upon the economic vulnerability of the overwhelming preponderance of married women. Equal distribution of marital assets might mitigate married women's economic vulnerability and dependence.

The position of the rebuttable presumption proponents was informed by a bitter historical legacy of gendered arguments, discussions, and negotiations. Their focus was on alimony, more particularly on an assessment of the nonmonetary contribution of a wife who worked in the home. Such contributions often were deemed invisible or were downgraded. The economic contribution of a husband as head of household and, in middle class households the primary if not the sole wage earner, was culturally acknowledged, identifiable in monetary terms, and rarely subject to evaluative scrutiny. It was said that the rebuttable presumption would eliminate the gendered, differential evaluation of contributions to a marriage depending on whether work was inside or outside the home and hence eliminate the possible gender-based disparities in the distribution of assets.

Proponents of the rebuttable equal distribution presumption also identified instrumental arguments which supported their position. The presumption was touted as a means to decrease court loads and unclog dockets by facilitating settlements.[297] Since public policy endorsed the recognition of equal contribution, a challenger to the policy would assume a substantial burden of proof.[298] Yet, by its rebuttability, the pre-

successful attempt to protect the system of patriarchal hierarchy through the sexual segregation of the labor force. Women have been relegated to the low-productivity sector of the market and their pay is unequal to men's even when the work is of the same or of comparable worth." *Id.* at 51.

297. A supporter of Winikow's presumption of equal distribution bill noted that "private settlements would mirror the pattern of the courts—anything other than a 50-50 arrangement would bring a threat of court action by the aggrieved partner." *Divorce New York-Style*, N.Y. Times, May 30, 1980 at A22, col. 1; *see also Legislating Fairness into Divorce Law*, Newsday, May 12, 1980.

298. Equal presumption partisans suggested that the equitable distribution bill would produce results paralleling those in Connecticut and New Jersey, where equitable distribution laws resulted in women receiving one third less of the assets of the marriage. *See* STATE OF CONNECTICUT PERMANENT COMMISSION ON THE STATUS OF WOMEN, MARITAL DISSOLUTION: THE ECONOMIC IMPACT ON CONNECTICUT MEN AND WOMEN (Nov. 1979) [hereinafter MARITAL DISSOLUTION: THE ECO-

sumption was said to permit flexibility and fairness in the interpretation of the law for exceptional cases.[299] Equal distribution recognized marriage as a gendered institution and divorce as a gendered conflict. It attempted to contain the gendered aspects of the conflict to avoid specific disadvantageous outcomes for women.

Significantly less discussion was focused on existing statutory provisions for alimony and its role in divorce settlements and court awards. Nevertheless, the subject of alimony was not without a long history in New York.[300] Consequently, members of the legislature were informed in their considerations by two related perspectives. One perspective, the traditional one, connected an evaluation of marital conduct to worthiness for alimony.[301] The other perspective considered it unjust to allow a dependent or economically vulnerable spouse's misconduct to serve as a complete bar to alimony regardless of such considerations as age, health, contributions to or the duration of a marriage. Rather than surrender the evaluation of marital conduct as a threshold determination of worthiness for alimony in litigated cases, the reform statute provided for continued judicial discretion in alimony awards.

Unstructured judicial discretion regarding the threshold determination of worthiness for alimony was not paralleled by unstructured discretion regarding the amount and term of an alimony award. The 1980 reform contained language taken from the pre-1980 statute:[302] a general standard of reasonable need in such amount as justice requires, having regard for the circumstances of the case and of the respective parties. The general standard was supplemented by a list of ostensibly gender neutral factors to assist the bench in the determining the amount and term of a maintenance award and the bar in negotiating an alimony settlement.[303]

Despite the facial gender neutrality of the 1980 provisions, it was apparent that the discussions of alimony were informed by, filtered through, and grounded in gendered cultural norms.[304] Historically, the

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NOMIC IMPACT]; *see also* Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 69 n.2 (1980).

299. The burden of proving the exception ought to rest with the party claiming it. N.Y. Times, Feb. 8, 1980, at A31, col. 2.

300. *See supra* notes 205-28 and accompanying text.

301. *See supra* notes 219-20 and accompanying text.

302. N.Y. DOM. REL. LAW § 236 (historical note on 1980 amendments) (McKinney 1986).

303. *See* N.Y. DOM. REL. LAW § 236(B)(6)(a)(1-10) (McKinney 1977 & Supp. 1985).

304. Ideas cannot be independent of the culture, though they may be critical, resistant or rebellious. They are in tension with, but not independent of, stereotypical images. M. FRYE, *supra* note 21, at xii; *see* S. GILMAN, DIFFERENCE & PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 15 (1985) ("We all create images of things we fear or glorify. These images never remain

origins of alimony, like those of access to and distribution of marital property, connected gender with status. Despite the technical severance of property, gender, and status which occurred with the nineteenth century development of married women's separate legal identity, alimony remained a prime example of a gendered category. Married women were the ones who were dependent and vulnerable in a male dominated legal and economic system. Gender remained the predictor of alimony.

Cultural responses to such gendered dependence and vulnerability are ambiguous. On the one hand, at least some gendered dependency is viewed as desirable. It reinforces the privileged position of men in a most flattering manner. On the other hand, dependency (especially at divorce) is reformulated as maladaptive. Women's dependence and vulnerability becomes men's financial burden. For women, it can assume paralyzing dimensions characterized by fear or ambivalence regarding change in or loss of dependent status.[305]

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abstractions; we understand them as real world entities."); *see also* P. BERGER & B. BERGER, THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND (1983) (analyzing family as an ideological battleground).

305. Lerner, *Female Dependency in Context: Some Theoretical and Technical Considerations*, 53 AM. J. ORTHO. PSYCHIATRY 697-99 (Oct. 1983). Lerner maintains that psychology has failed to take into account the structural or contextual factors which evoke women's dependent behavior, has maintained a dignified fraternal silence regarding the obvious facts that men have dependency needs (the fulfilling of which has been a role assigned to women), and has failed to appreciate the protective and systems-maintaining function for significant others of women's displays of passive-dependency.

> Our gender arrangements as well as our very definitions of "femininity" contain an important metacommunication which remains an unconscious guiding rule for many women. The message is that *the weaker sex must protect the stronger sex from recognizing the strength of the weaker sex lest the stronger sex feel weakened by the strength of the weaker sex.*

Id. at 700-01.

See P. CAPLAN, THE MYTH OF WOMEN'S MASOCHISM (1985) (mislabeling as a masochistic personality disorder much of women's learned behavior, especially being nurturant and self-denying); *see also* Willis, *The Politics of Dependency*, Ms. July/Aug. 1982, at 181. "If women are coerced into submission by a variety of social pressures, they are also lured into acquiescence with the promise (however illusory) of a compensatory reward: the right to abdicate responsibility for their fate and enjoy a childlike security." *Id.* A gloss on this theme also emerges in conservative women's opposition to ERA. These women identify claims to individual rights as selfish because they destroy traditional family relationships and thereby lead to the abandonment of women. In anti-feminist discourse, gender-based dependency is recast as "freedom." The loss of such dependency becomes equated with anarchy and, ultimately, the destruction of the "right to be a mother." P. SCHAFLY, THE POWER OF POSITIVE WOMEN (1977); *see also* M. DECTER, THE NEW CHASTITY AND OTHER ARGUMENTS AGAINST WOMEN'S LIBERATION (1972). Paradoxically, such conservative discourse relies on the prospect of women becoming vulnerable through the passage of feminist-oriented reforms to mask the existing vulnerability of women in the absence of such reforms.

See Newman, *supra* note 231, at 238 (for an analysis of generational differences in perception of financial "dependence" and downward mobility). Depression cohort women viewed alimony as an entitlement for the years they devoted to childrearing and homemaking. Sixties cohort women felt

Alimony viewed as gendered dependency resurrects and relies on the cultural theme of good girl/bad girl—one signifying virtue, the other indulgence.[306] Popular culture insists that the good girl be rewarded or at least not punished and that the bad girl suffer or renounce her ways. A particular version of this cultural theme emerged in the relationship between alimony and the evaluation of homemakers' lives. Women as homemakers were either deserving or undeserving.

The image of the deserving wife embodying culturally acknowledged virtue was the innocent, selfless homemaker. At divorce she was punished by the application of the harsh, but ostensibly gender neutral, common law of strict title for division of marital property. Possibly because she lacked interest in or understanding of financial matters, or was preoccupied with her societally approved role of nurturer, this homemaker may have failed to insist that her name be put as co-owner on any property or assets acquired during the marriage. Despite the purity or nobility of her motives, her deserts might be poverty. Cast as a victim,[307] she was worthy and helpless. She challenged none of the popularly approved images of lifestyle for married women. She had fulfilled the gendered requirement that she uphold the social fabric by caring and self-sacrifice. At divorce, that caring was devalued. In fact, as worthy victim, she constituted proof of the dependence of women on their husbands.

The mirror image of the deserving wife was the undeserving embittered "alimony drone."[308] She viewed alimony as a right, a permanent

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almost as angry about their need to remain dependent on their former husband's financial resources as with late or partial payment (viewed as an attempt to interfere in their post divorce lives and described in terms of a discourse of control and an extension of unequal power relations).

306. The good/bad girl theme is paralleled by the notion that boys will be boys. *See* Peterson v. Widule, 157 Wis. 641, 147 N.W. 966 (1914) (upholding a requirement that only men submit to test for venereal disease before issuance of marriage license). The court felt it was clearly within the police power of the state to protect the "pure" women from men who had been participating in "illicit sexual relations before marriage." Apparently, to require women to take the test would be to admit that they too were participating in "illicit sexual relations before marriage."

307. "The concept of woman as victims has its roots in early nineteenth century abolitionism." Fineman, *supra* note 5, at 814. Fineman discusses the image of woman as victim embodied in Wisconsin's divorce reform statute. "The victim image . . . depicts a woman who has sacrificed her goals and ambitions for the marriage and should be compensated for this sacrifice. *Id.* at 835.

308. The image of the alimony drone was conjured up by Hofstadter and Levittan:

> Alimony was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent young women into an army of alimony drones who neither toil nor spin and become a drain to society and a menace to themselves.

Hofstadter & Levittan, *Alimony—A Reformation*, 7 J. FAM. L. 51, 55 (1967). The authors' categories include the helpless older matron who has no specialized skills and has become accustomed to comfortable living in her suburban home as well as and the greedy younger wife who, regardless of her

entitlement[309] to her former husband's resources to subsidize her aimless activity, uselessness, and lack of imagination. Her prior work in the home, viewed as integral to heterosexual nuclear family life, was recast as meaningless activity should she choose to continue to work in the home and live alone. To thwart her former husband, she might even refuse to remarry and thereby shift her dependence to another male.[310]

To counter the allegation that some alimony awards under the pre-1980 rules were excessively generous to women in amount or in duration, the legislative history of the 1980 reform spoke of limited-term or rehabilitative maintenance as the anticipated norm.[311] The use of the term

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own abilities or resources, depends on her husband as the sole means of support. *See* Doyle v. Doyle, 5 Misc. 2d 4, 7, 158 N.Y.S.2d 909, 912 (Sup. Ct. 1957).

Note that the choice of the term "drone" requires a sex/gender reversal when talking about humans rather than bees.

> Their [drones] only role in the colony is to mate with nubile queens. They are not physically equipped to collect nectar or pollen, nor can they defend the hive, for they have no stingers. . . . Drones are found in bee colonies during the spring and early summer, when the workers regard them with favor. . . . But after the queens have mated the drones are no longer needed, and they are a drain on resources, so when the nectar flow begins to taper off in the summer the workers banish the remaining drones from the hives and they die.

Hubbell, *Annals of Husbandry, The Sweet Bee II*, THE NEW YORKER, May 16, 1988, at 75, 83-84.

(Consider this misogynist description of the problems caused by alimony):

> The present system of alimony, which legally enslaves man through his lower passions, or, as he calls them, love and marriage, builds for the feminist a throne of splendor and power whereon she rules over a society where much female sexual anarchy generally sets in. Soon, if the flood waters of present rampant feminism under its alimony laws are not checked, the entire texture of our social and moral fiber will give way, as it always has in the past in those cultures and civilizations in which women gained dominance.

C. WILNER, *supra* note 220, at xi-xii.

309. Feminist groups such as NOW viewed alimony as an entitlement and did not accept male definitions of alimony as a provision to keep women off the welfare rolls. Interview, *supra* note 254. *See Hearings on S.9076, A.11555 Before the Judiciary Comm. of the N.Y. State Assembly* (Nov. 10, 1976) (statement of Betty Blaisdell Berry). "Allowance puts one in the category of a child. Maintenance sounds as if it were an automobile. Women want the term entitlement used." *Id.* at 3.

310. *See Joint Public Hearings on Equitable Distribution, supra* note 294 at 5 (exchange between L. Kozak and Assemblyman Burrows). *But see* Address by Lillian Kozak, Chairperson NOW/NYS Marriage and Divorce Task Force, Law Women Symposium at 4 (New York University School of Law, Apr. 26, 1980), *reprinted in* BILL JACKET OF N.Y. EQUITABLE DISTRIBUTION LAW, 1980 N.Y. LAWS. "In 1974, 71.4% of divorced women participated in the labor force. In 1974, 78.4% of divorced men participated in the labor force. That should dispel the myths of the Gay Divorcee and the Alimony Drone." *Id.*

311. G. BURROWS, ASS. MEM., *reprinted* in 1980 N.Y. LEGIS. ANN. 129-30. "The objective of the maintenance provision is to award the recipient spouse an opportunity to achieve independence. . . . This legislation proposes the adaptation of law to current social values. It is hoped that it will serve to bring New York law into today's reality which will serve the best interests of the family." *Id.* at 130.

Compare the open-endedness of the New York statute with the New Hampshire statute, limiting

"rehabilitative" reveals the male-centered normative system in divorce law reform. It is a highly charged word with clear positive and negative casts to it.[312] It connotes societal recognition of and limited societal support for the "problem condition." It requires affirmative efforts on the part of the alimony recipient to change her life. It connotes social sin and laziness. It places blame for her situation and the burden of change on the divorced woman, without reference to her contribution to her husband and to society and without alluding to the societal structures that constrain women and devalue their contributions.[313] The construction of a new life through the market has as an unspoken premise the invalidation of a culturally acceptable prior life and set of skills. Such construction necessitates a move from the home—now no longer the warm center of family life but rather the locus of dependency or disabling helplessness—to the world of wage labor outside the home—formerly a heartless monetized world, now the place for mastery of self and the development of marketable skills. The now culturally appropriate form of worthiness and virtue for a divorced woman is work outside the home, no matter how disadvantaged the woman might be in the labor market.[314]

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the award to three years unless it is renewed, and the Delaware statute, limiting alimony to two years if the marriage has lasted less than 20 years. The Delaware law has been interpreted to require an express finding that the wife could never achieve financial self-sufficiency to qualify for a permanent alimony award. *Compare* N.Y. DOM. REL. LAW § 236(B)(6)(a) & (b) (McKinney 1986) *with* N.H. REV. STAT. ANN. § 458.19 (1983) (but note that 1985 amendments contain open-ended provisions) *and* DEL. CODE ANN. tit. 13 § 1512(a)(3) (1981). Marshall suggests that elastic standards and the freedom with which the judges may apply them has resulted in "doctrinal chaos." Marshall, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667, 686 (1984-85). For long-term alimony perceived as judicially imposed servitude, see Olsen v. Olsen, 98 Idaho 10, 12, 557 P.2d 604, 606 (1976) (Shephard, J., dissenting).

312. Rehabilitative alimony "contemplates sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining and for the further purpose of preventing financial hardship on society or individuals during the rehabilitative process." BLACK'S LAW DICTIONARY 1157 (5th ed. 1979) (citing Mertz v. Mertz, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973)).

313. Compare the treatment of unemployed steel workers, who have received job retraining and recognition that their prior life and work was constructive with women working in the home as homemakers. *See* T. BUSS & F. REDBURN, SHUTDOWN AT YOUNGSTOWN: PUBLIC POLICY FOR MASS UNEMPLOYMENT 98-103 (1983) (examining the effects of "retraining" on unemployed steel workers). However, Buss and Redburn conclude that most of the workers in the wake of the Youngstown Sheet and Tube plant closing appeared to find new jobs on their own. Retraining programs trained former steel workers for entry level positions elsewhere, which were undesirable due to lower pay and status as compared to former positions. The retraining programs were of some value, however, in allowing the unemployed worker to receive extended unemployment compensation during enrollment, a situation not applicable to "unemployed housewives."

314. Like the Tudor poor laws, work is viewed as a solution to poverty. D. GITTENS, *supra* note 21, at 137; Marshall, *supra* note 311, at 667.

The spouse charged with payment of rehabilitative alimony can look forward to the promise of a clean financial break between self-supporting adults[315] (though it does not affect any child support obligation). Rehabilitative maintenance assists in lessening the longer term financial inconvenience a former husband might experience should he desire to establish another family. It can assist in avoiding adequate compensation for the economic value of housework, child care, emotional support, and investment in a husband's earning capacity by a wife.[316]

As the discussion in this narrative suggests, the gap between form and substance in the reform was a clear one. The text in the divorce law reform discussion, both for property distribution and alimony, was one of formal gender neutrality; the subtext was a gendered one reflecting deep cultural images and continuities. Denial of the latter is not the equivalence of its demise, elimination, or even its lessened significance within a culture. As the final narrative reveals, the gendered subtext[317] continues to inform the implementation of New York's divorce reform.

Narrative 5—Implementing Reform: Distributional Results

As the preceding narrative suggests, the 1980 reform of the New York divorce law was premised on marriage as a partnership. The substantive ordering and internal valuation of the activities within the partnership were left to the parties during the relationship. At the termination of a marriage, however, the reform provided that courts could assess and evaluate the contributions of each partner in order to distribute marital assets and liabilities.[318]

Any analysis at such distribution must be informed by several crit-

315. *See* B. EHRENREICH, THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT (1983) (on the elimination of responsibility). Self-actualization meant the elimination of responsibility by a former marriage partner. Men could have it both ways: limits on their obligation and the full benefit of a woman's homemaking skills. The language of liberation turned on women by undercutting male responsibility. Interview, *supra* note 254.

316. *See generally* Marshall, *supra* note 311, at 673.

317. *See generally* P. MACHEREY, A THEORY OF LITERARY PRODUCTION (1978) (texts have double meanings—their overt ideologies and their absences, the "not said" of these ideologies).

318. Four different approaches available for the valuation of behavior or services under a contribution theory. They are: market value of the services provided; partnership; foregone opportunities theory, which attempts to compensate the stay-at-home spouse for the difference between what she can be expected to earn for the rest of her working life and what she might have earned had she not foregone her career during marriage; and compensation for the implicit contributions to the spouse working outside the home (the enhanced earning capacity of the spouse working outside the home that resulted from the stay-at-home spouse's contributions). J. AREEN, CASES AND MATERIALS ON FAMILY LAW 594-95 (2d ed. 1985); *see also* Avner, *Divorce, Money, Property Examined at Symposium on Women and Law*, 7 FAM. L. RPTR. 2334 (1981).

cal considerations. First, marital assets or property are no more than a statutory creation. This creation relies on socially constructed notions of property. In other words, marital property need not be equated with traditional concepts of property[319] including title. Second, such distribution is not simply material; it is symbolic as well. In dividing assets, a dissolution identifies the just deserts of each partner. Each partner has a gendered identity as wife or husband with the concomitant cultural baggage attached to that identity. And that gendered identity affects the distributional outcomes since just deserts have a strongly gendered normative component.[320] In theory, at least, the partner whose waged labor was said to result in the ability of the partnership to accumulate assets would not be advantaged in the distribution process. Indeed, pursuant to the reform, there were paeans to marital partnership in some judicial opinions.

Marriage is a joint enterprise whose vitality, success, and endurance is dependent upon the conjunction of multiple components, only one of which is financial. The nonmonetized, unremunerated efforts of raising children, making a home, performing a myriad of personal services, and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors. Their worth is consequently entitled to substantial recognition. Thus the extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance, but rather by the whole complex of nonfinancial components contributed. The function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of contributions, has a stake in and a right to a share of the marital assets accumulated while it endured, not because that share is needed but because those assets represent the capital product of what was essentially a partnership

319. Fouresque, *The O'Brien Case*, N.Y.L.J. Mar. 17, 1986, at 1, col. 1; *see* O'Brien v. O'Brien, 66 N.Y.2d 576, 584-85, 489 N.E.2d 712, 715-16, 498 N.Y.S.2d 743, 746-47 (1985); *see also* Winter, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301 (1983).

320. It was recognition of this reality which prompted proponents of the rebuttable presumption of equal distribution to express concern that the courts might be less likely to treat marriage as a partnership of equals in the absence of the statutory guidance provided by the presumption. *See* N.Y. Times Nov. 7, 1985, at C6, col. 1 (quoting Professor Mary Ann Glendon, saying "New York is the best laboratory we've got for what's really going on . . . . The problem is the education of the judges who are still overwhelmingly male and who tend consciously or unconsciously to take as a starting point what they think a man needs to get along. That's not the function of fault or no-fault and that's happening in every state.").

entity.[321]

But, in the preponderance of the reported cases since 1980, it is apparent that the term partnership is rarely equated with wives and husbands as equals in the relationship.[322] Courts do not view contributions to the marriage and its assets from unwaged work in the home as the equivalent of contributions to the marriage and its assets from waged work.[323] Income and value or worth appear to be separable. Despite the legal irrelevance of title for divorce distribution awards, property usually connected with waged work outside the home appears to be sex/gender identified.[324] At the time of distribution, gender as an evaluative category appears difficult to avoid either explicitly or implicitly.[325]

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321. Wood v. Wood, 119 Misc. 2d 1076, 1078-79, 465 N.Y.S.2d 475, 476-77 (Sup. Ct. 1983) (cited with approval in *O'Brien*, 66 N.Y.2d at 587, 489 N.E.2d at 717, 498 N.Y.S.2d at 748).

322. H. Cohen & A. Hillman, Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law from January 1981 Through October 1984 (Nov. 1, 1984) (unpublished manuscript) (analysis of 26 decisions from Jan. 1981 through Feb. 1983, confirmed by followup study of 70 selected decisions after trial from Jan. 1981 through Oct. 1984). *See* REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 98 (testimony of Herbert Siegel) ("[T]he economic partnership that I thought was established by way of passage of the law is a long way off."); *see also* MARITAL DISSOLUTION: THE ECONOMIC IMPACT, *supra* note 298. For a critique of the methodology of the Cohen-Hillman study, see Foster, *A Second Opinion: New York's EDL Is Alive and Well and Is Being Fairly Administered*, 17 FAM. L. REV. 3 (1985).

323. Three procedures for measuring the value of effort for home and child care have been developed: replacement cost method, lost opportunity cost method, and presumption of equal value. The replacement cost method values homemaker services by calculating the amount of money needed to replace the homemaker's services at market rates. *See* Hauserman, *Homemakers and Divorce: The Problems of the Invisible Occupation*, 17 FAM. L.Q. 41 (1983); Hauserman & Fethke, *Valuation of A Homemaker's Services*, 22 TRIAL LAW GUIDE 249, 251-54 (1978).

324. Cohen & Hillman report:

> Dependent wives, whether they worked in the home or in the paid market place, were were relegated to one or a combination of the following in an aggregate of 49 out of 54 cases susceptible of this analysis; less than 50% overall share of marital property; short term maintenance, *de minimis* shares of business and professional practice which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible equitable distribution or distributive awards and inadequate or no counsel fee awards.

Cohen & Hillman, *Is Equitable Distribution Fair? The New York Experience*, 4 N.J. FAM. LAW. 85 (1984).

325. In a survey of attorneys who have handled equitable distribution cases during the last two years (based on 659 responses) conducted by the Task Force on the Status of Women in the Courts respondents (F%/M%) reported that equitable distribution awards reflect a judicial attitude that property belongs to the husband and a wife's share is based on how much the husband could give her without diminishing his current life style: Always (12/2); Often (35/10); Sometimes (25/20); Rarely (13/31); Never (7/31); No answer (9/6). REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 109. Respondents (F%/M%) reported that judges refuse to award 50% of property or more to wives even though the probable financial circumstances indicate that even with such an award husbands will not have to substantially reduce their standard of living but wives will: Always (10/2); Often (41/16); Sometimes (19/26); Rarely (12/31); Never (6/18); No answer (11/8). *Id.* at 110.

The irony contained in these results gives pause. Reformers who claimed that ignoring title to marital property in divorce distribution offered greater opportunity to acknowledge married women's equal contribution and separate legal identity failed to learn from the history of divorce law reform. Moreover, they failed to take account of the gendered context of divorce. Arguments from supporters of equitable distribution, that judicial discretion informed by standards of fairness, was preferable to mathematical precision,[326] may have been misguided but appealing. On the other hand, the concerns of advocates for the presumption of equal distribution, that unequal treatment of like cases at the hands of different judges would occur under equitable distribution, may have been somewhat inaccurate. The gendered context of conflict over distribution of assets provides the basis for predictable, consistent legal patterns—men as husbands are likely to have their contribution valued more highly than women as wives.

Not only are contributions to a marriage valued differentially based on historically and culturally gendered understandings of worth, but a pattern in reported cases also suggests that different types of property, some which again have historically and culturally gendered identifications, are treated differently. One of the best examples of this gendered identification of property is the family home. It is the physically identifiable locus of many women's contributions to a marriage. In the reported cases, it is the one marital asset which is most likely to be divided equally.[327] But, since the vast majority of houses are jointly owned and

326. "Property need not be distributed equally but in a manner which reflects individual needs and circumstances unlike community property jurisdictions. Fairness not mathematical precision is guidepost." Rodgers v. Rodgers, 98 A.D.2d 386, 470 N.Y.S.2d 401 (2d Dep't 1983); *see also* Sementilli v. Sementelli, 102 A.D.2d 78, 477 N.Y.S.2d 626 (1st Dep't 1984). For the use of a mathematical ratio, see Kobylack v. Kobylack, 110 Misc. 2d 402, 442 N.Y.S.2d 392 (Sup. Ct. 1981), *modified*, 96 A.D.2d 831, 465 N.Y.S.2d 581 (2d Dep't 1983). In a divorce action to terminate the ten-year marriage of two relatively young working people who did not have children, where, plaintiff husband had consistently earned approximately two and one-half times the salary earned by defendant wife, each of the parties was capable of supporting himself, and the parties' contributions to the household—including the purchase of the marital residence—were in proportion to their incomes, value of premises was distributed in a 2-½ to 1 ratio, notwithstanding that the property was held as a tenancy by the entirety. The value of the parties' automobile and home furnishings were also to be distributed according to that ratio. *Id.*

See also Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 132 (1978). Arendell concludes that no matter what the divorce distribution scheme, divorce courts typically award women less than one half of the couples' property, given the varying determinations and definitions of "contribution."

327. In a few cases where the wife has been awarded the whole marital residence, she has been deprived of far greater interests in income-producing property, including businesses and in pension plans or to obviously hidden wealth. Cohen & Hillman, *supra* note 322, at 105. *But see* Comment,

may have been divided equally under strict title, the equal division of houses, while a reflection of the continuing gendered identification of property, is hardly evidence of an equalitarian perspective. In fact, there is evidence that it may fuel custody disputes.[328]

In reported cases involving property other than the marital home, the distributional patterns also reveal a gendered identification of property. In cases where marital assets included other real property and liquid assets[329] or the distribution of business property [330] or pensions, [331]

The Marital Home: Equal or Equitable Distribution, 50 U. CHI. L. REV. 1089, 1091, 1102-04 (1983) (claim that courts in equitable distribution states are better able to give special consideration to the place of the home, while courts in states requiring equal division of assets are more likely to make awards that result in the sale of the home). Special consideration of the home in property settlements is based on a number of considerations: recognition of the divorce's impact on children as well as the general trend to limit periodic support payments and consolidate the entire monetary settlement in the property award. *Id.* at 1090; *see also* UMDA § 307, 9A U.L.A. 238 (1973) (framework enabling a court to make special provisions for the home); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1204-07 (1981).

328. N.Y. DOM. REL. LAW § 236(B)(5)(d)(3) (McKinney 1986) (requiring the court to consider the desirability of awarding the marital home to the spouse receiving custody of the children). *See* Polikoff, *Gender & Child Custody Determinations: Exploring the Myths*, in FAMILIES, POLITICS & PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 183 (B. Diamond ed. 1983); *see also* Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 Women's Rts. L. Rep. 235 (1983).

329. In the 28 reported cases in which liquid investments and real property (other than the marital home) were part of the distributive award, the wife received more than 50% in 4cases 50% in 15 cases, and less than 50% in 9 cases. Cohen & Hillman, *supra* note 322, at 105.

330. In the 15 reported cases in which the distribution of business property was involved, wives received 50% in 2 cases and 0% in 6 cases (of which one involved a marriage of less than 7 years). In the rest, the wife received between 15% and 40%, with 5 cases clustered at 25% or less (of which 1 involved a marriage of less than 7 years). *Id.* at 104.

Some investment banking houses, closely held corporations, and other partnerships require single partners to sign a prenuptial pact with the firm providing that a future spouse or ex-spouse will not interfere in the business operation or make the firm's financial affairs public in a divorce. N.Y. Times, Dec. 29, 1985, § 3, at 1, col. 1. When asked why businesses were treated differently than other assets in both litigated and out-of-court settlements, one lawyer in the author's pilot study remarked, "Because judges are lawyers. They may have struggled to build a business." The same logic may well apply to lawyers in negotiation sessions for out of court settlements.

331. In the 30 reported cases (27 of which involved long marriages of at least 7 years) in which pensions were distributed women received 100% in one case, 50% in 12 cases (of which 2 were short-term marriages), and less than 50% in 17 cases. Of these 17 cases, in 3 of the 7 cases in which the wife received no part of the pension as part of the distributive award, the pension was an offset against 50% of the marital home or other marital property. Cohen & Hillman, *supra* note 322, at 106; *see also* Pottala v. Pottala, 112 A.D.2d 553, 490 N.Y.S.2d 936 (3d Dep't 1985) (in a 9 year second marriage, wife awarded 30% of husband's pension). Regarding the distribution of benefits received as a consequence of early retirement, see Biddlecom v. Biddlecom, 113 A.D.2d 66, 495 N.Y.S.2d 301 (4th Dep't 1985) (absent a specific agreement, benefits received as a consequence of early retirement are not marital property). *But see* Turnbull v. Turnbull, 129 Misc. 2d 683, 493

wives were less likely to receive an equal distribution. A similar pattern emerges in cases involving the distribution of such marital assets as professional licenses and practices.[332]

Given the consistent pattern for the distribution of various types of marital property, it is not unreasonable to assume that even an expansion in the definition of marital property may not have a significant impact on the distributional ratios. For example, an increase in the value of separate property attributable to the indirect contribution of a nontitled spouse as homemaker or parent,[333] may be subject to an evaluation which relies on

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N.Y.S.2d 717 (Sup. Ct. 1985) (court divided pension rights equally, including all fringe benefits, as part of plan including disability benefits "in lieu" of early retirement).

332. In the 13 reported cases (of which all but one involved marriages of at least 7 years) involving the inclusion of professional licenses and practices, 7 wives were awarded between 10% and 50% of a dollar amount of the value of the professional practice, with one half of the awards for 25% or less. In the 6 remaining cases (of which only one involved a marriage of less than 7 years), limited maintenance was awarded in 4 of the cases, including the case of the shorter term marriage. Cohen & Hillman, *supra* note 322. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); *see also* Raff v. Raff, 120 A.D.2d 507, 501 N.Y.S.2d 707 (2d Dep't 1986) (value of medical license for distributive award is "the enhanced earning capacity it affords the holder") (quoting *O'Brien*, 66 N.Y.2d at 588, 489 N.E.2d at 716, 498 N.Y.S.2d at 749); Kutanovski v. Kutanovski, 109 A.D.2d 822, 486 N.Y.S.2d 338 (2d Dep't 1985), *vacated*, 120 A.D.2d 571, 502 N.Y.S.2d 218 (2d Dep't 1986) (trial court must comply with N.Y. DOM. REL. LAW 236(b)(5)(g) with respect to the distribution of the value of the medical license; distributive award to wife 60% marital house and 50% other marital property representing her share of value of husband's medical license affirmed). New York is viewed as a minority jurisdiction in its treatment of professional licenses as marital property.

In general, wage and salary income is more valuable than property. *See* Weitzman, *supra* note 327, at 1188-94. In one year, the average couple can earn more than the total value of their marital assets. The tangible assets of a marriage typically are worth less than the spouses' earning capacities. *Id.* at 1192. Though this finding is based on California data, there is no evidence to suggest that it is geographically limited in its applicability.

333. N.Y. DOM. REL. LAW § 236(B)(1)(d)(3) (McKinney 1986) ("separate property includes the increase in value of separate property, except to the extent that such appreciation is due in part to the contribution or efforts of the other spouse."). *See* Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (2d Dep't 1986) (increase in the value of a divorcing spouse's separate business property attributable to the indirect contributions of the other spouse as homemaker and parent is marital property subject to equitable distribution). In cases prior to *Price*, there had been disagreement about the significance of the fact that an explicit reference to the "contributions and services as a spouse, parent . . . and homemaker" appears in N.Y. DOM. REL. LAWS § 236(B)(5)(d)(6) (McKinney 1977 & Supp. 1985) (marital property) and *id.* § 236(B)(6)(a)(8) (maintenance) but does not appear in *id.* § 236(B)(1)(d)(3) (appreciation in separate property), which lists no factors to define the term "contributions or efforts of the other spouse". *Compare* Jolis v. Jolis, 111 Misc. 2d 965, 446 N.Y.S.2d 138 (Sup. Ct. 1981), *aff'd*, 98 A.D.2d 692, 470 N.Y.S.2d 584 (1st Dep't 1983) (wife's homemaker services did not entitle her to share in the appreciated value of husband's separately owned stock) *with* Wegman v. Wegman, 129 Misc. 2d 968, 494 N.Y.S.2d 993 (Sup. Ct. 1985) (wife's contributions to husband's business as spouse, homemaker, parent, and social partner justified classifying increase in their value as marital property). For a discussion of the nature of a homemaker's

prevailing gendered cultural definitions of the nature and measure of the indirect contribution.

In sum, there is little evidence in the reported cases that the bench is inclined to distribute property equally unless exceptional circumstances are involved. Moreover, the propensity to differentiate among types of property has had a less obvious but equally important impact on the projected economic status of the parties.[334] Long-term, disadvantaging,

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recognition under equitable distribution, see Roffman v. Roffman, 124 Misc. 2d 636, 476 N.Y.S.2d 713 (Sup. Ct. 1983):

> The non-remunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to *substantial* recognition.

Id. at 637-38, 476 N.Y.S.2d at 715 (emphasis added) (quoting Wood v. Wood, 119 Misc. 2d 1079, 1079, 465 N.Y.S.2d 475, 483 (1983)).

The court in *Price* recognized spousal emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home." *Price*, 69 N.Y.2d at 14, 503 N.E.2d at 687, 511 N.Y.S.2d at 222 (quoting Brennan v. Brennan, 103 A.D.2d 48, 52, 479 N.Y.S.2d 877 (3rd Dep't 1984)), Even if the marriage was a troubled one, a homemaker may still contribute to her spouse's business sucess. Scherzer v. Scherzer, 131 N.J. Super. 397, 401, 346 A.2d 434, 436 (1975). But, as the court noted in *Price* concerning the active/passive appreciation distinction.

> As a general rule . . . where the appreciation is not due, in any part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the non-titled spouse has no claim to a share of the appreciation.

69 N.Y.2d at 18, 503 N.E.2d at 690, 511 N.Y.S.2d at 225. In determining the appreciation, New York courts have rejected both the replacement cost approach, Bidwell v. Bidwell, 122 A.D.2d 364, 366, 504 N.Y.S.2d 327, 329 (3d Dep't 1986), and the opportunity cost aproach, Connor v. Conner, 97 A.D.2d 88, 96-104, 468 N.Y.S.2d 482, 489-93 (2d Dep't 1983), as have courts in other jurisdictions. *See* Sementilli v. Sementilli, 102 A.D.2d 78, 88, 477 N.Y.S.2d 626, 633 (1st Dep't 1984); *In re* Gallagher, 5 Fam. L. Rep. 2908, 2910 (Ill. Cir. Ct. July 18, 1979) (court refuses to place dollar value on services of homemaker); *In re* Marriage of Briggs, 225 N.W.2d 911, 913 (Iowa 1975) (division of property at divorce is not on "price-per-hour basis"); *In re* Marriage of Schulte, 546 S.W.2d 41, 47 (Mo. Ct. App. 1977) (wife need not prove value of her contributions on dollar-per-hour basis); *Scherzer*, 136 N.J. Super. at 401, 346 A.2d at 436 (homemaker's contribution cannot be given a monetary worth and its value may be gleaned from earnings of employed spouse).

Compare COLO. REV. STAT. § 14-10-113 (entire increase in value of separate property is marital property) *with* N.C. GEN. STAT. § 50-21 (Michie 1988). *But see* Phillips v. Phillips, 73 N.C. App. 68, 326 S.E.2d 57 (1985) (distinguishing between "active" and "passive" appreciation in value of separate property); *see also* VA. CODE § 20-107 (repealed 1982) (increase in value of any separate property is separate).

334. Attorneys in a pilot study conducted by the author believe that courts frequently operate under the illusion that a property distribution should be used by a wife to create an income producing fund. Frequently the assets received by such a woman cost money to maintain, operate and repair (e.g., residence, contents, car) and are depreciating rather than appreciating assets (e.g., car and household contents), as opposed to liquid or appreciating assets (profit sharing plans, pensions, investments, businesses).

gendered consequences for the parties are produced by distributional awards geared to the present.

Counterclaims have been made that each reported case is unique or so situationally individuated, so richly textured and complex, that a statistical compilation of the distributional ratios is a misrepresentation.[335] It has been said that reported awards cannot provide sufficient accurate data for pattern recognition purposes. This position ignores or denies the gendered context in which reported cases, as well as negotiated settlements, occur. The gendered context, which includes perceptions and stereotypes, frames the events and affects the outcomes. It is the major unifying factor across seemingly disparate situations.

Since reported cases constitute a minute proportion of divorce awards,[336] it is important to know whether the patterns identified in the reported cases hold true in out-of-court negotiation[337] and settlement. Such private ordering[338] of marital dissolution is subject to judicial approval. Despite the fact that litigated cases have limited precedential value, distributional awards may provide cues for lawyers regarding local judicial norms of fairness.[339] Such cases may form the basis for a practi-

335. Foster, *supra* note 322.

336. "The principal institution of law in action is settlement out of court not trial." H. ROSS, SETTLED OUT OF COURT 3 (2d ed. 1980); *see* Mnookin and Korhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). The overwhelming majority of divorcing couples resolve distributional questions without bringing any contested issue to court for adjudication. "Although there are no data that permit reliable estimates on a national basis, available estimates are that only a very small percentage of divorces—probably less than 10%— involve disputes that are contested in court." *Id.* at 951 n.3; *see also* H. Erlanger, E. Chambliss & M. Melli, Cooperation or Co-ercion? Information Settlement in the Divorce Context, Working Papers Series 7, #6 Inst. for Legal Studies U. Wis. Law School, March 1986.

337. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, in THE RESOLUTION OF FAMILY CONFLICT 364 (J. Eekelaar & S. Katz eds. 1984); Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW AND SOC'Y REV. 93 (1986). As Sarat and Felstiner note:

> [M]ore is at stake, however, in the interaction between lawyers and clients than a unidirectional movement of information and advice from lawyer to client . . . this interaction provides one important setting where law and society meet and where legal norms and folk norms come together to shape responses to grievances, injuries and problems.

Id. at 94. "Lawyers must help their clients view the emotional process of dissolving an intimate relationship in instrumental terms." *Id.* at 116.

338. Mnookin & Kornhauser, *supra* note 336; *see also* Mnookin, *supra* note 337. Mnookin identifies the advantages of private ordering as: support for the liberal ideal that individuals have rights and should largely be left free to make of their lives what they wish, efficiency including consistency with the preferences of each spouse and savings (both financial and emotional) as well as the avoidance of risk and uncertainty in litigation. *Id.* at 366-67.

339. Reported judicial decisions set the parameters for the 90% of matrimonial cases that end in a negotiated settlement. REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 99 (citing Cohen-Hillman testimony). *But see* Sassower, *Looking Anew for Fair Divorce Law*, N.Y. Times, May 11, 1980, at 11, col. 1 (suggesting that the proposed equitable distribution statute would offer no

tioner's advice to a client; they may impact on negotiations with opposing counsel.

To compare the distributional pattern in reported cases with the distributional pattern in out-of-court settlements,[340] less readily available data must be utilized. In New York, judicially approved out-of-court settlements are placed in sealed files and a certificate of dissolution is filed in Albany. An alternative source of such data is attorney files. Efforts to determine property distribution patterns through a random sampling of the files of high volume matrimonial practitioners were unsuccessful in the pilot study conducted by the author.[341] Yet another source of data is more informal. It consists of lawyers' self-reporting the results and the observations of judges regarding the distributional ratio in out-of-court

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guidance to parties settling out of court). But note also the findings in a study on divorce negotiation which concluded:

> Judicial oversight of bargaining must be assessed as a factor in the negotiation process .... Parties who settled were clearly influenced by their lawyers' predictions of what the court would decide ... however what was most striking about our data was the evidence which documented the minimal role of the judge as the reviewer of the substance of the parties' agreement.

M. Melli, H. Erlanger & E. Chambliss, The Process of Negotiation: An Exploratory Investigation in the Divorce Context 3, 8, 9 (Disputes Processing Research Program, Working Papers Series 7, #1 Inst. for Legal Studies, U. of Wisconsin Law Sch., Dec. 1985) [hereinafter Working Paper #1]. The authors report that the courts' main concern was not to review the substance of the parties' decision but to establish that the parties had actually reached the particular stipulation and understood its terms and that in many cases the judge did not have the necessary information on which to review the stipulations for content. *Id.* at 10-11. "And among lawyers who think there are set standards and who do say they can predict outcomes there are differences of opinion as to the content of those standards." M. Melli, H. Erlanger & E. Chambliss, *supra* note 336, at 29-30.

340. The Chair of the Matrimonial Law Committee of the New York City Bar explained:

> Settlements have been harder to come by than anticipated at the time the law was changed. Many of us thought that the movement away from fault oriented disputes to the more business like questions of finding the right mix of property distribution distributive awards and support to provide an equitable result would reduce the "leveraging" use of fault and lead to speedier conclusion.

Joint Public Hearings on Equitable Distribution, supra note 294 (statement of Stanley Plesent, Chair of the Matrimonial Law Committee of the Association of the Bar of the City of New York).

341. Researcher access to sealed court files requires the permission either of the chief administrative judge of a judicial district, or of the individual parties, or their attorneys. Efforts by the author to undertake a pilot study to determine the distributional patterns in out-of-court settlements revealed that her plan to develop a random sample of out-of-court settlements from court files would be difficult to implement. Powerful matrimonial practitioners in the locale selected for the pilot study convinced the chief administrative judge not to allow the files to be unsealed for the study by threatening to enjoin him. Their reasons for non-cooperation included technical concerns of time and money, seemingly unallayable concerns regarding confidentiality, regardless of the safeguards built into the research protocol, and lawyer biases against the utility of social science research.

Moreover, the author discovered that the court records were not segregated by subject matter nor was their subject matter identifiable through numerical assignment. Even if permission to break the seal had been granted, the development of a random sample would have been a complicated matter.

settlements which they review. Such data, despite the limitations of self-reporting, make it abundantly clear that the patterns in the reported cases are consistent with norms for out-of-court settlements.[342]

Supporters of equitable distribution insisted that each out-of-court negotiated marital property distribution would reflect the individual marriage arrangement. In reality, attorneys appear to use tailoring principles in negotiating settlements.[343] Such tailoring principles are framed by the same gendered context as court-ordered awards. They reflect the same gendered differential assessment of contribution to marriage and gendered identification of types of marital property. Bargaining does not occur in the shadow of the law[344] but in the shadow of the culture.[345]

A review of the pattern of alimony awards indicates that maintenance remains a gendered issue. Much of the concern focuses on the conflicting principles governing maintenance as an economic allocation at dissolution.[346] More particularly, criticism has been directed toward the primary goal of the maintenance provision—rehabilitation and self-support. The statute itself offers no guidance to the meaning of the term "self-supporting."[347] Nor does the legislative history of the reform speak clearly to a prioritization of crucial factors: the consideration to be given to sex segregation in work outside the home, employment opportunities and wage scales for women, especially middle-aged women now destined

342. Reports indicate that women seem to be averaging awards of roughly 25-30% of the marital estate. Statement of Lester Wallman, Chair, Legislative Committees of the Family Law Section of the New York State Bar Association and the New York State Chapter of the American Academy of Matrimonial Lawyers in a televised editorial on November 14, 1982 for WNBC-TV, Channel 4, *reprinted in Joint Public Hearings onn Equitable Distribution*, *supra* note 294 (app. B to statement of Judith Avner); *see also id.* (testimony of Myrna Felder, Chair, Matrimonial Law Committee, Women's Bar Association of the State of New York).

343. *See* Spiegelman, *Remedies for Victim Group Isolation in the Workplace: Court Orders, Problem Solving and Affirmative Action in the Post-Stotts Era*, 29 How. L.J. 191 (1986); *see also* Memphis Fire Dept. v. Stotts, 467 U.S. 561 (1984).

344. Mnookin & Kornhauser, *supra* note 336, at 950.

345. See Working Paper #1, *supra* note 339, for a further gloss on this theme. The authors claim "that rather than a system of bargaining in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining." *Id.* at 12. "Informal settlement is not synonymous with the negotiation. . . . Because of a lack of procedural choice informal processes also can be extremely coercive." Working Paper #6, *supra* note 336, at 7; *see also id.* at 11-19, 39-42.

346. "Arguably the four factors deemphasized by rehabilitative alimony are those that may favor women in divorce settlements, whereas the rehabilitation factor favors men by curtailing the amount they will have to pay." Marshall, *supra* note 311, at 670.

347. "Of the 10 factors to be considered in determining the amount and duration of maintenance, only two relate to self support, yet . . . this is frequently the main factor that is addressed." *Joint Public Hearings on Equitable Distribution*, *supra* note 294 (statement of Diane White, Exec. Dir., Legal Awareness for Women, Inc.).

to be self-supporting, and the extension of maintenance should a recipient fail to "rehabilitate" herself.[348]

New York has followed the national trend regarding maintenance awards. Alimony is considered an exceptional consequence of divorce. The overall pattern is one of significant limitation in the number and duration of maintenance awards,[349] as well as a continuing failure to enforce compliance.[350]

The pattern regarding maintenance awards in the reported New York cases reveals an unwillingness to recognize the full contribution and/or long-term economic vulnerability of the unwaged worker in the home.[351] Judges in more than half of the cases involving a long-term marriage did not award long-term or permanent maintenance.[352] Rather

348. The legislature appears to have intended to provide the courts with a short-term maintenance option for a younger spouse with a strong potential to become self-supporting after a period of support for education and training. REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 113.

> We only meant and intended to have that short period of maintenance for the short marriage where the young lady might be 23 and he was 25; she was a teacher, she could go back to teaching or maybe even quit. That's what we intended, and we have allowed the leeway to those judges thinking that they would have the intelligence to follow through accordingly.

Joint Public Hearings on Equitable Distribution, *supra* note 294 (statement of Assemblyman Burrows).

349. *See* U.S. BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1983, SERIES P-23, NO. 141 (July 1985). In 1984, of all ever divorced or currently separated women (17.4 million), only 14% had been awarded spousal support. The average amount was $3,980 which is the equivalent of the $3,000 average of 1981 after adjusting for inflation. Of the women awarded alimony, 43.5% received the full amount, 23.9% received a partial amount, and 32.6% did not receive payment. U.S. BUREAU OF CENSUS: CHILD SUPPORT AND ALIMONY; 1981, SERIES P-23, NO. 124 (May 1983); *see also id.* at 41-50 (analysis of selected characteristics of women awarded alimony payments).

The California figure for alimony awards in 1977 was 16.7% (close to the national figure of 14%). The judges estimated that about half of the women they saw were awarded spousal support and the attorneys estimated that two-thirds of divorced women are awarded spousal support. Generally speaking, there appears to be an overriding concern for the welfare of men who might be supporting two households (including children in both households), which has been manifested by efforts to encourage— if not accelerate—the situation of self-sufficiency for a former wife. This concern appears to supersede the value of supporting a full-time custodial parent who works in the home, or of preventing a drastic permanent decline in a former wife's standard of living. Weitzman & Dixon, *supra* note 135, at 167.

350. REPORT OF THE NEWW YORK TASK FORCE, *supra* note 135, at 120. Female and male survey respondents (F%/M%) reported that the courts effectively enforce maintenance awards: Always (1/4), Often (12/27), Sometimes (27/38), Rarely (45/22), Never (10/3), No Answer (4/5). *See also* Arendell, *supra* note 326, at 33.

351. In a traditional marriage, the entire economic worth of the wife is absorbed into the marital unit while the husband's is absorbed only to the extent of support. Note, *Marital Property: A New Look at Old Inequities*, 39 ALB. L. REV. 52, 61-62 (1974).

352. *See* Cohen & Hillman, *supra* note 322, at 106. Since the passage of the reform, in 49 re-

than viewing the individual's worth in the marketplace as the product of joint decisions, courts and attorneys approach the issue of worth in terms of individual actions. Moreover, the bench reflects the gendered context in which alimony is awarded by remarking negatively on the continuing economic dependency on a former husband[353] and by scrutinizing a wife's behavior for marital fault which can affect the maintenance award. In addition, judges appear all too willing to limit enforcement for alimony payments.[354] In combination with marital property distribution patterns since 1980, judicially ordered maintenance awards have resulted in a disparate burden of support on the former wife who is likely to have significantly different gendered economic vulnerabilities and earning capacities. The former wife is often the custodial parent as well.

Like negotiated out-of-court property settlements, maintenance agreements are likely to reflect the norms and values embodied in the reported cases. Lawyers' negotiations tend to result in minimal short term maintenance awards, even for older women who have worked in the

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ported decisions maintenance was waived in 3 cases (none of these marriages was less than 10 years), denied in 12 cases (2 cases involved marriages of less than 7 years, 1 case involved a husband who was in prison from whom maintenance was uncollectible), awarded for a limited or short term despite the length of the marriage in 15 cases, and awarded for a long term or permanently for a long term marriage in 19 cases. Marriages in 44 cases ranged from 7 ½ to 57 years duration. In 10 cases, economically dependent wives married between 10 and 57 years (with 18 years of marriage the median) were totally denied a maintenance award. In 15 cases, women who had been married for between 8 and 36 years (20 years of marriage the median) were awarded only rehabilitative maintenance for periods ranging from 1 ½ to 5 years. *But see* Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (4th Dep't 1986) (trial court award of $80 per week maintenance inadequate and termination upon wife's receipt of share of retirement pension or social security benefits improper in 27-½ year marriage where 46 year old wife who raised 5 children earned $10,000 annually while husband earned $24,000); *see also* REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 113-14. Survey respondents (F%/M%) reported that older displaced homemakers with little chance of obtaining employment above minimum wage are awarded permanent maintenance after long-term marriages: Always (4/5), Often (24/43), Sometimes (36/24), Rarely (21/10), Never (5/2), No Answer (10/6).

353. Moreover, there is evidence that the physical appearance of the wife becomes part of the calculus. The appearance of women litigants may be the subject of comments by male attorneys as a negotiating tool. For instance, if an attorney represents a woman seeking maintenance, he will describe her as unattractive and argue that the chances of remarriage are slight. If he represents the husband, he'll describe the same woman as gorgeous with great chances of remarriage. Conversation by author with a matrimonial attorney participating in pilot study.

354. Stevens v. Stevens, 107 A.D.2d 987, 484 N.Y.S.2d 708 (3d Dep't 1985), *appeal after remand*, 112 A.D.2d 1091, 492 N.Y.S.2d 519 (3d. Dep't 1985); McMahan v. McMahan, 100 A.D.2d 826, 474 N.Y.S.2d 974 (1st Dep't 1984); Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dep't 1984); *see* REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 120. Respondents (F/M)reported that interest on arrears is awarded as provided by statute: Always (2%/4%), Often (10%/5%), Sometimes (19%/17%), Rarely (40%/39%), Never (20%/17%), No Answer (10%/7%).

home at a high opportunity cost to themselves.[355] These outcomes are based on tailoring principles informed by gender applied to maintenance,[356] as well as to property distribution. Reliance on such culturally acceptable principles ensures that women have little or no chance of becoming self-supporting at a standard of living in any way commensurate with their standard of living during the marriage.[357]

In theory, consideration of an award of rehabilitative alimony is premised on the presumption that marital property has been divided.[358] In reality, rehabilitative alimony is not considered as a separate matter and often substitutes for a fair distribution of marital property.[359] In theory,

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355. Homemaking is immensely valuable unpaid work that exacts a unique opportunity cost, often apparent only at dissolution of a marriage. It is unpaid labor for which the homemaker cannot develop a resume demonstrating prior experience utilizing skills recognized in the paid labor force. Her education, experience, and skills become outmoded and earning capacity is permanently diminished. *See, e.g.*, Minnesota Marriage Dissolution Law, MINN. STAT. ANN. § 518.552(d) (West Supp. 1989). Or, in her efforts to juggle her work as a homemaker with family income needs, she may take part or full-time low-wage service sector jobs, thereby incurring opportunity costs. Studies show that women continue to shoulder the major responsibility for homemaking, child care, and the care of elderly parents. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439-67 (1987); Parkman, *The Economic Approach to Valuing a Sacrificed Career in Divorce Proceedings*, 2 J. AM. ACAD. MATRIMONIAL LAWS 45 (1986); Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201 (1982).

356. REPORT OF THE NEW YORK TASK FORCE, *supra* note 135, at 116-17. Respondents (F/M) reported the duration of rehabilitative maintenance awards based on length of marriage as: 3/3 years of maintenance for a marriage of less than 10 years, 4/5 years of maintenance for a marriage of 10-20 years, 6/8 years of maintenance for a marriage of 20-30 years, and 8/9 years of maintenance for a marriage of more than 30 years. *See also* Note, *supra* note 352, at 65. "The phrase ability to pay has never been precisely defined. Some courts go by rule of thumb, uniformly awarding ¼ to ⅓ of the husband's income when there are children to support."

357. In practice, the statutory subjective reasonable need standard has led to widespread abuse. It often means the judge asks the husband what his needs are and then, after allowing for his rent, his car payments, his cleaning services, his meals out, his entertainment and so forth, the judge makes an award to the wife and children our of what is left. *See* Bruch, *Of Work, Family Wealth and Equality*, 17 FAM. L.Q. 99 (Summer 1983).

> Because we more readily understand tangible or traditional assets than potential future income, it is easy to conclude that a reasonable division of a couple's home, furniture, cars and savings accounts alone has fulfilled equity between the spouses. Similarly, because judges often lack sophistication about the costs of rearing children, or the difficulties for women in finding reasonable, fairly compensated employment, rose-colored glasses often control a divorce court's support awards. Unsubstantiated, seriously harmful financial practices are consequently the norm, not the exception, in contemporary American divorce . . . .

Id. at 106. Note, however, that the 1986 legislative amendment to the statutory provisions for temporary maintenance or maintenance substituted "standard of living of the parties established during the marriage" for "to meet the reasonable needs of a party to the matrimonial action." 1986 N.Y. Laws ch. 884, 2173.

358. *See* Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 275, 277-78 (1973).

359. Marshall, *supra* note 311, at 668.

rehabilitative alimony is awarded on the basis of economic need rather than punishment for the marital breakup. In practice, rehabilitative alimony reduces the likelihood that alimony will be used to punish former husbands, but maintains the practice of punishing former wives.[360] Equity has been all too likely to result in a disparate burden of support on two former spouses with significantly different economic vulnerabilities and earning capacities. "Short term rehabilitative maintenance is analogous to severance pay."[361]

Though the interval during which the reform has been operative is a relatively brief one, clearly identifiable implementation patterns have emerged. Not surprisingly, these patterns exist both in litigation and in out-of-court settlements. They reflect the continuing power of the sex/gender system, using men's lives as the referent, to utilize a reform measure designed ostensibly to help women which, in fact, accelerates their impoverishment.

IV. POST-PARTUM REFLECTIONS

Like other stories about law, this set of narratives about historic and contemporary relationships among law as ideology, the sex/gender system, and property, focuses on rules and their interpretation. Unlike many other stories about law, this analysis of rules and their interpretation is critically informed by an understanding of the operation and power of the sex/gender system. More particularly, treatment of women and men as wives and husbands at the time of marital dissolution.

Until the mid-nineteenth century in the United States, a married woman had no separate legal identity. Her identity was appropriated by her husband as a matter of law. Commencing in the 1840s, the century was punctuated by a series of major social and legal struggles to establish a separate legal identity for married women in New York. The results of the struggle were a series of statutes which eliminated marriage as a bar to women's access to all forms of property and endowed married women with a portion of that privileged legal identity possessed by males in New York regardless of marital status. Married women were reclassified. They became capable of owning and managing property, of earning wages in their own names, and of having access to all such property accumulated in their names during a marriage and at its dissolution.

360. *Id.* Former husbands benefit unjustly when rehabilitative alimony is awarded in circumstances in which permanent alimony would be appropriate, by limiting the amount which they would otherwise pay.

361. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 82 (1981).

Such reclassification is said to be a significant step for a legal system. When it involves a hitherto marginalized group, reclassification may provide that group with the formal legal bases[362] for making new claims on resources and their patterns of distribution. But reclassification does not eliminate prior history. Nor does it avoid the complex dynamic between dominator and dominated, privileged and subordinate. Prior historical experience of this dynamic can continue to inform and structure ongoing social interactions,[363] especially in institutionalized relationships such as husband and wife. Such experience is a powerful force which contributes to the setting of limits and constraints upon the exercise by reclassified persons of their newly recognized competence and capacity. In the interaction with former dominators, members of a marginalized and hitherto dominated group may reveal what has been identified as "the paradox of domination"—acknowledgment of and self-identification as dependent[364] despite formal reclassification as competent, autonomous individuals.

Despite their separate legal identity and concomitant formal access to marital property, most married and divorced women remained economically vulnerable. The gap between the symbolic significance accorded to the creation of a married woman's legal identity and the material results consequent upon the reform reflect the reality of continued gender-based privileging. Thus, this story of reform, of the first step in the creation of a separate legal identity for married women, the story

362. *See* J. NOONAN, *supra* note 39, at 14-19 (discussing the indispensability of impersonality and the complementarity of rules and persons).

363. For example, patriarchy can be viewed as a continuing set of social relations among men enabling them to dominate women. *See* Hartmann, *The Unhappy Marriage of Marxism and Feminism*, in WOMEN AND REVOLUTION: THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM (L. Sargent ed. 1981); *see also* R. CONNELL, *supra* note 5, at 184 (hegemonic masculinity as the operating principle for the organization of private and cultural processes).

364. O. PATTERSON, *supra* note 39, at 334-42; *see also* A. MEMMI, DEPENDENCE: A SKETCH FOR A PORTRAIT OF THE DEPENDENT 181 app. A (1984) (distinction between domination and dependence.) For a discussion of the confusion between economic dependence and emotional dependency in women, see L. EICHENBAUM & S. ORBACH, WHAT DO WOMEN WANT: EXPLODING THE MYTH OF DEPENDENCY (1983).

> Women are raised to be depended upon; to place their emotional needs second to those of others. . . . At the same time that women are depended upon for emotional support and nuturance, they learn to *behave* dependently. Girls learn from very early on that it is dependent behavior (passivity, helplessness, submissiveness) that will get them what they are searching for—someone to consistently care for them.

Id. at 9. But "[g]irls learn early that in the most profound sense, they must rely on themselves, there is no one to take care of them emotionally." *Id.* at 25; *see also*, Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 916-17 (1987) (discussing oppression theory, i.e. how patterns of male domination create an atmosphere that makes women acquiesce in their roles).

of degendering or gender neutralizing formal rules regarding access to property, is also the story of the power of a cultural context—that of the continuing gender based privileging of men.

A second major divorce law reform campaign involved expanded access to divorce through the expansion of the facially gender neutral number of fault-based grounds for divorce. This campaign is usually viewed historically as unconnected with marital property distribution reforms and the development of a legal identity for married women. In fact, however, the expansion of fault was culturally deeply connected to married women's identity and economic vulnerability. Understanding the legal and cultural implications of this campaign requires recognition of the historical importance and gendered nature of the institution of marriage in American culture.

Both men and women were encouraged to marry, but prevailing cultural reasons for this encouragement were gender specific. American culture identified work and association outside the home as a legitimate if not compulsory path for men seeking fulfillment and social recognition. For women, marriage was generally understood to be the focal point of adult life.[365] It provided social and cultural fulfillment and hopefully, a measure of economic security.

Marriage was a major determinant of gender roles, as well as their reflector and legitimator. The gendered roles for husbands as well as wives were embodied in cultural norms containing behavioral prescriptions and constraints in a marital relationship. The salience and ideological power of these norms were clearest at divorce, which triggered operation of the system of fault-based grounds for dissolution.[366] In New

365. *See* D. GITTINS, *supra* note 21; *see also* A. DOUGLAS, *supra* note 123; P. HILL, THE WORLD THEIR HOUSEHOLD: THE AMERICAN WOMAN'S FOREIGN MISSION MOVEMENT AND CULTURAL TRANSFORMATION 1870-1920 (1985); M. RYAN, THE EMPIRE OF THE MOTHER: AMERICAN WRITING ABOUT DOMESTICITY 1830-1860 (1985); L. SHAPIRO, PERFECTION SALAD: WOMEN AND COOKING AT THE TURN OF THE CENTURY (1986); M. VICINUS, INDEPENDENT WOMEN: WORK AND COMMUNITY FOR SINGLE WOMEN 1850-1920 (1985).

366. May explains this phenomenon:

> Women discarded husbands if they failed in the fundamental duty of providing the necessities of life: a comfortable place to live, enough to eat, and adequate means for reasonable well being. If they polluted the domestic environment through overindulgence in vices such as drinking or gambling, they were deemed unworthy. Sexual excess was also beyond the bounds of reasonable behavior. The limits and duties were clearly defined: husbands were to provide the necessities of life, treat their wives with courtesy and protection, and exercise sexual restraint. Men who found that their wives deviated from proper norms of conduct also sought redress. A wife's duty was to maintain a comfortable home, take care of household chores, bear and tend to the children, and set the moral tone for domestic life. She was to remain chaste and modest in her behavior, frugal in

York, the fault statute recognized adultery as the sole ground for divorce. It was written in gender neutral terms—but a different significance[367] attached to the moral shortcomings of an "errant" adulterous spouse depending on gender. In turn, this valuation supported and reinforced prevailing gender roles in marriage.

Reform campaigns to expand the fault grounds for divorce during the nineteenth and twentieth century relied on a series of rationales. Prominent among them were a set of gendered images which played upon cultural sensibilities of women as victims—of good women trapped in bad marriages by the rigid New York statute. The prescription for such situations was said to be greater access to divorce. At first glance, a push for expansive gender neutral statutes coupled with a reliance on gendered images to evoke a favorable response to such proposals appears inconsistent. But formal gender neutrality can readily exist in a gendered context. Notwithstanding the influence and impact of context, the results of form can be considered coequal with justice and with fairness.

The 1966 reform involved the belated expansion of fault grounds for divorce and the inclusion of an option of separation leading to a no-fault divorce. This reform likewise failed to transcend the gendered reality underpinning divorce. Devotion to homemaking led to economic vulnerability; hence, the cultural recognition that good women could be caught in bad marriages. Economic vulnerability was reinforced by the prevailing common law, strict title, marital property and divorce distribution

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matters of household expenses, and her conduct was never to reflect badly upon her home and her husband's good name. A woman who was not genteel in her demeanor, who acted like (or indeed was) a "whore," or who violated the boundaries—physical as well as moral—of a woman's proper sphere, might be shed in the divorce court. The roles for both husbands and wives, then, were well understood. These norms formed the basic requirements for attaining domestic peace and building solid communities around well-disciplined homes.

E. MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 157 (1985).

367. According to Nicholson,

[T]hough the home and family were viewed as a necessary refuge and antidote to the external world, they were also denied an aspect of the seriousness granted to the latter domain. The consequence was that those activities which were allied with the home and family were also denied a certain seriousness.

L. NICHOLSON, *supra* note 25, at 46. By the end of the 19th century

both the growth of an individualized social sphere outside the home and the increased individualization of social relations within it raised particular contradictions for middle class women. Increased autonomy within the family and new opportunities to function autonomously outside it remained tied to existing beliefs about women as necessarily dependent and private beings.

Id. at 52.

rule, as well as an unsatisfactory system of alimony awards and enforcement once these women were relieved of their wifely duties and obligations. No effort was made to address these effects in the 1966 reform.

Historically, fault grounds for the dissolution of a marriage have operated in tandem with alimony. Like access to marital property and unlike the grounds for fault-based divorce, the original statutory provisions for alimony were written in gender specific language. Only divorced women were eligible for alimony until 1980 in New York. Gender specificity for alimony persisted for one hundred thirty-two years after the passage of the first Married Women's Property Act.

Alimony reveals the power of the sex/gender system operating through law. Alimony has served either as a device for recognition of contribution to a marriage or as compensation for marital property distribution rules which have had a drastically disparate impact on women. On the one hand, provisions for alimony reflect a measure of recognition of married women's economic vulnerability. On the other hand, alimony is identified with powerful cultural images of married women's dependence, helplessness, and inability to participate in complex financial affairs. Such images are reinforced by the cultural assumption that the status of a married woman is derivative from her husband. In turn, such an assumption clearly differentially values gender. Not surprisingly, recourse to and reliance upon a post hoc evaluation of a wife's contribution to a marriage or a determination of her post-divorce living needs produces results which further reinforce married women's economic vulnerability.

Despite one hundred thirty-two years of legally degendered access for married women to physical property, one hundred twenty years of legally degendered access for married women to their own wages, fourteen years of expanded access to divorce, and one hundred ninety-one years of gender specific alimony provisions said to benefit women seeking divorce, the issues which surfaced in recent divorce law reform discussions in New York continued to focus on the differentially gendered economic consequences of marriage. Despite the gender neutral premises of common law strict title and fault-based dissolution, each was seen to have gender-biased effects. Despite the supposed compensation for these effects by gender specific alimony, dissolution outcomes were still perceived as fundamentally unfair to women. Women whose names were not on the title to marital assets and were dependent on gender specific alimony were highly unlikely to have their contribution to a marriage or

their need for support adequately recognized by alimony awards, if and when they were granted.

In 1980, after a decade of extensive discussion regarding the need for divorce law reform, the New York legislature replaced gender neutral, common law, strict title, marital property rules for marriage and divorce with gender neutral, equitable distribution rules applicable only in divorce proceedings. It also replaced gender specific alimony with bilateral alimony. The competing distributional principles for marital property, equitable distribution and a rebuttable presumption of equal distribution, were framed in facially gender neutral language. Nevertheless, the discussion between 1970 and 1980 in New York regarding divorce law reform remained informed by gendered values. For marriage and divorce in our society, there is no external referent beyond women and men as wives and husbands. The primary reform issue was the historic one—the valuation of a woman's contribution to a marriage and ultimately, the worth of a married woman. This issue was glossed over by attractive cultural prescriptions for autonomy and independence for each spouse. The legislature's choice of equitable distribution reflected a desire to continue this discussion at each divorce negotiation or litigation.

Litigated outcomes and out-of-court settlements during the seven years since the passage of the reform reveal the extent of the continued systematic privileging of men as husbands in the divorce process. In New York, as well as in other jurisdictions, equal numbers of men and women get divorced, but women are far more likely to become poor as a result of divorce.[368] Poverty is a more common experience for divorced women

368. Nicholson explains:

> Since men's participation in non domestic activity historically followed from their position as head of household, such activity has been less problematic, more sustained, and better paid than women's. When initially men took on jobs outside the home, this was viewed as necessary to their role as head of household, and not in contradiction to it. Moreover, their wages were set to cover the needs of a family and were not perceived, as were those of women, as supplementary. As a result, when men today abandon family ties they bring on themselves very different economic consequences than when women perform the same abandonment.

Id. at 61. *See* L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET (A. Mulroy ed. 1988). Recent analyses suggest that men who adopt even some homemaker duties frequently find that the resulting demands on their time and energy require them to cut back on their commitment to paid work, often with a resulting decrease in income. *See* Gregg, *Putting Kids First*, N.Y. Times, Apr. 13, 1986, § 6 (Magazine), at 47; *see also* Thompson, *In California: Unswinging Singles*, TIME, June 15, 1981, at 8. An overwhelming percent (77%) of single fathers are reported in a recent survey to have difficulty balancing the demands made by working and raising children. *See* Collins, *Single-Father Survey Finds Adjustment a Problem*, N.Y. Times, Nov. 21,

than for divorced men; almost one in three female headed households lives in poverty.[369] Women caught in this economic struggle to rear children with inadequate incomes and the prospect of cuts in welfare programs[370] simultaneously confront a range of debilitating psychological states.[371] For statistical purposes they are single. But, in economic and social reality, they are not. Many are mothers who are no longer married. They carry with them the contradictory cultural definition of two identities: single woman and primary parent.

Although poverty is as common among younger formerly married women as among their older counterparts, the causes are somewhat different. Poverty among young unmarried women is closely associated with the presence of children to be supported on modest earnings. Middle-aged and older women are less likely to have dependent children, but low earnings potential, disability, and difficulty in finding and keeping steady jobs are more common.[372] Furthermore, older divorced women are much less likely than their younger divorced counterparts to rise out of poverty through remarriage.[373]

Contemporary analyses suggest a plurality of explanations for the marked decline in the economic status of divorced women. One set of

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1983, at B17. Nearly a third travel, a third had to go to work late or leave early because of the demands of being a parent, and 10% had quit or been dismissed because responsibilities of parenthood had interfered with their work. *Id.*

369. U.S. COMM. ON CIVIL RIGHTS, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN (1983); *see* Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single Parent Households*, 46 J. MARRIAGE & FAM. 115 (1984).

See also N.Y. Times, Aug. 27, 1986, A17, col. 1. ("[T]he median income for families headed by women was 13,660 last year, slightly less than half the median for all families. . . . The median income for families with both husband and wife living in the household was $31,100 last year, up 1.4 percent from 1984. If the woman worked at a paid job, the median was $36,431. If the woman was not in the paid labor-force, the median was $24,556.").

370. *See generally* Aldous, *Cuts in Selected Welfare Programs: The Effects on U.S. families*, 7 J. FAM. ISSUES 161 (1986).

371. LIVES IN STRESS: WOMEN AND DEPRESSION (D. Belle ed. 1982); L. HALEM, SEPARATED AND DIVORCED WOMEN 221 (1982); T. L'HOMMEDIEU, THE DIVORCE EXPERIENCE OF WORKING AND MIDDLE CLASS WOMEN (1984).

372. *See* B. STOLZ, STILL STRUGGLING: AMERICA'S LOW INCOME WORKING WOMEN CONFRONTING THE 1980S (1985).

373. At ages 45-54, unmarried women outnumber unmarried men by 50% and by age 65 by four to one. *See* Goldman, Westoff & Hammerslough, *Demography of the Marriage Market in the United States*, 50 POPULATION INDEX (1984) ("After age 24 the prospects for a woman [finding a mate] deteriorate rapidly, with the odds in favor of men growing from a 20% male advantage at 25-29 to an advantage over 13 times greater by age 60-64."); *see also* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, PUB. NO. CDS-80-8, SPECIAL DEMOGRAPHIC ANALYSES—AMERICAN WOMEN: THREE DECADES OF CHANGE 4 (1983) (In 1975, only 23% of Divorced Women had remarried.).

explanations focuses on the economic context in which divorce occurs. Women who are part or full-time wage earners in a wage discriminatory sex-segregated labor market[374] continue to remain economically vulnerable, though they may appear to be better off to a court than a fulltime homemaker. Homemakers faced with the impossibility of transferring skills utilized while working in the home, limited job retraining options, and ineligibility for unemployment compensation or workers compensation, continue to be economically disadvantaged. While no quarrel can be generated with policy recommendations and programs designed to diminish sex discrimination in the market, it is unclear whether a modest bettering of women's economic condition in the market will lead to dramatic changes in the economic status of divorced women.

Another set of explanations focuses on the mechanisms of the legal system which reinforce and perpetuate a disparate economic impact on divorced women. Factors such as the availability of custody as a bargaining chip, inadequate child support awards[375] and enforcement mechanisms,[376] the availability of no-fault divorce,[377] and the pattern of property and alimony awards, even with equitable distribution, all contribute to this situation. While these problems are usually addressed singly or serially by reformers, their impact is cumulative and magnified by their occurrence within a relatively short time period. The economic results reveal the true worth of married women.

These results can be attributed to bureaucratic imperfections or misunderstandings of the alleged intent of the reform. Alternatively, they can be understood through a critical analysis of the ideology and the values[378] implicit in a statute which reflects prevailing gendered norms.

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374. *See* MEMORANDUM IN SUPPORT OF EQUITABLE DISTRIBUTION, *supra* note 261.

375. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 148, CURRENT POPULATION REPORTS-CHILD SUPPORT AND ALIMONY: 1983, at 2 (1986). Of those women due alimony payments, about half received the full amount they were due. The remaining women received partial payment (25.5%) or no payment (24%). *See also* D. CHAMBERS, MAKING FATHERS PAY (1979); L. WEITZMAN, *supra* note 369, at 272 (recommendation that child support awards be based on an income sharing approach).

376. N.Y. DOM. REL. LAW §§ 236 Part B(9), 244, 244-a, 245 (McKinney & Supp. 1986); N.Y. FAM. CT. ACT §§ 449, 842(F) (McKinney 1983).

377. The claim that women suffered less in fault-based systems is premised on the undocumented belief that property awards were substantial and/or alimony awards were generous and the rate of arrearages low. Weitzman and Dixon, *supra* note 135. *But see* Jacob, *Faulting No-Fault*, 1986 AM. BAR FOUND. RES. J. 773.

378. Reform efforts and the rhetoric surrounding them are rife with contradictions, paradoxes, anomalies, distortions, and selective appropriations of the past. But such seeming confusion is useful data. Reform talk must be understood at its face value but analyzed by questioning that face value. *See* S. COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 100

The former approach leads to gap studies ad infinitum.[379] The latter approach underscores the nature of domination in the sex/gender system. Distributive justice at divorce continues to be gendered justice and, not surprisingly, property distribution replicates status quo power relations.

One type of reform, the nineteenth century Married Women's Property Acts and the 1980 bilateral alimony provisions, replaced gender specific law with a gender neutral statute. The other type of reform, the expansion of fault-based marital dissolution and the substitution of equitable distribution for strict-title distribution of marital property, replaced one gender neutral statute with another. Both types of reforms were designed to remedy a perceived systemic unfairness toward married women which resulted, initially, from the appropriation of their identity and continuingly, from the married gendered identity accorded them by the culture. In fact, all of the reforms were touted as assisting or benefitting married women. Such a law reform strategy—creation and maintenance of formal gender neutrality—is identified with liberal political, social, and legal theory[380] in which rule equality or equal opportunity is largely a procedural matter without a context.

Formal degendering may be a societal statement proclaiming the desirability of removing gender-based barriers. Supplemented as it has been by almost two decades of litigation, it has led to a qualified guarantee of equal treatment through integration into a preexisting predominantly male world in which ostensibly neutral rules are susceptible to interpretation which buttresses male hegemony.[381] But desirability is neither a force for the elimination of a gendered social, economic, and cultural context nor does it necessarily have a significant impact on it. Legal degendering or systematic neutrality in a deeply gendered structure still results in overwhelmingly gendered outcomes.

(1985). *See also* Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978). *See generally* J. ATLESON, VALUES AND ASSUMPTIONS IN LABOR LAW (1983); K. Klare, *Labor Law as Ideology: Toward A New Historiography of Collective Bargaining Law*, 4 IND. REL. L.J. 450 (1981).

379. For a theoretical perspective, see Berman, *The Study of Macro and Micro Implementation*, 26 PUB. POLICY 157 (Spring 1978); *see* H. JACOB, *supra* note 191, at 146-48 (consequences of lack of institutional responsibility for implementation of divorce law reforms including extreme decentralization, lack of responsibility to collect information regarding emerging implementation patterns and absence of publicity to potential users of the law).

380. *See* Fineman, *supra* note 5, at 789 (critique of liberal feminism); *see also* Z. EISENSTEIN, *supra* note 24; Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM 159-60, 164 (1981); J. ELSHTAIN, *supra* note 242; A. JAGGER, FEMINIST POLITICS AND HUMAN NATURE 27-48, 173-203 (1983); MacKinnon, *supra* note 19.

381. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1983).

As implementation patterns for the New York divorce law reform have become increasingly clear, various proposals and recommendations have been made to correct the emerging pattern of inequities in the equitable distribution of property by court order and court approved settlements. These proposals have been characterized as "precise and modest." They are, in fact, classic tinkering responses.[382] They include: (1) increasing of the pool of divisible property by including increases in the value of separate property if the increases occur as a result of the efforts of either spouse;[383] (2) considering the wasteful dissipation of family assets by either spouse[384] and the tax consequences to each party of an equitable distribution;[385] (3) making available to the nonmonied spouse the services of court appointed appraisers and other experts[386] to collect financial

382. The Chair of the New York City Bar Matrimonial Law Committee suggested:

> The gestation period and birth of Equitable Distribution was long and arduous. Its early childhood has been somewhat stormy but so much better than what existed before, that we should be supremely careful to guide its continued growth with precise and modest changes and a maximum opportunity for case by case growth.

Joint Public Hearings on Equitable Distribution, *supra* note 294 (statement of Stanley Plesent); *see also* H. JACOB, *supra* note 191, at 9-15 (routine policy making characterizes divorce law reform process); Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1556 (1984) (critique of marital property distribution law reforms which address the needs of rich divorcing couples and which permit excessive judicial discretion). For a critique of "tinkering" in the area of divorce law reform, see Fineman, *Illusive Equality: On Weitzman's Divorce Revolution* (Review Symposium), 1986 AM. BAR. FOUND. RES. J. 781, 786.

383. *Joint Public Hearings on Equitable Distribution*, *supra* note 294 (statement of Stanley Plesent).

384. *Id.*

385. *Id.*

386. *See id.* (statement of Lynn Hecht Schaffran, Esq., Special Council to the New York City Commission on the Status of Women) (discussing the "prove it or lose it" aspect of divorce litigation under EDL which has "recreated much of what was wrong when New York was a title state"); *see also* Hirschfeld v. Hirschfeld, 114 A.D.2d 1006, 495 N.Y.S.2d 445 (2d Dep't 1985), *aff'd*, 69 N.Y.2d 842, 514 N.Y.S.2d 704 (1987); Gottlieb v. Gottlieb, 108 A.D.2d 120, 488 N.Y.s.2d 180 (1st Dep't 1985) (although husband believed to have converted and secreted vast amounts of marital property, he is awarded more than 50% of marital property); Wilson v. Wilson, 101 A.d.2d 536, 476 N.Y.S.2d 120 (3d Dep't 1984), *appeal dismissed*, 64 N.Y.2d 607, 487 N.Y.S.2d 1027 (1984); Muller v. Muller, 18 A.D.2d 1067, 239 N.Y.S.2d 519 (1st Dep't 1963) (although Court acknowledged husband's substantial hidden income and questionable business deductions, wife awarded only 35% of marital graphics business); Nehorayoff v. Nehorayoff, 108 Misc. 2d 311, 437 N.Y.S.2d 584 (Sup. Ct. 1981) (husband's failure to report $26,000 in cash income not held against him).

> "The burden of proof is on the partner who doesn't hold title. If you can't prove you deserve it you don't get it. The wife comes in pushing a snowball up a hill" said Manhattan divorce lawyer Louis I. Newman. "She has to say 'Judge here's why I think I am entitled to a share.' She not only has to say it," Newman went on, "she has to prove it-by hiring accountants and appraisers, tax and pension specialists, and, of course, a very good lawyer. The spouse with the assets-the 'deep pocket' as he's known in the matrimonial trade-tries to divulge as little information as possible. Or," as Newman said, "the golden rule applies: He who has the gold makes the rules."

information from the monied spouse;[387] (4) reintroducting the presumption of equal distribution;[388] (5) developing guidelines for equitable distribution awards in limited marital property cases;[389] and (6) revising the statutory provision regarding alimony to move from "reasonable need" to "standard of living during the marriage."[390]

Taken singly or collectively, the proposals are designed in large part to counter criticisms of the present statute and focus on the needs of women seeking divorce. As such, they constitute a recognition of the centrality of identity to ideology, of gender as a source of identity, and of gender as a source of power.

For supporters of equitable distribution, the emerging imperfections in the 1980 reform can be eliminated by passage of some if not all of the preceding proposals. Supplementing such proposals is a call for judicial education.[391] The premise underlying such a call is that once judges are made aware of the implicit if not explicit gender privileging of men which underpins their determinations, they will consciously avoid such outcomes. Should this change occur in litigated case outcomes, a trickle down effect would occur in settlements negotiated by lawyers.

Supporters of a rebuttable presumption of equal distribution argue that these proposals are no more than tinkering. So long as the crucial issue in litigation or negotiation is the evaluation of a woman's contribution, equitable distribution will skew outcomes because courts use the

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Bouton, *Women and Divorce: How the New Law Works Against Them*, 17 NEW YORK MAGAZINE 34 (Oct. 8, 1984).

387. In most instances, the husband is in a better position to finance the preparation of proof. In marriages with substantial assets, avoidance of accurate financial disclosure appears to be fairly common. Misrepresentations as to a husband's resources are made with abandon, knowing that the burden of proof to the wife is so heavy and costly that the dependent spouse will not have the means to aggressively prosecute the misrepresentations. One attorney in the author's pilot survey of matrimonial practitioners and judges reported that one of the most effective techniques to force adequate disclosure was a threat to call in the IRS to review the husband's business records.

388. *See e.g.*, N.Y.S. A.175, (Jan. 9, 1985) 1985-1986 Regular Sessions (sponsored by Assembly members Newburger, Weprin, Fink and Nadler); N.Y.S. A.8211, 1979-1980 Regular Sessions; N.Y.S. A.7111, 1983-1984 Regular Sessions. Bill A.175 passed the Assembly and died in the Senate Rules Committee.

389. Abrams, *Equitable Distribution-A Time for Objective Reform*, 19 FAM. L. REV. 1, 20-21 (1987). Abrams suggests using the criteria of length of marriage plus years the non-propertied spouse worked. For example: a non-propertied spouse in a three year marriage would receive 30% of the marital assets, plus an additional 2% for each year working outside the home.

390. *See* Act of Aug. 2, 1986, ch. 884, 1986 N.Y. Laws 3325 (codified at N.Y. DOM. REL. LAW 236(b)(6)(a) (McKinney 1986)).

391. Kay, *supra* note 201, at 310-11 n.155 (legislation requiring an annual one-week judicial training and education program in family law including instruction on the effects of gender bias on family law proceedings and the economic consequences of dissolution).

evaluation of gendered contributions to a marriage to disadvantage women. Current analytic models for arriving at a dollar value of the homemaker's work tend to undervalue such work[392] and trivialize it. Or courts undertake an evaluation of the quality of the homemaker's work without doing a comparable evaluation of quality of work for a male employed outside the home.[393] Assuming that the supporters of a presumption of equal distribution are accurate in their critique, it is not apparent that continuing to press for a presumption will solve the problem they have identified; gender neutral rules such as a presumption of equal distribution do not produce gender neutral results in a cultural context where gender is a major source of power.

Perhaps a more fruitful approach to prevent the post-divorce impoverishment of women would be to require that if possible, a distributional award should provide a custodial spouse and children whether in a sole or joint custody situation, with the preseparation standard of living. If this is not possible, the award should leave both households in similarly disadvantaged economic circumstances.[394] Such a proposal takes into account the systemic longer term and largely irreversible disadvantaging generated by the cultural, social, and economic implications of divorce. But even such a seemingly radical approach to property distribution is in fact premised on a set of liberal assumptions; it presupposes the family as an autonomous private economic unit fully responsible for the economic lives of its members.[395] It does not begin to suggest how the cost or the many functions performed by the family could be socialized. It relies on distributive relations rather than on the relations of production and reproduction and their transformation.

The choice appears to be between gender neutral or gender specific statutes. Critics of gender specificity argue that both types of statute can produce the same result on a material level. They recognize that gender neutral laws can be defined to either male or female advantage depending on who has political power. Such laws can replicate status quo relation-

392. Kozak Testimony, *supra* note 272, at 2.

393. *See* Avner, *Valuing Homemaker Work: An Alternative to Quantification*, 4 FAIRSHARE 11 (1984).

394. *Joint Public Hearings on Equitable Distribution*, *supra* note 294 (testimony of Judith Avner); *see also* M. GLENDON, *supra* note 362, at 1559 (proposal distinguishing between "marital" property available for division in a childless marriage and "family" property distributed to guarantee the financial security of children and their custodian after divorce).

395. O. PATTERSON, *supra* note 39, at 250.

ships and preserve the relative position of groups.[396] On a symbolic level, they argue that the disadvantage of gender specificity outweighs gender neutrality, for a gender specific legislative classification reinforces one ideal about the construction of gender and gender roles. What such critics prefer is the acquisition or articulation of a gender-based understanding of the effects of substantive choices on women's power and status. Such understanding would presumably then inform our substantive choices.[397]

As this study indicates, a desire to erase gender is not enough. We must understand how law and legalism in our culture and history are best viewed as an instance of ideology. Second, we must never underestimate the constitutive power of stereotypical gender roles which inform our daily lives[398]. Third, we must understand the power of power, especially the power associated with ownership or control of property.[399] Finally, we must understand that gendered identity and economic inequality reinforce one another's effects, not only in the context of marriage, but in the context of divorce as well. Marriage conditions economic dependence on gendered identity. Divorce not only destroys the economic basis for many women's lives; it often destroys the psychic and social basis as well. The fact that economic dependence in marriage is conditioned on gendered identity does not mean that economic independence can be achieved by and for women by ignoring or denying gendered identity in the name of formal neutral legal identity.[400]

396. Dworkin, *What Liberalism Isn't* (Book Review), 29 NEW YORK REV. BOOKS 47 (Jan. 20, 1983) (reviewing B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1982)).

397. Letter from Professor Wendy Williams to the author.

398. *See e.g.*, E. SCHUR, LABELING WOMEN DEVIANT: GENDER, STIGMA, AND SOCIAL CONTROL 22-48 (1983) (discussing the devaluation process).

399. *See* I. BALBUS, THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS (1973) (the combination of formal legal equality and extreme economic inequality is a distinctive characteristic of the liberal state).

400. "We have no simple a priori formula that we can apply to decide whether to support legal reforms," Olsen, *The Politics of Family Law*, 2 LAW AND INEQUALITY 1, 4 (1984); *see* A. BRITTEN, THE PRIVATIZED WORLD (1977). "There is no way that human beings in the late 20th century can claim that they are solely responsible for the integrity of the self or the uniqueness of their biology." *Id.* at 148.