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Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in Law: A Context for Reconstruction

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SETTING THE AGENDA FOR THE 1990s: THE HISTORICAL FOUNDATIONS OF GENDER BIAS IN THE LAW: A CONTEXT FOR RECONSTRUCTION

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I. INTRODUCTION

As a member of Florida's Supreme Court Gender Bias Study Commission and the author of its report, I have spent the last two-and-one-half years investigating Florida's gender-biased laws and discriminatorily enforced gender-neutral laws.[1] The Commission found that, despite the recent changes that have occurred in the law through gender bias commissions,[2] feminist jurisprudence, and the steady influx of women into legal and other professions, the legal system still is influenced to a significant and unacceptable degree by a cultural ideology that publicly condemns, yet tacitly accepts, rationalizes, and promotes male dominance and female subordination.[3] The tangible evi-

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1. THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, at viii-xi (1990), *published in* 42 FLA. L. REV. ___ (forthcoming 1990) (reported by Ricki Lewis Tannen) [hereinafter FLORIDA REPORT]. *Editor's Note*: All citations to the FLORIDA REPORT are to the official report released by the Florida Supreme Court Gender Bias Study Commission in March 1990.

2. For discussion of the states which have initiated gender bias commissions or task forces and the findings of these investigations, see Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA L. REV 181 (1990).

3. *See* FLA. REPORT, *supra* note 1, at 2.

dence of that cultural ideology can be found in the reports of pervasive gender bias documented by the many gender bias commissions and task forces that have issued reports, including the one issued by the Florida Supreme Court Gender Bias Study Commission.[4] For me, however, documenting the pervasive nature of gender bias and the enormity of its ramifications and dimensions in Florida turned out to be only the beginning. I discovered that, while many gender bias commissions had substantiated the extent of gender bias in their respective states' legal systems, none had investigated why gender bias in the law had developed and why it seemed almost impervious to eradication.

This prompted my pursuit for an explanation of gender bias. I have found that recent research in anthropology and history provide the best sources for the explanation. Thus, this essay offers an interdisciplinary context for gender bias.

Part II of this essay discusses how the ideology of male dominance and female subordination gained the force of law in Mesopotamia. By showing how present law still operates on these outdated ideals and assumptions, I hope to offer a context for deconstruction. Part III of the essay examines the dynamics of change within the Florida legal system as discovered by the Florida Supreme Court Gender Bias Study Commission. I will use the Florida experience as an example of the transition from a legal system based on a cultural ideology of female subordination to one based on a cultural ideology of equalitarian cooperation.

II. THE HISTORICAL FRAMEWORK

A. *Mesopotamia: From Equalitarianism to Patriarchy*

Those prehistoric cultures with adequate resources for sustenance, including the clans, villages, and cities of Mesopotamia, developed equalitarian cultures.[5] Life centered on the cooperative gathering-scavenging of food and not, as was once assumed, on hunting.[6] As

4. *See id.* ("gender bias permeats Florida's legal system today"); *see also* Schafran, *supra* note 2, at 181-208 (noting the pervasive nature of gender bias throughout the country as found gender bias study commissions).

5. For discussion of these equalitarian power structures, see R. EISLER, THE CHALICE AND THE BLADE, OUR HISTORY, OUR FUTURE (1987); M. FRENCH, BEYOND POWER: ON WOMEN, MEN AND MORALS (1985); P. SANDAY, FEMALE POWER AND MALE DOMINANCE (1981); Rohrlich-Leavitt, *Women in Transition: Crete and Sumer*, in BECOMING VISIBLE: WOMEN IN EUROPEAN HISTORY 35-59 (1977). *See generally* B. ANDERSON & J. ZINSSER, A HISTORY OF THEIR OWN: WOMEN IN EUROPE FROM PREHISTORY TO THE PRESENT (1988).

6. Richard Leakey recognized this common misperception:

"It's been assumed that we always killed to get our meat, and that the basis of

archeologist James Mellaart concluded, these neolithic equalitarian cultures were peaceful communities "with an extensive economic development, specialized crafts, a rich religious life, a surprising attainment in art and an impressive social organization."[7]

At some time in the late stone age, a transformation occurred within the equalitarian cultures — women became subordinate. Theories as to the exact cause of this transformation are diverse, and none points to any single event or cataclysmic occurrence as the sole cause of this change. One school of thought contends that external factors caused the change: the equalitarian cultures were overrun by invaders from the north who brought with them a culture of hierarchal male dominance.[8] This phenomenon caused what Raine Eisler termed "cultural regression and stagnation."[9] Others claim internal factors, produced by the shift from gathering-scavenging to sedentary agriculture, urbanization, and private property, caused the transformation.[10]

> our success was man the hunter. Yet our ancestors were amongst the slowest animals on the savannah, and had only the crudest of weapons. There were far more formidable hunters seeking meat then as now. It's probable that it was the leftovers from these kills that fed our ancestors. We know from the success of modern-day scavengers in Africa that there is always plenty of meat left over. It's a myth that it was hunting that made us human."

B. BENDERLY, THE MYTH OF TWO MINDS: WHAT GENDER MEANS AND DOESN'T MEAN 137 (1987) (quoting R. LEAKEY, THE MAKING OF MANKIND: A FIVE PROGRAM SERIES ABOUT HUMAN PREHISTORY AND ITS IMPLICATIONS FOR MODERN MAN NO. 5, at 12 (1983); *see also* R. LEAKEY, THE MAKING OF MANKIND 94 (1981).

7. Mellaart, *A Neolithic City in Turkey*, in READINGS FROM SCIENTIFIC AMERICAN: AVENUES TO ANTIQUITY 141 (1976) (study of Catal Huyuk, Turkey revealing that this early neolithic city was as urban as a bronze age civilization).

8. *See* R. EISLER, *supra* note 5, at 43-44. Eisler also noted invasions from the south; however, she found that a common denominator of these invaders to be "a dominator model of social organization." *Id.* at 44-45. Marija Gimbutas dated these invasions as occurring between 4300 and 2800 B.C. *See* M. GIMBUTAS, THE LANGUAGE OF THE GODDESS, at xx (1989); *see also* M. STONE, WHEN GOD WAS A WOMAN 20 ("Their arrival was not a gradual assimilation into the area, . . . but rather a series of aggressive invasions. . . ."); *id.* at 62-102.

9. *See* R. EISLER, *supra* note 5, at 44.

10. Rohrlich, *supra* note 5, at 83-84 ("The basic subversion of the clans occurred when the egalitarian relations between women and men, which were central to the democratic process, were destroyed. This occurred in the context of chronic warfare, which became a male occupation and a significant factor in the emergence of male supremacy, and in the development of private property and its generational transmission, secured in the male line by law."); telephone interview with R. Rohrlich, Apr. 14, 1990; *see also* E. BOULDING, THE UNDERSIDE OF HISTORY 161-62 (1976) (discussing the importance of trade, territorial expansion, warfare and urbanization, resulting in the disappearance of the "old clan rights"); G. LERNER, THE CREATION OF PATRIARCHY 46 (1986) (focusing on interclan warfare due to economic scarcity along with sedentariam and agriculture).

During this transitional epoch[11] the physical structure of the equalitarian cultures shifted along with the social structure. Fortified cities replaced unprotected settlements, and a new cultural ideology of female subordination and male dominance replaced the old cultural ideology of equalitarian cooperation.[12] Emphasis in the technology of metallurgy shifted from art and artifact[13] to weapons of dominance and distruction,[14] thereby facilitating the obliteration of the equalitarian cultures.[15]

War to accumulate land and power became the new paradigm. Private property and slavery[16] (humans became the spoils of war) were legitimized by law as urbanized city-states with kings replaced the communal clan structures. The earliest laws of these city-states — the Edicts of Urukagina,[17] the Laws of Eshnunna,[18] the Lipit-Ishtar Law Code,[19] the Code of Hammurabi,[20] the later Mesopotamian laws,[21] and the Old Testament Laws[22] — were used to legitimize the new cultural ideology of female subordination and male dominance.

B. *Early Mesopotamian Laws*

The earliest law codes of Ancient Mesopotamia destroyed equalitarian kinship groups, imposed momogamy upon women, and transferred jurisdiction for transgressions from the kinship groups to the state.[23]

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11. G. LERNER, *supra* note 10, at 8 (establishing this transition time as occurring between 3100 to 600 B.C.).

12. For a discussion of the components of the transformation and the cultural ideology of dominance, see R. EISLER, *supra* note 5, at 42-58.

13. *See id.* at 45-46; *see also* J. MELLAART, CATAL HURUK: A NEOLITHIC TOWN IN ANATOLIA (1967); J. MELLAART, THE NEOLITHIC OF THE NEAR EAST (1975).

14. *See* Gimbutas, *The Beginning of the Bronze Age in Europe and the Indo-Europeans: 3500-2500 B.C.*, 1 J. INDO-EUROPEAN STUDIES 163, 174-75 (1973) (areas north of the Black Sea from which the migrations occurred were devoid of copper). These migrating peoples used the metals they found in the south for weapons of destruction and subordination. *Id.*; *see also* R. EISLER, *supra* note 5, at 45-47.

15. *See* R. EISLER, *supra* note 5, at 45-54.

16. G. LERNER, *supra* note 10, at 76; *see also Slavery*, 27 THE NEW ENCYCLOPEDIA BRITANNICA 285 [hereinafter BRITANNICA] (15th ed. 1990) (slaves most frequently were generated by capture in war, either as an incentive to warriors or as a way of disposing of enemy troops and civilians).

17. *See infra* notes 24-26 and accompanying text.

18. *See infra* notes 27-30 and accompanying text.

19. *See infra* notes 31-34 and accompanying text.

20. *See infra* notes 35-51 and accompanying text.

21. *See infra* notes 52-62 and accompanying text.

22. *See infra* notes 63-83 and accompanying text.

23. Address by Ruby Rohrlich, Law and Disorder: Impact on Women of the Early Laws in Mesopotamia and Mesoamerica, The Third International Interdisciplinary Congress on Women,

During the reign of King Urukagina of Sumer[24] female autonomy first was restricted by a law that prohibited women from controlling their own sexual and reproductive capacities.[25] One commentator noted the import of this law:

> Under threat of death by stoning, still practiced in some parts of the Middle East, this first law, with one fell swoop, imposed monogamy on women only, thereby controlling their sexuality and reproduction. The fact that women, "used to take two husbands" indicates that in the not too distant past, property was owned communally by clans in which inheritance and descent were matrilineal, and that the accumulation of private property had not yet proceeded to the point where the identity of the biological father was considered necessary. When essential resources like land and water were owned communally, both women and men could have any number of mates, either simultaneously or sequentially. . . .[26]

The creation of the patriarchal family reflected and helped to perpetuate the hierarchal structure of the state. Children socialized into this type of family accepted gender and class stratification as the norm.

In the four hundred years between Urukagina and the Laws of Eshnunna[27] women became reproductive property. A formal contract was necessary to transfer ownership between patriarchal families:

> 27: If a man takes a(nother) man's daughter without asking the permission of her father and her mother and concludes no *formal marriage contract* with her father and her mother, even though she may live in his house for a year, she is not a housewife.[28]

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in Dublin, Ireland 1-6 (July 10, 1987); Anthropologist Ruby Rohrlich has concluded that the Urukaginian Code institutionalized patrilineal inheritance and descent, patrilocal residence, and the patriarchal family. *See* Rohrlich, *State Formation in Sumer and the Subjection of Women*, 6 FEMINIST STUDIES 97-98 (1980).

24. *See* Rohrlich, *supra* note 23, at 2 (first law enacted around 2415 B.C.).

25. S. KRAMER, THE SUMERIANS, THEIR HISTORY, CULTURE, AND CHARACTER 322 (1963) ("The women of former days used to take two husbands, (but) the women of today (if they attempt to do this) will be stoned with stones (upon which is inscribed their evil) intent."). *Id.*

26. Rohrlich, *supra* note 23, at 3-4.

27. ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 161-63 (J. Pritchard ed., 2d ed. 1969) [hereinafter ANET]. The Laws of Eshnunna were in use from about 2000 B.C. to the creation of Hammurabi's empire in 1728 B.C. *Id.* at 161.

28. THE LAWS OF ESHNUNNA LL. 27-28, *reprinted in* ANET, *supra* note 27, at 162 (A. Goetze trans.) (emphasis in original).

> 28: *On the other hand,* if he concludes a formal contract with her father and her mother and cohabits with her, she is a housewife. When she is caught with a(nother) man, she shall die, she shall not get away alive.[29]

Thus, according to the Laws of Eshnunna, once the legal ownership of the woman passed from the patriarchal family to the husband, the woman had to remain monogamous or suffer the death penalty. However, the Laws of Eshnunna contained no penalty for the adulterous conduct of a husband.[30] The laws, however, did not totally divest women of their former equal status. The marriage contract itself needed the consent of both the bride's father and mother.

Six hundred years after Urukagina, monogamy for women having been established by law, the Lipit-Ishtar Law Code[31] focused upon insuring that the patriarchal family could pass private property to legitimate heirs.[32] The law accomplished this by making women's legal status dependent upon their reproductive capabilities: "If a man's wife has not borne him children (but) a harlot (from) the public square has borne him children, he shall provide grain, oil and clothing for that harlot; the children which the harlot has borne him shall be his heirs. . . ."[33]

The Code also authorized men to have multiple wives and heirs: "[I]f the secon[d wife] whom [he had] married bore him [chil]dren, the dowry which she brought from her father's house belongs to her children, [but] the children of [his] *first* wife and the child of (his) second wife shall divide equally the property of their father."[34] By making the sole basis of a woman's legal existence her reproductive capabilities, laws began to deny independent legal status to women.

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29. *Id.*

30. *See id.* LL. 1-59 (text of code includes Laws 1-59, which do not mention any prohibition or penalty for adultery on the part of the husband). *But see id.* L. 26 (imposing the death penalty upon a man who rapes another's fiancè, thus penalizing a misbehaving man, but only with respect to the other man's property).

31. *See* THE LIPIT-ISHTAR LAWCODE, *reprinted in* ANET, *supra* note 27, at 159-63 (S. Kramer trans.). Lipit Ishtar ruled during the first half of the nineteenth century B.C., approximately 1800-1850 B.C. *Id.* at 159.

32. Of the 38 surviving laws, 13 or nearly a third deal with inheritance and marriage. The remaining laws deal with boats (2 laws), real estate (4 laws), slaves and servants (5 laws), taxes (2 laws), and rented oxen (3 laws). The remainder are unintelligible. *See* ANET, *supra* note 27, at 159-61.

33. THE LIPIT-ISHTAR LAWCODE L. 27, *reprinted in* ANET, *supra* note 27, at 160.

34. *Id.* L. 24, at 160 (emphasis in original).

C. *The Code of Hammurabi*

The Code of Hammurabi is the most complete evidence of Mesopotamian jurisprudence found to date[35] and is essentially a compilation and revision of older laws of Sumerian and Akkadian origin.[36] The Code represents changes that occurred in women's legal standing over approximately six hundred years between the reigns of Urukagina and Hammurabi.[37] The Code of Hammurabi barely discussed the legal status of women before their interfamilial transfer for reproductive purposes.[38]

Women's diminished autonomous legal status, their heightened significance as property, and the importance the Code placed upon the patriarchal family and patrilineal descent is illustrated graphically in the provisions of Law 135:

> If, when a seignior was taken captive and there was not sufficient to live on in his house, his wife has then entered the house of another before his (return) and has borne children, (and) later her husband has returned and has reached

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35. *See* 20 BRITANNICA, *supra* note 16, at 660 (The Code of Hammurabi is inscribed on a diorite stella, which was found intact in 1901 and removed to the Louvre in Paris. It is the most complete compilation of ancient Mesopotamian laws.).

36. *See* C. WOOLEY, THE SUMERIANS 91 (1928) ("a redaction of old partial or local codes and of old customs); *see also* 20 BRITANNICA, *supra* note 16, at 660.

37. *See supra* text accompanying notes 23, 27.

38. CODE HAMMURABI, *reprinted in* ANET, *supra* note 27, at 163-80 (T. Meek trans.). Of the 282 laws in the Code of Hammurabi, 74 covered marriage and sexual matters. No section of the Code dealt with women in other than her reproductive capacity except for certain sections regarding debt (binding the husband to her debt) and the sale of wine. *See id.* LL. 108-111, at 170. However, even these sections did not confer legal status on the women for they dealt with the rights of men against acts of a woman. *See, e.g., id.* L. 108, at 170 ("If a woman wine seller . . . has received money by the large weight and so has made the value of her drink less than the value of the grain, they shall prove it against the wine seller and throw her into the water."). The Code also punished married women for engaging in business. For example, Law 141 provided,

> If a seignior's wife, who was living in the house of the seignior, has made up her mind to leave in order that she may engage in business, thus neglecting her house (and) humiliating her husband, they shall prove it against her; and if her husband has then decided on her divorce, he may divorce her with nothing to be given her as her divorce-settlement upon her departure. If her husband has not decided on her divorce, her husband may marry another woman, with the former woman living in the house of her husband like a maidservant.

Id. L. 141, at 172. In short, as the property of her husband, a wife could do nothing which the husband did not allow. If she did do an unauthorized act, her penalty was to be divorced without provision for maintenance or to be reduced to a servant.

> his city, that woman shall return to her first husband, while the children shall go with their father.[39]

Further evidence of a woman's legal nonexistence except in her reproductive capacity is the Code's relative lack of provisions for redress of injury to a woman except in her reproductive capacity.[40] And even then, redress was made not to the women but to the men who had legally recognized interests. For example, if a man struck another man's daughter and caused her to suffer a miscarriage, he had to pay ten shekels of silver to her father,[41] presumably to reimburse him for the destruction of his inchoate property. If a man killed the daughter of another man, then the killer's daughter was put to death,[42] *i.e.*, property for property.

Marriage as the transfer of reproductive property between patriarchal families is reflected in the Code's provisions relating to betrothal and consummation.[43] By the time of Hammurabi, a woman's value in her family was her potential to be a bride. Her bride price could finance the purchase of a bride for a son, whose sons then could inherit the private property accumulated by the family.[44]

The Code contained no provisions for a woman to inherit independently the property of her family, "since her heritage belong[ed] to her brothers."[45] However, if an unmarried woman was a nun, a hierodule (a religious functionary),[46] or votary (a priestess),[47] and her father specifically granted her written permission to "give her heritage to whom she pleased,"[48] she was permitted to dispose of what her

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39. *Id.* L. 135, at 171.

40. *Id. See, e.g., id.* LL. 208-11, at 175 (injury to fetus). *But see* L. 127, at 121 (penalty for slandering some women).

41. *Id.* L. 209, at 175.

42. *Id.* L. 210, at 175.

43. *Id.* LL. 159-84, at 173-74. For a discussion of these sections, see G. LERNER, *supra* note 10, at 106-09.

44. G. LERNER, *supra* note 10, at 106.

45. CODE HAMMURABI L. 180, *reprinted in* ANET, *supra* note 27, at 174. The Code gave the daughter use of part of the family's inheritance, but specified the following reasons why she could not inherit:

> If a father did not present a dowry to his daughter, a hierodule in a convent or a votary, after the father has gone to (his) fate, she shall receive as her share in the goods of the paternal estate a portion like (that of) an individual heir, but she shall have only the usufruct of (it) as long as she lives, since her heritage belongs to her brothers.

Id.

46. *See id.* at 168 n.59.

47. *See id.* at 174 n.123.

48. CODE HAMMURABI L. 178, *reprinted in* ANET, *supra* note 27, at 174.

father had given her. Absent a written document, "her patrimony belong[ed] to her brothers."[49] The provisions for a married woman's transfer of property were more restrictive. If the wife and the husband had a written contract that specifically granted the wife certain property, she could choose her favorite son as the beneficiary of the property. She, however, could not bequeath the property to her daughter.[50] That the production of sons was the object of a woman's reproductive capacities can be seen in the disposition of property absent the production of sons. As one commentator noted,

> [T]he Mesopotamian example shows clearly that here property passes from man to man, male family head to male family head, but it passes *through* women. The wife had lifelong use-right of her dowry, but her husband (or sons) have vested rights in that property, which after her death goes to them. In the case of divorce or if she did not bear sons, the dowry is returned to her father (or her brothers). A woman cannot cede or will her property, thus her rights are extremely limited. Most significantly, these rights, such as they are, depend on her sexual and reproductive services to her husband, particularly on having provided him with sons.[51]

D. *Later Mesopotamian Laws*

Women's autonomous legal status further eroded as the city-states solidified the new cultural ideology of patriarchy and patrilineal descent.[52] Provisions of the Middle Assyrian Laws (MAL) of Mesopotamia[53] relating to the legal treatment of rape illustrate the

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49. *Id.*

50. *Id.* L. 150, *reprinted in* ANET, *supra* note 26, at 172.

51. G. LERNER, *supra* note 10, at 108-09 (emphasis in original). MIDDLE ASSYRIAN L. 29, *reprinted in* ANET, *supra* note 27, at 182 (T. Meek trans.) provided,

> If a woman has entered her husband's house, her dowry and whatever she brought from her father's house or what her father-in-law gave her on her entry are vested in her sons, with her father-in-law's sons having no claim to (them); however, if her husband cut her off, he may give what he chooses to his sons.

Id.

52. *See infra* notes 53-62 and accompanying text. Patrilineal descent was assured by premarital virginity and marital fidelity.

53. *See* MIDDLE ASSYRIAN LAWS, *reprinted in* ANET, *supra* note 27, at 180-88. The tablets from which the laws were transcribed and translated date from the 12th century B.C. However, the laws themselves may date from the 15th century B.C. *See id.* at 180; *see also* E. BOULDING, *supra* note 10, at 221 ("The Middle Assyrian Laws are not a code, but a miscellaneous assortment of laws in the character of amendments, nearly all referring to women,

extent of limitations the laws placed upon women and the extent to which the laws deprived the women any independent legal status apart from sexual and reproductive property.

Under MAL, the rape of a virgin was presumed to be an illegal trespass upon the father's property, with the rapist required to "give the (extra) third in silver to her father as the value of a virgin (and) her ravisher shall marry her (and) not cast her off."[54] The woman was required to marry her rapist without hope of divorce. If the rapist was married, the virgin still had to marry her rapist; however, the rapist's property, his wife, also was factored into the compensation. The rapist's wife was to be given to the father, "to be ravished . . . not [to] return her to her husband (but) [to] take her."[55]

This approach to rape developed because a virgin was considered a valuable asset, the value residing in men's ability to gain absolute ownership of the totality of her sexual and reproductive functions. Any infringement upon this totality through premarital sexual relations rendered the asset less valuable, and might even turn it into a liability. Therefore, the rapist was required to pay for and remove the liability because the rapist destroyed its value. The law recognized the father's property rights, not the victim's, as compensable. One commentator noted the devastating effect this had for women:

> Here we see the concept that rape injures the victim's father or husband carried to devastating conclusions for the women affected: the victim of rape can expect an indissoluble marriage with the rapist; the totally innocent wife of the rapist will be turned into a prostitute. The language of the law gives us a sense of the absolute "power of disposal" of fathers in regard to their daughters.[56]

The Middle Assyrian legal treatment of miscarriage and abortion further exemplify how the state increasingly encroached on women's autonomy. For example, the MAL penalized self-induced miscarriage by requiring the women to be "impaled on the stakes without burying

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on the subject of property rights and offenses to and by women. . . .") (citation omitted); G. LERNER, *supra* note 10, at 101-02 (Middle Assyrian Laws are those laws compiled between the 15th to the 11th century B.C. that amended and clarified Hammurabic law).

54. MIDDLE ASSYRIAN L. 55, *reprinted in* ANET, *supra* note 27, at 185.

55. *Id.*

56. G. LERNER, *supra* note 10, at 116-17 (citing Saporetti, *The Status of Women in the Middle Assyrian Period*, 2 MONOGRAPHS ON THE ANCIENT NEAR EAST, facsimile 1, at 1-20 (1979); *id.* at 268-69 ("Saporetti throughout shows the 'woman's total and absolute dependence' on her father and husband. . . .") (citing Saporetti, *supra*, at 13).

her."[57] Gerda Lerner explained why a self-induced miscarriage was deemed an attack upon the state of the highest order:

> The savage punishment against self-abortion has to do with the importance placed throughout the MAL on the connection between the power of the king (state) and the power of the patriarchal family-head over his wives and children. Thus, the right of the father, hitherto practiced and sanctioned by custom, to decide over the lives of his infant children, which in practice meant the decision of whether his infant *daughters* should live or die, is in the MAL equated with the keeping of social order. For the wife to usurp such a right is now seen as equal in magnitude to treason or to an assault upon the king.[58]

The MAL also specifically authorized legal and extralegal physical assaults upon women within the marital context. Bodily mutilations such as "tearing out (the eyes) [or] cutting off (the ears)"[59] were to be done in public by an official.[60] However, "[a]part from the penalties for [a seignior's wife] which [were prescribed] on the tablet, [when she deserved it], a seignior [could] pull out (the hair of) his wife, mutilate (or) twist her ears, with no liability attaching to him."[61]

Looked at through the prism of a woman's legal status, the development of ancient civilization, as reflected in the early Mesopotamian laws, increasingly restricted women's autonomy. First, it limited women to monogamous relationships. Next, it incrementally increased their fathers', husbands', and, finally, the state's power over their reproductive capacities.[62]

E. *Old Testament Laws*

In addition to the ancient laws of Mesopotamia, the laws of the Old Testament profoundly influenced our legal system.[63] In many re-

57. MIDDLE ASSYRIAN L. 53, *reprinted in* ANET, *supra* note 27, at 185.

58. G. LERNER, *supra* note 11, at 121 (emphasis in original).

59. MIDDLE ASSYRIAN L. 58, *reprinted in* ANET, *supra* note 27, at 185.

60. *Id.*

61. *Id.* L.59, at 185.

62. The situation seems to have been different for the women of ancient Egypt. *See, e.g.*, M. FRENCH, *supra* note 5, at 138 ("Women had full competence and rights in law and business even much later; they could sell and administer property, execute wills, sue at law, and officiate as witnesses of records.") (citing Zihlman, *Women as Shapers of the Human Adaptation*, in WOMAN THE GATHERER (F. Dahlberg ed. 1981)); *see also* E. BOULDING, *supra* note 10, at 185 ("women had full competence and rights in law and business").

63. C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 8 (1958) ("Ancient judaism has played a decisive role in shaping the origins of Western concepts of law

spects the laws of ancient Israel differed little from the laws of ancient Mesopotamia, except that biblical law had the added imprimatur of morality, *i.e.*, commanded by a deity. Features common to both Mesopotamia and ancient Israel include patriarchy with patrilineal descent and patrilocal residence, concubinage, slavery, and women's subordination to a male-dominated cultural ideology.[64] Both societies condemned women for conduct considered acceptable for men.[65] Under the biblical laws a woman committed adultery when she had sexual relations with any man not her husband.[66] Adultery for a man, however, occurred only when he had sexual relations with another man's wife, for this was an infringement of another man's property.[67] A woman was permitted only one husband, while a man could engage in multiple sexual liaisons.[68]

This double standard of strict morality for women concerning their sexual and reproductive functions with no corresponding morality of monogamy permeated biblical law.[69] In some biblical verses, prostitutes were to be burned to death;[70] however, the verses contain no corresponding condemnation for the men who had sexual relations with them.[71] Intricate tests existed to measure wives' marital fidelity, but no reciprocal tests existed to test a husbands' fidelity.[72]

A woman's legal status as the property of a patriarchal family is exemplified by the treatment in the biblical laws of those women who did not fulfill the expectation of giving birth to sons. Legally, the widow who had no sons suffered an untenable predicament: her husband's property (in order to stay within the patriarchal family) would pass to his nearest male relative, who was under no legal obligation to maintain her.[73] In order to assure that a woman continued to repro-

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. . . . It has less frequently been observed how extraordinarily powerful has been the influence of these religious notions upon Western legal thought and how much they continue to mold it."). *Id.*

64. *See infra* notes 66-83 and accompanying text.

65. *See id.*

66. *See, e.g., Genesis* 38:24 (father-in-law ordered daughter-in-law burned to death for conceiving out of wedlock); *Leviticus* 21:9 (when priest's daughter has extramarital sexual relations, she must be burned to death).

67. *Leviticus* 20:10.

68. *Genesis* 16:3-4 (Abraham conceives a child by his wife's maid, Hagar).

69. G. LERNER, *supra* note 10, at 170-71.

70. B. ANDERSON & J. ZINSSER, *supra* note 5, at 22 (citing *Leviticus* 21:9).

71. For example, the books *Genesis*, *Exodus*, *Leviticus*, and *Numbers* do not mention any penalty for men who had sexual relations with prostitutes.

72. *See Numbers* 5:11-31 (test given by God to Moses to determine wife's fidelity).

73. *See* Bird, *Images of Women in the Old Testament*, in RELIGION AND SEXISM 53 (R. Ruether ed. 1974).

duce within that family,[74] the law of the levirate required that the widow marry the deceased husband's brother or another male family member. The first son was then considered to be the son of the first husband.[75]

Biblical law did not recognize rape as an infringement upon a woman's autonomy, but rather as an infringement of the father's or husband's property interest. In the case of a virgin, rape was considered a declaration of ownership. The woman was forced to marry the rapist, while the victim, the father, was compensated for the damage caused to his property.[76] If the raped woman was married or betrothed, she was put to death because the property had been ruined for its intended use.[77]

That women did not have autonomous status within the biblical law while men had virtually unlimited powers over their female property is illustrated in the *Book of Judges*.[78] An old man was entertaining a traveler and his party when a mob demanded that the man send the traveler outside.[79] The old man offered the mob a choice between his own daughter or the traveler's concubine in lieu of the male traveler.[80] The mob choose the concubine and gang raped her; she later died at the threshold of the old man's house.[81] The story ends without a mention of the victim or of any prohibition against offering one's daughter or another woman to an unruly mob.[82] Despite frequent prescriptions of right and wrong and prohibitions against "immoral conduct" in the Old Testament, this conduct of offering a woman to be gang raped, tortured, and murdered was permissible, because a patriarch had an absolute right to dispose of female property as he wished.[83]

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74. G. LERNER, *supra* note 10, at 118 ("The family had paid for her [their son's widow] and the family owned her . . . family property . . . . was not allowed to lie fallow . . . . This woman . . . bought and paid for and capable of wifehood and childbearing, could not be allowed to be without a husband . . . .") (citing L. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD 77 (1942)).

75. *Id.*

76. *See Deuteronomy* 22:28-29 (man who had sexual relations with unbethrothed virgin forced to marry her and pay her father fifty schekels of silver).

77. *Cf. id.* 22:23-25 (when man had sexual relations with betrothed virgin, both man and virgin were to be stoned to death).

78. *Judges* 19:25-30.

79. *Id.* 19:22.

80. *Id.* 19:24 ("Behold, here is my daughter a maiden, and his concubine; them I will bring out now, and humble ye them, and do with them what seemeth good unto you: but unto this man do not so vile a thing").

81. *Id.* 19:25-29.

82. *Id.* 19:17-30.

III. RESTRUCTURING THE LAW

The laws I have used as examples from ancient Mesopotamia and the Old Testament represent merely a fraction of those which pertained to women. Nevertheless, the laws that I have focused upon were essential for the new cultural ideology of patriarchy first to displace and then to supersede the previous equalitarian cultural ideology. Thousands of years have passed since these ancient legal codes were law. How, then, can they be relevant to changes occurring in the law today? They are germane because these ancient laws and concepts of women's legal status continue to influence significantly the boundaries of our expectations. Some of the laws enacted to subordinate women long ago have become seemingly immutable universal norms.[84] From the research completed for the Florida Supreme Court Gender Bias Study Commission, I offer these illustrations of how pervasive and intransigent the ancient ideas of women's proper place in man's world are as they continue to influence our laws today.

The first law code imposed monogamy upon women only, the penalty being death.[85] Today, the penalty is no longer death, but the law continues to punish disproportionately a woman who is alleged to be an adulterer in comparison to a man who is charged. In Florida we have a "no-fault divorce statute";[86] however, the statute states that: "The court may consider [in awarding alimony] the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded."[87] In hearings and meetings around the state, the Commission was told that the practical operation of this statute results in punishment only for women accused of adultery, not for men. Undoubtedly, this is true because the wife generally is the more impecunious spouse in divorce litigation and thus is the spouse most likely to seek alimony. Once a spouse requests alimony, an allegation of adultery can operate to reduce or preclude an alimony award. Since men do not generally request alimony, their adultery is not a consideration. In public testimony Justice Rosemary Barkett of the Florida Supreme Court noted,

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83. R. EISLER, *supra* note 5, at 99-100. Eisler also cited the Story of Lot, who offered his two virgin daughters to a mob threatening two male guests in his home. *Id.* at 100.

84. For a discussion of how these property ownership concepts over reproduction prevade contemporary American treatment of women, see Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA L. REV. 81 (1990).

85. *See supra* notes 23-26 and accompanying text.

86. FLA. STAT. § 60 (1989).

87. FLA. STAT. § 61.08(1) (1989).

> I pointed out to the legislative subcommittee that dealt with child support guidelines that the impact of this language [Section 61.08(1)] was to limit the amount of money that a receiving spouse is to get in terms of alimony by the consideration of whether or not that spouse [has] committed adultery, and that despite the fact that the language appears to be gender neutral — that is[,] that it applies to the receiving spouse, not the receiving wife — it is specious, I believe, not to recognize that 95 or 99 percent of receiving spouses are women, and therefore the language in this statute in this day and age, I believe, effectively says that you can punish a wife for adultery by giving her less than she needs, but you cannot correspondingly punish an adulterer husband . . . .[88]

The present-day legal structure also maintains, like its ancient counterpart, a state interest in self-induced miscarriage. Even under the formulation of the United States Supreme Court in *Roe v. Wade*,[89] the state has an interest in an unborn child during the third trimester of pregnancy.[90] Currently, throughout the nation, state legislatures are attempting again to place the states' interest paramount to a woman's legal autonomy.[91]

The current operation of our legal system in distributing marital assets upon dissolution also resembles ancient law. Under the ancient laws the husband-father owned the assets of his family. If he decided to divorce a wife, the wife either took nothing or was to take only what she had brought into the marriage, without any division of assets accumulated during the marriage.[92] In Florida men today still are awarded the bulk of their families' assets upon divorce.[93] While Florida

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88. Testimony of Justice Rosemary Barkett, Gender Bias Study Commission, Tallahassee Public Hearing 3 (Jan. 25, 1988).

89. 410 U.S. 113 (1971).

90. *Id.* at 162-64.

91. *See, e.g.*, Wardle, *"Time Enough"*: Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 FLA L. REV. 881, app. A, B, at 958-82 (1989) (comprehensive listing of current state and federal regulations regarding abortion).

92. *See, e.g.*, CODE HAMMURABI L. 138, *reprinted in* ANET, *supra* note 27, at 172 ("If a siegnior wishes to divorce his wife who did not bear him children, he shall give her money to the full amount of her marriage-price and he shall also make good to her the dowry which she brought from her father's house and then he may divorce her."); MIDDLE ASSYRIAN L. 37, *reprinted in* ANET, *supra* note 27, at 183 ("If a seignior wishes to divorce his wife, if it is his will, he may give her something; if it is not his will, he need not give her anything; she shall go out empty."); *see also supra* note 38.

93. FLORIDA REPORT, *supra* note 1, at 59 ("The research indicates that Florida's courts

courts ostensibly have adopted the partnership theory of marriage,[94] the evidence gathered by the Florida Supreme Court Gender Bias Study Commission revealed that marriage still is treated in many respects as it was in the distant past. Women are expected to contribute to the families assets, but to forego compensation for those efforts upon marital dissolution.[95] Equitable distribution in Florida has been proven to be inherently inequitable.[96]

Another powerful influence from the past[97] in law today is the condoning of wife-beating under the euphemism "domestic violence."[98] The Commission found that those charged with upholding the law generally do not consider violence inflicted upon women by their sexual partners to be crimes.[99]

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routinely award sixty-five to seventy-five percent of the marital assets to the husband and twenty-five to thirty-five percent to the wife.").

94. *Id.* at 60 (citing Neff v. Neff, 386 So. 2d 318, 320 (Fla. 2d D.C.A. 1980).

95. *See id.* at 60 ("Testimony also revealed a perceptible judicial attitude that women are not bona fide partners of a marriage regardless of their contributions. . . ."); *id.* at 61 ("Family lawyers testified that they routinely advise female clients that, regardless of their contributions to the marital partnership, they will not share equitably when the marital partnership dissolves. . . ."); *id.* ("One family practitioner spoke of a 'value extravagance on the husband's side and a value diminishment on the wife's side.'") (quoting from testimony at the Tampa Regional Meeting of the Florida Supreme Court Gender Bias Study Commission).

96. *Id.* at 59 ("Equitable distribution is anything but equitable.").

97. *See infra* notes 61-63 and accompanying text.

98. FLORIDA REPORT, *supra* note 1, at 103 ("Testimony and empirical research presented to the Commission convincingly show that many members of the criminal justice system are influenced to a significant and unacceptable degree by longstanding and still prevalent beliefs that violence against women is more 'acceptable' than other coercive crime.") (citing U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 5-11 (1982); Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 2, 4 (M. Roy ed. 1977); Stedman, *Rights of the Husband to Chastise Wife*, 3 VA. L. REV. 241 (1917)).

99. *See* FLORIDA REPORT, *supra* note 1, at 112 ("The Commission's informal survey of police conduct indicated that the problems of insensitivity to physical injury and the failure to arrest or report domestic violence exist everywhere in the state.") (citation omitted); *id.* at 113 ("This message — that law enforcement will not protect a woman from physical assault — is understood all too well by the men and women of Florida. Attorneys around the state repeatedly testified that their battered clients feel they have no rights because they are women."); *id.* at 115 ("The Commission found that prosecution practices in cases involving domestic violence are insensitive and often hostile toward women. Statewide, witnesses and survey respondents complained of problems such as the abuse of prosecutorial discretion to drop cases, callous behavior toward battered women and a general reluctance to view domestic violence as criminal behavior."). The Report further noted,

> When the judge in a recent first-degree murder case learned that the defendant had tried to kill his wife, the judge asked in open court, "Is that a crime in Florida"?
>
> The Commissions inquiry into the judiciary's handling of domestic violence cases revealed that these are only the more visible examples of gender bias. The Com-

These are only a few examples; the Florida Supreme Court Gender Bias Study Commission Report contains a plethora of further illustrations. But what of the future? I believe a close examination of our contemporary culture would reveal the beginnings of a transformation every bit as momentous as the transition from equalitarianism to the male-dominated cultural ideology that occurred thousands of years ago. This transition can be felt in the critical tension that now envelopes the legal system.[100] As the influx of women in public culture reaches critical mass, they are poised to change policy and structure. The existence of gender bias commissions and task forces proves that we have moved past the point of discussing the merits of restructuring law and culture and are now involved in a process of actually restructuring the law.

The first step in this process is, as Deborah Rhode noted, to develop "fewer abstract theoretical typologies and more historically and empirically grounded analyses."[101] These empirical analyses of our contemporary legal structure will provide the foundation for subsequent reconstruction. Already, gender bias commissions throughout the country have collected substantial data.[102] Feminist jurisprudence is providing the historical analyses.[103] Make no mistake however: we are at the very beginning of the journey and are not a step farther down the road.

Just how far we have to go was demonstrated repeatedly during the deliberations[104] of the Florida Supreme Court Gender Bias Study Commission. Recommendations for structural changes were defeated narrowly in favor of recommendations that were in accord with the

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> mission received numerous complaints that many courts minimized, were indifferent to, or refused to acknowledge the criminality of domestic violence. These attitudes — compounded by a lack of training and reluctance to learn — result in significant gender bias in too many domestic violence cases brought before the courts of Florida.

Id. at 121-22.

100. *See id.* at 196-235.

101. D. RHODE, JUSTICE AND GENDER 317 (1989). Rhode criticized contemporary liberal theoretical legal analyses: "Inattention to gender is striking in much contemporary liberal work such as John Rawls's and Ronald Dworkin's, which rely heavily on universalist claims and disembodied subjects. . . . In essence, we need theory without Theory; need fewer universal frameworks and more contextual analysis." *Id.* at 316.

102. For the results of these commissions, see Schafran, *supra* note 2.

103. *See generally* D. RHODE, *supra* note 101; *see also Women in Legal Education — Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1 (Mar./June 1988) (containing articles by leading scholars on feminist jurisprudence).

104. All deliberations of the Florida Supreme Court Gender Bias Study Commission were confidential. What follows are the author's personal observations as a member of that Commission and participant in the deliberations.

status quo patriarchal ideology. For example, in the area of domestic violence, the Commission rejected a recommendation that acknowledged that women are blamed for domestic violence while they are not the perpetrators of the criminal conduct. The finding adopted by the Commission stated that the criminal justice system blames both the victim and the perpetrator,[105] thereby distorting reality and lending support to continued lack of enforcement in wife beating incidents.

In the family law area the Commission found overwhelming evidence that women are not treated as partners in their marriages.[106] After divorce, women frequently are left destitute by courts that distribute the bulk of the marital assets to men.[107] The Commission recommended adoption of a community property concept to alleviate the inequities in Florida's present equitable distribution system.[108] However, the Commission did not recommend that the major asset of most marriages today,[109] the partners' earning capacities, should be included in the community property formulation. Thus, wives contributing to their husbands' future earning capacities at the expense of their own lost opportunities will still fare poorly.

IV. CONCLUSION

Historical analysis has shown conclusively that the operative legal paradigm of the past 3500 years has been the establishment and preservation of a societal culture built upon the premise of male dominance and female subordination. By exposing the ancient premise and examining empirically grounded analyses of current laws, gender bias commissions and scholarly research provide both a context and justification for the deconstruction of our present legal system. These same historical and empirical analyses provide the foundation and context for reconstructing the legal system with an equalitarian infrastructure.

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105. *See* FLORIDA REPORT, *supra* note 1, at 128 ("The criminal justice system generally blames both the victims and perpetrators of domestic violence.").

106. *See infra* notes 92-96 and accompanying text; *see also* FLORIDA REPORT, *supra* note 1, at 45-85.

107. FLORIDA REPORT, *supra* note 1, at 45-85.

108. *Id.* at 82.

109. *Id.* at 80.