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Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York

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Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York

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I. INTRODUCTION

*The master's tools will never dismantle the master's house.*¹

Gender free or even gender neutral divorce law in a gendered society is an oxymoron. An oxymoron is defined by the *Oxford English Dictionary* as "[a] rhetorical figure by which contradictory or incongruous terms are conjoined so as to give point to the statement or expression; an expression, in its superficial or literal meaning self-contradictory or absurd, but involving a point."² It is this second meaning that I wish to emphasize. It neatly encapsulates and summarizes my position regarding the contemporary state and significance of gender neutral or gender free divorce law reform.

Perhaps a distinction is in order. Gender neutral and gender free are not synonymous, and when used interchangeably, may be a source of confusion. The term "gender" refers to a socially constructed collection of roles and behaviors connected to, and identified with, each sex.³ The term "gender neutral" presumes recognition of gender as a social phenomenon coupled with the adoption of a posture of studied neutrality toward this phenomenon. In law, the term gender neutral assumes that neither gender is to be privileged in and by law.⁴ The

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1. Lorde, *An Open Letter to Mary Daly*, in *THIS BRIDGE CALLED MY BACK* 98 (C. Moraga & G. Anzaldua eds. 1981).

2. 7 OXFORD ENGLISH DICTIONARY 353 (1933).

3. See *infra* text accompanying notes 22-30.

4. For example, divorce laws may be drafted so that their terms are ostensibly gender

term "gender free" suggests the nonexistence of gender. In law, the term gender free suggests the elimination of gender as a category in law or in its underpinnings.

The purpose of this paper is to add to the critique of the direction of divorce law reform during the past twenty years.⁵ I believe feminists need to reconsider and reevaluate their understanding of the relationship between a society governed by gender, and legal reform that simultaneously claims to bypass, change, or transcend sex and gender. I view this paper as part of the continuing feminist elaboration, analysis, and critique of the impact of law reform on the lives of women in contemporary American society.

Almost without exception, contemporary divorce law reforms display what is presumed to be the broad cultural desideratum of prevailing social and jurisprudential theories of gender neutral or gender free law.⁶ To achieve this goal, legislatures have removed from existing statutes sex- and gender-specific provisions, alleged to advantage one party upon the dissolution of a legally recognized marriage.⁷

This formal removal of sex/gender-specific categories can be viewed as, and in fact was, heralded as both a symbolic and social divestiture of the historically well developed claim of differences between men and women, cast as a basic sexual polarity between women and men. Biology was believed to form the basis of highly differentiated roles for women and men, and enjoyed primacy over culture. These claims and beliefs were the underpinnings of a "separate spheres" ideology.⁸

During the nineteenth century, the struggle between advocates of separate spheres as a manifestation of fundamental and essential sex-based attributes, and critics of separate spheres who identified the sep-

neutral. The gender neutral terms "parties" or "spouses" can replace the gendered terms "wife" and "husband." Even the term "homemaker" is said to be gender neutral.

5. For an excellent presentation of the issues, see Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789.

6. Litigants have enjoyed varying degrees of success in challenging sex/gender specific statutory provisions in a variety of contexts. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). For cases upholding sex/gender classifications, see *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

7. See *infra* text accompanying notes 31-53.

8. See generally A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977); M. RYAN, *CRADLE OF THE MIDDLE CLASS* (1981). The quid pro quo for remaining in that sphere for married women, and for cultivating and demonstrating the appropriate behaviors and their accompanying values, was said to be the protection of a wife by her husband. In circumstances where the husband was derelict, the quid pro quo was the possible protection by the state.

arate spheres ideology as a social construction with sex/gender privileging consequences, dominated the discourse on the status of women. This struggle became the focal point for attack by the developing American women's movement during the second half of the nineteenth and the entire twentieth century. For the better part of the twentieth century, the unpackaging of this Victorian imagery and the dismantling of Victorian ideology have been major legal, cultural, and social tasks.⁹ Eliminating the separate spheres from the law has not been merely a shift in perspective. It has been, and is, interpreted to connote progress.¹⁰

Choice and option, individuation, and autonomy are said to have replaced the Victorian legacy of constraining and coercive gendered legal and cultural designations. In the headiness of the times, as attention focused on "change," less consideration has been given to the relationship between the formality of gender neutral or gender free laws, and the reality of a gendered society.

I regard reconsideration of divorce law reform as an undertaking with a sense of almost poetic historical justice. For many feminists in the nineteenth century, the institution of marriage and the availability of, and terms for, its dissolution, were the initial focal points for social, cultural, and legal analysis and critique.¹¹ In addressing issues of marriage and divorce, nineteenth century feminists identified the structure, force, and power of sex/gender privilege and hierarchy in one of its most compelling and profound contexts. A late twentieth century analysis of the issues these women raised, remote on first appearance from the rhetoric and the reality of the nineteenth century, continues to reveal patterns of sex/gender privileging and hierarchy in marriage.

In this text, I am informed by, and rely upon, various ways of thinking about the problem—experiential, historical, and philosophical—none of which are sharply delineated. Each supports the others. I am unwilling to say simply that sex identification and the sex/gender system are important issues and to cite anthropological and sociological texts to support the claim. I do not seek agreement based on

9. See, e.g., R. ROSENBERG, *BEYOND SEPARATE SPHERES* (1982).

10. For an analysis of the importance of progress as a motivating force in modern history, see J. BURY, *THE IDEA OF PROGRESS* (1932). Note that during the nineteenth century, the emphasis on the divergence between the sexes was applauded as a sign of civilization which, in turn, was equated with progress. "Differentiation is nature's method of ascent. We should cultivate the difference of the sexes, not try to hide or abolish it." R. ROSENBERG, *supra* note 9, at 9, quoting C. DARWIN, *I THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX* 35-36 (1871).

11. See G. LERNER, *THE GRIMKE SISTERS FROM SOUTH CAROLINA* 1-12 (1967); E. STANTON, *EIGHTY YEARS AND MORE* 215-33 (1971).

text; I seek understanding. My point in partially relying on the evocation of an experiential mode is to address the issue of a socially constructed and imposed identity in its complexity and in its many levels of denial. Where text can assist in obstruction or denial, acknowledgment and the capturing of both individual and collective experience may sidestep that denial and help clear the way to recognition, which is a step closer to understanding.

In the second section of this paper, I use experiential knowledge to discuss the power of the sex/gender system. These thoughts provide the context and underpinnings for the third section, in which I explore historical patterns using divorce law reform in the State of New York as a brief case study of the power of the sex/gender system.¹²

II. EXPERIENTIAL KNOWLEDGE: THE POWER OF THE SEX/ GENDER SYSTEM

Informing my claim that gender free divorce law is an oxymoron is my reluctant recognition that as a culture and as individuals, we have not escaped the sex/gender system. Rather, we simply have dealt with it in different ways—by coping with it, trading in it, and compromising around it. But we have dealt with it. We have used it as the referent even in our attempts to deny it or in our struggle against it, and most likely lived it in more than the corners of our lives. To attack it is to claim it, and to celebrate it is to claim it. In neither instance is it a denial.

The sex/gender system is that set of arrangements by which human, social intervention shapes the biological raw material of human sex and procreation. It involves the social creation of two genders from biological sex,¹³ a particular sexual division of labor, and the social regulation of sexuality.¹⁴ Sex and the gender constructed from it, as well as families and the sexual division of labor associated with them, are socially constructed or socially organized rather than immutable, despite the appearance of strong continuities across time and cultures.¹⁵

12. This material is discussed in greater detail in Marcus, *Locked In and Locked Out*, 36 BUFFALO L. REV. — (1987).

13. *But see* C. MACKINNON, FEMINISM UNMODIFIED (1987) (claiming that it is incorrect to assume that biological sex differences are the basis of gender differentiation, and arguing that gender dominance is the basis of sexual difference).

14. Rubin, *The Traffic in Women: Notes on the Political Economy of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (R. Reiter ed. 1975).

15. *See* Collier, Rosaldo & Yanagisako, *Is There a Family? New Anthropological Views*, in RETHINKING THE FAMILY 25 (B. Thorne & M. Yalom eds. 1982).

The first term "sex" refers to the social construction of the category of two sexes, male and female, *said to be* biologically distinguishable. I emphasize the phrase "said to be," because there is evidence that newborn infants whose sex is ambiguous are subject to a medical determination regarding what sex they are or, should one say, ought to be. The appropriate surgery can be performed early in infancy to structure or arrange an externally conforming body for their designation.¹⁶ Perhaps this example, however extreme, best serves to illustrate our avoidance or perhaps horror of ambiguity in this area. But our concern with sex identification of individuals extends beyond the already born to the unborn. I have in mind not simply the desire of some prospective parents to ascertain the sex of their unborn child through amniocentesis,¹⁷ but rather the requirement in New York that the sex of an aborted fetus be identified, if possible, on the state's fetal death certificate.

One may find another set of illustrations regarding the power of sex identification in the following situations. Consider the cultural unlikelihood, if not the absurdity, of the following exchange. Friendly questioner to parent of newborn: "Is the baby a boy or girl?" Parent of newborn to friendly questioner: "I don't know and I don't care. And furthermore why are you asking such an irrelevant question?" This might provide fun and grist for an ordinary language philosopher's academic mill, but it does not eliminate the seeming preposterousness of the response. Recall the not unusual experience of

16. See H. BARBIN, *BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH-CENTURY FRENCH HERMAPHRODITE* 119-51 (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 in the affirmative. They have obstinately brought into play this question of a 'true sex' in an order of things where one might have imagined that all that counted was the reality of the body and the intensity of its pleasures." *Id.* at vii. Foucault briefly traces the status at law of hermaphrodites, noting that in the Middle Ages "it was the role of the father or the godfather (thus of those who 'named' the child) to determine at the time of baptism which sex was going to be retained." *Id.* At the time of marriage, "hermaphrodites were free to decide for themselves if they wished to go on being of the sex which had been assigned to them, or if they preferred the other. The only imperative was that they should not change it until the end of their lives, under pain of being labeled sodomites." *Id.* at viii. According to Foucault, "Biological theories of sexuality, juridical conceptions of the individual, forms of administrative control in modern nations, led little by little to rejecting the idea of a mixture of the two sexes in a single body, and consequently to limiting the free choice of indeterminate individuals. . . . The doctor [was concerned] . . . with deciphering the true sex that was hidden beneath ambiguous appearances." *Id.*

17. There is some evidence that pregnant women who believe that talking to the fetus in utero enhances its development talk differently to their fetus, based on the determination of the fetus' sex by amniocentesis. In a sense this should come as no surprise given the studies that reveal the different ways in which parents handle and talk to infant females and males. Conversation with Professor Ruth Bleier, University of Wisconsin at Madison, at the State University of New York at Buffalo (Apr. 28, 1987).

seeing a bundled up infant or toddler whose apparel lacks the color or sex identifying codes, praising the baby's cuteness, then hesitating, perhaps to consider asking, "Is it a boy or girl?" If one does not ask that question, choosing instead a pronoun and asking, "How old is *he*?" "*She* is eight months old," is the reply. No discussion ensues about the ambiguity in the baby's appearance. No detailed inquiry is made regarding the basis for the incorrect choice of pronoun. The matter is best excused and forgotten, though clearly it is important to "get it right."

Why we place such emphasis on getting it right has always been interesting to me. I admit to feeling a bit uneasy if I do not; moreover, I confess that this feeling is not limited to babies. I find myself alert and disconcerted if, upon a general scan while walking down a street, I am unable to determine the sex of a person. This is the case even when there is no likelihood of my having a particular identifiable conscious response to the person once I have identified their sex. I suppose sex classification of individuals is learned and encouraged as a basic social mapping activity.¹⁸

If we have some shared understanding of the importance of socially constructed sex identification, by considering situations that are marked by ambiguity and our response to them, we are ready to move on to the second component of the sex/gender system: gender. Gender is that socially constructed set of roles and behaviors stressing difference and connected with sex identification.¹⁹ Over time and across cultures, historians and social scientists have discovered shifts, modifications, and differences in the content of gender. Nevertheless, the existence of gender is a constant factor that cannot be explained satisfactorily solely by reference to reproductive capacity.²⁰

For each of us there is an acknowledgment of gender. That acknowledgment may be manifested in an acceptance of the particular boundaries, set in time and culture, that gender imposes. Or it may take the form of a struggle to redefine gender for ourselves, presumably with a different, more personalized set of boundaries with which we feel comfortable.²¹ These choices range from such actions as the

18. I have found that the showing of a film about transsexuals, *What Sex Am I?* elicits responses from students in my Family Law class indicating embarrassment, confusion, and discomfort.

19. See Harding, *Why Has the Sex/Gender System Become Visible Only Now?*, in *DISCOVERING REALITY* 311 (S. Harding & M. Hintikka eds. 1983).

20. For the argument that the ideology of male supremacy finds its roots and rationales within the total process of human reproduction, see M. O'BRIEN, *THE POLITICS OF REPRODUCTION* (1981).

21. A significant cultural contribution of the contemporary women's movement has been the continuation of the nineteenth century heritage of expanding roles for women. The roles

retention of one's birth name upon marriage, to the rearrangement of obligations connected with work inside and outside the home with a cohabitant or spouse. We may feel that we have tailored gender to and for ourselves. But the act of tailoring is still the act of acknowledging and differentiating. It is central, not accidental.

For the purposes of clarification, let it be understood that I am not claiming that from a historical perspective there has been no change at all in the status of women. Rather, I am arguing that the core concepts of sex and gender dominate our culture through the categories they create, whether overtly or covertly, whether manifested through intentional acts or masked by structured social arrangements. Moreover, I am claiming that they are a source of privileging, and that this privileging is not isolated or confined. It is both social—the ability to make decisions and to control resources or people—and ontological—the ability to make views treated as true, and values and behavior treated as natural. It is far reaching and comprehensive, and therefore systemic. To ignore or to downplay the significance of the categories and their use as privileging mechanisms is to misread and misunderstand the context in which reforms addressing the sex/gender system occur.

All of the above should not be interpreted to assume that I espouse a belief that biology constitutes destiny or that biology exerts primacy over culture. Such determinist or essentialist positions regarding the sex/gender system rather simplistically dismiss any movement or change by preemption. I emphasize the term "socially constructed" in reference to the sex/gender system to indicate my recognition of the determinist or essentialist trap.

But having affirmed the credo of the social construction of the sex/gender system, I must add that I cannot deny its power as the gravitational force of our culture.²² I experience this power as either profoundly unsettling, strangely comforting, or both. I experience it as maddeningly extensive and awesome in its power within culture to affect political change and personal identity. "Sex is not only something one *has*; nor is gender merely a category to which one *belongs*."

for men have expanded as well, though with little organized assistance from men. In both instances, the dominant mode has been expansion through incorporation of hitherto unacceptable, or gender marginalized, roles or behaviors for each gender. For example, males now work as telephone operators and nurses, and women are employed as telephone repair lineworkers and bus drivers.

22. E. Meidinger, *Regulatory Culture* (1986) (unpublished manuscript) (discussing the various definitions of culture used by social scientists).

Male or female is what one *is*."²³ It is an issue that is not simply sociological; it is phenomenological.

The plethora of recent scholarship on the historical existence of "women's culture" makes a strong, persuasive case that it served women as a means of survival, protection, and adaptation, as well as a force for change.²⁴ It is a part of the enterprise of attributing agency rather than victimhood to women.²⁵ The existence of such culture, however, is not inconsistent with the proposition that, through patriarchal structures, men historically have encouraged, formulated, revised, and enforced rules whose form and content have privileged them. In fact, the existence of "women's culture" may be excellent proof of this proposition.

The categories of the sex/gender system with their sex marking and sex announcing directives²⁶ affect the way we live our lives and assist us in making sense of our experience.²⁷ They are embedded in our language.²⁸ They function as a basic component of ideology, whatever its particularity. They suffuse and infuse our laws.²⁹ They

23. Haavind, *Love and Power in Marriage*, in *PATRIARCHY IN A WELFARE STATE* 139 (H. Holter ed. 1984).

24. See, e.g., DuBois, *Politics and Culture in Women's History*, 6 *FEMINIST STUD.* 1, 26, 29-30 (1980). Social change movements such as abolition, temperance, and social welfare are identified with women's input and support. In considering these movements, it is important to distinguish among the actors in the espousal of a cause, the actual development and successful popular mobilization on its behalf, and an assessment of the role played by the espousers and mobilizers in the implementation of a law or public policy. In all three instances, it was largely men who appropriated the issues and incorporated them into public policy.

25. A contemporary version of this debate is the recent controversy among feminists over pornography. For authorities on both sides of the debate, see Duggan, Hunter & Vance, *False Promises: Feminist Antipornography Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP* 130 (V. Burstyn ed. 1985); *TAKE BACK THE NIGHT* (L. Lederer ed. 1980).

26. M. FRYE, *THE POLITICS OF REALITY* 19-33 (1983).

27. "Ideology is the medium through which consciousness and meaningfulness operate. . . . It includes both everyday notions and experiences and elaborate intellectual doctrines." G. THERBORN, *THE IDEOLOGY OF POWER AND THE POWER OF IDEOLOGY* 2 (1980).

28. Perhaps the most compelling, full-blown, imaginative analyses of the connection between language, ideology and the sex/gender system appear in contemporary French feminist writings. For examples of these writings, see H. CIXOUS & C. CLEMENT, *THE NEWLY BORN WOMAN* (1986); L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* (1985); L. IRIGARAY, *SPECULUM OF THE OTHER WOMAN* (1985); *NEW FRENCH FEMINISMS* (E. Marks & I. De Courtivron eds. 1980). These works raise the "root and branch" issue of the multiple levels of the sex/gender system in our culture, including the structure and content of our speech and language.

29. Contemporary feminist legal and historical scholarship has exposed the incorporation of these categories in particular laws, in entire areas of the law, and in the philosophic underpinnings of the law. See MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515 (1982); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 3 (1982); Law,

structure our deepest forms of connection, our personal and social relationships.

Marriage is one of the primary categories of the sex/gender system. It is a sexed structure, limited as a recognized form of intimate connection between two persons, one female and the other male,³⁰ who are not married to another party at the time of their marriage. It creates the sexed categories of wife and husband. It is also a gendered structure. These two sexed categories institutionalize identities or clusters of sex-identified and sex-specific appropriate behaviors known as genders. Each gender reflects cultural, social, economic, and political norms.

The dissolution as well as the formation of the sex/gendered structure of marriage is a rule-governed process. The rules may or may not be drafted in sex- or gender-specific language. But the context in which the rules operate is a sex/gendered one. While particular couples may construct their lives to expand the boundaries of this gendered structure in a multiplicity of ways, marriage and its dissolution are identified culturally as part of the sex/gender system. The laws drafted to regulate this structure, as well as the court decisions interpreting these laws, reveal it directly or indirectly.

One can understand and interpret efforts at marriage, and especially divorce, law reform by many feminists, as attempts to eliminate the privileging of men in this area of law. The cultural, legal, and ultimately ideological vehicle for this deprivileging is feminist insistence upon a version of formal equality between and for both sexes, including the neutralization of gender consideration in statutes.

III. HISTORICAL PATTERNS: THE POWER OF THE SEX/GENDER SYSTEM

Experiential knowledge is essential to understanding ourselves as actors in contemporary society. It also informs our recognition of historical patterns. In turn, these patterns or their legacy may influence, constrain, or bind our claims and actions in the world, as well as others' interpretation of these claims and actions. If the content of the first part of this paper resonates with the experience of others, if there is some shared recognition of the power of the contemporary

Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955 (1984); Fineman, *supra* note 5. For historians' works, see generally N. BASCH, *IN THE EYES OF THE LAW* 15-41 (1982); N. COTT, *THE BONDS OF WOMANHOOD* (1977); J. KELLY, *WOMEN, HISTORY AND THEORY* (1984).

30. See *Jones v. Hallahan*, 501 S.W.2d 588 (1973); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *cert. dismissed*, 409 U.S. 810 (1972).

version of the sex/gender system in our lives, then we must be better equipped to review and analyze law reform efforts seeking redress of inequities attributable to the operation of the sex/gender system.

Having identified divorce law reform as an ideal candidate for this enterprise, and believing that New York is more than a convenient locus for this inquiry,³¹ I propose an exploration of several strands of reform legislation that have addressed or had an impact on the sex/gendered institution of marriage and its dissolution in New York. For each instance there is a set of basic questions. To what extent did the status quo privilege one sex/gender over the other in the dissolution process? What was the impact of the reform on sex/gender privileging at the time of marital dissolution?

The first strand of reform is the degendering of access to marital property. It encompasses a series of statutes passed between 1848 and 1900 that removed the common law bar to ownership of all forms of property by married women, commencing with the Married Women's Property Act of 1848.³² The second strand of reform is greater access to marital dissolution for both women and men through the expansion of the grounds for divorce in 1966. The third strand of reform, which occurred in 1980, is the revision of the rules governing the distribution of marital assets at marital dissolution.

Prior to 1848, marriage brought about the appropriation of women's legal identity in New York and other common law jurisdictions. Under common law doctrine, at the time of marriage man and woman became a new unit as husband and wife. A legal construction of the relationship between the parties marked the unit. In a marriage, the "very being or legal existence" of a married woman was "suspended," "incorporated," and "consolidated" into the legal existence of her husband.³³

Though neither an unmarried nor a married woman enjoyed the incidents of citizenship, such as the franchise or jury duty, prior to 1848, under the common law unmarried women could own property and engage in commercial transactions in their own name. Generally speaking, given the common law doctrine of marital unity in a husband, a married woman had neither title nor access to assets brought

31. New York is an important jurisdiction by virtue of its size, diversity, and complex history. It was both a pioneer when it enacted Married Women's Property Acts, and is a traditional jurisdiction in that it was one of the last common law states to adopt equitable distribution.

32. Law of April 7, 1848, ch. 200, 1848 N.Y. Laws 307-08 (currently N.Y. DOM. REL. LAW § 50 (McKinney 1977)).

33. W. BLACKSTONE, COMMENTARIES *430 (1765).

to, or accumulated during, a marriage.³⁴ These disabilities, in turn, barred married women from engaging in commercial transactions and reinforced a married woman's economic vulnerability. Again, in turn, this economic vulnerability was recast as her economic and social dependence on her husband.

In 1848, the New York legislature responded to a wide variety of pressures, largely from nonfeminist sources,³⁵ by enacting one of the earliest pieces of legislation for married women.³⁶ It marked a clear departure from the common law doctrine of the "submerging" of a married woman's legal identity. This legislation, known as the Married Women's Property Act,³⁷ provided a married woman with a partial separate legal identity by allowing her to own real property in her own name.

This departure from the common law doctrine of unity in marriage meant that the new statute contradicted other common law rules affecting married women's access to other forms of property. Further statutory revision was needed. In 1860, the New York legislature, pressured by an emerging women's movement in New York, and led by New Yorkers Elizabeth Cady Stanton and Susan B. Anthony, extended the boundaries of a married woman's separate identity by granting her the right to own her own wages.³⁸ By the end of the nineteenth century,³⁹ the elimination of sex and gender as categories derived from the sex/gendered institution of marriage, which served as a bar to formal access to all forms of property, was complete. The basic formal differentiation and individuation of married women had been accomplished through statutory revisions.

Whether late nineteenth century jurisprudence was capable of

34. Equity, an ancillary body of law, did allow a limited number of wealthy married women access to property brought to or accumulated during a marriage through the operation of a trust designed by, administered by, and derived from, men. See generally N. BASCH, *IN THE EYES OF THE LAW* 72-74 (1982); P. RABKIN, *FATHERS TO DAUGHTERS* (1980); M. SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986).

35. See N. BASCH, *supra* note 34, at 156; P. RABKIN, *supra* note 34, at 97.

36. The New York statute was preceded by Married Women's Property Acts in Arkansas, Act of Nov. 2, 1935, 1935 Ark. Terr. Laws 34-35, and Mississippi, Act of Feb. 15, 1839, 1839 Miss. Laws.

37. Law of April 7, 1848, ch. 200, 1848 N.Y. Laws 307-08 (currently N.Y. DOM. REL. LAW § 50 (McKinney 1977)).

38. Law of March 20, 1860, ch. 90, § 2, 1860 N.Y. Laws 157 (currently N.Y. DOM. REL. LAW § 50 (McKinney 1977)).

39. In 1884, the New York legislature extended a married woman's freedom to contract to all of her separate property. Law of May 28, 1884 ch. 381, 1884, N.Y. Laws 465 (currently N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1978)). In 1896, the New York legislature granted a married woman the freedom to contract with her husband. Law of April 17, 1896, ch. 272, § 21, 1896 N.Y. Laws 220 (currently N.Y. GEN. OBLIG. LAW § 3-301 (McKinney 1978)).

accommodating this separate or differentiated legal identity for married women is worthy of some notice. But first it is important to note that this identity was a partial one. All women were still barred from such activities as the franchise, jury duty, and combat duty in the military.⁴⁰

Within the framework of bourgeois market ideology,⁴¹ the selectively constructed category of "rational man," capable of purchasing and selling things and of owning property, could be extended to include all women. The referent was still male. Implied in the extension was the premise that the potential competence that married women possessed to handle themselves in the wider commercial world—as did all men regardless of their marital status—was often unrealized.⁴²

Nor did such formal individuation and differentiation create problems for either the implementation of New York's existing marital property regime or for the distributional rules regarding marital property upon divorce. The common law relied on title as the basis for establishing ownership. Distribution followed ownership. The inclusion of married women as possible title holders to marital property was largely an expansion of a formal category.

Degendered access to title to marital property is a prime example of gender neutralization in divorce law reform by category expansion. Formally, the nineteenth century acts appeared to remove the major source of privileging of married men over their wives. In a gendered relationship, however, even formally gender neutral, title remained a privileging mechanism.

There are no statistics regarding the distribution ratios of marital property upon divorce under the common law's strict title marital property regime of the nineteenth and twentieth centuries in New York. Nevertheless, based upon contemporary patterns of title to marital property in New York,⁴³ there is good reason to believe that, despite the formal degendering of access to all forms of property by

40. During the last quarter of the nineteenth and early twentieth centuries, up to the passage of the nineteenth amendment granting suffrage to all women, the claim was made that it was inconsistent to provide women with access to property and not to the franchise. The dissonance was cultural and political, and therefore legally sustainable among white male voters, politicians, and judges. For discussion of these claims, see E. FLEXNER, *CENTURY OF STRUGGLE* (1975); E. STANTON & S. ANTHONY, *CORRESPONDENCE, WRITINGS, SPEECHES* (1981); *HISTORY OF WOMAN SUFFRAGE* (S. Anthony & I. Harper eds. 1902).

41. See C. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 44-92 (1977).

42. Other gendered privileging in marriage continued to coexist with these reforms. For example, the husband was designated as head of household; the wife was required to cohabit and perform domestic services as a condition of her support.

43. See *infra* note 54.

the end of the nineteenth century, a married woman was unlikely to have her name on the title of much of the property accumulated during her marriage.⁴⁴ A married woman who did not engage in waged labor—the preponderance of the married female population until the past two decades—ultimately relied on her wage earning husband's willingness to include her name on the title to various marital assets. Moreover, given the sex and wage segregated labor market of the nineteenth and twentieth centuries, a married woman who worked outside the home in the waged labor market earned far less than her husband. Her contribution, often essential to the family's survival and well-being, might well be insufficient to make it the source of acquisition of a marital asset, however humble or meager.

In part to compensate for the serious financial disadvantage created by common law gender neutral distributional rules at divorce, the law provided for sex/gender-specific alimony. Between 1789 and 1980, only a former wife was eligible for alimony. But the award was not automatic. A wife's marital conduct was scrutinized and evaluated by a court to determine her moral worthiness for the award.⁴⁵

In a striking parallel to the absence of dates regarding the distribution of marital property upon dissolution is the absence of statistics regarding the patterns for alimony awards between 1789 and 1980. Such key issues as the frequency of alimony awards, the average amount awarded, the default rate, and the number and outcomes of enforcement efforts to obtain alimony arrearages by former wives, are left to informed inferences. There is some twentieth century lawyers' folkloric evidence that alimony was not awarded frequently, despite popular belief to the contrary, that the average amount was low, that lawyers were uninterested in pursuing enforcement proceedings for arrearages, and that judges were unwilling to utilize the contempt sanction for the debtor husband.⁴⁶

There is a painful irony in this reading of alimony and its relationship to law reform aimed at gender neutrality. Alimony constituted legal recognition of the sex/gender system. Alimony as gendered compensation for broader social and economic inequality

44. Among various categories of property, there are predictable differences in the likelihood of a married woman's name being on the title. For example, if her name appears at all, it is more likely to appear on the title to the family home than on stocks and bonds. It is more likely to appear on these paper assets than on the title to a business.

45. For example, between 1789 and 1966, New York recognized only one ground for divorce, namely, adultery. Alimony could be awarded only to a wife who was not a defendant in a divorce suit. A husband's behavior might be the cause for the divorce, but a woman's role as a dutiful wife, and her innocence from fault with all the attendant cultural and ideological baggage, determined the postdivorce financial arrangements.

46. See Marcus, *supra* note 12.

connected the wider society to inequality within a marriage. Alimony reinforced gender—especially culturally appropriate gendered behavior—by rewarding it. Had such gendered legal compensation not existed, however, there is no sound reason to believe that the existing pervasive gendered inequalities would have diminished.

The second strand of divorce reform legislation was the expansion of the grounds for divorce and the consequence of increasing access to it. Historically, the dissolution of a marriage required a showing that one party bore responsibility by their actions for the need to terminate the relationship. Assignment of fault in a dissolution required the public recounting of a story of the parties lives as a couple, which then served to justify the state's permission to dissolve the relationship.

This public recounting was a "moral script" that embodied notions of the cultural propriety of each party's behavior during the marriage. In the sex/gendered institution of marriage, sex/gender lines demarcated culturally appropriate behavior. It served as a powerful set of markings and reinforcements for the sex/gender system. In identifying the morally deficient party to the marriage, this moral script also provided the basis for determining the amount of financial support a wife might receive after marital dissolution. With the 1966 expansion of the grounds for divorce,⁴⁷ the repertoire of possible moral scripts increased dramatically. The rigidity and formulaic quality of the pre-1966 adultery scripts was replaced by a multiplicity of alternatives that, in time, would become equally formulaic. In

47. N.Y. DOM. REL. LAW § 170 (McKinney 1977).

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 one or more years. (3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant. (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. . . . (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.

Id.

theory, the post-1966 script could be less rigidly gendered. Either party could be guilty of abandonment or cruel and inhuman treatment, without the major social consequences attached to the earlier adultery ground. In fact, the number of defendant wives did increase. But the degendering of the moral script was embedded in a gendered process replete with clearly gendered economic consequences in property distribution and alimony awards.⁴⁸

In effect, between 1848 and 1980 in New York, there were several seemingly separable yet deeply connected aspects of the divorce process. One was the gender neutral distribution of property based on strict title. The gendered results were predictable in a society in which social and economic inequality along sex/gender lines was fundamental. Another was a gendered rule for alimony to mitigate the harshness of the gross economic inequities that resulted from gender neutral property distribution rules. A third was gender neutral grounds for access to marital dissolution, tied to the gendered rule for alimony.

By the 1970's, outcomes under New York's divorce law were flawed, given the increasing divorce rate since the post-World War II period. Neither gender neutral laws, such as common law strict title, nor gendered laws, such as alimony provisions, produced results that comported with what were said to be changing notions of fairness.

In 1980, the New York legislature enacted a divorce law reform said to mark a dramatic change. The major reform concerned the distributional rule regarding marital property upon divorce. The degendered rule of title at common law was set aside as the basis for the distribution of property upon the dissolution of marriage, although title still determined ownership of property during a marriage. Instead, marital property was to be distributed equitably between the parties. Equity was to be guided by ten statutory, nonprioritized, formally gender neutral factors.⁴⁹

48. See Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 143-44 (1980).

49. N.Y. DOM. REL. LAW § 236 (McKinney 1986). Section 5(d) provides:

In determining an equitable disposition of property under paragraph c, the court shall consider: (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 subdivision six of this part; (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,

In the New York legislative debates during the eight years preceding the enactment of the 1980 reform, two major positions surfaced as to the distributional rules for marital property. While the partisans of each position were united on the need to set aside strict title, they were divided over the formulation of its substitute. Their debate is instructive. It reveals the dilemmas generated by formal gender neutrality. Neither side could escape the issue of sex and gender. Both sides claimed that their respective positions embodied culturally acceptable norms of fairness by acknowledging, in different ways, gender and its importance.

One group identified equity as the preferable distributional principle. Equity proponents argued from the existential claim that no two marriages are the same. From this self-evident claim of differences among marriages, it followed that a distributional presumption that preempted a review of the particularities of the dissolved marriage was unfair to the parties. It minimized or set aside the "private ordering" of their relationship. It failed to acknowledge different, perhaps gendered, contributions to the relationship.

The other group, identified with feminists in the state, supported a rebuttable presumption of equal distribution of marital property.⁵⁰ It was a two-pronged argument. Ideologically, a presumption of equality would reflect a commitment to the idea of marriage as an economic partnership of equals. It would be consistent with contemporary notions of equality between women and men despite possible differences in each spouse's particular contribution to the marriage. Pragmatically, a presumption would bypass the ideological and cultural assumption that a husband's contribution was at least fifty percent, and likely more, if he were the higher wage earner in a double-wage household, as he was likely to be, or the sole wage earner in the marriage. In turn, the rebuttable presumption would minimize the likelihood of scrutiny and evaluation of one party's contribution to a marriage, namely, a nonwaged wife or a wife who worked both outside the home at lower wages than her husband as well as inside

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 desirability of retaining such asset or interest intact and free from any claim or interference by the other party; (10) any other factor which the court shall expressly find to be just and proper.

Id.

50. "All marital property shall be distributed equally unless the court expressly declares that justice and equity require a different distribution based on [several] factors." N.Y. Ass. No. 175, 1985-86 Regular Sessions. For the list of factors, see *supra* note 49.

the home. It could avoid the basic issue in divorce law reform, specifically, the measurement of the contribution of a woman to a marriage.

Presumption supporters pointed to the unequal bargaining power of women in both adversarial and out-of-court negotiations. Given the track record of the courts, women's reliance on courts for understanding and protection in litigated divorce situations was misplaced and unwarranted.

For almost a decade (1972-1980), the debate over the distributional rules governing marital property upon divorce was caught up in the intricacies of New York politics.⁵¹ In 1979, the Supreme Court of the United States broke the legislative impasse by deciding *Orr v. Orr*.⁵² The *Orr* Court declared Alabama's gendered provision for alimony unconstitutional. The New York alimony statute suffered from the same constitutional infirmity. The New York choice was either to eliminate alimony or make it available to either spouse.

The need to revise the alimony provision provided the catalyst for the resolution of the broader issue of property distribution rules. A compromise trade of property distribution and alimony was drafted. Equitable distribution replaced strict title as the distributional principle for marital property upon dissolution. Alimony was made available to either spouse. But the legislative history for the degendered alimony provision emphasized the legislature's preference for limited or term alimony, recast as "rehabilitative maintenance."⁵³ The gender neutralizing of the statute was complete.

IV. CONCLUSION

The results of the implementation of these reforms during the past six years confirm the hypothesis that gender has continued to be a key issue in property distribution patterns in New York.⁵⁴ Gender

51. See Marcus, *supra* note 12.

52. 440 U.S. 268 (1979).

53. 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). The need-based nature of the award and its identification with economic vulnerability was understood to make the provision applicable almost exclusively to women. Even the choice of term "rehabilitative" revealed the devalued gendered images of married women, especially those women who utilized their skills and energy working in their homes.

54. A study of reported awards in New York under the new law reveals that women, unless there are extraordinary extenuating circumstances, do not receive fifty percent of the marital property. The figures tend to range between thirty and forty percent. 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 (unpublished manuscript); see

considerations and images dominate the dissolution process and serve to privilege or advantage men over women. As a systemic matter, women risk more *in divorce* than do men. Yet divorce law reform denies this experience. This result is neither surprising nor unusual, although it is painful. In a sense I could have started as well as ended with this observation.

But there is a larger point to be made from this background material and analysis. Earlier in this paper I identified marriage as a gendered structure. The history that I have outlined supports the claim that divorce is a gendered process often involving gendered conflict over resource distribution. This is so not simply because the parties to the dissolution are women and men, as well as possibly mothers and fathers, but because of the profound significance attached by culture to these categories and the ways in which disagreements or conflicts are played out along sex/gender lines.

Analytically, I can maintain with a measure of scholarly detachment that the sex/gender system consists of socially constructed categories. In so saying I ally and identify myself with contemporary intellectual trends. But despite that alliance, in living one's life and existing in mainstream structures, I cannot deny that I am a woman or a mother. To observe gender and to struggle with it genders me. I am part of the culture even as I address it. It is the dilemma of knowing and being. The pervasiveness of the categories and the seeming paradox of their elusiveness and concreteness give pause to one who is trained to propose, argue, and revise the rules governing such issues as desirable distributional policies in family law.

One of the major controversies among feminists who have focused on law's cognizance of, and impact upon, women, is the choice between gendered and degendered approaches to law reform. The choice is between laws that explicitly recognize the sex/gender context in which social action occurs or laws that do not. Neither law reform strategy and policy prescription is sacrosanct. The discussion asks us implicitly if not explicitly: What is it we choose to recognize as gendered, at what level of consciousness and understanding, and with the anticipation of what consequences? To acknowledge the complexity of identity and its social construction, and to recognize and face the inconsistencies and contradictions in ourselves and in others as we consider the changes in rules, is a part of the undertaking that we ought not deny.

Here is the painful irony. For feminists, the issue of what to do

also Fineman, *supra* note 5. One cannot help thinking about dower and the common law magic number of one-third life interest in marital property for widows.

with the categories has been a source of current and historical concern. The sex/gender privileged with whom we believe we share this society will not view this issue as meriting serious self-confronting consideration. We, however, cannot successfully deny or escape our own experience by submerging it in abstract notions of progress.