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**With all my worldly goods I thee endow: A study of marital
property, law and ideology in American culture**

Brett, Leslie Jan, Ph.D.

City University of New York, 1990

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WITH ALL MY WORLDLY GOODS I THEE ENDOW:
A STUDY OF MARITAL PROPERTY, LAW AND IDEOLOGY
IN AMERICAN CULTURE

by

LESLIE J. BRETT

A dissertation submitted to the Graduate Faculty in
Anthropology in partial fulfillment of the
requirements for the degree of Doctor of Philosophy,
The City University of New York.

1990

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This manuscript has been read and accepted for the Graduate Faculty in Anthropology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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Abstract

WITH ALL MY WORLDLY GOODS I THEE ENDOW:
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IN AMERICAN CULTURE

by

LESLIE J. BRETT

Advisor: Professor Jane Schneider

This thesis is an inquiry into the nature of ideology in a modern capitalist society and an examination of the role of law in shaping, reflecting or obscuring social relations. Marital property laws and the divorce process in a New England community were chosen as a case study because divorce is a process through which women, men, and the state redefine their social and property relations to each other. The research demonstrates how marital property laws under capitalism are contrary to the relations of dependency which characterize families. It traces the historical significance of this contradiction in terms of gender inequality, the ideology of a public/private dichotomy and the contest between families and the state for social control over people and property. The research also explores the paradox of legal fetishism and simultaneous alienation from family laws felt by both men and women.

ACKNOWLEDGEMENTS

At the beginning of my graduate studies, I had the privilege to study with two extraordinary feminist teachers who have now passed away. Although in very different ways, they combined feminism, scholarship and activism in their writing and in their teaching, and communicated their passion for social change to me and many other students. With great gratitude, I dedicate this dissertation to the memories of Professor Joan Kelly and Professor Eleanor Burke Leacock.

The completion of a research project, from the formulation of a question to the final draft of a manuscript, can be a long and complicated process. I would first like to thank my advisor, Professor Jane Schneider, for her guidance and assistance throughout this process. I would also like to thank the members of my original examination committee, which included Eleanor Leacock, June Nash, Susan Lees, and Delmos Jones, for helping to shape my thinking in the early stages of work. I am grateful to the members of my final dissertation committee, which included Jane Schneider, Delmos Jones and Leith Mullings, for their help in reviewing my dissertation and making it sharper and more persuasive. I was delighted to have Carol Greenhouse

from Cornell University, whose scholarly work strongly influenced mine, agree to serve as the external reader.

My research was partially supported by a Woodrow Wilson Women's Studies Dissertation Fellowship. The survey research was partially funded by the New Haven Foundation, the Primerica Foundation, and the George A. and Grace L. Long Foundation. I am grateful for their generous support.

Chapter Four of this thesis is based upon data generated by a comprehensive survey project conducted collaboratively by several organizations. I was very pleased to work with Sharon Toffey Shepela, Janet Kniffin, and Jennifer Brown in the design, implementation and analysis of the survey, and thank them for their many contributions, skills and insights. I would also like to thank Cynthia Hall and other staff and Board members of the Connecticut Women's Education and Legal Fund for their support of and participation in this project.

Of course, no anthropological research can be accomplished without people who are willing to share their stories and thoughts. I am particularly grateful to the people who spoke so honestly to me about their divorces and were willing to share some very personal and painful

moments. I hope this and other research projects will contribute to a rethinking of family laws so that they become more humane and equitable in the future. I am also grateful to the judge and court personnel who assisted me in my research.

Few people can complete the graduate marathon without considerable support, patience, and humor from family and friends. I was lucky to have all of the above from many people. I would like to acknowledge my friends and classmates in New York, including Margo, Gerald, Elizabeth, John, Aisha, Betsy and Faye. I offer special thanks to the department staff person, Ms. Terri Vulcano. I was also fortunate to have a dissertation group in Hartford, and thank Peg, Tracey and Mary for support and good food. I will not try to mention my other wonderful friends by name, but thank them all for their love and endurance.

My parents have contributed many things to this process, from the spiritual to the concrete. My sister Randy contributed typing, transcribing, and encouragement above and beyond the call of familial duty. Thanks to all the members of my warm and supportive family.

Finally, I want to thank my partner, Carolyn Gabel, whose contributions to my work are so daily and so deep that they cannot be listed here. I also dedicate this to her, with all my love.

Leslie J. Brett
January, 1990

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Chapter One

INTRODUCTION

With this ring I thee wed, with my body I thee
worship, and with all my worldly goods I thee
endow.

The Book of Common Prayer
"Solemnization of Matrimony"¹

By marriage, the husband and wife are one person
in law: ...that is the very being or legal
existence of the woman is suspended during
marriage or at least incorporated and consolidated
into that of the husband...

William Blackstone²

This research began as an inquiry into the nature of
ideology in a modern capitalist society. It was motivated
by curiosity about how ideology is maintained in the face
of contradiction, inequity and personal loss. I chose as my
case study the process of divorce and the experiences of
people in a New England community as they confront the
breakdown of their marriages and the intervention of state
marital property laws. The divorce process is a social
drama in which women, men, children and the state redefine
their social and property relations to each other. I chose

¹The "Solemnization of Matrimony" from the Book of
Common Prayer, the service book of the Church of England
and other Anglican denominations, compiled in the 16th
century.

²William Blackstone, Commentaries on the Laws of
England, 4 vols., Oxford, 1765-69, vol. 1:430.

to study divorce and marital property laws because they lead to a collision between the "moral economy" of the family, based ideologically on sharing, love and interdependence, and the "market economy" of family laws, based historically on private property, contract and independence. The personal consequences of divorce can be devastating and unjust. The collision has both ideological and material dimensions -- dreams and property can both be lost.

Anthropologists have long understood the role of marriage as a social transaction involving the relationships among kin groups, labor, property and other elements of social organization. As in other societies, civil marriage in modern America serves specific functions in arranging the relations of gender and ordering the relations among individuals, families and the state. The meaning and consequences of marriage in a large and complex society may vary significantly by class, ethnicity and region. Marriage cannot be discussed as a single, unified social form. However, the codification of family laws in the American legal system creates a controlling pattern and structure of kinship and property relations within which all traditions must adapt and function. This over-arching pattern is rooted in history and contains within it both social power and paradox.

How, and to what degree is ideology maintained at the point of collision between personal experience and the law? For many people, a divorce provides their first encounter with the explicit rules of property and financial obligation entailed in a civil marriage. Indeed, for some it brings the first recognition that their marriage is not only a religious sacrament or personal commitment, but a civil contract to which the state is a party. It is also a moment when the state, through the power of family laws, steps into the private domain of family life to arrange care and custody of children, visitation, and distribution of the family home, savings and personal property. A study of the experiences and explanations of men and women as they confront the contradictions and inequities of divorce provides an opportunity to explore the reproduction of capitalist ideology. It is also a case study of the role of law and ideology in shaping and reflecting the relations among men, women, property, families and the state.

In beginning this discussion, it is important to deconstruct two sets of analytic concepts which shaped my research, and to explain how I used them. The first set of concepts concerns the public/private distinction and the consequent description of the modern Euro-American nuclear family as the locus of affectional bonds -- the "haven in a heartless world." As Yanagisako, Collier and several other contributors to their volume on gender and kinship make

clear, the public/private distinction, though often useful, is neither a natural nor a universal dichotomy. Indeed, Yanagisako and Collier assert that the domestic/public, nature/culture and production/reproduction distinctions are "variations of an analytical dichotomy that take for granted what we think should be explained."³

Yanagisako relates the domestic/public concept found in feminist anthropological literature, which she attributes to Michelle Rosaldo's early theoretical essay on the structural basis of universal sexual asymmetry⁴, to the more traditional distinction in kinship literature between domestic and "politico-jural" domains, elaborated by Fortes⁵, characterizing them both as analytic models with specific historical and social roots. She describes them as "mixed metaphors" which conflate a "hierarchy of social space" (e.g. inside/outside among Japanese-American households) with a "functional division of social activity"

³Sylvia Junko Yanagisako and Jane Fishburne Collier, "Toward a Unified Analysis of Gender and Kinship," in their edited volume, Gender and Kinship, Stanford University Press, 1987, p. 20. On this issue, see also the chapters by Comaroff, Yanagisako, and Rapp.

⁴Michelle Rosaldo, "Woman, Culture and Society: A Theoretical Overview," in Rosaldo, Michelle Z. and Louise Lamphere, Woman, Culture and Society, Stanford University Press, Stanford, 1974.

⁵Meyer Fortes, Kinship and the Social Order, Chicago University Press, Chicago, 1969.

(e.g. family/workplace in industrial capitalist societies). She seeks to combine the theoretical perspectives based on gendered domains with those based on the division between kinship and polity in order to "see more clearly their relation to social formations and historical transformations." The analytic direction she prescribes is one of self-reflection for anthropologists. In her words, "we need to examine our own concepts and the historical processes that have produced their ambiguities and their social implications."⁶

To accomplish this kind of task, Yanagisako and Collier propose a methodology requiring "analysis of the social whole." The first step is an analysis of cultural systems of meaning. The second step is the construction of a model of social inequality within which cultural meanings are employed. They explain this challenging mandate as follows:

Ideas and actions are aspects of a single dialectical process, and we understand this process by focusing on how inequality is organized. Because we assume that cultural conceptions are voiced in contexts in which, among other things, people make claims, provide explanations, try to influence action and celebrate the qualities they use when creating relationships, we understand cultural conceptions by focusing on what claims may be made, what

⁶Sylvia Junko Yanagisako, "Mixed Metaphors: Native and Anthropological Models of Gender and Kinship Domains," in Collier and Yanagisako, *ibid.*, p. 89.

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⁶Sylvia Junko Yanagisako, "Mixed Metaphors: Native and Anthropological Models of Gender and Kinship Domains," in Collier and Yanagisako, *ibid.*, p. 89.

things explained, what actions influenced and what relationships forged. In order to understand what people talk about, we must ask what people may want or fear. And so we must understand how inequality is organized in any particular society.⁷

The final step in their methodology is an historical analysis to identify the roots, changes and continuities in current ideas and practices.

The distinction between the public and private spheres, or as suggested earlier, between the moral economy of the family and the market economy of the polity, provides a central theme of my research. As the authors above advise, however, I do not take its concrete or ideological existence as a given, but rather as a question to be asked. The historical and ethnographic data discussed in the following chapters offer an analysis of the social whole. They make clear that the division between family and public domains has meaning in the everyday lives of the people I studied. It is an idea that exists beyond the pages of anthropological debate and has identifiable concrete manifestations. However, it is not a monolithic or omnipotent idea. That is, some people refer to it or rely on it some of the time; contradictory or different ideas also exist and have social power. Nor does the

⁷Yanagisako and Collier, op. cit., p.42.

public/private distinction necessarily associate women with private and men with public; both women and men have some degree of access to both spheres. The goals of this research, therefore, are to better understand the native meanings of the public/private divide and where they come from, to discover when and where they work and for whom, and to explicate "their social implications."

Just as feminist anthropologists caution against an uncritical use of the public/private concept so, too, have legal anthropologists written about the dangers of seeking a simple or direct relationship between legal ideologies and social ideas and behaviors. The second set of analytic concepts which are central to my research concern the meanings and functions of laws and ideologies in society, and the relationships among them. Critical legal scholar Alan Hunt echoes Collier and Yanagisako when he argues that theories which claim that law and ideology necessarily distort or reflect social reality in a particular way take for granted that which needs to be explained. In fact, in an earlier review essay on legal anthropology, Jane Collier wrote that "the long preoccupation in legal studies with explaining the gap between law and behavior has precluded the search for a more complex model of relations between law and society that accepts the gap [between them] as

given..."⁸ Hunt, even more focused on the ideological content of the law, suggests that "the nature of the relationship between reality and its ideological representation should be seen as 'the problem,' or object of analysis."⁹

The ethnographic research that follows demonstrates that some laws and the ideas expressed by them neither hide nor reflect social behaviors as much as they are irrelevant to them. Just as Carol Greenhouse found in her ethnography of "legal behavior" among southern Baptists in an American community, people often operate within a framework of ideas that has little to do with jurisprudential notions of rights, remedies and property. In her study, people relied on religious values which encouraged them to avoid disputes rather than seek "justice."¹⁰ Both Greenhouse's data and my own illustrate Moore's assertion, discussed further in Chapter Two, that social rules have only "partial" control

⁸Jane Collier, "Legal Processes," Annual Review of Anthropology, vol. 4, 1975, p. 121.

⁹Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law," Law and Society Review, vol. 19:1, 1985, p.21.

¹⁰Carol J. Greenhouse, Praying for Justice, Cornell University Press, Ithaca, 1986.

over human behavior.¹¹

In my study, however, people have no choice but to enter the legal system and encounter the laws of divorce and marital property. They are powerless before the authority of the state, expressed through the courts, to distribute property and arrange custody. Laws and legal ideas enter their lives whether they wish them to or not; avoidance is not an option. How, then, do people receive these uninvited legal ideologies, and how do they manage the encounter? Moreover, if the dominant legal ideologies are not folk ideologies, then whose ideas are they and whose interests do they serve? Where do they come from and what is the source of their power? These are the questions addressed by this research.

Some of the answers to these questions return our attention to the uses of the public/private divide in Western industrial capitalist societies. Throughout the analysis that follows, the functional significance of the segregation of the family and the family home from other aspects of the public economy becomes apparent at the same time that the incompleteness of this characterization becomes clear. That is, the historical record shows that

¹¹Sally Falk Moore, Law as Process, Routledge and Kegan Paul, Boston, 1978.

the family home and the workplace were indeed spatially divided, that women and families were ideologically segregated from the public domain, and that these social and ideological arrangements served specific functions in the transfer of property and the growth of a wage-based economy. The record will also show that the public/private divide was never as wide or as real as it was portrayed. Working men, women and other family members always existed in both worlds and spoke the language of both cultures. The boundary existed, but it was permeable.

More pertinent to the questions outlined above, however, is the power of this idea to allow people to segregate their experiences. The ethnographic record shows that the division between public and private is real insofar as it allows individuals to maintain ideas and values which differ from the dominant legal ones precisely because they are "private." From a functional perspective, the division between public and private is a strategy to enable contradiction to exist. From a marxian perspective, it inhibits consciousness. It encourages the privatization and individualization of suffering and discourages a social or systemic critique. The division between public and private serves complexity by reinforcing boundaries -- not necessarily between people in their daily lives, but between ideas held simultaneously in the same heads.

Identifying the fact of a public/private divide is not useful without some explication of the themes or content of each domain. The review of theoretical issues in Chapter Two includes a discussion of the emergence of the idea of individualism. Max Weber, Louis Dumont and others explain the roots of individualism in the evolution of Christianity and Protestantism, and show how this ideological innovation related to the growth of capitalism and the new morality of the marketplace. Marxist scholars such as Althusser, Balbus, and Sumner provide a framework for understanding how ideas which serve the economy and the state can be socially reproduced and encoded in law. Understanding the creation and reproduction of the "free individual" is crucial to appreciating the differences between the sphere of kinship, organized by principles of relatedness, sharing and interdependence, and the sphere of the capitalist economy, driven by principles of independence and freedom. These themes are more fully discussed in Chapter Two.

Chapter Three presents an historical picture of marital property laws in Puritan and modern New England and related developments in gender relations, family forms, economics and political relations. It offers one of the most important insights of this research: Much more than a struggle between men and women or husbands and wives over the control of property, the course of marital property law

reform reflects a battle between the state and the family for control of property and social authority. From the time of the Puritan settlements until now, the economic position of women has fluctuated but has not been radically altered by changing laws. The real winner in the competition for control of property has been the State, and the losers have been individual men as heads of families. The state weakened families as it strengthened individualism and wage labor. The fundamental nature of patriarchal relations within Anglo-American Protestant culture did not change, but the authority was largely transferred from male heads of families to white male heads of state and white male judges. For African American and other non-majority group families who were excluded by racism from positions of authority in the public sphere, the losses were more absolute. That is, even the men of these groups could not identify with or claim any control through state authority.

Chapter Three also describes the influence of Puritanism on the marriage and divorce laws of New England. The discussion illuminates the way in which Puritanism helped to translate between secular and religious ideas, making them fit more comfortably together. It provides a case study of one of the social processes through which ideological accretion occurs.

The fourth chapter reports the findings of a comprehensive survey of property and income distribution following divorce in Connecticut. It is based on a collaborative project which I organized under the auspices of a non-profit organization and conducted together with colleagues from a small college and a state agency. Data were collected from 1,500 court records of cases closed in 1980 and 1984, and from a random telephone survey of 400 people divorced in Connecticut since 1980.

The survey results illustrate four points: First, they confirm what the theoretical and historical analyses predict concerning the slow and modest changes over time in women's control over property. The data show that the actual economic outcome for divorced women in the 1980's is only slightly better than it would have been under the traditional dower laws of pre-19th century Anglo-American jurisprudence. Second, the results document a "system of inequality," in the sense proposed by Yanagisako and Collier, based on gender and family relations. Just as surveys from other states have shown, women and children in Connecticut suffer far greater economic losses than do men as a consequence of divorce. This is the social reality, based on empirical data, within which women, men and state officials must make their claims and state their beliefs. Third, the pattern of property and income distribution shaped by the law demonstrates the extent to which it is

based on private or "separate property" principles, in contrast to the collective or community property spirit which, ideally, shapes economic behavior within families. This can be understood by comparing the percentage of household income awarded to husbands and wives as individuals with the percentage calculated on a per capita basis, taking into account the needs of all family members. When viewed through the lens of individualism, the property distribution appears equitable; when viewed through the lens of collectivity, however, it appears grossly unequal.

Another way of saying the same thing introduces the final point of Chapter Four, and one of the major conclusions of this research: Individual or separate property principles are exposed particularly by the inequities caused by the financial obligations of supporting dependent children. The data from the telephone interviews we conducted show, as have studies across the country, that inadequate child support awards and compliance are primary factors leading to economic decline for mothers and children after divorce. On a more abstract level of analysis, the problem lies in the inability of the law under capitalism to incorporate social relations of dependency into its ideological framework. To the extent that kinship in an industrial capitalist society can be defined as the social organization of relations of

dependency, the contradictions of capitalist family laws rooted in private property and independent individualism become apparent.

Chapter Five, based on interpretations of two years of public testimony regarding the proposed enactment of a community property law in Connecticut, allows a further consideration of dominant legal ideas regarding families and property. Feminist scholar Martha Fineman¹² helps to sharpen the case against the inappropriate application of Anglo-American liberal legal ideas to the sphere of kinship. As she explains, even the fundamental concepts of equality and rights are unable to account for relations of dependency because they are so inextricably linked to a social vision of sameness based on a non-familial male norm of independence. Capitalist legal ideology falters in the face of difference. Dependency is based on difference. And kinship organizes dependency. The public discourse about the Uniform Marital Property Act provides examples of the confusion and contradictions that result as both advocates and opponents pursue the logical impossibility of greater liberal equality in property relations between husbands and wives.

¹²Martha Fineman, "Implementing Equality: Ideology, Contradiction and Social Change," Wisconsin Law Review, 1983:4.

Chapter Six includes the interviews I conducted with individual men and women who had been divorced. The interview texts provide evidence of the assertion made earlier that many individuals simply ignore or deny the laws and dominant legal ideas about family and property, even as they must confront the power of the law and its consequences. They articulate clearly their personal ideas about marriage and family while they are nearly silent about the law. When the legal system fails them by permitting unfair settlements and contributing to their pain and loss, they blame individuals within the system rather than the system itself.

As the forgoing discussion makes clear, the tendency to be deaf to family laws is understandable insofar as family laws do not speak to family relations. The failure to blame the system when it creates inequity can be understood as a "fetishism of the law" which grants the legal system an unquestionable natural authority. Marxian scholar Isaac Balbus draws an illuminating parallel between the concepts of commodities and citizens and the fetishism of both marketplace and legal system.¹³ His ideas, discussed further in Chapter Six, broaden the critique of

¹³Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," Law and Society Review, vol. 11:3, 1977.

individualism and equality as liberal ideas which cannot accommodate kinship or social diversity.

The question still remains as to how the individuals who pass through family court are able to maintain a fetishism of the law and their ideological equilibrium. Marxian scholars speak freely about the abstract process of "mystification" and anthropologists refer often to the function of ritual in masking social conflict. Chapter Seven is an ethnographic description of the secular rituals of family court which provides a case study of mystification. The drama, obscurity and confused formality of a day in court creates solidarity, as any ritual does, for legal practitioners (lawyers, judges and clerks) in inverse proportion to the alienation it creates for disputants. It reinforces the boundaries between ordinary citizens and the courts, which, at another level of abstraction, reinforces the boundaries between public and private. People are able to maintain contradictory belief systems to the extent that they keep those systems of ideas from coming face to face.

The research that follows, then presents a picture of people in conflict with ideas and ideas in conflict with each other. It portrays the public/private dichotomy under industrial capitalism as an ideological shelter for the

battle between competitive individualism and the relations of dependency in human social organization. And it places this ideological battle within the historical contest between the state and the family for social control of people and property.

Chapter Two

ANTHROPOLOGY, LAW AND IDEOLOGY

"I have first of all considered mankind; and the result of my thoughts has been, that, amidst such an infinite diversity of laws and manners, they were not solely conducted by the caprice of fancy."

Montesquieu, 1748

Preface, The Spirit of Laws

Anglo-American jurisprudence contains clear and highly elaborated ideas about private property, contract and individual rights. Many scholars have interpreted the relationship between these ideas and the modern capitalist formation. In the area of family law and marital property, Anglo-American jurisprudence includes other ideas about parental obligation, conjugal fault, family inheritance and widow's dower. These cannot be so easily linked to capitalism. In fact, they come from other roots and traditions and, at times, create conflict among the legal rules.

Studying the modern divorce process offers an opportunity to observe these conflicts and consider the impact they have on people's lives in order to learn more about law and ideology under capitalism. The analytic task, however, is not a simple one. The relationships among legal ideas, folk ideas, ideology and social practice are complex and particular to a given time and place. Interpretation requires an holistic approach.

Traditional studies in legal anthropology took the problem of conflict and social control as their starting points and focused on law as a social process. More recent analyses, growing out of the Marxian tradition, have considered law as an ideological "discourse" or "text", and have focused on the content of the law as the key to understanding its function. But, as Marxian scholar Colin Sumner acknowledges in his work on the ideology of law, "...the very form of law seems to have an important ideological function."¹ That is, in legal proceedings as in many other social actions, form can be substance, and the analysis of the two cannot be neatly divided.

Not only is it difficult to separate the analysis of legal meaning from legal practice, it may be more difficult to find a reliable distinction between laws and ideology. An ideology, after all, cannot be expressed or understood without a phenomenal form, an appearance produced in a social context. An ideology is mute unless it is articulated by a social practice. Laws and legal behaviors are an identifiable and rich set of social practices. Through them, ideology is shaped, communicated and imposed. As this research demonstrates, however, laws may

¹Colin Sumner, Reading Ideologies, Academic Press, New York, 1979, p.7.

also hide, deny or be silent about some ideologies; in some cases, we must consider that ideology may take another, equally powerful phenomenal form. One must study law in relation to other social practices.

In this chapter, I will review some of the theoretical and methodological tools anthropologists have developed to create an holistic approach to law and ideology. I will also highlight the interpretations of scholars such as Max Weber, Louis Dumont and Louis Althusser about the particular origins and meanings of legal ideologies under capitalism. I will explore a Marxian idea, explicated by Dumont, that modern capitalist ideology as expressed in Anglo-American law devalues the relations among people as it elevates the relations between people and things.² Finally, I will briefly introduce a feminist critique of Western jurisprudence as it relates to the issue of equality and individuality.

LAW AND CONFLICT

Rejecting the ethnocentrism of Anglo-American jurisprudence, anthropologists have long understood that law is a social process of regulation that can be found in some form in almost every society. The cultural

²Louis Dumont, From Mandeville to Marx, University of Chicago Press, Chicago, 1977, p.7.

application of "law" can range from judicial due process in Western complex societies to the use of physical ordeals and magical oaths in some tribal societies.³ In fact, some anthropological definitions of law have been so broad that they fail to distinguish law from other concepts of social order such as "norms" or culture, itself. Consider, for example, the sweeping statement of Sally Falk Moore in her Introduction to Law as Process:

The making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing, and unmaking of rules and symbols in which people seem almost equally engaged.⁴

Moore, herself, prefers not to use the concept of "law" to describe this broadly defined activity, creating instead the term "reglementation" which she defines as "all those attempts to organize and control behavior through the use of explicit rules."⁵

In order to solve the dilemma caused by inflating the definition of law, at least one school of anthropologists

³See, for example, John M. Roberts, "Oaths, Autonomic Ordeals and Power", in The Ethnography of Law, ed. by Laura Nader, a special publication of American Anthropologist, vol. 67:6, part 2, 1965, pp. 186 - 212.

⁴Sally Falk Moore, Law as Process, Routledge and Kegan Paul, Boston, 1978, p. 1.

⁵ibid., pp. 2-3.

has chosen to focus on the rules and behaviors associated with disputes and their resolution. By identifying conflicts or instances of "trouble" as the object of analysis, one is able to find rules explicitly at work. Rules are most clearly articulated when someone has broken them, or when two parties disagree about what they say. The conflict and case study method thus creates a conceptual boundary around the anthropological study of law. Several excellent reviews have summarized the themes and theoretical debates of this large body of literature.⁶

This branch of legal anthropology is most closely associated with the work of Max Gluckman, although Gluckman's early work was contemporaneous with Llewellyn and Hoebel's similar study, in 1941, of conflict and case law among the Cheyenne.⁷ In Politics, Law and Ritual in Tribal Society, Gluckman makes a distinction between two

⁶See, for example, Laura Nader, "The Anthropological Study of Law", in The Ethnography of Law, a Special Publication of American Anthropologist, vol. 67:6, part 2, 1965, pp. 3 -32; Jane F. Collier, "Legal Processes," Annual Review of Anthropology, vol. 4, 1975, pp. 121 - 144; and Francis G. Snyder, "Anthropology, Dispute Processes and Law: A Critical Introduction," British Journal of Law and Society, vol. 8:2, 1981, pp. 141 - 180.

⁷Karl N. Llewellyn and E.A. Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence, University of Oklahoma Press, Norman, 1941.

different types of dispute: those which grow out of competing self interests, and those which grow out of contradictions within the social order itself. He argues that, since the first type of dispute represents a conflict of interests but not of values, it can be settled by a judicial process including the examination of rules and behavior, followed by a judgement. The second type of dispute, however, cannot be resolved in this way because it is an expression of conflicts among the social rules. Gluckman goes on to argue that this second type of dispute is more likely to be resolved by extra-judicial processes such as ritual, divination or gossip, which can mask the "underlying causes of disharmony."⁸ In identifying the second type of dispute, Gluckman points out the inevitability of internal social contradiction. As he explains,

...the structural principles which organize the society and the values which motivate its members are not logically consistent with one another: they are independent of one another, and furthermore sometimes discrepant, and situationally at least in conflict, with one another.⁹

Rituals, he argues, help to maintain an inherently

⁸Max Gluckman, Politics, Law and Ritual in Tribal Society, Aldine Press, Chicago, 1965, pp. 246-7.

⁹ibid., p. 247.

contradictory moral system by reaffirming basic loyalties and group solidarity while actively shifting the social gaze away from the source of conflict.

There are two themes embedded in Gluckman's analysis which bear significance for this research project about family law in the United States. The first is the recognition of independent and sometimes contradictory social principles which give rise to disputes. As the historical and ethnographic data will demonstrate, family law is precariously balanced on a foundation of contradictory principles concerning private property and self-interest on the one hand, and community property and mutual obligation, on the other. What Gluckman does not address is the possibility of disputes which appear to be, or are socially construed to be disputes rising out of competing self interest, but are in fact unresolvable disputes created by internal contradictions in the rules. I will argue, based on my research, that divorces are disputes of this nature -- that is, they appear to be contests between two individuals, while, in fact, they represent the collision between the rules of the marketplace and the rules of the family. On the individual level, they cannot be equitably resolved. The focus on the individual dispute, however, elaborated by the rituals of family court, helps to "mask the underlying cause of disharmony" which, in this case, is a larger historical

struggle between the family and the state.

The second theme concerns the failure of rules to fully control social behavior. Gluckman discovers the under-side of explicit rule-making and dispute resolution; he discovers the place where people are not following the cultural rules, or, they are not following the consciously articulated ones. He finds, as Sally Falk Moore later argues, that cultural rules are only partially successful instruments of social control. To limit one's observations only to what takes place within the explicit rules of the game is to miss half the action. In Moore's words,

The analytic import is that if one is dealing with partial order and partial control of social life by rules, then any analysis which focuses entirely on the orderly and the rule-bound is limited indeed, and does not place the normative in the context of the whole complex of action, which certainly includes much more than conformity to or deviance from normative rules.¹⁰

Moore's perspective is clearly demonstrated in a recent ethnography which began as an investigation of dispute processing in a town in the American South. In Praying for Justice, Carol J. Greenhouse explains how, in her words, "... one can begin by looking for conflict and end by considering questions of a person's relationship to God."¹¹ Choosing a community dominated by a

¹⁰Moore, op. cit., p. 3.

¹¹Greenhouse, op. cit., p.1.

fundamentalist Baptist Church, Greenhouse discovered the most significant social behaviors were not the ways in which people settled disputes, but the ways in which they avoided and denied them. Moreover, she found that dispute avoidance was based on strongly held religious beliefs that did not include familiar jurisprudential ideas of worldly relief or remedy. Echoing Moore, she concludes,

The alternative to imagining rules at the heart of every positive act is to see society's heart in it's mind, that is, to probe not rules but the ideas that people find compelling and on which they base (or try to base) their conduct as a matter of course.¹²

Her ethnography is about people's ideas about conflicts rather than about conflicts themselves.

The conclusion reached by Greenhouse leads back to the original questions of this research about the relationship between law and ideology, and the roles each play in governing behavior. It is interesting to note that the early emphasis in legal anthropology on conflict and dispute tended to limit the consideration of law to its function as a proscriptive or coercive force -- that is, "law" was observed when there was social "trouble." As a result, little attention was paid to another characteristic

¹²ibid., p.31.

of law, which is that it also expresses consensus or social agreement about the way people should behave. Many theorists now agree that law must be understood as a paradoxical form that reveals social order and social disorder at the same time.¹³ Moreover, it is generally agreed that the gap between rules and social behavior must be taken as a given, as must the lack of fit between explicit laws and other forms of ideology and social control.¹⁴ As Moore aptly describes, "...there is a constant struggle between deliberate rule-making and planning, and other more untameable activities and processes at work in the social aggregate."¹⁵ Productive analysis, therefore, must focus on the processes at work in the struggle, taking for granted the fact that rule-making and human behavior are only limited partners.

¹³See, for example, Moore, op. cit., and Colin Sumner, Reading Ideologies, Academic Press, London, 1979, for a discussion of these ideas.

¹⁴In addition to the above, see Collier, op. cit., and Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law", Law and Society Review, vol. 19:1, 1985, pp. 11-36.

¹⁵Moore, op. cit., p. 29.

MARXISM, IDEOLOGY AND LAW

Legal ideas and social ideology are also limited partners. Neither can be said to fully encompass the other, nor can either be reliably read as a representation of social reality. Many pages of scholarly debate have been spent on the question of whether ideology is an accurate reflection or an intentional mystification of social reality. This question does not produce a useful answer because it takes for granted some objective vision of reality against which we can agree to measure the accuracy of a given ideological version. Instead, we may only agree with Alan Hunt who said "...that the nature of the relationship between reality and its ideological representation should be seen as 'the problem,' or object of analysis, without prejudgment as to the way in which the relationship can be captured or portrayed."¹⁶

Most contemporary Marxist scholars agree that Marx himself never provided a clear definition of the concept of ideology. Many have tried to construct a definition from Marx's texts, or to extrapolate it from his thinking. Just as Gluckman and the social process theorists took conflict on the micro level as their theoretical starting point, the Marxists presume class struggle and domination as the

¹⁶Hunt, op. cit., p.21.

object of analysis. Thus, ideology and law are concepts often employed by Marxian scholars in the service of explaining class hegemony and consciousness. Many have been drawn to the notion of ideological mystification and the uses of ideology and law to coerce and legitimate. In addition, Marxist scholars have tended to assert a strong link between law and ideology, on the one hand, and the intentional actions of the State, on the other.

For example, Antonio Gramsci argues that the functions of ideology and law, working together, are to create social consent for the existing class structure, where possible, and to provide coercive state power, where necessary. In his model, the "superstructure" is divided into "civil society" and "political society." In civil society, the world view and values of the ruling class are transmitted through morality, custom and other non-coercive means in an attempt to gain domination by consent. When consent fails, however, the legal mechanisms of the political society are available to enforce domination. Thus, he links the activities of intellectuals together with those of politicians in "educating" members of the dominated classes to accept the social order.¹⁷

¹⁷Antonio Gramsci, Selections from the Prison Notebooks, International Publishers, New York, 1971.

Louis Althusser develops this idea even further in his essay on "ideological state apparatuses."¹⁸ He moves beyond Gramsci first by asserting that some elements of the superstructure enjoy "relative autonomy" from the economic base; that is, while the superstructure is determined, in the last instance, by the mode of production, it is possible to analyze and understand it to a large degree based on its own internal logic. While Gramsci described his model in terms of consent and control, Althusser suggests that ideology is part of the process of reproducing the relations of production. In his words,

...the reproduction of labour power requires not only a reproduction of its skills, but also, at the same time, a reproduction of its submission to the rules of the established order, i.e. a reproduction of submission to the ruling ideology for the workers, and a reproduction of the ability to manipulate the ruling ideology correctly for the agents of exploitation and repression, so that they, too, will provide for the domination of the ruling class "in words".¹⁹

While it can be argued that Althusser's position does not differ from a sophisticated reading of Marx's own position, his work clearly led him and others to focus more attention on the production of ideology as a significant process in

¹⁸Louis Althusser, "Ideology and Ideological State Apparatuses," in Lenin and Philosophy, trans. by Ben Brewster, Monthly Review Press, New York, 1971.

¹⁹ibid., pp. 127-8.

its own right, rather than as only an epiphenomenon.

Althusser's descriptive model is similar to Gramsci's. He proposes that modern states have Repressive State Apparatuses, such as armies, police and courts, whose ultimate authority rests on violence. More significantly, he suggests the existence of Ideological State Apparatuses (ISA's) which appear to be private institutions, but are still part of the public process of reproducing the relations of production. Examples of ISA's include the church, the media, schools, trade unions, political parties and the legal system.

In his critical review of Althusser's work, Colin Sumner²⁰ credits Althusser with an insight that is particularly important to understanding the power of individualism as a modern ideology. According to Althusser, the ideology of capitalistic economic relations requires the notion of the "Absolute Subject." Ideology "constitutes concrete individuals as subjects" under capitalism, inventing for them a sense of individual free will. Through participating in ISA's, people learn, practice and reproduce the dominant ideology. Then, recognizing themselves as subjects in an ideology which

²⁰Colin Sumner, Reading Ideologies: an investigation into the Marxist theory of ideology and law, Academic Press, New York, 1979, p.41.

posits the absolute power of the Subject, people must conclude that they are acting freely. Sumner quotes the following passage from Althusser:

...caught in this quadruple system of interpellation as subjects, of subjection to the subject, of universal recognition and of absolute guarantee, the subjects "work", they "work all by themselves"...²¹

Ideology works this way, through the mechanism of ISA's, to create and reproduce the bourgeois ideology of free subjects. But the idea was not created only to meet the needs of capitalism: The historical roots of the ideological "free self" are traced by both Max Weber and Louis Dumont to earlier cultural developments, as reviewed in the section below.

Modern Marxists have made another significant contribution to understanding ideology by emphasizing that it originates in social action. As Althusser describes it, ideology is "the expression of the relation between men and their 'world', that is, the (overdetermined) unity of the real relation and the imaginary relation between them and their real conditions of existence."²² In Reading Ideologies, Colin Sumner summarizes the features common to

²¹Althusser, op. cit., p. 169.

²²Louis Althusser, For Marx, Allen Lane, Harmondsworth, 1969, pp. 233-4; cited in Sumner, op. cit., p.31.

the definitions of ideology offered by Marxists: Ideologies are "(1) elements of consciousness, (2) originating in social practice, which (3) are widespread throughout society." In addition, Sumner adds that ideologies tend to reflect the primary social relations in a society.²³

Sumner also offers one of the more helpful definitions of law by stating simply that law is a "conjoint expression of power and ideology." He goes on to say that "Law is a hybrid phenomenon of politics and ideology: a politico-ideological artefact."²⁴ He has taken care elsewhere in his book to emphasize that ideology does not stand alone, but is always a product of activity that can be labelled political, cultural, or economic. Moreover, he acknowledges that particular institutions in modern society may include combinations of political, economic and cultural activity; the spheres are not autonomous. In his definition of modern law, then, he simply ties ideology, which may originate from many sources, to political power. As he explains, "Law without some hegemonic class bloc [maintained by ideological consensus] is merely naked power and thus no law at all."²⁵

²³Sumner, op. cit., p.6.

²⁴ibid., p. 267.

²⁵ibid., p. 265.

Early on, Marx declared that contract law was the juridic expression of exchange relations.²⁶ Sumner makes a thoughtful attempt at elaborating that position. He begins with the "necessity thesis": the assertion that a particular ideology must emerge in order for a particular social relation to exist. In his words:

The thesis holds that for a particular social relation to be carried out on a regular basis, certain ideas are required to be present as a sine qua non. Without these ideas the practice is impossible socially and thus ceases to be a social practice.

Moreover, he adds,

...since social practices entail the purposive living out of certain social relations in a specific socio-geographical context, it must be the case that these ideas are the reflections of those relations (the assumptions or beliefs which make them socially operable), and that the ideas adopt their historical imagery, terminology and elaborated substance from the material circumstances, existing ideologies and socio-geographical contexts which constitute the environments in which they are brought to life.²⁷

Thus, he argues, there is a necessary dominant ideology which accompanies exchange relations. It has three primary characteristics: The first is the ideology of ownership which socially validates possession. Valid possession, of course, is a logically necessary precondition for

²⁶Karl Marx, Capital, vol. 1, Vintage Books, New York, 1977, ch. 2.

²⁷Sumner, op. cit., pp. 218-19.

exchange. The second is the ideology of the "legal personality". As he explains, "Regular exchange demands that the parties recognize each other as the valid representatives of their produce, as legal persons." The third characteristic is the ideology of contract, which is fundamental to a capitalist society. Not only must the parties accept each other as the representatives of their goods, but they must assume freely given consent on both sides of the exchange. As Sumner summarizes, "What is ultimately a relation between differentially located economic practices of production thus becomes seen as an ideological consensus between intentional, free agents."²⁸

The conclusions reached by Sumner, then, are not very different in substance from those reached by Althusser, described above, and Dumont, discussed below. The primacy of ownership or property, the invention of the free individual as subject or legal personality, and the significance of contract in the exchange relation recur as central themes. What distinguishes Sumner's perspective is that he relates these ideas to social practice -- the things people do in a capitalist society.

He also offers an elaboration which is helpful to this

²⁸ibid., p.221.

research about the law: He argues that legal rules are "ideologies necessitated by social relations and sanctioned by the institutions for the execution of social power." However, actors in different roles, with differing degrees of power, may hold different versions of ideology. For example, producers, distributors and consumers may all believe something different about the nature of "contracts." He concludes that it is "a question of political power, not economics, as to which version becomes legalized. There is no good reason to assume, in general, that legal ideology is identical to the equivalent ideology in everyday practice."²⁹

Sumner's conclusion is reminiscent of Moore's assertion, discussed above, that rules and laws are only partial determinants of behavior. Indeed, the data of this research will allow an examination of whether men and women, in their social roles as husbands and wives, hold different versions of ideologies about the family and family law. The following sections of this chapter will consider the historical and political questions about how a particular version became legalized.

WEBER, LAW AND RATIONALITY

In the opening chapter of Economy and Society, Max Weber offers his famous definition of law. It is a

²⁹ibid., p.222.

definition which focuses on law's coercive quality and seems most applicable to complex societies:

An order will be called ... law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation.

In his chapter on the sociology of law, Weber delineated a typology of legal systems. Most significantly for this research, he then made the grand assertion that the development of "logically formal, rational law" in the West was a necessary condition for the rise of capitalism.³⁰

His typology of ideal types of legal systems consists of a two-by-two matrix along two axes: formal/substantive and rational/irrational. The degree of "formality" is measured by the extent to which lawmaking and lawfinding are driven by principles which are intrinsic to the system and autonomous or differentiated from other social processes. "Rationality" is measured by the degree to which principles are universally rather than idiosyncratically applied. Thus, for example, a formal irrational system might be one in which decisions were made

³⁰Max Weber's "Sociology of Law" is found as Chapter 7 in his larger work, Economy and Society. It is also reprinted, with relevant excerpts from other sections, as Max Weber on Law in Economy and Society, edited with an Introduction by Max Rheinstein, Harvard University Press, Cambridge, 1954. I refer to this edition. The definition quoted above is found on p.5.

by rules which were part of a known and bounded system, but were unpredictable in any given case, such as the pronouncements of an oracle or mystic. Substantively rational lawmaking would be a system in which decisions were predictable, but based on norms from other undifferentiated systems such as ethics, politics or religion. Finally, Weber also distinguished between "logical" rationality, which relies on a specialized style of reasoning, and "extrinsic" rationality which relies on ritualistic mechanisms of standardization, such as seals or charters.³¹

"Present day legal science", as Weber referred to it, having achieved the "highest measure of methodological and logical rationality", is based on five postulates:

...first, that every concrete legal decision be the "application" of an abstract legal proposition to a "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" legally in rational terms is legally irrelevant; and fifth, that every

³¹Weber, "Categories of Legal Thought", in the Rheinstein edition, pp.61-64. My summary also draws heavily on the summaries provided by David Trubek, "Max Weber on Law and the Rise of Capitalism," Wisconsin Law Review, vol. 1972:3, pp.720-753; and Piers Beirne, "Ideology and Rationality in Max Weber's Sociology of Law," Marxism and Law, ed. by Piers Beirne and Richard Quinney, John Wiley and Sons, New York, 1982, pp.44-62.

social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof.³²

The description of these five features serves well as a model self-description of modern Western law found, even today, in the introductions to many law school textbooks.

Just as Weber attempted to explain the origin of capitalism in The Protestant Ethic and the Spirit of Capitalism, his goal in the "Sociology of Law" was to explain the emergence of this particularly advanced form of legal system in Western Europe. Not surprisingly, he proposed that capitalism and the modern European legal system were closely related, and that both depended upon the rise of the modern bureaucratic state. He argued that several unique historical trends set the stage for these developments in Western Europe, and that the growing administrative machinery of the state and the needs of the merchant classes were directly linked to the growing need for a rational (i.e. predictable) legal system. In his words:

To those who had interests in the commodity market, the rationalization and systematization of the law in general and, with certain reservations to be stated later, the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic

³²ibid., p.64.

enterprise intended to function with stability and, especially capitalistic enterprise, which cannot do without legal security.³³

David Trubek provides a helpful explication of Weber's theory of the symbiotic rise of modern rational legalism and capitalism. He emphasizes, as Weber does, that an economy based on commodity exchange requires calculability and predictability to function. As the bureaucratic state and the bourgeoisie increased their power relative to the weakened roles of theocratic or patrimonial rulers, some reliable form of social control was needed. Moreover, as society grew more complex, its spheres of activity grew ideologically more distinct from each other, if not functionally more separate. Kinship, religion, politics and the economy were differentiated. The exchange market eroded the cultural bases of tradition and the solidarity of social groups which formerly enforced social customs. In this context, Trubek explains, "Only law is left to fill the vacuum; legal coercion is essential because no other form is available."³⁴

Liberal ideas about individual liberty, freedom to contract, and laissez-faire highlight some of the paradoxes of the legal system in the historical context described

³³ ibid., p. 304-5.

³⁴ Trubek, op. cit., p.42.

above. In order to meet the needs of the merchant classes, the "law" had to loosen the traditional bonds on property and facilitate its freer exchange. At the same time, it had to ensure a "fair" and orderly system, and guarantee, as Weber suggests, a reliable enforcement mechanism. As Trubek argues,

This required that the state, as legal order, be strengthened, so that it superseded other sources of social control, and at the same time be limited, so that it did not encroach upon areas of economic action. The state was to provide a formal order, or facilitative framework within which free economic actors could operate.³⁵

Upon this ground, then, the idea of a free market and laissez-faire grew. But clearly, the legal order of the state served different functions in different spheres of social life. While it may have increased the degree of individual freedom within a limited sphere of economic activity, for example, it also decreased the power or freedom of the patriarchal family to control property. And, as a later discussion in Chapter 3 will show, the development of the law of domestic relations in the United States tended to ratify the status quo within the family rather than increase individual liberty among its members. In the United States, laissez-faire in the marketplace meant the enforcement of individual liberty, while

³⁵ibid., p.744.

laissez-faire in the family meant the reification of patriarchal hierarchy.³⁶

Weber's legal positivism resonates through much of the classical legal literature of the past century. In fact, for many classical legal scholars (Weber himself was trained as a lawyer), the essential task is to "discover" the natural laws of democracy and the marketplace. However, this emphasis on the scientific rationality of law and the presumption of rationality in human behavior (as in the fifth postulate described above wherein every human action must be seen as an application or infringement of a legal rule) places Weber in direct opposition to anthropologists such as Gluckman and Moore who see less conscious intention in human behavior.

I will argue that Weber's description of formal justice in the historical rise of capitalism is an example of "rule fetishism" that operates in a way similar to the "commodity fetishism" described by Marx. By substituting abstract logic and scientific rationality for human decision-making in the process of social governance and dispute resolution, Weber and others after him seem to give modern formal law a life of its own, as if it were beyond human control instead

³⁶Frances E. Olsen, "The Family and the Market," Harvard Law Review, vol. 96:7, 1983, pp. 1497-1578.

of shaped by it. The state, expressing itself in a legal idiom, is interjected in disputes between individuals just as the market is interjected in exchange relations. The entire process is de-humanized or de-animated. The rules appear to have a "natural" authority just as commodities in the market seem to have natural value, and resolutions of conflict appear inevitable. In this light, the precious legal right of individual "freedom" can be seen as something of an illusion in which humans behave "freely" insofar as their actions appear to be constrained only by an immutable natural law, beyond the control of other humans.

This vision of law is consistent, of course, with other significant ideas of the modern liberal state. Weber's description of "logically formal, rational law" fits comfortably beside Spinoza's distant god and Adam Smith's invisible hand of the marketplace. As Gluckman pointed out, social systems must have a means of shifting attention away, in some cases, from the true source of conflict in order to mask structural contradictions and maintain group solidarity. Thus, the elaboration of the idea of rational law can be seen as part of the process of replacing the supernatural with natural science and de-animating social behavior in the cosmology of modern Western society.

Several of the themes suggested by Weber, then, are significant to this research. The ethnographic data demonstrate the extent to which modern Americans accept the legitimacy of family law based on their presumption that it is logical, natural and inevitable. Conversely, however, the data demonstrate, as Moore predicts, that many people in family law disputes act and react entirely outside the law; they are motivated by other "untameable processes in the social aggregate." The following discussion will consider further interpretations of the social differentiation noted by Weber -- that is, the ideological differentiation of the spheres of politics, religion, economy and kinship -- together with the increasing commoditization and de-animation of public life. These historically shaped social forces are particularly significant to the elaboration of gender roles and the evolution of family law, and lead to a consideration of modern ideology.

DUMONT, INDIVIDUALISM AND MODERN IDEOLOGY

There is significant continuity between the work of Weber and the contributions of French anthropologist Louis Dumont on modern Euro-American ideology. While adopting a different perspective on the problem, Dumont sets out a similar program: Weber intended to explain the unique development of capitalism and modern law in the West. Dumont attempts to explain the emergence of "modern

ideology", in comparison to the ideologies of traditional societies which have dominated most of human history.³⁷

In contrast to Weber's description of modernity as an advance in human organization, though, Dumont describes modern ideology as a curious development, almost an aberration that must be explained. In his words, "The main task of comparison is to account for the modern type in terms of the traditional type. For this reason, most of our modern vocabulary is inadequate for comparative purposes: the basic comparative model has to be non-modern."³⁸ In developing his theory of the emergence of modern ideology, Dumont travels along many of the same paths explored by Weber, including Christian doctrine and its relation to political and economic transformations in Europe. A brief review of his thoughts will help lead this discussion to an integration of concepts regarding ideology, law and economy.

First, Dumont offers a simple definition of ideology as "the totality of ideas and values common to a society or to

³⁷I am referring, in particular, to two works by Dumont: From Mandeville to Marx: The Genesis and Triumph of Economic Ideology, The University of Chicago Press, Chicago, 1977 [hereinafter cited as Mandeville]; and Essays on Individualism: Modern Ideology in Anthropological Perspective, The University of Chicago Press, Chicago, 1986 [hereinafter cited as Essays].

³⁸Dumont, Mandeville, p. 7.

a group of people in general."³⁹ He acknowledges that, in discussing ideology in this broad fashion, he is working at a level of generality that ignores internal variations and contradictions. His explicit intent is to examine "wholesale, all-embracing, or encompassing social valuations." While he notes that competing ideas may co-exist in a society, he believes that the dominant or "all-embracing" themes can still be identified and studied.

Dumont argues that modern Euro-American society is separated from traditional society by a "revolution in values," and he devotes the better part of these two works to explaining the genesis and substance of that revolution. He draws a major distinction between "holistic" societies, in which order and benefit for the social whole are the highest value and direct most human behavior, and "individualistic" societies of the modern type, in which each person is "an embodiment of humanity at large," presumed to be equal to all others and controlled by his or her own free will. He further suggests that the ideology of individualism is related to the ideas of egalitarianism and liberty, while holism tends to be related to hierarchy. Finally, he claims that holism has overwhelmingly dominated human history, and that our modern

³⁹ ibid., p.7

civilization is the only exception to the rule.⁴⁰

It is beyond the scope of this chapter to summarize all that Dumont had to say on the subject of modern ideology, but a few themes seem particularly relevant. Following Marx, he notes the important difference in human history of immoveable and moveable wealth. Immoveable wealth consists primarily of heritable land and thus is closely associated with kinship and relations of power and control among people. Moveable wealth, on the other hand, consisting primarily of money and chattels, became an autonomous and superior form of wealth only in the modern, commercial societies. With the ascendance of moveable wealth, the direct link between wealth and control over people was broken, and the entire business was severed from kinship. Following Weber, Dumont asserts that this transformation marked the division, for the first time in history, of the political from the economic. In fact, Dumont suggests that politics and economics are "the modern innovation," while religion and society are evidence of "the continuity with the traditional universe that remains in the modern

⁴⁰I am drawing here from the first chapter of From Mandeville to Marx, "A Comparative Approach to Modern Ideology and the Place Within it of Economic Thought", pp. 3-32; and from Essays on Individualism, chapter 1, "Genesis, I", pp. 23-59.

universe."⁴¹ The significance for family law of the distinction between moveable and immoveable wealth, as well as the division between the economy and the polity will be discussed further in the chapter dealing with legal history.

Like Weber, Dumont proposes an historical interpretation of the emergence of modern ideology in Europe rooted in the evolution of Christian doctrine. In his essay, "Genesis, I", he locates the birth of individualism in early Christian theology which places each individual in direct relation to God. He points out, however, that this early individualism was quite different from the modern form. In his terms, early Christian individualism was "outworldly" in that it directed the individual to find meaning and value in life beyond this world, and to devalue the concrete and worldly aspect of life. Through commitment to and faith in this "outworldly" perspective, individuals would find community not in their daily lives on the ground, but in the fellowship of Christ. As Dumont summarizes: "...the emancipation of the individual through a personal transcendence, and the union of outworldly individuals in a community that treads on earth but has its heart in heaven, may constitute a

⁴¹Dumont, Mandeville, p.22.

passable formula for [early] Christianity."⁴²
He argues, further, that this was the only form of individualism that could emerge, initially, from traditional holism. It was an individualism that was apart from social and political organization, and thus did not immediately disrupt it. His point here provides an important lesson in the historical interpretation of ideological change, directing the interpreter to look for the small shift in ideas that still sit comfortably in their old social niches as the seeds of later revolutions.

When Jesus preached that people should "render unto Caesar the things that are Caesar's, but unto God the things that are God's", he established rules for the relation between heaven and earth that were soon to be broken. Dumont suggests that while early Christian doctrine elevated the outworldly or sacred, it still directed people to live by and obey worldly authority. The next significant historical shift occurred, then, when the organized Church began to seek, and eventually won, political authority in medieval Europe. When Pope Leo III crowned Charlemagne as Emperor in St. Peter's cathedral on Christmas Day, A.D. 800, Dumont claims that a fundamental transformation was completed. As he explains,

⁴²Dumont, Essays, p.31.

With the claim to an inherent right to political power, a change is introduced in the relation between the divine and the earthly: the divine now claims to rule the world through the Church, and the Church becomes inworldly in a sense it was not heretofore.⁴³

It is also important to note, here, the fusion of the religious and the political which will later be severed again.

In the religious doctrines of Luther and Calvin, the inworldly transformation which was initiated by Papal ambition finally comes to rest in the individual. Focusing on the teachings of Calvin, Dumont argues that his theology resolved the contradictions of an outworldly Church participating so fully in the matters of this world and completed the logic of the transformation already started. Calvin's doctrine of predestination and the demonstration by the select of their salvation through works in this life created justification for the "inworldly individual." The sharp dichotomy between heaven and earth, characteristic of early Christianity, became blurred. In Dumont's words, "Instead of taking refuge from this imperfect world in another which allowed us to cope, it would seem we had decided that we should ourselves embody that other world in

⁴³ibid., p. 51.

our determined action upon this one."⁴⁴ Thus, the modern individual, acting of his own will upon the world and embodying it within himself, was born.

Dumont emphasizes, too, the emergence of what he calls "modern artificialism": the identification of the individual's will with the will of God, and the mandate to apply this will or to act upon this world. The contradictions between sacred and secular, or between religious and political authority that were previously played out on a large social field, now resided within the individual. "Outworldliness" is expressed by individual will because it is identified with God's will. Worldly activity is now elevated; it attains a sacred quality. Dumont's interpretation seems to support Weber's thesis about "worldly asceticism" and the emergence of the spirit of capitalism.

In a moment of bluntness, Dumont wrote: "It should be obvious that there is nothing like an economy out there unless and until men construct such an object."⁴⁵ Of course, this has not been obvious to many, including classical economists and some anthropologists who see natural laws and inherent economic or maximizing

⁴⁴ ibid., p.56.

⁴⁵ Dumont, Mandeville, p. 24.

behavior at work in all human societies. But without taking up an old debate, it seems safe to say that the sharp separation of the economy from other spheres of human activity such as politics and kinship is a human, and fairly recent invention.

Dumont argues further that, within the historical context explained above, the economy was severed not only from the polity, but also from the general morality. That is, in the new, worldly economy, people were expected to act out of self-interest. How, then, could community be maintained? As mentioned earlier, Trubek suggests that only modern law, raised to the level of natural law, could fill the gap of social control. Dumont maintains, however, that the economy was granted its own special morality, expounded in the works of Mandeville and Adam Smith. The new morality of the economy was expressed by Smith in the phrase "self love works for the common good." Smith explained in the Wealth of Nations that "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."⁴⁶ The ideology of the capitalist economy, driven by individual self-interest but resulting

⁴⁶Dumont, Mandeville, p. 62; citing Edwin Canaan, ed., Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, vol. I:ii, p.16; London, 1904.

in the common good, was an extrapolation of Calvinism writ large.

Given this shift in morality, an important contrast between a traditional holistic society and a modern individualistic society becomes evident: Restating Marx, Dumont asserts that members of a traditional society, in which wealth and the economy are inseparable from the affairs of politics and the family, value highly the relations among people. For members of an individualistic society, on the other hand, in which wealth is moveable and the economy appears to have a life of its own, the relations between people and things become primary. But Dumont also acknowledges that "...ideology has the power to transform social reality only between certain limits..."⁴⁷ The historic and ethnographic data that follow will demonstrate the extent to which the traditional and modern morality survive together, and show how each is codified or contradicted by the law.

Another Marxist scholar has developed a thesis about ideology and law under capitalism which will help move this discussion toward a consideration of gender differences and family law. In his article on "Commodity Form and Legal Form", Isaac Balbus offers a semiotic analysis to

⁴⁷Dumont, Mandeville, p. 12.

demonstrate that the liberal legal form parallels the economic form of commoditization. As the economic sphere of exchange becomes stripped of human intention and increasingly quantitative and abstract, a sphere of human activity emerges which is stripped of its social nature, in which people appear as individual legal citizens who mediate their interactions through free will and rights.⁴⁸ Both economic commoditization and legal privatization, then, have the effect of de-animating and de-contextualizing social relations.

But legal privatization has very different effects for women than it does for men in modern capitalist society. In the first place, as the next chapter will show, women have historically been excluded from fundamental legal concepts of individualism, contract and rights, and have had, over time, to fight their way inside the new legal ideology. In the second place, men and women have had different social experiences of the public/private divide. If one accepts the premise that ideology emerges out of social practice, then one can predict that women will hold a different version of the dominant ideology. Perhaps, for example, having not been granted a full measure of the

⁴⁸Balbus, op. cit., p. 571.

dubious privileges of individual rights, women in capitalist societies will maintain a higher degree of contextual knowledge and believe interactions to be more animated by social needs than men. Perhaps, because the dominant ideology does not fit as well with the daily lives of most women, they will experience its contradictions more sharply than do men. These are some of the issues considered by feminist scholars.

A FEMINIST CRITIQUE OF ANGLO-AMERICAN LEGAL IDEOLOGY

Remarkably, none of the authors discussed above considered the significance of gender differences in their theories. Although several noted the possibility of internal contradictions and competing forms of law and ideologies within a particular society, their examples tended to refer to class differences and the generalized distinctions between rulers and ruled. In the explications of legal ideology in the modern West reviewed above, the fact that, until recently, all of the significant concepts such as individual freedom, ownership and contract, applied exclusively to white men, seems to have gone unnoticed. This fact has not escaped the attention, however, of feminist legal scholars and historians. And while the theories above may be substantively biased, they provide insights and methodological tools that will help correct the problem.

In her essay on "Transcending Equality Theory", Lucinda Finley wrote:

Autonomy, which is held out as the ideal for decontextualized human beings, is defined as the realization of self-fulfillment guided by the ultimate authority of self-judgement without interference from others...The conception of abstract individualism leads to a definition of freedom as noninterference from other individuals. Rights are seen as necessary to protect our glorious isolation... The inadequacies of these underlying visions of human nature and rights for describing human reality are readily apparent. The most fleeting contemplation of reproductive biology demonstrates that individual self-sufficiency is neither possible nor desirable...The notable absence of values of interconnectedness and care in our system of rights, and the tendency of equality analysis to overlook context in its search for essential similarities, suggest that these analytic approaches may only reflect the male aspect of human experience.⁴⁹

Finley is responding to a dialogue among feminist legal scholars that has come to be known as the "equal treatment/special treatment" debate. The debate concerns the appropriate legal response to the problems of women workers who have children and suffer the loss of jobs and seniority. The "equal treatment" approach⁵⁰ is to treat

⁴⁹Lucinda Finley, "Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate," Columbia Law Review, vol. 86:6, 1986, pp. 1160-61.

⁵⁰See Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," New York University Review of Law and Social Change, vol. 13:2, 1984-5, pp. 325-80.

pregnancy as any other temporary disability. The "special treatment" approach⁵¹ is to affirmatively acknowledge the biological differences between men and women, particularly regarding childbirth and breastfeeding, and to fashion laws that make appropriate allowances for those differences. The debate has also been characterized as one between formal and substantive equality -- that is, one that compares strict principles of equal treatment against principles of equal outcome. Although the debate is quite recent, the legal problem is not new: Similar debates occurred among feminists in the earlier part of the century in the United States concerning protective labor laws and the first introduction of the Equal Rights Amendment. During that earlier wave of feminism, the protagonists were political feminists, on the one hand, who believed that the advancement of women would be achieved through equality in legal rights, and cultural feminists, on the other, who argued for the social elevation of characteristics they considered particularly feminine, such as morality and religiosity.

Finley argues, however, that the controversy cannot be

⁵¹See Linda Krieger and Patricia Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality," Golden Gate Law Review, vol. 13, 1983, p. 513.

resolved in these terms because the concept of equality itself is male-biased and unproductive. In her analysis, it has two fatal flaws: The first is that a judgement of equality, under the legal doctrine, requires a comparison among individuals who are "similarly situated." It requires, therefore, a process of classifying things into groups that are similar in opposition to those that are different. But, Finley asks, who is to decide what constitutes a relevant similarity or difference? This, she concludes, is ultimately a moral and political judgement for which legal reasoning is irrelevant. Finley calls this problem "the indeterminacy of equality analysis."⁵² Her conclusion supports the assertion of Sumner, discussed earlier, that it is a "question of political power" as to which version of ideology becomes the legal version.

The second fatal flaw is the assumption of homogeneity based on the male norm. As Finley explains, equality analysis is incapable of coming to terms "with the reality of human variety."⁵³ She goes on,

The very idea of a norm implies that whatever is considered "normal" can take on a quality of objective reality, so that it is no longer possible to see that the standard of measurement reflects simply one group of qualities out of the infinite variety of human experience. The

⁵²Finley, op. cit., p.1149.

⁵³ibid., p. 1148.

qualities chosen as the standard of measurement for legal equality analysis have been determined by those who have had the power to define or to imprint their view of what is real, important and normal, on others.⁵⁴

In this interpretation we see the theoretical models of ideology-making at work: An ideology emerges out of the social relations of employment and childrearing in which the vision of the class in power is codified in the law and imposed as the norm. The female experience of pregnancy becomes the "problem."

Many other feminists have challenged the basic categories of Western legal ideology. They have re-examined not only the liberal concept of equality, but also the concepts of individuality, rights, and the public/private dichotomy.⁵⁵ Some have attempted to demonstrate the specific ways in which laws have contributed to the perpetuation of patriarchy and the domination of women in modern society.⁵⁶ In this

⁵⁴ibid., p. 1154.

⁵⁵See, for example, Sylvia Law, "Rethinking Sex and the Constitution," University of Pennsylvania Law Review, vol. 132, 1984, p. 955; and Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," Harvard Law Review, vol. 96, 1983, p. 1497.

⁵⁶See, for example, Nadine Taub and Elizabeth M. Schneider, "Perspectives on Women's Subordination and the Role of Law" and Diane Polan, "Toward a Theory of Law and Patriarchy," both found in The Politics of Law, ed. by David Kairys, Pantheon Books, New York, 1982.

chapter, some of the cultural and historical roots of individualism and liberal equality theory have been reviewed in the interpretations of authors who were not particularly concerned with the division of social roles and values by gender. Their analyses help clarify the power of these ideas and place them in the context of historical struggles for social control among the spheres of kinship, religion and political organization. The feminist critique adds another dimension by interpreting the exclusion of private needs and relations from the discourse of public law and ideology. The feminist perspective also identifies the relations of power based on gender as another instance of conflict and domination to which laws and other means of social control must be applied.

These theoretical models provide a basis from which to explore the contradictions between legal ideas and social behavior. They offer methodological tools for explaining how particular ideas became law and how they persist in the face of internal inconsistency. In the chapters that follow, I will use these tools to explore the history and practice of family law.

Chapter Three

FROM COVERTURE TO NO-FAULT:
A HISTORY OF MARITAL PROPERTY LAWS IN NEW ENGLAND

If one were to identify a single smoldering issue that symbolized the subordinate status of women in the wake of the [American] Revolution and sparked the rise of the women's movement in the antebellum years, it would have to be the inability of married women to control their property. Property, after all, was the most fundamental of republican rights, a component of -- and perhaps tantamount to -- the pursuit of happiness.¹

Throughout this study, law is understood to have a dual nature: it is both coercive and representative of social behavior. At any given moment in history, the law is both descriptive and proscriptive. This is particularly true of family and marital property laws which govern behavior many people consider private and personal. More than in other spheres of social action, decisions to marry, divorce, have children and fulfill the obligations of kinship are influenced by norms based on religion, ethnicity and class in addition to the norms of civil law.

Changes in family law over time, then, reveal the efforts of local lawmakers to accurately reflect a social consensus about appropriate and moral behavior as much as they reveal the efforts of local governments to control economic relations and the distribution of property. Of

¹Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce and the Constitution", Signs, 12:1, 1986, p. 99.

course, these are not two separate processes. Ideological kinship norms, often expressed in religious or cultural terms, together with the political and economic relations among classes and geographical regions, often expressed in state laws, are part of the dialectical seesaw of history.

The evolution of divorce and marital property laws in Connecticut reveals the enduring nature of patriarchal property relations, even in the face of blossoming republicanism and wage-based capitalism. While control over property and marital relations shifted from the family to the state and the property rights of women were redefined, women's actual control over property changed very little. As this and subsequent chapters demonstrate, new forms of social organization articulated with old ones so that gradual change occurred in some spheres without radical disruption of other spheres of social life.

In order to appreciate that process, one must examine the interaction of ideas and social practices. In this chapter, I will examine the historical interaction of political, economic and religious ideas and events as they shaped women's property rights and marital property laws in New England. Because family laws vary from state to state, I will often limit my discussion to Connecticut. In particular, I will analyze the importance of the strong Puritan roots in Connecticut's governance and religious ideology, as well as the economic conditions in New England

over time, in shaping the family laws of Connecticut.

COVERTURE AND DOWER

Two legal principles were most significant in defining women's marital property rights under the Anglo-American law of the colonial era: coverture and dower. These two principles persisted after the Revolution and into the early 19th century, until they were finally overturned by the Married Women's Property Acts.

Under the rule of coverture, a woman forfeited to her husband upon marriage all her individual rights to own or manage property. Even property that was explicitly hers before marriage, as well as any earnings or bequests she might receive during marriage, became the property of her husband. A wife had no legal right to enter into contracts, nor to appear as a plaintiff or witness in a court of law. The rule was summarized by William Blackstone in his famous treatise on the laws of England, written in the 1760's:

By marriage, the husband and wife are one person in law: (1) that is the very being or legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything...Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by marriage."²

²William Blackstone, Commentaries on the Laws of England, 4 vols., Oxford, 1765-69, vol. 1:430; cited in Marylynn Salmon, Women and the Law of Property, University

By this principle, a married woman was legally termed a "femme covert", a covered or hidden woman, in contrast to unmarried women, labeled in legal writings as "femme sole."

Of course, no single doctrine completely describes the legal situation of women nor their actual life experiences. As several legal historians have described in great detail, married women in some jurisdictions could manage and maintain their own estates through special "equity laws", could often act in commercial transactions as their husbands' "agents", and were protected in many instances by the requirements that they "consent" to land sales and waive future dower rights (discussed below).³ All of these exceptions to the rule, however, were created in the context of a powerful, overriding principle: In the eyes of the law, married women were nearly invisible.

It is interesting to note that the inability of women to enter into contracts under the doctrine of coverture flowed directly from the fact that they could not own property. As legal historian Marylynn Salmon points out, a woman could not enter into a valid contract because she owned nothing with which to secure it. In case of default, creditors and courts could find nothing to seize in order

of North Carolina Press, 1986.

³Marylynn Salmon, Women and the Law of Property in Early America, University of North Carolina Press, Chapel Hill, 1986, ch. 3.

to satisfy a judgement. Even a woman's services belonged to her husband; therefore, a contract for her services was not enforceable unless it was executed by him.⁴ Whatever other religious or social explanations may have been offered for the exclusion of married women from commercial transactions, the fundamental right to enter into contracts rested on the ability to own property, and thus, under coverture, was reserved for men.

What would happen to a femme covert when the husband under whose wing she had been hidden pre-deceased her? Recognizing the need to allow some protection for widows and their children, common law provided the concept of dower. Under dower, a widow was granted a minimum of "life-use" of one-third of the real property owned by her husband during their marriage. If there were no children of the marriage, the dower share was often one-half. "Life-use" meant that she could live on and use the property for as long as she lived, but she could not own it nor could she give it away. After her death, the property would revert to the beneficiaries named in his will, or to his legal heirs by the laws of testate.

Dower was a surprisingly strong doctrine for women. In most jurisdictions, a widow's dower share included one-third of all the real property owned at any time during

⁴ibid., p.41.

the marriage. If a husband sold some land, or died a debtor, the widow could sue a third party and claim her proper dower. In other words, a widow's rights to life-use of her one-third share superceded the rights of her husband to sell property during his lifetime, and took precedence over the rights of creditors. However, she only had the right to the use and income generated by the property; she didn't own it.

Dower was not uniformly applied in all the colonies, and Connecticut seems to have been the least generous to widows. Salmon reports that legislators in Connecticut enacted a statute in 1673 limiting a widow's dower share to one-third of the property that her husband owned when he died, rather than property owned at any time throughout the marriage. This rule had serious consequences for women: Husbands were free to sell or devise property as they pleased up until the day they died. Wives had no rights or protections against their actions. If a husband squandered or purposefully sold off his land, a widow could be left destitute.⁵

Salmon suggests the motivation behind these seemingly punitive rules was to enhance commerce and free trade by removing restrictions on the alienation of land. She quotes Zephaniah Swift, an 18th century legal scholar, in

⁵ibid., p.161.

his treatise on the System of the Laws of Connecticut, as referring to dower as an "inconvenient encumbrance", "repugnant to the policy of our laws."⁶ She also cites a decision by the Connecticut Supreme Court in 1824 in which the judge wrote:

Our ancestors did not think it expedient to restrain that free transfer of real estate, which the interest of the community requires; for this reason, the law has given to the wife no lien upon, or right, legal or equitable, to the husband's estate, during his life. Her condition, in this respect, is like that of her husband's children, or other heirs;...

Salmon concludes that "Connecticut acted upon impulses usually associated with the nineteenth century...The fact that Connecticut laws long had observed the need to facilitate conveyancing and restrict the liens of widows indicates an early commercial emphasis in colonial America."⁸

Salmon also reports that Connecticut was the most restrictive in its laws governing women's rights to separate estates, and least protective of women against physical abuse and coercion in land sales. In many jurisdictions other than Connecticut, the procedures for the sale of land included a "private examination" of the

⁶ibid., p.161; citing Zephaniah Swift, A System of the Laws of the State of Connecticut: In Six Books, New Haven, Connecticut, 1795-96, 1:255.

⁷ibid., p.162; citing Harvey and Wife v. Pecks, 15 Munford 523-4 (1810).

⁸ibid., p.161.

wife by an officer of the court, through which the court determined that the wife had freely consented to the sale. These procedures did not so much represent an early concern about domestic violence as they did a concern to protect the rights of buyers against future dower claims. Since, as described above, Connecticut statutes already protected buyers and creditors against dower claims, the private examination was unnecessary. In 1723, however, the Connecticut legislature finally decided to join its neighbors by passing "An Act for Preventing the Sales of the Real Estates of Heiresses, without their Consent" which required a wife's acknowledgement before a justice of the peace of a deed of sale.⁹ Although Salmon describes the legal reform in Connecticut, she does not explain its origin. It would be interesting to know what prompted law makers in Connecticut in 1723 to finally provide a small measure of protection for women against male coercion, and greater recognition of their property rights.

Although Connecticut was more restrictive in many ways than other colonies, it was the most "liberal" (at least in terms of modern values) concerning divorce. Most colonies provided two types of legal separation: The first was simply a separation from "bed and board" which included property and financial settlements so that spouses could

⁹ibid., p.22-3.

live apart, but left the parties legally married. This was the favored option and, to the extent that separations were granted at all, these were much more common. Separations from bed and board could be particularly devastating to women because they remained "femme covert" without the power to control their finances or enter into contracts. Historians report that this option was only sought by women in desperate situations of abuse and desertion.¹⁰

The second type of legal separation was an absolute divorce, with the right to remarry. In Connecticut, only absolute divorces were granted; the legal concept of separation from bed and board did not exist. The grounds for a divorce were desertion, cruelty and adultery, and they were judged sternly. In Connecticut, you were either married or you were not.¹¹ For women, absolute divorces were more powerful remedies because they granted the status of "femme sole"; divorced women could act for themselves as legal adults. Salmon cites Swift and others to argue that the restrictive rules in Connecticut prohibiting married women from controlling separate estates were justifiable because women had the option of divorce. That is, instead of providing a variety of half-way remedies and loopholes

¹⁰Nancy F. Cott, "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts", William and Mary Quarterly, 3d ser. 33, 1976, pp. 586-614.

¹¹op. cit., Salmon, p. 69.

for discontented spouses to stay married but live apart, Connecticut lawmakers offered a single, more absolute remedy.¹²

The distinctiveness of marital property and divorce rules in colonial and early republican Connecticut provide a good opportunity to consider basic questions about law and social change: What caused these laws to take the shapes they did? Were they a reflection of a new social order, and if so, what was shaping the new social order? Were the laws, themselves, an expression of conscious efforts by social leaders to create a new society? Can a reading of these laws help us understand the kinship patterns and ideology of the period? In particular, the family laws in Connecticut of this era raise interesting questions about the role of Puritanism in shaping social structure and ideology, and about the changing status of women in this emerging society.

Salmon returns often to a single, clear explanation of legal developments in Connecticut: the doctrines of Puritanism. She argues that one of the primary objectives of Puritanism, in England as well as in the New World, was legal reform. She maintains that the Puritans, more than any other group of emigres, had the courage of their convictions to create legal systems that differed

¹²ibid., p. 71.

substantially from English common law. She points, as an example, to a Puritan treatise on legal reform, published in England in 1552, which argued against the laws for separation from bed and board, as the basis for the statutes later enacted in Connecticut regarding divorce.¹³.

The goal of Puritan legal reforms, in her view, was to codify the patriarchal, interdependent family. Many social historians have shown how deeply Puritans believed in hierarchical. patriarchal authority.¹⁴ Puritan author William Gouge wrote, in Of Domestical Duties, that husbands and wives were "yoak-fellows in mutuall familiaritie, not in equal authority...She must give place and yeeld."¹⁵ Under Puritan teachings, a submissive wife was a virtuous wife, and a virtuous husband provided for all of his dependents. In his treatise on womanhood, Ornaments to the Daughters of Zion, the well-known Puritan leader Cotton Mather wrote, "In every lawful thing she submits her Will and Sense to his...she acts as if she were but one Mind in two Bodies."¹⁶ Thus, Salmon concludes that Puritans did

¹³ibid., p. 69.

¹⁴See, for example, Edmund S. Morgan, The Puritan Family (1944, reprint 1966), and John Demos, A Little Commonwealth (1970), for two well-known treatments of Puritan family life and ideology.

¹⁵ibid., p. 8.

¹⁶Quoted in Julie A. Matthaei, An Economic History

not create special protections and rights for married women because they believed that wives would be adequately protected by their husbands. In her words,

...the rules of law adopted in Connecticut and Massachussetts assumed that families would be loving, considerate and interdependent. Protective strategies for wives and widows could be reduced because they were viewed as unnecessary, restrictive, and perhaps even destructive of family harmony.¹⁷

Her interpretation presumes a direct, causal relation between explicit religious doctrine and civil law. In this case, the presumption may be somewhat justified. In early Puritan settlements, there was very little separation between religious doctrine and civil law. Puritan theology was the basis of the law, and settlements were governed by the Church elite. Moreover, Puritan settlers in Massachussetts and Connecticut did, indeed, arrive with a mission, and began to shape a new society with deliberate, intentional steps. This was not a social order that evolved naturally from its predecessor. This was, after all, the New England.

But to simply assert the idealist explanation that Puritan patriarchy was at the heart of strict interpretations of coverture and other marital property laws in New England does not tell the whole story. In

of Women in America, Schocken Books, New York, 1982, p. 30;
 Cotton Mather, Ornaments to the Daughters of Zion, Kneeland
 and Green, Boston, 1741, p.89.

¹⁷op. cit., Salmon, pp.8-9.

fact, other historians have painted a very different picture, arguing that colonial women experienced a "golden age" of greater economic participation and legal protections of their property rights than did their mothers and sisters in the homeland.¹⁸ Although Salmon's critique of the "golden age" thesis¹⁹ and her comprehensive review of property laws remain convincing, these authors give us a glimpse of the variety and texture of colonial life in demographic, economic and social terms. To show how property laws shaped or reflected social behavior in this era, they place them in the context of these other social and economic forces.

Early American settlers from Europe were, of course, mostly farmers. The first generation of immigrants to the Northern colonies reproduced the "open field" system of farming that had been common in feudal Europe. By the time one generational cycle had turned, however, increasing stratification and diversification of the economy caused the open field system to break down in favor of larger private holdings and the family farm system. The mode of production which characterized 17th and 18th century

¹⁸See, for example, Demos, op. cit., or Joan Hoff Wilson, "The Illusion of Change: Women and the American Revolution", in Alfred H. Young, ed., Explorations in the History of American Radicalism, (1976).

¹⁹Marylynn Salmon, "The Legal Status of Women in Early America: A Reappraisal", Law and History Review, vol. 1:1, 1983, pp. 129-151.

American settlements was petty commodity production, or what economist Julie Matthaie calls the "family economy" in order to emphasize the merging of family and productive relations.²⁰

Matthaie points out that the Northern colonies had a very different experience from the Southern colonies because the land in Massachusetts and Connecticut was less arable, producing less surplus for export. This produced several results: First, there were more failed family farms, resulting often in Westward expansion as sons sought greater opportunities on the frontier. More significantly for the discussion here, those families who stayed in New England turned increasingly to self-sufficient production. That is, Southern colonists were more able to maintain trade relations with England, exporting raw materials and importing manufactured goods from the homeland. New Englanders, on the other hand, with less surplus to export, were forced to develop home production of goods they could not import from England. Textiles became an important home industry.²¹

²⁰See Rona S. Weiss, "Primitive Accumulation in the United States: The Interaction Between Capitalist and Non-Capitalist Class Relations in 17th Century Massachusetts", Journal of Economic History, vol. 42, 1982, pp.77-85; and Julie A. Matthaie, An Economic History of Women in America, Schocken Books, New York, 1982, Part 1.

²¹Matthaie, op.cit., pp.24-6.

This is an interesting point, in light of Salmon's repeated assertion that Southern colonists chose to reproduce British customs and laws out of social or cultural affinity, as opposed to New England Puritans who rejected British forms out of religious conviction. Although this may have been true, it is clear that other factors were also at work. From an economic point of view, New England Puritans could not have reproduced British society if they had wanted to -- they could not afford it. Puritan reforms and revolutionary zeal may have buttressed sagging spirits and, in turn, gained greater social acceptance in a community rudely cut off from the comforts of home by economic hardship. This is an example of the way in which religious ideology and economic conditions reinforce one another.

How did the conditions of family farming and home production in New England relate to the family property laws? Historians do not agree on the meaning of divergent demographic data available from several Puritan settlements. In an analysis of records from 17th century Plymouth Colony, John Demos argues that, in contrast to the classic image of Puritan communities as rigidly hierarchical and unchanging, Plymouth Colony was fluid, changing, and rapidly expanding. Young men and entire families moved often, and land titles were transferred "with astonishing rapidity." When the pressure for available property could not be met, many moved away and

settled new towns.²² In contrast, Philip Greven Jr. describes neighboring Andover, Massachusetts as more representative of the classic Puritan village. In Andover, fathers exercised strong patriarchal control over sons by not relinquishing title to land until they died. Greven describes a tightly controlled community in which marriages were arranged by parents, sons and daughters married late, and married sons lived with their families in separate households on property owned by their fathers. He also cites evidence from wills that fathers used their property rights aggressively to control the economic and moral behavior of their sons, requiring in some cases economic support in return for an inheritance, and stipulating obedient and moral behavior in other cases.²³

It is not surprising that greater sophistication in historical methods produces more variation in the descriptions of life as it was actually lived in different communities of 17th century New England. What is more important is the consistency of certain features which demonstrate the role of family property laws. In all

²²John Demos, "Notes on Life in Plymouth Colony," pp. 122-141, in Stanley N. Katz and John M. Murrin, eds., Colonial America, Alfred A. Knopf, New York, 1983.

²³Philip J. Greven, Jr., "Family Structure in Seventeenth Century Andover, Massachusetts," pp. 142-161, in Katz and Murrin, Colonial America.

American colonies, the rule of primogeniture was rejected, presumably as part of the general ethos of individual equality and opportunity. As a consequence, family wealth in land was somewhat harder to accumulate and secure, as heritable property was divided among sons. This result, as Matthaei points out, was exaggerated in the North, where family farming was less successful. It is no wonder, then, that New Englanders used the law to vest even greater control over family land in the hands of the patriarch, and sought to free him of "inconvenient encumbrances" in commercial transactions. As both Demos and Greven illustrate, land was of great importance, and the environment was highly competitive. This picture supports the argument offered by Salmon that the property laws of Connecticut reflected "an early commercial emphasis."

Even as some variations are illuminated, there is no denying the powerful control that Puritanism had over most of the social and economic life of early New England. I would go even farther than Salmon to suggest that the power of Puritanism in shaping family property laws reflected more than the ethos of patriarchy. At least two other ideological themes were at work: The first was the Puritan elaboration of the "spirit of capitalism" as described by Weber. According to Weber, Puritanism "stood at the cradle of modern economic man" by combining "worldly asceticism", a drive toward success on earth, and an emphasis on

rationality. As Weber explains,

...the religious valuation of restless, continuous systematic work in a worldly calling...must have been the most powerful conceivable lever for the expansion of that attitude toward life which we have called the spirit of capitalism.²⁴

The second theme, particularly relevant to this discussion about marriage and property, was the concept of contract as a mechanism of social order. Certainly, the idea of contract was not unique to Puritanism. Indeed, the twin concepts of individualism and contract may be deemed the central organizing principles of the Enlightenment, modern bourgeois capitalism and the republicanism of the New World. What is particularly interesting about the Puritans was the way in which they embraced the concept of contract as a religious idea. That is, the significance of contractual relations is usually discussed in relation to economic and political forms; its importance is stressed in explanations of the growth of individualism and secularism as organizing principles in competition with religious hierarchy and control. But Puritanism, which eventually became Congregationalism in New England, was a religion explicitly based on the premise of social contract: it was the religion of "the covenant."

According to Thomas Hooker, who led the migration of

²⁴Max Weber, The Protestant Ethic and the Spirit of Capitalism, New York, 1956, p.172.

Puritans from Massachussetts to Connecticut and founded the First Church of Christ in Hartford in the late 17th century, the Congregational Church was "a gathered, covenanted, autonomous group of visible saints."²⁵ The "covenant" was understood as a contract for moral behavior that would ensure consensus, peace, and the good of the whole. In Hooker's words, a covenant required "mutual voluntary engagement each to the other...to promote the good of the whole." He went on to explain,

Mutual covenanting and confederating of the Saints in the Fellowship of the Faith according to the order of the Gospel is that which gives constitution and being to a visible Church.²⁶

Puritans adopted the secular idea of social contract and made it their own.

Under Puritan doctrines, then, the distinctions between sacred and secular, or between religious and civil, were blurred. Indeed, the word "constitution" is often used in Puritan documents about the organization of the Church, while the state of Connecticut became known as "The Constitution State" based on claims that it had the first written constitution in America. In fact, the

²⁵Quoted in Paul R. Lucas, Valley of Discord: Church and Society Along the Connecticut River, 1636 - 1725, University Press of New England, Hanover, 1976, p.29.

²⁶ibid., p. 108.

"constitution" claimed by Connecticut historians was the "Fundamental Orders", a document written and adopted by Congregational Church leaders in order to resolve disputes about organization and authority.

Defining marriage as a contract was perhaps a more comfortable idea for the Puritans, therefore, than for some of the other religious communities of the period. The distance between religious sacrament and civil contract was not so far. In fact, one could argue that the Puritans did not reduce the idea of marriage to a civil contract as much as they raised the concept of contract to the level of a sacrament. With less sacred, or "popish" embellishment, the rules of marriage, property and divorce were leaner and stricter. For instance, where the Anglicans of the southern colonies may have felt the need to permit "separations from bed and board" in order to preserve, at least, the illusion of an intact, sacred marital union, the Puritans were less concerned with sacred sentimentality. The marriage contract was either valid, or it was not. There was no need to separate the rules governing civil behavior relative to "bed and board" (i.e. property) from those governing marital bonds; the two spheres were ideologically linked.

While this analysis of Puritan ideas helps to explain some of the particularities of marriage and property laws in New England, it also highlights the contradictions which

led, later, to reform. If marriage and the family were increasingly defined in terms of contractual relations, how could these ideas be reconciled with the concept of the "femme covert"? A contract requires two, freely consenting individuals; under coverture, there was only one. As the American family was drawn further into the ideological universe of republican, anti-authoritarian and anti-patriarchal values, it appeared increasingly to be, as John Demos described it, "a little commonwealth." As that occurred, the contradictions in women's legal and family status became more pronounced. As Basch explains in the opening quotation of this chapter, restrictions on married women's property rights was "the single smoldering issue" leading to the rise of the women's movement in the 19th century. As she concludes, "Property, after all, was the most fundamental of republican rights, a component of -- and perhaps tantamount to -- the pursuit of happiness."

THE MARRIED WOMEN'S PROPERTY ACTS

By the middle of the 18th century, the influence of traditional Puritanism had nearly been swept away by the first Great Awakening of evangelical Protestantism in New England and the general diversification of the population. Moreover, by then the American imagination had been captured by revolutionary rhetoric and republican ideals.

In terms of marriage and property rights, the contradictions described above became intensified by the spread of these ideas. Although it took another one hundred years of controversy and debate, those contradictions were finally addressed in the middle of the 19th century by the Married Women's Property Acts. As the following discussion will demonstrate, however, addressing the contradictions did not actually resolve them.

Many authors have described the evolution of the so-called "separate spheres" of American culture under which men were assigned to the ideologically defined "public sphere" of work and politics, and women were assigned to the "private sphere" of home and family.²⁷ By the middle of the 19th century, the family economy was disappearing in favor of a factory based economy. Although the young United States was still primarily an agrarian nation, massive industrialization was on the horizon. It was in this context that the modern American family was born.

To describe the new family forms and family laws, it is

²⁷See, for example, Eli Zaretsky, Capitalism, the Family and Personal Life, Harper and Row, New York, 1976; Nancy Cott, The Bonds of Womanhood, Yale University Press, New Haven, 1977; Carl Degler, At Odds, Oxford University Press, New York, 1980; Carroll Smith-Rosenberg, Disorderly Conduct, Alfred A. Knopf, New York, 1985.

important first to draw a picture of the economic conditions upon which they stood. For example, economist Julie Matthaie describes the ethos of "individualism" in the late 18th century not only as a revolutionary and libertarian idea, but as a consequence of increasing wealth and class differentiation in the new nation. In her words,

...as the family economy and slavery broke down, there were increasing opportunities for individuals to earn wealth, regardless of the legacies of their parents; the power of family ties to determine one's economic position gradually declined. The freeing of men from determination by their fathers freed masculine self-seeking from the constraints of lineage and allowed it to emerge as the dynamic motor of the new, capitalist economy...

Under capitalism, men's striving in the economy became, literally, a seeking of their selves, a struggle to establish their own identities by economically competing with other men.²⁸

Two economic patterns developed together to change the nature of the family: increasing wage labor and the removal of commodity production from the home. As men and young women left the home to work in factories and on other people's farms, the household became less a center of economic production and more a center of affectional and familial bonds. Moreover, the growth of wage labor meant that young people needed to learn different types of skills. Parenting no longer meant teaching ones' children

²⁸Matthaie, op.cit., pp.105-6.

to contribute to the family farm. As industrialization increased, childrearing meant molding children into disciplined, productive wage laborers. The roles of mothers and daughters in the home became sharply differentiated from the roles of fathers and sons in the marketplace. Matthaei sums up the development of separate spheres this way:

Family and economy began to emerge as distinct spheres characterized by distinct relationships...The sphere of commodity production was characterized by exchange relationships between property owners; it was a sphere in which individuals sought their fortunes and determined themselves, a sphere of impersonal, quid pro quo relationships and competition. The home became a familial sphere; it became the sphere of personality formation and of the emotional bond of love, the sphere where particular personalities mattered and were appreciated, the sphere of sharing rather than competition.²⁹

This is the economic context in which the modern American family described by historian Carl Degler, emerged. In At Odds, a social history of women and the family in America³⁰, Degler highlights four major characteristics of the family that took shape in the years between the Revolution and approximately 1830: 1) marriage

²⁹ ibid., p.114.

³⁰ Carl Degler, At Odds: Women and the Family in America from the Revolution to the Present, Oxford University Press, New York, 1980.

based upon mutual affection and respect; 2) elaboration of the role of wife as mother and moral caretaker of the home; 3) increasing importance of childrearing; and 4) shrinking family size. He contends that these changes reflected the improving status and increasing autonomy of women within families as they actively chose to free themselves from the life-long burdens of childbirth and childcare at the same time that they elevated the cultural status of those activities. The central thesis of his book, summarized in the title, is that the role of women within the family was, and still is, at odds with the free and individualistic ethos of public society.

Degler also discusses the invention of romantic love as the basis of marriage. In his words, "Love as the basis for marrying was the purest form of individualism; it subordinated all familial, social and group considerations to personal preference." He credits the Puritans with introducing the idea that love would grow between marriage partners and enhance family unity. He also argues that by abandoning the Catholic ideal of celibacy, Protestantism, in general, gave greater value to sexual expression within the family.³¹

Legal historian Michael Grossberg expands upon the

³¹ibid., p.14-15.

themes outlined by Degler in attempting to trace the relationship between the new family and changes in the law. He describes several factors leading to the transition of the family from a public institution, intimately connected with the economy and the polity, to a private institution that was ideologically segregated from the public sphere. He confirms Degler's claim that this transformation occurred in the years following the Revolution, as middle-class households became models, in his words, of "the republican family". Some of the formative factors he points to are economic and demographic: For example, he suggests that the household economy shifted from one based on production to one based on consumption. He also notes that new fertility patterns resulted in smaller family size which, in turn, loosened generational ties and patterns of control. Most important, he states that private property became more clearly defined as a "source of domestic autonomy."

Some of the other factors that he describes are ideological: He points out, as Degler did, that companionate marriage increasingly became the social ideal, as the social values of both motherhood and childhood were elevated. He suggests, though, that the ideal of "domestic intimacy" developed less as an expression of Protestant doctrine and more as a balance to the harshness of marketplace competition. He summarizes these changes as

follows:

The family and the outside world came to be viewed as separate entities, often pictured as bitter adversaries. Privatization spurred a new concept of the family: one in which the nation's households occupied a narrower place within secular society, but one in which heightened emotional and affective bonds and socialization duties were seen by almost all Americans as crucial to national well-being.³²

While Grossberg does not attempt to offer an explanatory model, he does rely heavily on an idealistic view of "republican ideology" as the source of much of the transformation he describes. As he explains, the "home and the polity displayed some striking similarities." Most significantly, he points to a "deep aversion to unaccountable authority", the "equation of property rights with independence", and "a tendency to posit human relations in contractual terms." He contends that "American revolutionary ideology contained a fierce anti-patriarchal strain."³³

Taken together, these authors paint a comprehensive picture of the changes in American ideas and practices concerning family life. They show how economic, demographic, political and ideological shifts occurred together. More importantly, each portrait includes some

³²Michael Grossberg, Governing the Hearth, University of North Carolina Press, Chapel Hill, 1985, p.6.

³³ibid., p.7.

indication of a fatal flaw -- the contradiction in the roles that women played as moral and emotional caretakers in an economy and society bursting with the pride of individualism and personal achievement. As the previous section demonstrated, the roots of this contradiction reached deep into the soil of English common law and the principle of coverture. By 1830, the distance between popular ideas and the law was too great, and the process of legal reform began.

In 1839, Mississippi was the first state in the nation to enact a Married Women's Property Act. By the turn of the century, every jurisdiction in the United States including Connecticut had adopted some form of married women's property act. The essence of all these state laws was to "de-unify" the marriage³⁴, or to bring women out from under the shield of coverture. Under these acts, married women were granted some of the fundamental rights of citizenship previously denied: Married women were granted the rights to own and transfer property, make contracts, earn and keep their own wages, sue or be sued, make a will, testify in court, and be held legally responsible for their own debts and crimes.

³⁴See William P. Cantwell, "Man + Woman + Property = ?", The Probate Lawyer, vol. 6, New York, 1980, for a history of the Married Women's Property Acts.

In a strictly legal sense, married women of the mid-nineteenth century finally became individuals under the law. In terms of liberal ideology, they won some of the rights and privileges of freedom and citizenship granted by a constitutional republic (suffrage, of course, was still nearly 75 years away). From a marxian historical perspective, another step was taken toward completing the bourgeois revolution enjoyed first by men through extending the elaborate rights of private property to mostly white, middle class women. But from a concrete, material perspective, married women gained very little: Although they gained the right to own property, because of the elaborate segregation of the family and the marketplace, married women actually had very little property to own. The right to own property without the means to acquire it was an ideological victory with a hollow core.

In order to fully understand why women did not gain very much through enactment of The Married Women's Property Acts, one more piece of legal history is required. During this period of reform, each state had to adopt one of two models: separate property or community property. Community property was a principle adapted from Spanish civil law in the states and territories originally colonized by the Spanish. Thus, the first five community property states were Texas, Louisiana, California, New Mexico and Arizona. Three other states, Nevada, Idaho and Washington, joined

their ranks to make a small minority of eight states with community property. The remaining states adopted separate property and, in so doing, created a lopsided division in marital property laws across the country which persists today.³⁵

The distinction between community property laws and separate property laws embodies much of what this study is about -- the competing principles of sharing versus private property. Under a community property system, all of the property accumulated by either spouse during a marriage, with the exception of individual gifts and inheritances, is presumed to belong to both spouses together. At death or divorce, each spouse is presumed to own one-half of whatever was earned or purchased during the course of the marriage and may transfer, spend or devise it as she or he wishes. Under a separate property system, on the other hand, each spouse is treated as an individual. The power of title prevails: the person whose name is on the check or the title owns the money or the property. Under this system, if one spouse is the primary wage-earner in a family and purchases property in his or her own name, it belongs to that spouse alone.

³⁵For discussion of marital property laws, see Greene, "Comparison of the Community Property and Common-Law Marital Property Systems and Their Relative

Paradoxically, the separate property systems adopted by the majority of jurisdictions in the United States were both extensions and repudiations of British common law. They were an explicit repudiation of the common law principle of coverture in which married women lost their individual property rights. But they were an extension of the common law principle of individual ownership. In fact, under the married women's property acts, husbands and wives were to be treated almost as individual property owners who had never married.³⁶

According to legal historian Charles Donahue, Jr., the distinction between separate property and community property in the Euro-American legal tradition dates back to the thirteenth century. In an article entitled, "What Causes Fundamental Legal Ideas?",³⁷ Donahue traces the divergent paths followed in the thirteenth century by the royal courts of England, from which the principles of

Compatibility with the Current View of the Marriage Relationship and the Rights of Women", 13 Creighton Law Review, 71, 1979; Glendon, "Is There a Future for Separate Property?", 8 Family Law Quarterly, p. 315, 1974; Prager, "Shifting Perspectives on Marital Property Law", Thorne and Yalom, eds., Rethinking the Family, 1982.

³⁶Cantwell, op.cit., pp. 24-27.

³⁷Charles Donahue, Jr., "What Causes Fundamental Legal Ideas?" Michigan Law Review, vol. 78, 1979, pp. 58-88.

separate property evolved, and the customary laws of northern France which favored community property during the same period. Donahue rests his complex historical analysis on the differential strength of the English kings and centralized royal courts of the era in contrast to the weaker French kings, the absence of royal courts, and the greater relative strength of the medieval French family. He argues that community property in France favored the interests not of the wife as an individual, but of the wife's family or lineage. Separate property in England, conversely, favored the interests not merely of the husband, but of the warranty rights of the feudal lord and ultimately the King because it produced a system in which land was alienable but not partible or divisible. In other words, community property was a concept which favored the great family or lineage, and separate property was a system which favored the state.

By the time the debate over separate versus community property reached the public arena in the United States, five hundred years of history had recast it as a debate over the appropriate roles of men and women in families, and the proper place of families in the polity. The contentious debate held at the California Constitutional Convention illustrates the opposing themes. Some state delegates argued that separate property would destroy the family and the natural order of patriarchal authority:

The principle of setting the wife up as an equal in everything whatever, to the husband - raising her from the condition of a head clerk to partner...is contrary to nature, and contrary to the real interests of the married state.³⁸

Others argued the more liberal view of equality:

At the time the common law was introduced, woman occupied a position far inferior to that which she now occupies. As the world has advanced in civilization, her social position has been the subject of increased consideration, and by general consent of all intelligent men, she is now regarded as entitled to many of the rights in her peculiar sphere which were formerly considered as belonging only to man.³⁹

It is interesting to note that the delegate in the first instance invoked the image of the family as a business at the same time that he argued against individual rights for wives. Conversely, the second speaker argued modestly for the increased status of woman at the same time that he consigned her to her "peculiar" and separate sphere. Ideological wires were crossed and the contradictions were right on the surface: Women were to be granted legal rights to act as individuals at the same time that social norms and institutions were conspiring to keep women from exercising these rights. Women were given a legal key and then locked in a house with no doors.

³⁸Quoted in Prager, op. cit., p. 113.

³⁹ibid., p. 114.

It is also interesting to note that passionate ideology had little to do, in the end, with outcome. Those states that had been colonized by the Spanish and had grown accustomed to the rule of community property codified it in the 19th century and continue to apply it today. Those states colonized by the British continued in the common law tradition. Argument and ideology, in this case, were epiphenomena; history and custom were the final arbiters.

Thus, a major legal reform expressing bourgeois liberal ideology was fitted on top of an economic and political relation between the family and the state which originated in the thirteenth century. The resulting property relationship between husbands and wives may actually have increased women's economic dependence rather than accomplishing the opposite. Like a chemical added into an already complex reaction, the Married Women's Property Acts combined with several other social forces to create a new social role for women: the idealized, propertyless housewife.

If, in fact, the Married Women's Property Acts did not produce the expected benefits for women, why were they passed at all? Whose interests did they serve? Donahue's analysis of property laws in medieval Europe provides a clue to understanding marital property laws in 19th century America by pointing to the relationship between family authority and state authority. I believe that the reform

movement that created the Married Women's Property Acts served to strengthen the authority of state government by weakening patriarchal authority in the nuclear family. This occurred during an era when free, alienated labor and family mobility was crucial to rapid industrialization and economic expansion. It was also a period in the development of capitalism when the industrializing North was gaining political, economic and ideological dominance over the more land-based, aristocratic society of the South. Legal reforms which challenged the integrity of large land-holding families favored the interests of the North.

Moreover, this change was accomplished without a genuine challenge to the fundamental social relation of patriarchy. What happened, instead, was that authority taken away from individual fathers and husbands was granted, not to individual women, but to judges. Grossberg argues that, in spite of the fact that republican ideology was strongly anti-patriarchal, the development of family law in the 19th century demonstrates the emergence of a "judicial patriarchy." His book, silent on the issue of marital property rights, concentrates instead on the increasing regulation of conjugal and family relations. He describes the evolution of laws governing courtship, weddings, contraception and abortion, illegitimacy and child custody. In addition, he notes the expansion of

judicial authority relative to legislative authority in the area of family law. In his words,

Over the course of the nineteenth century, trial and appellate judges became the primary domestic-relations agents of the expanding republican state...Judges were new kinds of patriarchs...They used the broad discretionary authority conferred on them by equity and common law procedures, and conceded by legislative inertia, to rewrite laws governing the allocation of resources, rights, and duties within the home and between family members and the state.⁴⁰

The increasing power of family law judges was rooted in the relocated but undisturbed ideology of male dominance over women. As Grossberg explains,

The judicial patriarchy represented a refined and revised legal version of the distinction between the male authority to govern the home and the female responsibility to maintain it...The judicial acquisition of patriarchal powers stemmed from the traditional assumption that married women lacked the economic and intellectual independence to act without male supervision (and thus needed special protection), combined with new faith in separate and mutually exclusive spheres so central to the organization of the republican family.⁴¹

Enactment of the Married Women's Property Acts, then, presents a useful opportunity to inspect the interplay among ideological debates, economic and social change, and shifting political control. In one discourse of the

⁴⁰Grossberg, op. cit., p. 290.

⁴¹ibid., p. 300.

period, the Acts clearly represented an early feminist struggle, as Basch suggests. They seemed to resolve some of the ideological dissonance of a liberal society in which women were denied basic property rights. But patriarchy was not deeply wounded -- it only moved out of the parlor and into the courtroom. As some people talked with satisfaction about a victory for women's rights, the patriarchal authority of the state was enhanced, families were weakened and industrial capitalism was given more room to grow.

DIVORCE REFORM AND THE DEBATE OVER MARITAL PROPERTY

The rise of the "judicial patriarchy" and the retreat of state legislatures created a long period in which family law was shaped by developments in case law. For approximately one hundred years, until the 1970's, marital property and divorce laws maintained the basic statutory form defined by the Married Women's Property Acts. In the majority of states governed by separate property laws, the rule of "source and title" prevailed: property legally belonged to the person who acquired it and/or to the person whose name was on the title. But in many states, including Connecticut, the harsh effects of this doctrine on divorced women was ameliorated by the developing concept of "equitable distribution."

It is important to emphasize that the concept of "equitable distribution" became part of divorce law only

and thus had no impact on the basic principles of marital property ownership. However, it had a considerable impact on the consequences of divorce for women and children. Under "equitable distribution", property could be redistributed by a judge as part of a settlement in a divorce. For example, a divorced wife could be granted a share of the house, a lump sum payment or periodic alimony, even if she did not have title or had not directly earned money during the marriage. In dividing property, the judge was to apply statutory criteria such as the length of the marriage, age and health of the parties, contribution of each to the value of the property, earning capacity and "station" of the parties, and future obligations for childrearing. Most significantly, "equitable distribution" was partially governed by traditional "fault" grounds regarding the reasons for the divorce. That is, the distribution of property was, to some extent, a punitive response to moral failings such as alcoholism, adultery, cruelty and desertion. The guilty party paid the victim by forfeiting a greater share of the family property.

Sociologist Lenore Weitzman defines four basic elements of the divorce laws of this period: "fault-based grounds, one party's guilt, the continuation of gender-based responsibilities after divorce, and the linkage of

financial awards to findings of fault."⁴² Under this system, one party had to sue the other for divorce on the basis of fault, and the plaintiff had to prove the guilt of the defendant with evidence in court. The system was based on the definitions of gender roles and family structure that had been shaped in the last half of the nineteenth century. As Weitzman suggests, gender based roles were expected to continue even after a marriage ended, giving rise to a strong presumption that an ex-husband would support his dependent ex-wife through alimony and his children through child support payments.

The feature of the marriage and family laws of this period most relevant to this research is the blurring between moral rules and property rules, or the cloaking of one within the other. In both popular and legal discourses, family property laws were no longer linked to problems of dower or the division of family lands. Instead, they were expressed in terms of moral fault and parental obligation. The images so richly embellished in the 19th century of women as dependent housewives, children as precious and non-productive minors, and men as dutiful, wage-earning patriarchs were reproduced and reinforced in statutory and case law. The idea of romantic love as the

⁴² Lenore Weitzman, The Divorce Revolution, The Free Press, New York, 1985, p. 7.

basis of an enduring companionate marriage, invented in the 19th century, became canonized in modern fault-based divorce laws. Adultery, previously a sin against morality and the rules of inheritance, leading to the dilemma of an illegitimate propertyless child, increasingly became a transgression against modernity signifying a failure to love.

Weitzman cites legal scholar Homer Clark's summary of domestic relations laws as follows:

The courts say that the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal...A reading of contemporary judicial opinions leaves the impression that these roles have not changed over the last two hundred years.⁴³

Although I would argue that Clark exaggerates by approximately one hundred years, his analysis of 20th century domestic relations law is to the point. In fact, the Connecticut marriage statute, as late as 1977, read in part:

It shall be the duty of the husband to support his family, and his property when found shall be first applied to satisfy any such joint liability. [C.G.S. 46-10, 1958 Rev.]

While the language of that section was finally changed in 1977 to read: "It shall be the joint duty of each spouse to support his or her family...", an odd anachronism remains on the books to this day: As part of the section

⁴³ ibid., p. 2, quoting Homer Clark, Domestic Relations, West Publishing Company, St. Paul, 1968, p.281.

enumerating the mandatory liabilities of husbands and wives for such things as housing expenses, medical bills and so on (the "necessaries doctrine"), the Connecticut statute still states that the husband shall provide for "(5) the reasonable apparel of the wife; and (6) her reasonable support while abandoned by her husband." [C.G.S. 46(b)-37]

But the paradox noted in the previous section continued: At the same time that the cultural symbolism surrounding companionate marriage, dependency and sharing was being elaborated in divorce laws and divorce court, marital property laws still emphasized the separate legal identity of the individual. Over the course of time, it was almost as if a deal were struck between two contradictory discourses, allowing them to co-exist. Marital property laws encoded the principles of individualism with separate, private property rules, while divorce laws, in a compensatory fashion, encoded the morality of sharing and obligation. What was taken away from women, children and the "sharing family" by the cold hand of capitalism, was sometimes given back to them by the moralistic hand of the judicial patriarchy.

The battle being fought in the courtroom between individual husbands and wives, then, was also, on another level, a battle between the state and individual men as a class over legal control of property. Legal developments in the 20th century continued the trend established in the

19th century favoring individuality over family solidarity, and placing the state in direct relationship with individuals.

A political event that clearly signified the changing relationship between the government and individuals was the passage, in 1913, of the 16th Amendment to the Constitution, allowing the federal government to levy an income tax. Taxes had originally been conceived under the Constitution as property taxes. The first federal income taxes were levied in 1862, to help finance the Civil War. In the 1890's, however, the U.S. Supreme Court ruled the federal income tax unconstitutional, arguing that the Constitution granted authority to the federal government only to collect taxes that were apportioned by population, but not to collect direct taxes. Congress overturned that decision by adopting the 16th Amendment and enacting a personal income tax in 1913. The passage of the income tax amendment reflected the transition from a family, land-based economy to an individual, wage-based economy, and the increasing prominence of the federal government. It was the next Constitutional Amendment to be adopted following the 14th and 15th Amendments of the Reconstruction Era which granted citizenship to African American men and provided "equal protection" under the law.

How did new tax laws intersect with marital property rules? The enactment of a personal federal income tax

heightened the contradictions between the principles of individual and community property. The federal government, through the Treasury Department, became actively involved in disputing the assignment and control of income. The contradictions were particularly acute in the eight community property states. In a case that eventually came before the Supreme Court, the Treasury Department attempted to supercede the community property principle and count all of the income earned by one spouse as his alone, in order to tax him at a high rate. The married taxpayer, citing the state community property law, argued that half belonged to him and half to his wife, and that each would pay income taxes at a lower rate. In this 1930 case, known as Poe v. Seaborn, the Court held in favor of the taxpayer and the state community property law. The decision allowed "income splitting" for married couples in community property states and created a substantial tax advantage for married couples in these states in comparison to those who lived in the separate property states. A full 18 years later, this glaring inequity among states was finally resolved by the passage of the Revenue Act of 1948 which, to the detriment of federal coffers, created a federal policy permitting income splitting for husbands and wives. Thus, for the purposes of income taxation, spouses in every state could, if they wished, be treated as a community rather than as

individuals.⁴⁴

A complete discussion of the relationship among marital, divorce and tax laws is beyond the scope of this study. However, this brief description of the introduction and modifications of the personal income tax is sufficient to demonstrate a profound confusion of legal ideas. The Revenue Act of 1948, characterized by legal scholar William Cantwell as "a quiet revolution", created rules for income taxes that were in direct contradiction to the marital property and divorce rules in effect in a majority of states. Cantwell notes that in the 18 years between Poe v. Seaborn and the Revenue Act, many states had moved tentatively toward community property laws; following the passage of the Act, those states repealed their laws and halted their efforts. In enacting the controversial tax reform legislation, then, the federal government might have been choosing the lesser of two evils by pre-empting a more complete conversion to community property. At the same time, the federal government created an economic advantage for family units that took the preferred shape: married couples with a single wage earner and a full-time, propertyless housewife.

The next major legal reform to change the shape of marriage and divorce occurred in the early 1970's. The

⁴⁴Cantwell, op. cit., pp. 29-35.

introduction of "no fault" divorce statutes began in California and quickly swept into every state except South Dakota. Connecticut adopted a no-fault divorce statute in 1973. As briefly described above, the no fault reform removed the traditional, moral grounds required to obtain a divorce, and replaced them with the single, modern ground of "irretrievable breakdown." In order to get a divorce under the new system, one spouse needed only to claim that the marriage was no longer viable; no evidence was required.

This reform movement seemed to grow clearly out of the social "revolution" of the 1960's in an attempt to bring divorce laws into step with newly embraced values of sexual freedom, gender equality and personal growth. As Weitzman explains:

The abolition of grounds, fault and and consent were to rid the divorce process of its anachronistic moral elements and reduce the acrimony, hostility, perjury and hypocrisy that pervaded the divorce process under the old law. The gender-neutral standards of "financial need" and "ability to pay," which replaced the fault linked alimony and property awards of the old law, were welcomed as enlightened reforms that recognized and supported the emerging equality of men and women.⁴⁵

In many states these reforms were embraced by feminists as part of a general repudiation of laws based on gender stereotypes.

⁴⁵Weitzman, op. cit., p.51.

As with previous reforms, this one carried within it evidence of ambivalence and contradiction. In Connecticut, as in several other states, the new "irretrievable breakdown" standard was simply added to the list of other grounds. The traditional "faults", including adultery, long-term separation, wilful desertion and habitual intemperance remained in the statute, although they are now rarely used. More significantly, in Connecticut, the traditional faults are still legitimate factors in property settlements. That is, although a wife does not need to prove that her husband was a brute in order to be granted a divorce, she can still use it against him in negotiating a property settlement. Weitzman claims that the no-fault reform separated fault from property, but in Connecticut this is only partially true.

Across the country, the reforms had very unexpected and unintended economic consequences. By removing the old moral factors and applying a formal equality to individual husbands and wives in divorce, the law inadvertently laid bare the severe structural and economic inequalities facing women and mothers as a class. Weitzman was the first to document this phenomenon in California where, she reported, men enjoyed a 42 percent rise in their standard of living immediately following a divorce, while women and their children suffered a catastrophic 73 percent drop in

theirs.⁴⁶ Others have found similar, if less dramatic results in other states.⁴⁷

Many specific reasons for these unequal results are currently being analyzed and debated by legal reformers around the country. The most obvious problem is that mothers are overwhelmingly the primary custodial parents following a divorce, and property distribution is rarely calculated as a genuine per capita assignment with the children taken fully into account. That is, a settlement that may appear generous to the wife in that she receives as much as 60% of the family's assets or income, does not seem generous at all when it is understood that her share must be used to support herself and three children, while the husband's 40% is for his support alone. A related problem leading to serious economic decline for women and children is the high rate of "non-compliance" with court ordered child support. The U.S. Census Bureau reported in 1981 that approximately 25% of women who were awarded child support never received any money at all, and that an additional 30% only received partial payment.⁴⁸ A third reason for the unequal results following a divorce is one

⁴⁶ibid., p. 323.

⁴⁷See Terry J. Arendell, "Women and the Economics of Divorce in the Contemporary United States", Signs, vol. 13:1, 1987, pp. 121-134.

⁴⁸Weitzman, op. cit., p. 283.

which seems, on the surface, to be beyond the reach of family law: the inequality in earning ability for women as a class in our economy. In the 1980's, the average income for full-time women workers hovered between 60 and 65 percent of the average income for full-time working men. As feminist legal scholar Martha Fineman observes, "...women must suffer equality in this one area [divorce law] while the rest of the society and culture continues to treat them unequally."⁴⁹ These and other economic patterns following divorce will be examined further in Chapter Four which summarizes data concerning the consequences of divorce in Connecticut.

The problems following the "no-fault" revolution appear so severe that many have now concluded that the reform itself is a social problem to be corrected. Sociologist Terry Arendell asserts that "Divorce is a primary contributor to the increase in the number of impoverished women."⁵⁰ Moreover, she claims,

...despite a dramatic increase in the number of households headed by divorced women...social institutions -- the labor market, the legal system, public assistance and health care systems, and the American family itself -- have not adapted to accommodate the needs of divorced women. The result is a society that supports economic benefits for divorced

⁴⁹Martha L. Fineman, "Illusive Equality: On Weitzman's Divorce Revolution", American Bar Foundation Research Journal, 1986, p. 783.

⁵⁰Arendell, op. cit., p. 122.

men and economic hardship for divorced women.⁵¹

In the historical context presented here, however, this result seems neither surprising nor new. Divorce has always been an economic disaster for women. It is only the contemporary political rhetoric about "equality" between men and women that casts the current conditions created by marital property and divorce laws as a new social problem to be solved. Moreover, it is the mystification of the property relations inherent in marriage and divorce, clouded over by one hundred years of romantic idealizations and moral interventions, which makes the current inequities in divorce and marital property laws seem so "unexpected."

The actual economic position of women in marriage and divorce has changed very little since the mid-nineteenth century when the entire economy was transformed by industrialization -- notwithstanding the Married Women's Property Acts, equitable distribution, tax reform, and no-fault reform. The property relationships between husbands and wives are much the same now as they were then. It is instructive to note, as evidence, the way in which Engels described the bourgeois marriage as early as 1884, in The Origin of Family, Private Property and the State:

As regards the legal equality of husband and wife in

⁵¹ibid., p. 135.

marriage, the position is no better...The modern individual family is founded on the open or concealed domestic slavery of the wife, and modern society is a mass composed of these individual families as its molecules.

In the great majority of cases today, at least in the possessing classes, the husband is obliged to earn a living and support his family, and that in itself gives him a position of supremacy without any need for special legal titles or privileges. Within the family he is the bourgeois, and the wife represents the proletariat.⁵²

Dramatic changes have occurred, instead, in two relations other than those between husbands and wives: First, the state has shifted from relations primarily with family units to relations with separate individuals. Second, the social and legal ideas about men, women and property have shifted to reflect the increased emphasis on individuality and independence, leading to increased claims and conflicts over the concept of equality.

The ideological battle over equality and the struggle between independence and dependency are at the heart of the current debate over marital property reform. While some reformers are advocating a return to a fault-based system, most of the public policy debate is now focused on whether or not a uniform community property system would be more equitable than separate property. The proponents of the Uniform Marital Property Act (UMPA), a model community property law that has been proposed for adoption by the

⁵²Frederick Engels, The Origin of the Family, Private Property and the State, International Publishers, New York, 1972, pp. 136-7.

National Conference of Commissioners on Uniform State Laws, argue that contemporary social norms hold marriage to be a full economic partnership. Under UMPA, each spouse would actually own one-half of all the property earned or accumulated during the marriage, regardless of whose name is on the check or title. The opponents of UMPA, on the other hand, argue that the concept of community property is inappropriate for a society with fluid and diverse family forms and a high rate of divorce. Further protections of separate property rules and more equity in earning capacity, they reason, are the strategies which more accurately reflect the social value of individual equality.

In the debate over the value of community property principles in reducing the economic disadvantages for women in marriage and divorce, there are feminists on either side. In a well-known exchange of views, Mary Ann Glendon⁵³ has argued that community property is a reform whose time has passed, because it addresses a problem which is disappearing: the propertyless housewife. She favors increasing competitive equality for women in the economy and the protection of "individual liberty" which she sees expressed in separate property. On the other hand, Susan Westerberg Prager claims that "sharing theories are likely to be appropriate even if we achieve a world free of sex

⁵³Glendon, op. cit.

discrimination." She believes that they signal the intimacy and dependency that are normal and desireable in a marriage. As she explains, "the central issue may well be the relationship of the principle of individualism to marriage."⁵⁴

These are the essential issues upon which marital property and family law reforms have foundered for over one hundred years. They reflect the dilemma articulated by Degler and other social historians of the nineteenth century: women "at odds", caught between the contradictory social values of individualism in the marketplace and community in the home. Formal Anglo-American law, being fundamentally an instrument to protect private property and the interests of owners and the state, tends to favor individualism. However, formal law is not immune to other powerful social forces; on the contrary, it is in constant dialectical relationships with religious, moral and other popular values. Thus, while the basic principles of property ownership have remained fairly constant over time, various accommodations and compromises have been absorbed by the family law system.

Legal scholar Frances E. Olsen discusses this historical process in a Harvard Law Review article entitled, "The Family and the Market: A Study of Ideology

⁵⁴Prager, op. cit., pp. 112, 120.

and Law Reform." She posits three essential dichotomies: market/family, male/female and state/civil. Using a definition which she ascribes to Marx, she distinguishes between the "state", which is public, and "civil society", which is considered private. She points out that, under capitalist ideology, both the family and the market are considered "private" -- that is, outside of state control. But privacy in these two spheres, she argues, has two very different meanings under the law:

Neutrality toward the market means treating the participants in economic life as juridical equals. The state is said to take a neutral stance toward the family, however, when it ratifies the preexisting social roles within the family.⁵⁵

A fully Marxist legal interpretation would describe the law under capitalism as also ratifying preexisting class relationships within the economy. The confusing or mystifying element is that the law of the marketplace is infused with discourse about juridical equality, whereas legal and social discourse about the family is not. Again, the contradiction seems to rest on the meaning of formal equality.

Olsen offers a sophisticated analysis of the inherent paradox of "laissez-faire" or free market ideology in relation to families and gender equality. She explains,

⁵⁵Olsen, op. cit., p. 1504.

The seemingly contradictory desires to be free and to relate with others in community present an important dilemma of liberal society. In laissez-faire ideology, the market is predominantly associated with freedom, and the family is associated with community...It turns out, however, that the liberal dilemma of freedom and community is not resolved by the interplay between the market and the family.⁵⁶

She might have added that it is resolved more favorably for men than for women. She goes on to argue that reform efforts have, thus far, been trapped in a market/family dichotomy which produces one of four failed schemes: "...to make the family more like the market, to make the family more like the ideal family, to make the market more like the ideal market, and to make the market more like the family." In other words, Olsen is proposing that reformers have been attempting either to make equality more genuinely equal, or to make sharing and altruism more pervasive and reliable. These strategies fail, she concludes, because of the unquestioned links between "equality and individualism, on the one hand, and altruism and hierarchy, on the other..."⁵⁷

Olsen's argument is supported by Fineman in a response, more recently, to Weitzman's study. She writes that the essential dilemma is based on "this uneasy reconciliation

⁵⁶ ibid., p. 1564.

⁵⁷ ibid., pp. 1529-30.

of need and dependency with the modern ideal of independence." She adds a more concrete analysis of women's current economic condition:

The care of children produces dependency, not only for the children, but for the primary caretaker. The needs that this dependency generate must be met, either by society as a whole or by individuals with legally significant connections to children.

As long as cultural confusion and massive denial about women's dependency exists, the rules will continue to create horrendous results and no real reform will be proposed or effected...We have to do more than tinker with the legal rules that embody the illusion of equality. The solutions to women's inequality will not be found in the legal rules but in the cultural and social climate in which legal rules are developed and used. It is there that women must continue to live and raise the children after divorce.⁵⁸

Fineman and Olsen, together with other recent participants in the community property debate focus sharp attention on the ideological contradictions within the law -- collisions between the concepts of equality, dependency and family. In historical perspective, it is clear that these tensions are deep and tenacious. Moreover, an historical perspective has shown that what appears as a struggle between men and women, or between husbands and wives, often includes a hidden or ideologically obscured third party -- the state. These themes will be explored further in the following chapters.

⁵⁸Fineman, op. cit., pp. 785-6.

Chapter Four

THE MORE THINGS STAY THE SAME: PROPERTY DISTRIBUTION FOLLOWING DIVORCE

Despite the historical trend toward treating divorcing parties as juridical equals, the outcome of divorce remains more economically punitive for women than for men. This chapter reviews the current legal situation, presents data to demonstrate economic inequality, then raises questions about what the inequality means. In part, the economic inequality reflects the gender system of the larger society. But it is also related to something else -- namely, the commitment of the law to private property and individualism in a way that precludes or contradicts family relations. This problem explains the failure of the courts to adequately consider the dependency of children in proposing settlements.

It also partially accounts for why men, as well as women, feel alienated from the family court, and why non-custodial parents (usually fathers) have such a high rate of non-compliance with court support orders. Put another way, the unequal economic consequences of divorce for women and men demonstrate both the lack of fit between the law and society relative to gender and family relations, and the internal contradictions within the law itself. Together, these flaws tend to deepen the alienation from and disregard of the law among family members unwillingly drawn into its grasp.

EQUITABLE DISTRIBUTION IN CONNECTICUT

Since the recent wave of divorce reforms in the 1970's and 80's, most states have adopted some form of equitable distribution policy. However, Connecticut's doctrine of equitable distribution pre-dates these reforms by more than sixty years. It did not arise out of a feminist reform movement, but instead emerged quietly from the statute governing the wife's dower rights. A Connecticut wife's dower rights to one third of her deceased ex-husband's estate was first introduced into the statutes governing divorce in 1821.¹ The statute read, in part:

The superior court shall have power to assign to any woman, so divorced, such reasonable part of the estate of her late husband, as in their discretion, the circumstances of the estate will admit, not exceeding one third part thereof.²

In 1911, however, the language limiting the award from the husband's estate to one-third was deleted. "An Act concerning Alimony and Change of Name" passed by the Connecticut General Assembly that year read:

The superior court may assign to any woman divorced by such court a part of the estate of her husband and, in addition thereto, or in lieu thereof, may order alimony to be paid from the husband's income ... In fixing the amount which is proper to be allowed, the court shall take into

¹Victor M. Gordon, "Alimony and Allowances (Part A)", Connecticut Bar Journal, vol. 27, 1953, p.181.

²Conn. Stat., 1821, p.179, Sect.4

consideration the amount of the husband's income, whether the same is derived from property already acquired, or from his personal daily exertions, or from both...³

This language signals several important changes: At the same time that it removes the one-third limitation, it also grants the court the broad discretion which characterizes equitable distribution. It also reflects the shift in our economic structure making wage income more common and significant to many families than real property.

The very broad discretion granted the court by the language of the 1911 statute was soon trimmed by case law. In Olmstead v. Olmstead, Judge John Rufus Booth wrote:

The basis of alimony is the means of support to which the wife is entitled and of which she has been deprived through the husband's default in the performance of his marriage contract. In determining the amount of such support consideration should be made of the amount of the estate of the husband, his age, health, and earning capacity; the age, health, station and separate estate of the wife.⁴

Much of this language, and certainly the intent of Judge Booth, were incorporated directly into the divorce statutes as revised in 1972 and still in effect at this time. The current Connecticut statute governing equitable distribution (C.G.S. 46b-81) reads in part:

³Conn. Public Acts, 1911, c.190.

⁴85 Conn. 478 (1912) at 366; cited in Gordon, op. cit., p.310.

C.G.S. 46b-81 Assignment of property and transfer of title

(a) At the time of entering a decree annulling or dissolving a marriage...the superior court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

(b) In fixing the nature and value of the property, if any, to be assigned, the court...shall consider the length of the marriage, the causes for the...dissolution of the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

The reforms of 1972 modernized the statute in terms of making "equal" reference to husbands and wives. However, Connecticut's "no fault" divorce laws still contain a significant number of traditional role-based and fault-based principles in the scheme for property distribution. In fact, it was not until 1988, in O'Neill v. O'Neill, that the Connecticut courts articulated the real value of the "non-monetary" economic contributions of a "homemaker-spouse" in determining the equitable distribution of marital property.⁵ In addition, this long and varied list of factors to be considered by the

⁵O'Neill v. O'Neill, 13 Conn. App. 300 (1988).

court provides insight into the variability of property settlements. Although a comprehensive list is provided, little guidance is given about how to weigh one factor against another. Thus, one judge may base decisions primarily on the length of marriage, another on the "causes" of the marital break-up, and another on the earning potential and economic contributions of each party. As this research demonstrates, each set of factors expresses different legal and social principles about families and property.

The application of the statutes to actual divorce cases follows a circuitous path filtered by at least two levels of discretion. While trial courts are given a wide range of discretion to evaluate the facts of each case and to apply the rules described above, they must do so in compliance with the definitions and principles elaborated by the Court of Appeals and the Connecticut Supreme Court in previously reported cases. Ironically, however, judges rarely get the opportunity to actually decide cases, even on the trial court level, because most divorce settlements are made by agreement of the parties before reaching trial. In more than ninety percent of divorce cases, the parties, or their attorneys, simply present a settlement to the judge who, if he or she is satisfied that the principles and procedures of the law have been followed, orders the agreement.

This does not mean that the law and the courts are not part of the process; it only means that the law determines the process at one step removed. The parties and their attorneys negotiate a settlement in the "shadow of the law". Each party adopts a bargaining posture based on the argument that what he or she is seeking would be judged equitable if the parties went to trial before a judge. The role of the attorney is to advise his or her client about what the law and recent cases permit and, given that framework, to negotiate for the best possible deal.

In some cases, disputing parties are referred by a judge to the Office of Family Relations which serves an investigative and mediating function. Family Relations Officers, with the presumed impartiality of the court but without the authority of the judge, often mediate property settlements. If the parties fail to reach an agreement through negotiation or mediation, then they may "put on" a trial before a judge on some or all of the elements of their divorce settlement. In such cases, a judge listens to the arguments and evidence of each side, then issues a final decision on the divorce settlement.

It is important to remember that a divorce settlement may involve more than a distribution of property. The most important issues in many divorces are the custody of children and visitation rights. Moreover, the process described briefly above may include many other steps and

participants. I have provided this summary of property settlements to help place the data below in context.

THE TWO STUDIES

The two studies reported in this chapter document the property relations that result from the dissolution of marriage in Connecticut in the 1980's. They describe a "system of inequality"⁶ between men and women in the ownership of and control over property and income. I will argue that this particular "system of inequality" is based on the economic and social relations created by patriarchal, Protestant industrial capitalism, as described in the preceding chapter. Modern changes in the law and in the economic and social roles of women have had an impact, but not a radical one. Although there is a modern "vernacular" to marriage and divorce, the language of marital property relations is still the same. Just as Degler described the circumstances of women in the 19th century, contemporary women and children are still "at odds."

The findings demonstrate the extent to which this inequality results from the inability of the law to adequately address the relations of dependency within a family. Our data show, as do the results of similar

⁶In the sense proposed by Yanagisako and Collier (see Chapter 1, p. 7).

research in other states⁷, that the inadequacy of child support awards and the high rate of non-compliance with child support orders are the greatest and most consistent cause of economic inequality for mothers and children.

The results of this research also illustrate the material consequences of the ideological contradictions between the concepts of individual and community property. "Equitable distribution" is a hybrid system in which the theory of separate property prevails during marriage, but is modified by a community property system upon divorce. This hybrid legal system does not work -- that is, it does not produce equity -- because its fundamental principles are in conflict with one another, and because people do not comply with its orders. The data from the first study show that property settlements following marital dissolution in Connecticut can only be considered "equitable" to the extent that they are viewed as settlements between two competing individuals -- a husband and wife. When viewed, instead, in terms of the economic needs of the entire family including dependent minors, they appear grossly

⁷See, for example, Lenore Weitzman, The Divorce Revolution, The Free Press, New York, 1985; Heather Wishik, "Economics of Divorce," Family Law Quarterly, vol. XX:1, 1986; Terry Arendell, "Women and the Economics of Divorce in the Contemporary United States," Signs, vol. 13:1, 1987; and James B. McLindon, "Separate but Unequal: The Economic Disaster of Divorce for Women," Family Law Quarterly, vol. XXI:3, 1987.

inequitable. This conclusion is demonstrated by the comparison between total household income and per capita income, explained below. The data from the second study show the degree to which people do not comply with court orders, particularly concerning child support, and highlight the subsequent inequities between households headed by men and women.

Data were collected in 1987-88 from two sources: written court records, and telephone interviews. The two sources of data were chosen because they offered very different information: The court records provided written documentation of the assets and income of each party before the divorce, as well as a written record of the terms of the settlement. With varying degrees of accuracy, they also provided some information about the process of each divorce (e.g. how long it took, whether it was decided by agreement or by a judge, etc.). The telephone interviews, on the other hand, were intended to elicit information about compliance with court ordered settlements, and the economic effects of these several years following the divorce. Although they allowed for more qualitative responses, they also relied upon the memory and honesty of each respondent.

The studies were conducted between 1986 and 1989 by the Connecticut Women's Education and Legal Fund, Inc. (CWEALF), the Women's Research Institute of Hartford

College for Women, and the Connecticut Permanent Commission on the Status of Women. In 1986, as Research Director of CWEALF, I convened the three organizations to develop the research project. Data from the court records were collected by me and research assistants under my supervision. The Commission on the Status of Women allocated funding to hire the Institute of Social Inquiry at the University of Connecticut to conduct the random telephone survey, using an interview protocol developed by the researchers from all three agencies. The statistical analysis of the data was also a collaborative effort.⁸

⁸The research team included me, Sharon Toffey Shepela, Ph.D., Director of the Women's Research Institute, and Janet Kniffin, Special Projects Coordinator of the Commission on the Status of Women. CWEALF Education Associate Cynthia Hall participated in collecting data and analyzing the results of the court records survey. We were assisted in statistical analysis of the court records data by Jennifer Brown, the Director of Institutional Research at the Connecticut State University, who donated her time and expertise as a public service. Under her direction, the computer files were designed by Jill Norman. The telephone interview instrument was designed by the research team with the assistance of Atty. Gail Hamm, Legislative Coordinator for the Commission on the Status of Women, and G. Donald Ferree, Director of the Institute for Social Inquiry.

The research was supported by small grants from the Primerica Foundation, the New Haven Foundation, and the George A. and Grace L. Long Foundation.

This survey project was a collaborative effort. I am very grateful for the cooperation and contributions of my colleagues. The text of this chapter is written by me, and I take responsibility for it.

Court Records

A ten percent random sample of court docket numbers for divorces issued in 1980 and 1984 was generated from a list provided by the Bureau of Vital Statistics of the Connecticut State Health Department. The sample year 1984 was chosen because it was the most recent year for which complete data were available. The sample year 1980 was then selected as a year sufficiently prior to allow some analysis of trends over time, but sufficiently recent to be comparable with our telephone survey data.

We then chose to sample four out of a possible nine judicial districts in order to capture economic, racial/ethnic and rural/urban differences. Two of the districts we sampled have major cities and suburban areas in them. The population in each of the cities is poor and racially mixed, while the suburban areas are middle-class to affluent and tend to be racially segregated. I will call these two districts Mixed/Average A and Mixed/Average B. One of the districts we sampled has, in addition to a poor city, the wealthiest suburban area in the state. I will call this district Mixed/Rich. The fourth district will be called Rural/Poor.

Data were collected from a total of 1,566 court records. According to the Bureau of Vital Statistics, there were 13,488 divorces in 1980 and 11,777 in 1984 in

Connecticut. In our sample, 854 records were from 1980 and 708 from 1984, representing six percent of all Connecticut divorces in each year. According to the data recorded by the Bureau, approximately 88% of our sample are white, 9% are black, and 3% are coded as "other". (Although Puerto Ricans make up a significant minority population in this state, data were not recorded by the Bureau of Vital Statistics in such a way as to allow us to report whether or not they were represented in our sample.)

Because a divorce is, in legal terms, a lawsuit brought by one party against another, it is considered a matter of public record. Unless the parties specifically request that their records be sealed, they may be examined by anyone who requests to do so. With a list of docket numbers in hand, we were able to sit in the archive rooms of courthouses and collect data.

An eight page data schedule was developed to collect information from the files (see Appendix 1). A standard file in a divorce case includes, at least, the original summons and complaint which details the length of the marriage, the number of minor children and the plaintiffs' "grounds", if any, for divorce; a financial affidavit filed by each party detailing income, assets and liabilities; court forms which indicate whether the divorce was contested or settled by the parties; transcripts of official court hearings, if there were any; and a Final

Judgement. We found, in the process of data collection, that these records could vary somewhat from district to district, depending upon the requirements of the judges and clerks, and also varied significantly depending upon the styles and competencies of the attorneys involved. From these records, we collected data about demographics, income and property before the divorce was issued, and property transfer, child custody and support orders as specified in the Final Judgement.

Telephone Survey

A telephone survey was conducted in which we interviewed 400 individuals who had been divorced in the state since January 1, 1980. A fifteen minute interview was completed with each respondent (see Appendix 2). The interview was intended to elicit demographics about the respondent, information about household finances before the divorce, the terms of the divorce settlement including property, child custody and support orders, the degree of compliance with court orders, and the general economic outcome for the respondent and his or her household. A few attitudinal questions were also asked, such as "Did you think the divorce was fair?" and a question about whether the respondent felt that he or she had focused on getting a fair financial settlement during the divorce process.

The respondents were contacted between February and May, 1988. In the months prior to February, the survey research organization had conducted several other public opinion polls, unrelated to this research. They used random digit dialing to contact respondents. In order to prepare for our research project, they asked respondents contacted for these other surveys whether or not they had been divorced in Connecticut since 1980. In this way, a random list of potential respondents was compiled. In February, these people were called back and asked to participate in our research. When this list was exhausted, the remaining respondents were contacted by random digit dialing.

The respondents are distributed randomly throughout the state. In all, 165 men and 235 women completed the interview. There was no attempt to contact matched pairs (i.e. ex-spouses); in other words, the men and women constitute independent, random samples. Of the entire sample, 94% identified themselves as white, 3% as black, and 1% as Hispanic.

The survey methods we used resulted in some under-representation of the experiences of poor people. Many people in the lowest economic classes never actually enter the legal system for marriage or divorce. One reason underscores the property interests underlying family laws: When there is little or no property at stake, there is

little need or incentive to involve the courts in family matters. Other reasons include language barriers and a general sense of alienation from institutions of state authority. Our telephone survey also excluded families who had no phones, as well as those less likely to agree to a telephone interview with a person associated with an academic institution.

RESULTS

The data from the court records study are presented first to show the patterns in income distribution. Section A compares total household income with per capita income for men and women immediately prior to and following a divorce settlement. These data illustrate that women appear to receive slightly more of the total family income than men do following divorce but that the per capita income in households headed by women declines while the per capita income of households headed by men increases after divorce. It is important to note the exception in the poorest judicial district, in which female headed households lag behind male headed households in both total and per capita income.

To help explain these findings, data are presented in Section B about custody and child support awards, and awards of periodic alimony. These data break the income distribution down to its constituent parts so that the inadequacy of settlements relative to dependent children is

more clearly exposed.

The last set of figures from the court records study appear in Section C which describes the distribution of assets. This section contains information about the family home which, for many middle class families, is the major family asset.

The data from the telephone interview study are then briefly reported to demonstrate the patterns of compliance with court orders in Section D, and the long term economic consequences of divorce, described in Section E.

A. HOUSEHOLD AND PER CAPITA INCOME

A.1 Household Income Prior to Divorce

All of the income data were drawn from the financial affidavits filed in the court records by the parties. In some cases, no affidavits or only the affidavit of one party was filed. (This generally occurred if only one party participated in the divorce process, or if there were little or no property to divide.) We based our income calculations on only those cases where two complete affidavits were found (n=845).

We found a great deal of variability in how these Financial Affidavits were completed. The form asks each party to list "total weekly net income" as well as "net weekly wages." Many parties filled out these forms after they had been living separately for some time. In some cases, parties included support payments they were

receiving or paying (formally or informally) in their "total weekly net income" while others did not. For people in higher income ranges, "total weekly net income" also included investment or other income sources. For the sake of consistency and comparability, we chose to use the more straightforward report of "net weekly wages" in our calculations. In doing so, we are losing some data, and probably reducing the absolute dollar amount of this variable for the sample as a whole. However, it creates a more reliable variable which allows us to assess the ratios and trends in income distribution.

To calculate a baseline "household wages" figure for families prior to divorce, we added the reported net weekly wages of husbands and wives. This is a constructed variable which illustrates what the total net wages for the family would have been prior to divorce if both parties were employed or unemployed as they were at the time they filed their affidavits.

In District Mixed/Rich, the mean household wages prior to divorce was \$520 per week; in Mixed/Average A it was \$427/wk.; in Mixed/Average B it was \$412/wk.; and in Rural/Poor it was \$298/wk.

A.2 Per Capita Income Prior to Divorce

This variable was calculated by dividing the total household wages figure (above) by the number of people in the family.

In District Mixed/Rich, the mean intact household per capita income prior to divorce was \$201 per week; in Mixed/Average A it was \$151/wk.; in Mixed/Average B it was \$148/wk.; and in Rural/Poor it was \$90/wk.

A.3 Post-Divorce Total Household Income for Men and Women

To calculate the post-divorce household income, we added or subtracted the amount of child support or alimony ordered by the court, if any, to the net weekly wages reported on the Financial Affidavits. This figure, together with the distribution of real property (discussed below), most closely represents "the settlement" in the eyes of the participants, because it is the amount attributed to the parties as individuals. It is "what he gets" and "what she gets." The results are summarized in the table below:

MEAN POST DIVORCE HOUSEHOLD INCOME

(Reported per week, and as percentage
of total available income)

<u>Judicial District</u>	<u>Wife</u>	<u>Husband</u>
Mixed/Rich	\$288 (55%)	\$231 (45%)
Mixed/Average A	\$233 (55%)	\$194 (45%)
Mixed/Average B	\$221 (54%)	\$191 (46%)
Rural/Poor	\$140 (47%)	\$158 (53%)

In three out of four districts, the wife, as an individual, walks out of the courtroom with 4% to 5% more

of the total available income than her husband. However, in the poorest district, where there is little income to distribute, the husband, as an individual, walks away from the divorce with 3% more of the available income than his wife.

For a majority of families (56%) where there is no family home, the distribution of income constitutes "equitable distribution" in Connecticut. (In Section C, the effect a family home has on property settlements will be considered.) As the per capita income figures below make clear, however, this pattern of property distribution is not very equitable for families with children.

A.4 Post-Divorce Per Capita Income for Men and Women

To calculate post divorce per capita income, we took the household income figure for each wife and husband and divided it by the number of people in each household. In other words,

$$\text{PCI} = \frac{\text{NET WEEKLY WAGES} \pm \text{CHILD SUPPORT} \pm \text{ALIMONY}}{\text{NUMBER OF CHILDREN RESIDING WITH PARTY} + 1}$$

The results are summarized below:

POST-DIVORCE WEEKLY PER CAPITA INCOME

<u>Judicial District</u>	<u>Wife's Household</u>	<u>Husband's Household</u>	<u>Percent W's PCI is of H's PCI</u>
Mixed/Rich	\$170/wk.	\$239/wk.	71%
Mixed/Average A	\$133	\$172	77%
Mixed/Average B	\$124	\$172	72%
Rural/Poor	\$ 70	\$146	48%

This table shows that when all the family members are taken into account, the economic outcomes reverse: Women and children, generally living together in a household, have a lower per capita income than men. In fact, as the summary table below makes clear, men actually have a higher per capita income after a divorce than they had in an intact family, while that of women and children declines.

COMPARISON OF PRE- AND AT-DIVORCE PER CAPITA INCOME
(figures in parentheses show percent
increase or decrease)

Judicial District	Pre- Divorce	Mother's At-Divorce	Father's At-Divorce
Mixed/Rich	\$201/wk.	\$170 (-15%)	\$239 (+19%)
Mix/Avg A	\$151/wk.	\$133 (-12%)	\$172 (+14%)
Mix/Avg B	\$148/wk.	\$124 (-16%)	\$172 (+16%)
Rur/Poor	\$ 90/wk.	\$ 70 (-22%)	\$146 (+48%)
TOTAL SAMPLE	\$148/wk.	\$124 (-16%)	\$182 (+23%)

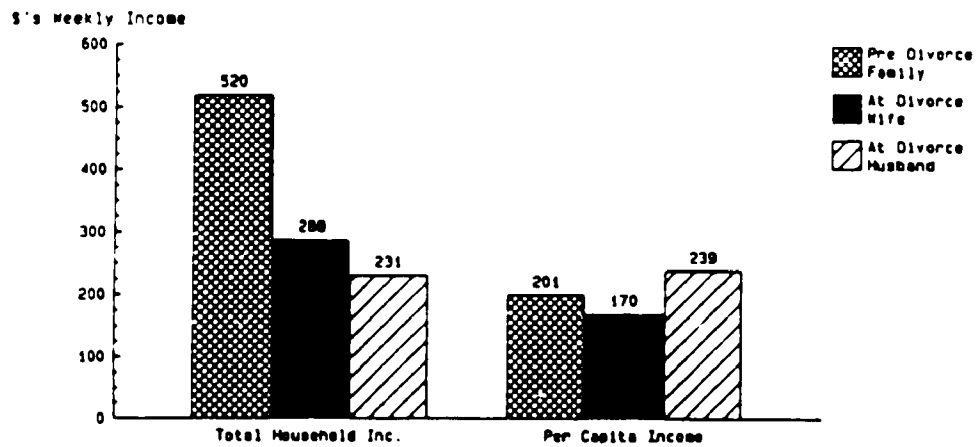
A.5 Summary of Income Data: Individual vs. Collective Awards

In the graphs below, the household weekly income (shown by the bars on the left) represents property distribution based on an individual, private property model in which husband and wife are the referents. The husband or the wife, as an individual, stands for his or her household. The property distribution is made in the context of a lawsuit brought by one person against another; the settlement resolves the competing claims of two people. The household is not "unpacked" so that all of its members can

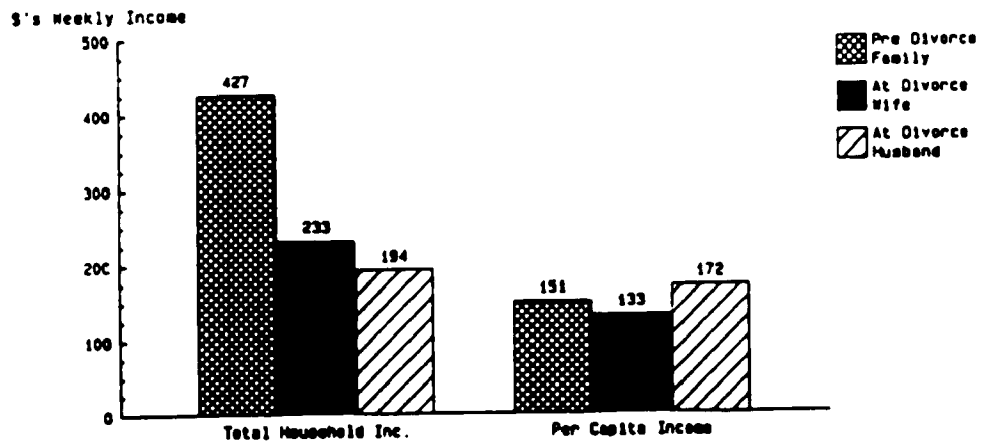
be considered. Under this model, the pattern of income distribution appears to be one in which the available income prior to divorce is divided in half, and the wife receives slightly more than the husband after the divorce.

The per capita weekly income (bars on the right), on the other hand, represents the outcome viewed through the lens of a collective, shared property model. That is, the per capita calculation is made on the assumption that each member of the family needs and shares in the income and property of the household. Thus, the total household income is divided by the number of family members to see how each one fares when all of them are taken into account. Under this model, the non-custodial parent/husband increases his personal share of the available weekly income following a divorce, leaving less per person for the members of the custodial parent/wife's household. In other words, mothers and children have less income to share. The figures below summarize these findings:

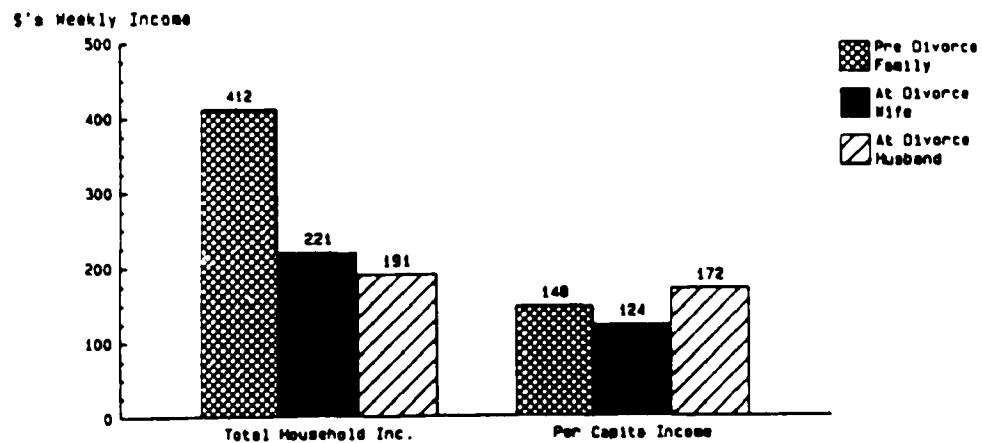
Judicial District
Mixed/Rich



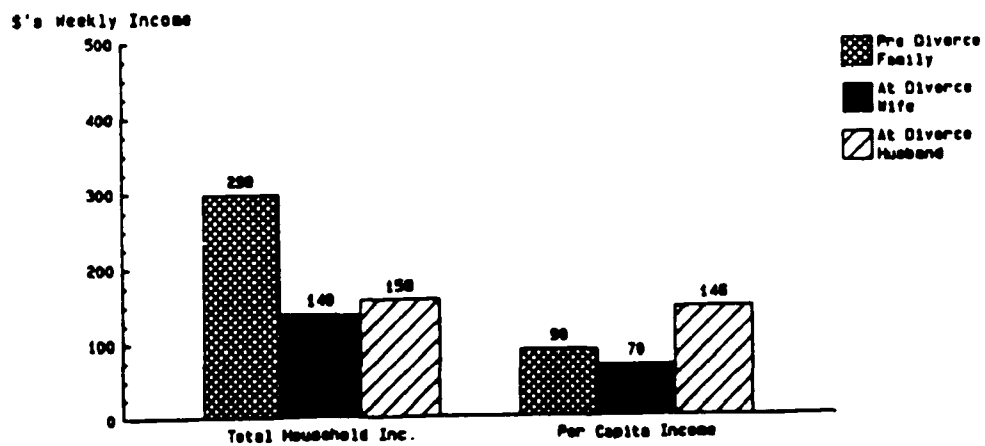
Judicial District
Mixed/Average A



Judicial District
Mixed/Average B



Judicial District
Rural/Poor



B. CUSTODY, CHILD SUPPORT AND ALIMONY

In this section, the elements of the per capita income formula are reviewed in order to describe the underlying decisions which lead to the inequities between men and women. In theoretical terms, the data below show why the "phenomenal form" or social expression of the contradiction inherent in the "relations of dependency" under a private property system is often the impoverishment of divorced women.

B.1 Custody Awards

In the cases we sampled, 774 or 49.4% divorcing couples had children. In the vast majority of cases (84.3%), the mother was awarded physical custody of the children: In 74.4% of cases where there were children, the mother was awarded sole custody. In 9.9% of cases there was an award of joint legal custody with the children living with the mother. (Joint legal custody means that both parents retain full parental rights to make significant decisions about the raising of the children, including religious, educational and medical decisions. However, "legal custody" is different from "physical custody", which refers to the parent with whom the children live and who must care for them on a daily basis.)

The father was awarded sole custody in 4.8% of cases, and joint legal custody with the children living with him in 3.4% of cases. Thus, in a total of only 8.2% of cases

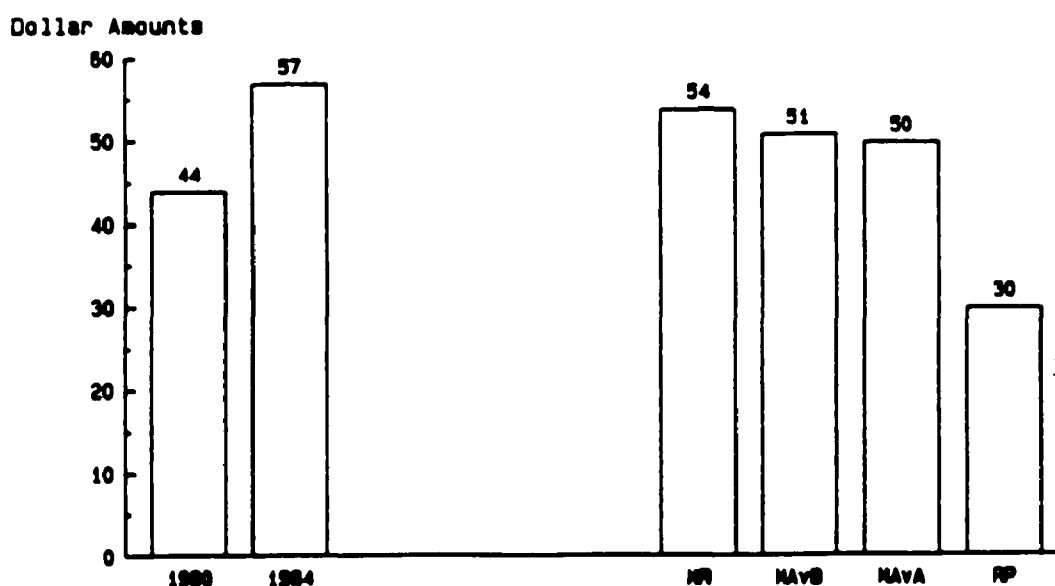
did the children live with their father after the divorce. In 4% of cases, the children lived half-time with each parent, or in some other particular arrangement.

B.2 Child Support Awards

Child support was ordered in 551 cases, which represents 71% of families with children in our sample. In 29% of families with children, therefore, no child support was ordered at all.

The average weekly child support ordered per child for the whole sample was \$49.58. There were significant differences among the sample districts: District Mixed/Rich had the highest average weekly award of \$54.03. Districts Mixed/Average A and B each had weekly average awards of approximately \$50 per week. But District Rural/Poor had an average child support award of only \$29.76 per week per child.

Child Support Awards



B.3 Post-Divorce Per Capita Income by Custody Agreement

To test the proposition that physical custody of children, rather than gender in and of itself, is the key factor in shaping post-divorce per capita income, we ran a comparison of per capita income figures for males and females with physical custody and males and females without physical custody. The results are as follows:

	<u>Father has</u> <u>custody</u> (n=46)	<u>Mother has</u> <u>custody</u> (n=440)
Father's PCI	<u>\$113/wk.</u>	\$162/wk.
Mother's PCI	\$169/wk.	<u>\$ 99/wk.</u>

(Underscored = custodial parent)

These data show that the parent with physical custody of children is economically disadvantaged, regardless of whether that parent is the mother or the father. (However, they also show that mothers with custody are more disadvantaged than fathers with custody.) This economic disadvantage falls more heavily on women as a class because women are the physical custodians of children in the overwhelming majority of cases.

B.4 Periodic Alimony Awards

Data about periodic alimony are included in this section because alimony is a variable in the per capita income formula. Historically, periodic alimony was intended for the betrayed, dependent wife as a "means of support to which the wife is entitled and of which she has

been deprived through the husband's default..."⁹ In the modern "no fault" era, this function still exists to the extent that women are often at an enormous disadvantage in earning capacity, particularly after long, traditional marriages. Alimony is sometimes awarded to compensate for this imbalance. However, our data show that awards of child support are much more significant than alimony in determining the economic status of post-divorce households. The use of alimony is rare and not often economically significant.

There was no alimony award of any kind in 61.3% of our sample. In 14.8% of cases, there was an award of \$1 per year, which is a legal maneuver meant to leave open the possibility of requesting real alimony payments at a later date. In only 18.2% of cases, therefore, was there an award of genuine periodic alimony. In 5.7% of cases, there was an award of one-time, lump sum alimony. In this sample, 97% of all alimony awards were paid by the husband to the wife.

⁹Olmstead v. Olmstead, op. cit., this chapter p. 117.

B.6 Values of Periodic Alimony

In calculating the values of periodic alimony awards in each judicial district, we found some odd results, including widely divergent means and medians. These were caused by four extremely high values. The table below reports the means and medians for all data by district, and then shows a second column of means and medians with the four outlying values removed. We believe the second column is more meaningful.

Periodic Alimony Awards (Weekly)

<u>District</u>	<u>All Data</u> (n=172) (mean/median)	<u>Without Outliers</u> (n=168) (mean/median)
Mixed/Rich	\$237/125	\$166/115
Mixed/Average A	\$141/ 55	\$121/ 50
Mixed/Average B	\$150/ 55	\$ 72/ 50
Rural/Poor	\$ 88/100	\$ 88/100

C. DISTRIBUTION OF ASSETS

The preceding sections described the division of income and dependents. This section examines the distribution of real property and other assets. For more than half the families in our sample, there were no significant assets; for them, income distribution was the only economic issue in the divorce settlement. For other middle class families in our sample, the most significant asset is the family home. We report data below describing the distribution of

family homes, and awards of lump sum alimony, pensions and insurance.

C.1 Division of Family Home

In our sample of court records, a total of 692 families, or 44%, owned a home at the time of the divorce. Because the court records are often incomplete, clear information about how the family home was awarded was available in only 271 cases; data were either missing or unreliable regarding this essential family asset in nearly two thirds, or 421 cases. The confusion in the data derives mostly from the fact that the disputing parties and their attorneys may use the value of the family home as a strategic bargaining issue, and claim unverified and divergent values on their financial affidavits. In many cases, therefore, the court records data were so unreliable they could not be used. A smaller, follow-up study should be undertaken in which the value of a sample of homes can be professionally assessed.

Although our sub-sample of 271 cases is smaller than the whole sample, we believe it is large enough to demonstrate patterns. In general, women are awarded the family home nearly twice as often as men. In the sample of 271 cases where data were available, the full value of the home was awarded to the divorced wife in 49% of cases, or 134 times. In contrast, the divorced husband was awarded the full value of the home in only 20% of cases, or 54 times. In another 21% of cases, or 57 times, the court

ordered the value of the home to be equally divided. In the remaining 10% of cases, the value of the home was divided in some other fashion.

DIVISION OF FAMILY HOME

100% of Home to Wife	134	49%
100% of Home to Husband	54	20%
50/50 Split	57	21%
Some other division	<u>26</u>	<u>10%</u>
	271	100%

C.2 Value of Homes Awarded

The estimated value of the homes are reported by the parties on their financial affidavits. According to these reports, the mean value of all the houses in our sample was \$51,076; the lowest reported value was \$571, and the highest was \$545,000. In 1980, the mean value of all houses in our sample was \$47,231, and in 1984 it was \$55,487.

Although women were awarded the full value of the family home in nearly half of all cases reported above, the mean value of the property awards shows a smaller margin between women and men. In general, the value of the portion of family homes awarded to men was 70% of the value awarded to women. That is, the mean value of all family home property awarded to women was \$47,809, while the mean value of all family home property awarded to men was \$33,604. The difference, in terms of actual dollars, is \$14,205.

[It is important to remember that these statistics illustrate the pattern for the aggregate, rather than for individual property awards. In other words, it is not common for an individual wife to receive approximately 3/5 the value of a house while the husband receives 2/5, as the above medians might suggest. Rather, the common patterns of division are described in C.1. These data, on the other hand, summarize the net effect of property distribution for the entire sample of women and men.]

There is little difference in the relationship among awards between 1980 and 1984, although there are some noticeable differences among judicial districts: In Mixed/Average B, men were awarded only 62% of that which women were awarded, whereas in Mixed/Rich, men were awarded as much as 74% of that which women were awarded. The figures are summarized in the table below.

VALUE OF HOMES AWARDED

	TOTAL	1980	1984	MIXED/RICH	MIXED/AVG A	MIXED/AVG B	RURAL POOR
TOTAL REPORTED VALUE OF HOMES	\$55,519 (n=271)	49,245 (n=155)	63,902 (n=116)	71,491 (n=98)	49,044 (n=106)	45,018 (n=50)	34,705 (n=17)
MEAN VALUE AWARDED TO WOMEN	\$47,809	43,063	54,068	53,819	47,901	39,164	36,359
MEAN VALUE AWARDED TO MEN (% of women's mean award)	\$33,604 (70%)	30,830 (72%)	37,104 (69%)	39,739 (74%)	30,756 (64%)	24,187 (62%)	25,616 (70%)
DIFFERENCE	[\$14,205]	[12,233]	[16,964]	[14,080]	[17,145]	[14,977]	[10,743]

Although the court records provide incomplete information about the distribution of real property, one can predict from these and other data¹⁰ that even those women who receive a greater share of the family home may have difficulty maintaining their standards of living or remaining in those homes because their incomes are inadequate to support the monthly costs. In Section E, based on the results of the telephone survey, we demonstrate that the gap in per capita income between women and men is not significantly reduced by accounting for housing costs. Although that finding does not directly answer the question of whether or not women enjoy a genuine advantage in long-term equity in real property, it does establish that the award of the family home does not buffer a woman and her children from economic decline.

C.3 Lump Sum Alimony

Lump sum alimony awards are another method for transferring assets from one spouse to another. Lump sum alimony can be ordered as a one-time payment in lieu of periodic alimony. Such an order may stand alone, or may be made as part of an overall package including the transfer of real property and other assets.

¹⁰See, for example, Katherine S. Newman, Falling From Grace, Vintage Books, New York, 1989; Weitzman, op. cit.

Lump sum alimony awards were made in a very small percentage of cases: Only 104 such awards were found in our sample, representing 6% of all cases. The mean value of all such awards was \$13,346, but the median was \$3,000. The two smallest lump sum alimony awards were apparently absurd values under \$50; the highest value was \$150,000. The majority of lump sum awards (63) were ordered in cases where there was also a family home to distribute, while 41 awards stood alone.

Because the sample size is small and the variability in data large, we could find no meaningful pattern in these awards. In general, we can conclude that lump sum alimony awards are relatively rare and do not significantly alter the pattern of property distribution for the vast majority of women and men.

C.4 Pensions and Insurance

Some advocates are now arguing that divorce courts must take into consideration the "new family assets": those things which have cumulative value for a family, but are not necessarily "owned" in the traditional sense at the time of the divorce.¹¹ Our data suggest that neither lawyers nor divorcing parties took much notice of these

¹¹The primary example of such a family asset is the "career/future earnings" of a professional spouse. Trial courts are now struggling over the issue of whether and how much a medical or legal degree, for example, can be considered divisible marital property.

assets in 1980 and 1984. We have no data on "career" assets. Very rarely did pensions or insurance appear in court records of the settlement. The data reported here document the fact that these assets did not have a significant effect on the equitableness of the property settlements we studied.

The husband's pension was mentioned in only 18 cases (1%), and the wife's pension in 11 cases (.7%). Of those cases, there were 3 instances where the wife was awarded 100% of the husband's pension, and 2 instances where she was awarded 50%. All the rest of the cases are unclear. No conclusion can be drawn from such a small result except that, for almost all divorcing couples, pensions either did not exist or were not divided in the divorce.

Life insurance was mentioned in a slightly greater number of cases, but still very rarely in the sample as a whole: A total of 133 mentions of life insurance were found in settlement agreements, representing 9% of the sample. In 91 cases, the husband was ordered to hold life insurance in the name of the wife; in 5 cases, the wife was ordered to hold it for the husband; and in 37 cases, the settlement simply noted that each party had her or his own life insurance policy. In general, it is important to emphasize that the vast majority, or 91% of all cases, did not include any mention of life insurance.

D. COMPLIANCE

The information regarding compliance with court orders was obtained through the random telephone survey of 400 individuals divorced in Connecticut. As explained earlier, these data are "self-reports" by respondents. On the concrete level, they show that women and children suffer even greater negative consequences than the data above predict because many non-custodial fathers do not comply with court orders of support. On a theoretical level, they demonstrate the intersection of the "law and society" problem with the "individual versus sharing" problem: That is, there is a gap between law and society to the extent that men do not comply with court orders, and they do not comply particularly with those orders that have to do with the relations of dependency.

D.1 Rates of Child Support Compliance

As in every other survey, our data indicate that compliance with child support orders is not reliable. Of those mothers entitled to child support payments, a majority (55%) reported that they were receiving all or some of the payments. However, approximately 1 in 4 (26%) reported that they were receiving no payments at all, and an additional 19% were unclear about the status of their child support payments. When asked if there was an "arrearage" in child support payments, a full 15% of male respondents admitted that they made no payments at all.

Rate of Compliance with Child Support Orders

	Responses by Women	Responses by Men
Some payment to mother	55%	73%
No payment to mother	26%	15%
Unclear payment	19%	12%

D.2 . Amounts of Child Support Received

In this sample, the average number of minor children per family is two. The mean amount of child support ordered is approximately \$5,000 per year for all children. (Women respondents reported that they were awarded a mean of approximately \$4,700 per year, while male respondents reported that they were ordered to pay a mean of approximately \$5,500 per year.)

In terms of actual dollar amounts, women reported that they were receiving a mean of approximately \$3,000 per year, instead of the approximately \$4,700 they believed was due them. Men, on the other hand, reported that they were paying a mean of approximately \$4,400 per year, which is considerably better than what the women report receiving, but still falls short of the actual amount reported ordered by either men or women. In other words, women report receiving approximately 65% of what is ordered, while men report paying approximately 80% of what is ordered. Perhaps more convincing is the fact that both male and

female respondents reported that the average arrearage in child support payments was approximately \$1,650 per year.

Amount of Child Support Ordered and Received

	Responses by Women	Responses by Men
How much fathers ordered to pay	\$4,739/yr.	\$5,499/yr.
How much mothers receive	\$3,072/yr.	\$4,384/yr.
Percent of total order mothers receive	65%	80%
Reported arrearage due mothers	\$1,694	\$1,650

The statistics hold another clue to interpreting the rate of child support compliance: When the zero payments are taken out of the calculation for the mean, the difference between what is owed and what is paid nearly disappears. This finding leads us to conclude that child support obligors tend to pay all or most of what is ordered, or they pay nothing at all. That is, rather than finding a distribution of those who pay varying portions of their child support, we find a sample more sharply divided between full payors and non-payors.

D.3 Rates of Alimony Compliance

Alimony tends to be a less significant factor in the overall economic consequence of a divorce because it is ordered less frequently. However, it is important to note that the pattern of non-compliance is similar to the pattern described above. In this sample, approximately 30%

of respondents reported that alimony was ordered by the court. Women reported that they were receiving no payments at all in 41% of cases where there was an alimony order in effect. Among the male respondents ordered to pay alimony, a full 22% admitted that they themselves were making no payments.

D.4 Amounts of Alimony Received

The actual dollar amounts reported ordered and received support the interpretation that approximately half the sample of obligors pay all or most of their alimony, while between 1/4 and 1/2 of the sample pay nothing at all. Women report a mean alimony order of \$5,068 and a median of \$1,560. (These data were strongly influenced by a few very high values. In this case, the median may be more meaningful than the mean.) Men report a much lower mean alimony order of \$2,754, and the nearly identical median of \$1,500. However, women report receiving a mean of \$4,381 per year, and men report paying a mean of \$2,015 per year. There is a shortfall between what is ordered and what is paid, but not as dramatic a difference as in child support payments. Again, the data suggest that the difference in mean dollar amounts is created by those who pay nothing at all.

E. ECONOMIC CONSEQUENCES

We showed in Section A that women appeared to have an advantage in total household income as prescribed by court

settlements, but actually had a significant disadvantage in terms of per capita income. Section B broke down the per capita income figure by reporting custody, child support and alimony awards. In Section C we showed that, among homeowners, women had an advantage in awards of the family home. However, more than half of the families in the sample (56%) did not own a home. We also showed that there was little attention paid to the so-called "new family assets" such as pensions and other insurance protections. In Section D, we showed that compliance with court-ordered child support and alimony payments was unreliable for many recipients. According to the respondents to our telephone survey, the net effect of these patterns tends to be a deterioration in the economic position of all parties, but a far greater deterioration for women and children.

E.1 Household Income Decline for Women and Men

Both male and female respondents in the telephone survey sample reported that, before divorce, mean total household income was approximately \$41,000¹² per year.

¹²Connecticut has the highest per capita income level of any state in the country. This is because a portion of the state is a very wealthy suburb of New York City. However, three of Connecticut's cities are among the ten poorest in the nation. There is a wide disparity between rich and poor.

The median household income figure of \$41,000 reported by our telephone respondents is substantially higher than the national mean. For example, Cebus Bureau data show the median household income for U.S. families in 1986 was:

Immediately following the divorce, men reported that their total household income dropped approximately 22% to a mean of \$31,786. Women, on the other hand, reported that their total household income dropped a precipitous 53% to a mean of \$19,380.

HOUSEHOLD INCOME DECLINE AFTER DIVORCE

	Responses by Women	Responses by Men
Pre-Divorce Household Income	\$41,565/yr.	\$40,928/yr.
Post-Divorce Household Income	\$19,380/yr.	\$31,786/yr.
Percent decrease	53%	22%

\$32,805, all races; \$33,426, white families; \$26,583, black families; \$23,912, families of Hispanic origin (Current Population Reports, Series P-60, No.157, 1987, Table 1).

We believe our random telephone survey reasonably reflects the population of Connecticut, including the wide range from rich to poor. The income disparities are easier to see in the court records data because they are broken down by judicial district; the difference between the Mixed/Rich and the Rural/Poor communities are obvious.

There is some bias toward the upper income ranges introduced by the telephone survey method. Very poor people are less likely to have a telephone, and are therefore missing from the data. Other poor people, particularly those receiving welfare benefits, may be less likely to agree to a 15 minute telephone interview concerning financial matters with an unknown interviewer from an academic institution.

This reported experience directly contradicts the expected pattern, described in A.3 and A.5, derived from the financial affidavits and court orders. Those data indicated that women's total household income would have dropped approximately 45% and men's would have dropped approximately 55%. The difference between the expected and the reported consequences may be partially accounted for by inaccuracies or lies on the financial affidavits and other immediate and unforeseen changes of circumstances. However, the data in section D above makes clear that the difference is also the result of immediate non-compliance with court orders. The self-reports of women and men demonstrate that the immediate deterioration in the circumstances of women and their dependent children is severe and initially hidden from the court process.

E.2 Post-Divorce Per Capita Income for Women and Men

In earlier sections, we demonstrated that women's per capita income was likely to be significantly lower than men's based on the figures contained in court records and orders. The following data illustrate that this effect is also compounded by non-compliance with court orders.

Using the same formula we used earlier (A.4), we added the respondents' reported income to the reported amount of

child support and alimony either received or paid at the time of the telephone survey. We divided this number by the number of dependent children plus one to arrive at a per capita income figure. We found that the mean PCI for men at the time of the telephone survey was \$27,552 per year while the mean PCI for women was \$15,189, or 55% of men's. We are seeing the compounding effects of false predictions at the time of divorce and non-compliance over time in contributing to the increasing income gap between men and women.

A significant portion of our sample (20% of women and 24% of men) were remarried at the time of our telephone survey. Their responses about household income, therefore, reflect their changed marital status. In order to take the "cleanest" measure of the consequences of divorce, without the confounding effects of remarriage, we ran the same calculation of PCI for only those respondents who were unmarried at the time of the survey. The gap between women's PCI (\$15,731) and men's PCI (\$30,071) widened slightly. The interesting finding was that the gap widened because the PCI for unmarried men was considerably higher than it was for men who were remarried; women's PCI changed little. People in families with dependents will have a lower per capita income, and women, whether in married relationships or not, are more likely to have dependents.

Post Divorce Per Capita Income

	Responses by Women	Responses by Men	Women's PCI as % of men's
Mean PCI all households	\$15,189	\$27,552	55%
Mean PCI unmarried households	\$14,472	\$31,617	46%

E.3 Post Divorce Per Capita Income After Housing Costs

In order to assess the impact of housing costs on per capita income after divorce, we subtracted the amounts of monthly rent or mortgage payments and the total monthly utilities payments reported by respondents. That is, the numerator of this new variable, PCI/ah (per capita income/after housing), was: respondents income $\pm$ child support $\pm$ alimony - [monthly housing + utilities payments].

The results of this calculation reduced the gap between the per capita incomes of men and women, but not by very much. Using the original formula, women's post-divorce PCI is 55% of men's (above). Deducting housing costs from the income, women's PCI/ah rises to 59% of men's (below).

MEAN CURRENT PER CAPITA INCOME AFTER HOUSING
(all respondents)

Responses by Women	Responses by Men	Women's as % of Men's
\$14,556	\$24,804	59%

The finding above helps to illustrate that the tendency to award family homes to women does not necessarily alter the imbalance between the standards of living of men and women following divorce.

E.4 Reliance on Welfare Following Divorce

We collected data that provide a direct measure of the most obvious kind of impoverishment: When asked whether the respondent had received any welfare benefits (e.g. AFDC, food stamps) during the separation period before the final divorce, 11% of women said yes, as compared to only 1% of men who said that they had received such benefits. When we asked whether the respondents had received welfare benefits at any time since the divorce, 13% of the women said yes, as compared to 4% of men.

DISCUSSION

The two studies reported above describe the material consequences of a legal system built upon at least two types of contradiction: The first type emerges from the gap between the law and society; that is, people are not behaving according to the patterns assumed by the law. In this case, the law rhetorically promotes equality between men and women, while the larger society is constructed in a way that makes equality impossible to achieve. Moreover, the second and deeper type of contradiction, which applies marketplace, individualistic principles to the distribution of property without regard to kin-based relations of

dependency, contributes to the inequality between men and women and reinforces imbalanced social structures. The contradictions feed each other, so that both men and women feel alienated from a family law system that does not relate well to family behavior. As men feel alienated, they may use the male privilege of independence granted them by the larger society to escape the system entirely and refuse to comply with its orders. For women and children, more trapped by the relations of dependency, the net consequence of these contradictions is downward mobility and impoverishment.

It is important to note the ways in which the family law system fits together with other social practices to maintain an enduring inequality for women. The economic losses of women and children following divorce result from at least three proximate causes: The most direct cause, documented by this study, is the overwhelming majority of cases in which mothers maintain physical custody of children, and the inadequate award of and compliance with child support orders. The second cause is that the institution of marriage and motherhood tends to create a cumulative economic disadvantage for women over time. Even in the most "non-traditional" families where both parents have careers, women tend much more frequently than men to lose earning capacity and upward career growth as they assume a greater share of responsibility for childcare and

housework.¹³ Of course, in the so-called "traditional" families where women actually leave the paid labor force in order to raise young children, this economic disadvantage is most pronounced. Finally, women still suffer the effects of sex discrimination in the labor force, without regard to family or parental status. In the late 1980's, full-time women workers as a class still earn only 65% of what full-time male workers earn.¹⁴

It is also important to point out the ways in which a system of inequality based on gender intersects a system of inequality based on race. Inadequate child support awards and poor compliance, recognized as factors leading to poverty for women and children across the country, tend to have the most severe consequences for black female headed households. In an analysis of the impoverishment of women and children, Harrell Rodgers reports Census Bureau statistics from 1980 documenting that only 35% of women

¹³See Myra Marx Ferree, "Sacrifice, Satisfaction and Social Change: Employment and the Family," in My Troubles are Going to Have Trouble with Me, Karen Sacks and Dorothy Remy, eds., Rutgers University Press, New Brunswick, 1984; and Arlie Hochschild, The Second Shift, Viking Press, New York, 1989.

¹⁴See, for example, a briefing paper on "The Wage Gap," prepared by the National Committee on Pay Equity, Washington D.C. based on data from the Census Bureau's Money Income of Households, Families and Person in the United States: 1987, Current Population Reports, Consumer Income, Series P-60, no. 162, February, 1989.

with minor children and an absent father receive any child support payments, and of those, only 68% receive the full amount. Black women and women of Spanish origin¹⁵ fare considerably worse than do white women: While 71% of white mothers were awarded support and 43% received it, only 29% of black mothers were even awarded support and 14% received it. Among mothers of Spanish origin, 44% were awarded support and 24% received it. These data are even more alarming for black women when coupled with the fact that their rates of divorce and separation are approximately twice what they are for white women. Rodgers concludes, "Black female-headed households often become the victims of poverty because of high rates of divorce, out-of-wedlock births, and fertility, combined with limited sources of income from employment, child support, and social welfare programs."¹⁶

Although our research data have not been analyzed to demonstrate differences by race and ethnic origin, there is no reason to believe the pattern would be significantly different in Connecticut than it is on a national level.

¹⁵The racial/ethnic labels "black" and "Spanish origin" are used here because they were the categories used in the census from which these data are taken, and because they are the terms used by Harrell Rodgers in his analysis.

¹⁶Harrell Rodgers, Poor Women, Poor Families, M.E. Sharpe, New York, 1986, pp. 39-40, 42-43, 53.

Indeed, Census data show that 78% of the poverty population in Connecticut consists of women and children. The rate of poverty among black women (28%) is a staggering four times the rate of poverty among white women (7%), and even greater among women of Spanish origin (36%).¹⁷ Further data analysis is needed to document the combined effects of racism and sexism in the application of divorce and child support laws.

These "new social problems" are described in modern language, but have deep historical roots. I propose that the results of this and similar studies demonstrate that fundamental ideas about gender roles and the economics of a family are deeper and stronger than contemporary changes in the law. Notwithstanding the Married Women's Property Acts of the 19th century, and the "no fault" and equitable distribution revolution of the twentieth century, the division of property between husbands and wives still approximates the traditional concept of dower. That is, courts are unlikely to award (and enforce) the redistribution of more than 1/3 of "his" property to her. The clearest indicator of this pattern is the small and poorly enforced awards of child support, which rarely

¹⁷Facts About the Status of Connecticut Women, a report issued by the Connecticut Permanent Commission on the Status of Women, Hartford Connecticut, 1984, p.9; based on 1980 U.S. Census Bureau reports.

exceeded \$5,000 per year in our sample. Judges, attorneys and divorcing parties work under the law, but somehow manage to shape results that are more similar to than different from the past. The more things change, the more they stay the same.

The next three chapters offer further examination of these themes. Chapter Five concerns the public debate over marital property reform and highlights the paradox that results from promoting gender equality in family law without proper regard for gender inequality in other social institutions. Chapters Six and Seven describe the relationship between the individual and the law in terms of alienation and mystification.

Chapter Five

EQUAL PARTNERS IN MARRIAGE:
THE PUBLIC DEBATE OVER COMMUNITY PROPERTY

Given the inequities that follow divorce, it is not surprising that a public debate has emerged about how to create greater economic equality in marriages. The debate in Connecticut raises one of the major questions of this research: Would a community property, or sharing model, be more fair than the separate property model now in effect? The hidden problem in the debate, however, is the inadequacy of the liberal concept of equality to create a genuinely fair result. In this chapter, I utilize feminist critiques of equality theory to help explicate the current debate over the Uniform Marital Property Act in Connecticut and consider further the ways in which marital property reforms may fail to include the relations of dependency.

The texts reviewed in this chapter also provide an opportunity to consider the separation of public discourse from private lives. It is probably no exaggeration to state that no more than four hundred people in the state of Connecticut have heard of the Uniform Marital Property Act (UMPA). It is a legislative proposal which would radically reform the marital property laws in Connecticut. Even though only a small minority of citizens in the state are

involved in it, the debate concerning the value of the Uniform Marital Property Act is part of the dominant discourse on families and the law. Basic social ideas about families, gender roles, property, and the appropriate role of the law are being articulated in a public setting. By the end of the debate, there will either be a new law or a reaffirmation of the existing law. One of the problems explored in this research is how and to what degree this discourse is genuinely distinct from the common discourse about these important social topics and, if separate and different, how and to what degree does the outcome of this debate gain legitimacy or authority in people's daily lives. To put it more plainly: How does the law get shaped, and how well does it shape social life?

The texts in questions are the transcripts of two years of public meetings and hearings held by the Advisory Commission to Study the Uniform Marital Property Act. The Commission was first created by an act of the Connecticut state legislature, effective July 1, 1985. It was reauthorized for a second year, and submitted a final report to the legislature in 1987. Over the course of two years, the Commission held as many as twenty public meetings, including a public hearing and several hearings with invited speakers. I was able to attend some of these meetings. All of the meetings were fully transcribed.

THE UNIFORM MARITAL PROPERTY ACT

The Uniform Marital Property Act would transform Connecticut from a separate property to a community property state. Although it is being considered for adoption elsewhere, each legislature must determine how it will effect the unique marital property system of its own state. As explained in Chapter Three, two consequences of the Puritan influence on British common law in Connecticut were that divorce was actually easier to obtain, or more "liberal" than in other colonies, at the same time that the protections for women's "dower rights" were weaker. Under Connecticut's early laws, marriage was clearly a contract that was not meant to come between a man and his property, and to the extent that women had any property rights, they were generally designed to prevent them from becoming destitute and dependent upon the state.

In the area of divorce, fault was always a primary consideration: a woman was only entitled to her right of dower "where she is the innocent party." So strong was the concern that a "guilty" wife might wrongfully acquire property from an "innocent" husband, that a special protection was written into the statutes after the passage of the Married Women's Property Act. In 1866, a section entitled "When estate reverts to husband" was added to the divorce statutes which read:

When any married woman shall have derived any estate from her husband in consideration of their marriage, or of love and affection, and her husband shall thereafter be divorced from her on the ground of her misconduct, the court may decree that such personal estate remaining in her possession, and such real estate standing in her name, shall thereafter belong to him.¹

This provision protecting husband's property rights, but silent on the rights of wives, survived several revisions of the law, remaining on the books until the 1950's.

Because the early American economy was land-based, the original marital property laws refer, in the main, to tenancy in and transfer of real property. The term "alimony" first appeared in the statutes in 1877² as New England was industrializing and cash income was gaining more importance to many families. Over the next hundred years, the concept of alimony developed in case law and statutory reforms to appear more in the form of support or maintenance payments for a dependent wife. As described in Chapter Four, the traditional limitation on the award of alimony to "no more than one-third of the husband's estate" was removed from the statute in 1911, allowing

¹Quoted from C.G.S. 43:254, section 4557 (1902), as amended in 1888.

²Victor M. Gordon, "Alimony and Allowances", Connecticut Bar Journal, vol. 27, 1953, p. 180. Gordon also provides an interesting note about the etymological root of the term, based on the Latin stem, alere, which means 'to nourish.' Alimonia thus means 'sustenance.'

Connecticut's doctrine of "equitable distribution" to develop. This was the same historical period, as noted earlier, in which the federal income tax amendment was added to the Constitution, signifying the elevated status of cash income together with the more direct, interventionist relationship of the federal government with the individual. Now, the symbolism of "dower" with its reference to the family estate was replaced by a state enforced contractual obligation of a husband to a wife. As Judge Booth explained in the 1912 case of Olmstead v. Olmstead, cited earlier, "The basis of alimony is the means of support to which the wife is entitled and of which she has been deprived through her husband's default in the performance of his marriage contract."³ However, the fundamental purpose of dower remained: the protection of an abandoned wife against destitution.

The next significant revision of Connecticut's divorce laws came in 1973, with the passage of sweeping new legislation featuring the concept of "no fault" divorce. Chapter Three describes this reform, noting that, although the faultless ground of "irretrievable breakdown" was added to the law as an option, Connecticut legislators chose to retain the traditional list of faults as possible grounds

³op. cit., Olmstead v. Olmstead, p.366.

for divorce, as well as factors that could be considered in the distribution of property. Thus, Connecticut is currently a "hybrid" fault/no fault state.

Through all of these reforms, Connecticut remained a "separate property" state. Indeed, dower rights, alimony and equitable distribution are all strategies designed to compensate a dependent spouse and create a degree of equity in the face of the doctrine of separate property.

The Uniform Marital Property Act, on the other hand, is a community property law. It was written and approved by the National Conference of Commissioners on Uniform State Laws in 1983. (The role of this appointed national organization is to recommend uniform laws for consideration by the states.) Wisconsin is the only state, thus far, to adopt the law, having enacted a draft version of it in 1981. UMPA came to the attention of the Connecticut state legislature in early 1985, which responded to the proposal for major reform by appointing a study commission. As of this writing, a complete version of the Act has not come before the legislature for a vote.

Although UMPA is a long and complex proposal, its major provisions can be summarized as follows:

1. Property acquired during marriage is marital property ("marital property" is the term now preferred over the traditional "community property"), to which "both husband and wife have a present undivided
-

one-half interest." This undivided one-half interest applies from the moment such property is created, rather than only at death or divorce. In other words, of every dollar brought home by either spouse, 50 cents is his and 50 cents is hers.

2. Individual property, separately owned, includes property owned before marriage or acquired at any time by gift or inheritance.

3. The rules of title still govern the management and control of property. In other words, if property is in one person's name, he or she may manage or sell it.

4. Spouses are granted the right to enter into good faith marital property agreements with different terms from those established by the Act. In other words, spouses may agree to design their own contract to maintain separate property or adopt some other system of their choice.⁴

Proponents of the Act claim that it embodies the principle of "sharing", relying often on the imagery of marriage as an economic contract. The drafters of the Act emphasize its value in bolstering the economic stability of the traditional nuclear family. A summary distributed by

⁴Summary adapted from Mary Moers Wenig, "The Marital Property Act", Women Lawyers Journal, 69:4, 1983, pp. 10-11.

the Uniform Law Commissioners states:

Elementary sociology tells us the self-evident fact that the nuclear family is the basic social unit upon which all other social and political institutions are based. Much has been said, as well, in those arenas in which public policy is debated and made, about the primacy of the family and the need to support and sustain it. But, most of this discussion and concern has overlooked an inherent weakness in the family as an economic unit, at least in those states that are common law states. As an economic unit, it is non-existent. And of all those factors that contribute to the problems of the family, perhaps its economic weakness is the most devastating.

After three years of consideration, the Uniform Law Commissioners promulgated the Uniform Marital Property Act in 1983. For the first time, the family can be made into a functioning economic unit. And, for the first time, there is an opportunity to give more than lip service to the family as an economic entity.⁵

As further discussion in this chapter will demonstrate, other constituencies emphasize the theme of gender equity in supporting the sharing concept of the Act.

A FRAMEWORK FOR ANALYSIS

In "Implementing Equality: Ideology, Contradiction and Social Change"⁶ author Martha Fineman analyzed some of the ideas and rhetoric that led to the implementation of a

⁵Excerpt from a two-page reprint labelled "Summary -- The Uniform Marital Property Act", printed by the Uniform Law Commissioners, and distributed at a public meeting in 1985 in Connecticut.

⁶Martha Fineman, "Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce", Wisconsin Law Review, 1983:4, pp. 789-886.

community property act in Wisconsin. She differentiated between two types of law reform, which she labelled "symbolic" and "instrumental." In her model, symbolic law reform occurs when the reformers advocate a position which expresses an ideal goal, even if the practical implications of the reform do little to advance the goal itself. This was the case, she argued, in Wisconsin where feminists adopted the law of community property as an expression of the ideal of egalitarianism between the sexes, particularly within the family. But "rule equality," which she associates with symbolic reform in this case, is not the same thing as "result equality," the pursuit of which would have led to instrumental reform.

There is considerable debate in the feminist literature about the legitimacy of rule or formal equality versus result equality as strategies for reform on behalf of women.⁷ As Fineman makes clear, rule equality, which is based on the classical legal notion of "treating likes alike", has fallen short in remedying many of the inequalities faced by women precisely because it is based on a model of sameness in cases where men and women are not the same. Feminist legal scholar Catherine MacKinnon has

⁷See, for example, Williams, op. cit., or Finley, op. cit., Chapter 2, or Catherine A. MacKinnon, Feminism Unmodified, Harvard University Press, Cambridge, 1987.

postulated that the liberal theory of rule equality will always fail to produce genuine gains for women, racial minorities and other groups who suffer discrimination because it requires a "submerged referent" against which to measure sameness, and, in our society, the submerged referents are always the characteristics or experiences of white males.⁸

Fineman, a critic of the shared marital property law adopted in Wisconsin, argues, then, that a legal reform that took into account the real differences between the conditions faced by men and women would have better served women's needs. She firmly points out that her argument does not rest on any presumptions of inherent differences or on a "biology is destiny" point of view, but rather on an acknowledgement of the genuine, external or institutional forces that differentially shape women's and men's lives. In her words:

Difference of treatment is therefore desirable not because of women's inherently different internal qualities, but because of the discriminatory qualities of the institutions with which they must deal. The significant question of differences between men and women are externalized.⁹

She suggests that such an approach to family law reform

⁸Catherine MacKinnon, talk given at the Annual Women and the Law Conference, Oakland, CA, 1989.

⁹Fineman, op. cit., p. 818.

would be analogous to the reasoning used in fashioning affirmative action rules in the workplace.

Fineman offers one other dichotomy useful in understanding the contradictions in marital property reform. In addition to fault, marital property distribution traditionally rested on the courts' evaluation of relative contribution and need. According to Fineman, feminist reformers in Wisconsin tended to emphasize the significance of contribution over need because, in her words, "Need is a concept which might be said to characterize women as unequal...Contribution is an equalizing concept, while need demands an acknowledgement and evaluation of differences."¹⁰ Contribution is a concept from which it is easier to make symbolic statements about equality. For example, reformers in Wisconsin argued for the equal contributions that homemakers made to the accumulation of family property.

Contribution can be understood as a measure of an individual's activity in the marketplace, and therefore is a symbol of it, while need is a measure of dependency which symbolizes relatedness and obligation. Fineman's discussion of the tension between these concepts is thus reminiscent of arguments made earlier by Degler, Grossberg

¹⁰ ibid., p. 877-8.

and others regarding the contradictions inherent in women's family role.¹¹ Degler argued, in a sociohistorical framework, that women are trapped between a private or family sphere, in which sharing and collectivity are valued, and a public sphere in which individual rights are valued and protected. Similarly, legal scholar Frances Olsen observed that the "seemingly contradictory desires to be free and to relate with others in community present an important dilemma of liberal society" which recent reforms in family laws have failed to resolve.¹²

The dilemma described by all of these scholars also recalls Louis Dumont's theoretical distinction between holism and individualism as organizing social principles. Not only did Dumont relate holism to ideologies of hierarchy and individualism to those of egalitarianism, but he also proposed that members of a traditional holistic society will tend to value more highly the relations among people while members of an individualistic society will value the relations between people and things. Indeed, as Chapter Two describes in more detail, Dumont, Weber, and Marx all observe a significant relation between the commodity/marketplace form and the legal form of contract

¹¹Degler, op. cit., Grossberg, op. cit., Chapter 3.

¹²Olsen, op. cit., Chapter 3.

and private property.

In this study, the family seems to be the preserve of Dumont's holism in a larger society dominated by individualism. The debate about separate versus community marital property, therefore, expresses a wider and deeper debate about the appropriate organizing principle for our society. In this debate, the rights and needs of women are held hostage because it is they, more than men, who carry on the business of holism in their roles as mothers and wives. If Dumont is correct that individualism is a relative newcomer to human history far outshadowed by the longevity and influence of holism, then this small case study of a debate may shed some light on the ways in which an older ideology survives and its carriers fight to reassert it within a newer, encompassing ideology.

DEFINING THE PROBLEM IN CONNECTICUT

As in Wisconsin, the issue of marital property reform was first raised in Connecticut by feminists who framed it in terms of gender equality and economic partnership. The first public record actually pre-dates the formation of the Study Commission: On April 12, 1985, at a public hearing of the Judiciary Committee of the Connecticut state legislature, a female state senator proposed a bill to create a commission to study the Uniform Marital Property Act. In introducing the bill, she framed the issue as follows:

This Act reflects what actually is being practiced in most marriages, that is, a full economic partnership between the spouses.

Presently, Connecticut law treats all properties and earnings in a marriage as the property of the individual who earns it or accumulates it, until death or divorce. It does not recognize that marriage is a partnership, an equal sharing by husband and wife of the benefits and liabilities of marriage. I don't think that we in Connecticut should tolerate laws that would in marriage place one partner at a severe economic disadvantage in such matters as credit, shared property, inheritance, and life insurance benefits.¹³

Following the lead of the Uniform Laws Commission, and for political expediency, the feminists who first testified on behalf of this bill were also careful to portray it as a reform that would benefit the family unit. These are the words of the Executive Director of the Connecticut Permanent Commission on the Status of Women, which is a state agency:

Let me, in closing, say to you that we don't think this is just a women's bill, we think this is a family bill. We think it has enormous benefits to men and women in Connecticut. We think a principle that recognizes marriage as an economic partnership and promotes the principle of sharing in marriage for the benefit of both men and women is one which we are ready for.¹⁴

The same speaker, while summarizing the proposal as one favoring men, women, and the family, began her remarks by

¹³ Transcript of Public Hearing, Judiciary Committee, April 12, 1985, p.8.

¹⁴ ibid,. pp. 35-36.

enunciating the "women as economic victims" of marriage theme which dominates the public record. She cited a study conducted by her own agency in 1977, which showed the pattern of property ownership favoring men in the state, and documented the consequences of divorce. She also cited two particularly egregious court decisions in divorce cases where women who had clearly participated throughout their marriages in a "family business" were denied any share of it upon divorce because the business was held in the husband's name.

The clearest statement of the need for symbolic law reform, as defined by Fineman above, came from a prominent local law professor who had participated on the national level in drafting UMPA. In her testimony, she said:

It is time to move from patriarchy to partnership. It is time to move from outmoded law which said that in marriage husband and wife are one and that one is the husband to a law which recognizes spouses as equal. It is time to honor marriage as a partnership of co-equals.¹⁵

At this early hearing, the battle was not yet joined and few advocates were prepared to speak against UMPA. The proposal to establish a study commission was soon enacted. In the creation of the commission, the legislature established some of the ideological boundaries of the

¹⁵ ibid., p. 88

question by defining the categories of appointees who would serve: They specifically enumerated that the twelve commission members "shall include" representatives of the Permanent Commission on the Status of Women, the Divorced Men's Association and the Connecticut Bar Association. In so doing, they recognized, in some way, that the battle would be fought among men, women and the practitioners of "the law."

SYMBOLIC AND INSTRUMENTAL REFORMERS

The Study Commission held a public hearing on November 13, 1985. At a public hearing, any individual may sign up to testify. Such hearings are generally publicized through legal notices in the newspapers and through mailing announcements to organizations and individuals identified by committee members as interested in or knowledgeable about the issue being addressed. Most often, professionals and leaders of advocacy groups dominate such hearings. To the extent that "ordinary people" appear to testify, it is usually because an advocate has "recruited" people to tell their stories and illustrate a position. For this reason, the statements reviewed here should be understood as "official discourse" -- the language of people actively involved in the political process.

Just as in the Wisconsin case, the symbolic reformers repeatedly articulated a vision of women as unequal, economic victims under a separate property regime. The

sharing concept was equated with greater equality for women in the family. As in the earlier example, it was also associated with supporting the family unit. For example, a spokesperson for the Junior League, a voluntary women's civic association, said the following:

We see marriage as a partnership...Clearly, the non-earning spouse is disadvantaged by the current arrangement. We see UMPA as a means of strengthening the family unit by equalizing obligations, liabilities and assets. Now we are faced with a system where what is yours, is yours, what is mine, is mine. This is not conducive to the idea of sharing.¹⁶

The same speaker also made an important comparison between women's rights in the public sphere, which she believed to be greater, and her rights in the private sphere of the family:

The absurdity of the current laws become apparent, for example, when you consider the progress of women in the political arena. A woman can be, and has been elected Governor of the state, yet look at the gap between the laws and the realities of our society. She would be responsible for a multi-billion dollar state budget but would not have a legal say in her own family's financial affairs.¹⁷

Another speaker, representing the Women and the Law Section of the Connecticut Bar Association, took both a symbolic and instrumental position in her remarks

¹⁶Public Hearing, UMPA Study Commission, November 13, 1985, p.8.

¹⁷ibid., p. 8.

supporting UMPA. She did this by focusing on those aspects of the Act that would most directly remedy some of the most glaring inequities faced by wives. She cited a recent court decision in which a wife had worked as a purchasing agent for her husband's business. Over the course of their six year marriage, the value of the business increased from \$1 million to \$9 million. Upon divorce, the court awarded the full value of the husband's business to the husband, awarding to the wife about \$100,000 of property plus alimony for three years. The speaker claimed that UMPA would specifically remedy this kind of inequity, then went on to make a strong symbolic statement:

The Levy decision [described above] indicates that it is not the public policy of Connecticut to view marriage as an equal partnership. In this particular case, the woman lost. We would ask this study commission to consider UMPA in light of the need for a strong public policy in which marriage is an equal partnership.

She continued by arguing that this reform would better reflect the actual beliefs and practices of the community:

It is clear according to a 1984 study by U.S. Senator Dodd [citing an opinion poll conducted by one of Connecticut's senators] that a sense of equality is apparent in the management of household finances in Connecticut. In that study, 83 percent of women responded that major decisions about finances were joint decisions within the family unit. We would hope that this concept of joint decision-making as an equal economic partnership is also part of the law.¹⁸

¹⁸ibid., p.15-16.

It is interesting to note that the feminists who made instrumentalist arguments tended to focus on cases where the boundary between the family and the marketplace was crossed -- that is, cases where there was a family business. It was this paradigm, more than any other, to which these reformers returned to illustrate how women received unequal treatment under the law. I would argue that this is not surprising, given that the sub-text of this debate is about the conflicts between the values of the family and the marketplace. What better example to use, then, than stories about family businesses? The reformers are saying: Look what happens when a married couple takes the sharing values of the family into the individualistic world of business. When the sharing values break down, the law supports the individualistic principle. Moreover, the feminist reformers argue, men are more likely to assume this principle, and the courts are more likely to confirm their rights in property. Wives are left holding on to their sharing values without their share of property to show for it. I suggest, then, that this particular instrumental argument also expresses a more symbolic cause.

Several other "instrumental" arguments were made. It is more difficult to quote or summarize these comments because of their nature: In contrast to the crystallized, symbolic statements cited above, the instrumental remarks

tended to be detailed considerations of small pieces of the proposed legislation, attempting to predict their concrete effects. Most of the speakers who offered such remarks did not take a clear position in favor or against UMPA; they merely raised questions or predictions for the Study Commission to consider. For example, a family law attorney from a legal aid agency raised the question of whether or not UMPA would make an abandoned spouse more vulnerable to the debts incurred by a missing spouse than she or he would be under existing law. A spokesperson for the League of Women Voters asked the Study Commission to consider carefully whether UMPA would have an adverse effect on the disposal of property upon death. As is the case in any public forum, the symbolic statements were easier to make and to hear, and probably more compelling.

There was only one speaker who made a "symbolic" case against UMPA. He was a practicing attorney, and Co-Chair of the Estates and Probate Section of the Connecticut Bar Association. He opposed UMPA on two grounds: The first was, simply, that it would drastically change the nature of property in Connecticut, and he did not think such a change was necessary:

Essentially, in summing up, UMPA is a fundamental change in the property law concepts of this state and any other state that does not have the community property tradition. It is alien to the property law concepts of Connecticut...

It's going to require everyone, attorneys, judges, doctors, banks, brokers, realtors, business people, all Connecticut residents to learn new property concepts and this is my final question to you: Is all this worthwhile? We have a system that seems to be working. If it ain't broke, don't fix it.

Clearly, this speaker was not convinced that women or any other constituency were suffering any serious inequity, and therefore argued for tradition and consistency. His second objection, however, was more interesting: He argued that UMPA would increase family discord, rather than engendering the sharing and increased solidarity that others predicted:

Most importantly of all, forgetting what it does to the laws, this act will affect the relationships between spouses. It will add a potential friction to marriages that does not exist at present and you can say, well, this is true in community property states and it doesn't seem to be a problem. But those people have grown up under community property. We haven't. It is a problem there anyway. It's going to require the need for the public to use attorneys far more frequently...¹⁹

Were this speaker willing to accept the feminist position that women are currently economically disadvantaged within marriage, his statement might be construed as favoring the rule of traditional law to "ratify" the status quo, or the hierarchical nature of families. This is the role, Olsen argued²⁰, played by family laws in a so-called laissez-faire republican society.

¹⁹ ibid., pp. 6-7.

²⁰ Olsen, op. cit., chapter 2.

I would argue, though, that this speaker is pointing to another symbolic contradiction of UMPA: In an attempt to codify a highly elaborated version of family sharing, UMPA actually uses the means of the individualistic legal system. The speaker above points to this contradiction with dismay: If a husband and wife fail to "share" out of genuine good will and affection, then UMPA allows one party to sue the other to gain her or his fair share. Indeed, it may be logically impossible to legally require sharing; sharing is extra-legal behavior. It cannot be contained within a system which protects and enforces rights. The concept of rights is not opposite, but it is also not included in the concept of true sharing. Following the logic of Frances Olsen, one could argue that UMPA will not work because it is a misguided attempt to make the family more fair by making it more like the market -- that is, by giving spouses the means to exercise more individual rights. As Fineman's argument suggests, the concept of sharing, like need and dependency, does not fit comfortably with equality of rights.

SPEAKING UP FOR PRIVATE PROPERTY

Why are the concepts of need and sharing so uncomfortable in a system based on individual rights? A

brief return to Weber's analysis of legal rationality and capitalism helps to answer this question. According to Weber, a commodity economy requires calculability and certainty. In his words,

To those who had an interest in the commodity market, the rationalization and systematization of the law in general...constituted one of the most important conditions for the existence of economic enterprise intended to function with stability and, especially capitalistic enterprise, which cannot do without legal security.²¹

Under the common law principles of separate property, title to and ownership of property are synonymous. That is, the person whose name is on the title to property owns it and has full rights to manage it, sell it or give it away. This legal position protects third parties. It creates certainty and predictability. It guarantees a creditor or buyer that the property owner has the power to act freely. It enhances exchange.

Sharing, on the other hand, confuses commerce. It requires third parties to make deals with more than one person at a time. It increases the possibility that a seller may sell something that is not fully his. It reduces certainty. In other words, separate property laws speak to the needs of the market; they do not speak to the

²¹Weber, op. cit., p.304-5.

needs of the family.

The importance of title and ownership was explained to the Commission by an attorney representing a title insurance company. He described the concepts as follows:

...when we talk about title, I think we're concerned about legal rights that flow from incidents of ownership...Title is the evidence of ownership. It presents to the world certain information regarding rights in property...²²

From a classic Weberian perspective, he further explained:

I said that the record title is almost sacrosanct in Connecticut. By that I mean that we have to have certainty in our dealings with real property and that certainty is provided by the land records that go to the Town Clerk's office. You do a search of the title there and that will tell you what person or persons have free title to the property and what person or persons have various subordinate interests in the property and you can rely on that. Everyone in the world is charged with knowledge of the claims with respect to that property.²³

This speaker reiterated not only the significance of individual ownership, but also the reliance on legal procedures for legitimizing property rights and making the system work.

In our modern economy, access to cash and credit operate on the same principles. They rely, ultimately, on property rights. Thus, a similar position was elaborated to the Commission by an attorney representing a major

²²April 9, 1986, p.2.

²³ibid., p.6.

bank. He said:

I think the first thing I would point out is that the credit granting community likes one thing and that's certainty. It likes to know what assets are available in the event that there is a default and it likes to know what income is available in order to repay the debt. And any time there is uncertainty, then a credit granting community is, if not hesitant, ...is much more likely to enforce stricter underwriting standards than it might ordinarily.²⁴

This speaker argued that UMPA would create higher costs and greater hesitancy to lend because it would require lenders to take extra steps to insure certainty: For example, they would have to inquire about the marital status of individual credit applicants, and obtain the written consent of spouses in order to obligate marital property.

Under both existing law and the proposed reform, a number of contradictions arise when the rights of the marketplace confront the rights of family members. In almost all cases, the needs of commerce and free exchange supercede other considerations. Thus, the speaker above noted that even under current separate property rules, a creditor can now "reach" marital property in order to satisfy a debt: that is, a credit card company can pursue a wife to collect the unpaid debts of her husband, even if her name does not appear on the card or the bill of sale. Under UMPA, he predicted that banks would quickly design an

²⁴March 12, 1986, p.5.

agreement form stipulating that any major loan was presumed to be made "in the interests of the marriage" and that marital property would therefore be available to satisfy it. Banks would say to credit applicants, in his words, "Please keep your marital agreements among yourselves."²⁵ In other words, when one deals in the marketplace, one deals with marketplace rules.

In an interesting digression, this speaker also noted the power of history and tradition in shaping behavior. At two points in his remarks, he essentially said that it did not matter very much whether the law was changed or not -- people were likely to do what they have always done. Responding to a question about whether UMPA would compel lenders to consider the income of both spouses when reviewing a loan application from either one, he replied:

I would say that in a perfect world that would be true. I suspect, quite frankly, that what you are going to find is that credit grantors, like everyone else, have done things the traditional way, which is that traditionally, they have relied on the man's income. And therefore, [if] a woman comes in who doesn't have income and is relying on marital property income, despite all the laws, you are going to have reluctance in that area.

I heard Professor [Smith] say that the Act codifies what most couples come into the marriage with: the expectation that what is created during the marriage is ours. But that isn't the case, obviously. And creditors have never believed that. And probably wouldn't continue to believe it for some time after the

²⁵ibid., p.13.

Act, in any event.²⁶

This speaker explicitly states a theme of this study: The laws may change, but people may not change their behavior or attitudes at the same time.

It is also interesting to note that, however powerful the rules of the marketplace may be, they are still subject to the rule of the state. As the title insurance attorney pointed out to the Commission in his explanations about rules of title, Connecticut statutes grant the court the right to transfer title to property. They may do so under the common law principles of "equity" at the point of divorce or in other special circumstances. Their authority supercedes the wishes of individuals. In the next section, the role of this "judicial patriarchy" is explored further.

THE DOMESTIC PATRIARCHY VERSUS THE JUDICIAL PATRIARCHY

In his review of family law in the 19th century, Michael Grossberg described the development of a "judicial patriarchy" in which the property rights of the father within the family were being reduced as the degree of control and intervention by the courts increased²⁷. Indeed, as I elaborated in Chapter 3, the state appeared to be weakening the family unit, increasing the rights of the

²⁶ibid., pp. 20, 30.

²⁷Grossberg, op. cit. chapter 2.

individual and strengthening the direct relationship between the individual and the state during an historical period when the need for free wage labor was blossoming. Although the real winners in this shifting balance of rights and powers were not women as individuals, the real losers may well have been individual men within families.

It is therefore interesting to find the development of an advocacy group for "men's rights," the primary target of which is the state. Representatives of the Divorced Men's Association participated in the Study Commission and testified at the public hearings. Their message was that men's rights were being trampled in family law disputes. Although they may have been angry with individual women in their personal lives, they focused their public blame on judges, lawyers, and the courts. A representative from the Divorced Men's Association testified at the first public hearing as follows:

Laws are not the problem. The system is what's wrong. And it's the process whereby if you don't have enough money for professional representation, you're rolling the dice, particularly if you go before the courts in any state. I can attest from my own personal situation in this state -- it can be brutal and it can destroy your confidence in the legal system and in the whole process of law.

Family law has to be taken from the courts...

I'm concerned about the state intervening in a citizen's life (inaudible) until he dies in the sense that alimony goes on until he dies. The state reaches into the retirement, reaches into insurance.

... when a person gets married with one of these lease purchase agreements [referring to UMPA], there's going to be the husband and the wife, two lawyers and a judge in that bed. And if you're going to do that, then you best make sure that the system is equitable, is flexible and allows for independent determination of who's right and who's wrong and who owns what property.²⁸

The positions taken by the Divorced Men's Association clearly illustrate the historical developments described by Grossberg. The men who spoke on behalf of this organization felt powerless and disenfranchised. They repeatedly claimed that the courts had usurped their prerogatives as fathers, granting custody too often to mothers along with too much child support and control over visitation. They told angry and tragic stories about divorce settlements which robbed them of their earnings as well as of their family lives. They invariably blamed incompetent attorneys, tyrannical judges and an overbearing, anti-male family court system.

Several speakers representing different interests noted the broad discretion and powers of judges in family law cases, although not all speakers felt this was a problem. A spokesperson for the Family Relations Office of the courts testified that the entire legal doctrine of "separate property" was, in his words, "irrelevant" because the divorce statute granted the power to the courts to

²⁸Public Hearing, April 12, 1985, pp. 205-6.

"assign to either party any part of your estate..."²⁹

(The Family Relations Office is part of the court system. It provides mediators who work with clients and attorneys to fashion settlements before the parties appear before a judge.) During this same discussion, the Family Relations Officer entered into an exchange with an attorney from a legal aid agency who argued "You have to start with the idea that the practice in the State of Connecticut is not [consistent]...What happens in Hartford is not what happens in New Haven...is not what happens in Stamford..." The Family Relations Officer agreed that this was "a tremendous problem."³⁰

On another occasion, a well-known family lawyer testified that the "flexibility" of the courts under the existing statutes was beneficial. In his experience, the powers of the court were used well to correct the private imbalances between disputing parties:

...our society, our system has a way of building balances into it in very pragmatic ways. When there is an imbalance, our judiciary, particularly -- I deal with them on a regular basis -- I'm very impressed with their capacity to see through many layers of issues and to reach genuinely valuable conclusions in many, many cases. They make mistakes, but I would, too, if I were a judge...Our system is flexible.³¹

²⁹February 19, 1989, p.12.

³⁰ibid., p.19.

³¹January 22, 1986, p.12.

This particular attorney, then, saw the use of judicial discretion as valuable "flexibility" rather than as inconsistency, and apparently felt comfortable with idea that the courts could provide balance and justice when private individuals could not. However, when directly asked by one of the commissioners whether he was describing a system that "works relatively well", he replied, "You're not going to get me to say that."³² This man was appointed a judge the following year.

Each of these speakers clearly describes a court system with considerable power to intervene in and direct the private lives of divorcing people, at least in regard to custody, visitation and property. The family courthouse is clearly the home of a "judicial patriarchy." The personal interview data in the next chapter offers another perspective on the degree to which individuals accept or resist the authority of the judicial patriarchy.

³²ibid., p. 14.

Chapter Six

I AM THE LAW:
PERSONAL RESPONSES TO FAMILY LAWS

While public policy-makers debated for two years the Uniform Marital Property Act and the proper role of the state in dividing marital property, approximately 50,000 people were divorced in the state of Connecticut. Most of them were totally unaware that the debate was occurring. Moreover, as the data of this chapter will demonstrate, many of them would not have cared very much if they had known. The legal issues of concern to lawmakers and legal professionals are not particularly relevant, in the same terms, to people experiencing a divorce. The people who spoke at the meetings of the Commission to study UMPA, and the people I met who had recently been divorced, did not speak the same language.

In this chapter, I will explore the meaning of family law to individuals who have been divorced. In their own words and experiences, they speak about their family lives within and without the law. But, as I suggested above, they tend to describe their experiences in personal and individual terms; rarely did an informant have a great deal to say about marital property laws or the legal system as a whole.

The interviews also provide insight into the problems of need and dependency in American families, and the role of gender in structuring relations of dependency. Both men

and women speak with deep pain and confusion about their roles as parents and financial supporters of children after divorce, and complain about the contradictions between their personal needs and expectations, and the requirements of the law. Both men and women experience the law as harsh and inappropriate. However, men seem to experience the pain of being excluded from the relations of dependency, while women experience the pain of being trapped by them.

The informants in this study were randomly selected from among those who were contacted through the telephone survey reported in Chapter Four. At the end of the telephone interviews, each respondent was asked whether he or she would be willing to be interviewed at more length in person. Surprisingly, over half of the 400 respondents said yes. This result, alone, attests to the intensity of feelings and discontent that many people feel following a divorce.

I report below the responses of fourteen people with whom I held lengthy, face-to-face open-ended interviews. Twelve of these people had been divorced in Connecticut within the last eight years. The two other informants were a practicing family attorney, and the Director of the Family Relations Office in Connecticut. Eleven informants were white and three were African American; there were seven men and seven women. In all cases, I asked informants to reflect on their personal experiences, to

explain their understanding of the laws and the courts, and to describe their own personal values regarding marriage, family, property, and the law. I also asked questions about gender roles, race and class differences.

In reporting these interviews, I have changed the names and altered identifying information about the informants in order to protect the privacy of those who shared their personal stories with me.

CITIZENS, COMMODITIES AND FAMILY LAW

Marxian scholar Isaac Balbus has drawn a useful comparison between commodities under capitalism and "citizens" within the modern liberal state. In his essay entitled "Commodity Form and Legal Form", he writes:

If, in a capitalist mode of production, products take on the form of individual commodities, people take on the form of individual citizens; the exchange of commodities is paralleled by the exchange of citizens. A citizen, in turn, is every bit as "mysterious", twofold, and in fact contradictory a reality as a commodity.¹

Balbus maintains that "real" people, like real products, are "qualitatively distinct" individuals with varying needs and interests. Just as the bourgeois marketplace demands, however, that products be reduced into equivalences in order to permit exchange, the liberal or republican state

¹Balbus, op. cit., p. 575.

requires that individuals be reduced to equivalent citizens so that they may be "represented" in both democratic and commercial processes. In his model, representation is a social process governed by the same principle as exchange; in fact, he calls it "political exchange."

Balbus' analysis helps solve the problem posed earlier of the inadequacy of the legal doctrine of "equality":

The existence of political exchange or representation thus requires that qualitatively distinct individuals with otherwise incommensurable interests enter into a formal relationship of equivalence with one another, i.e. that the qualitatively different subjects become what they are not: equal. This relationship of equivalence, in turn, is made possible by the law...Each individual is made equivalent to every other individual, so that any one individual can represent any other.

Balbus goes further than Fineman and Finley who argued that the doctrine of equality requires a reductive comparison to assert that it literally obliterates knowledge of social origins in human relations. In his words:

The 'blindness' of the legal form to substantive human interests and characteristics thus parallels the blindness of the commodity form to use-value and concrete labor, and if the commodity form functions to "extinguish" the "memory" of use-value and concrete labor, so too the legal form functions to extinguish the memory of different interests and social origins...And, just as the commodity form "replaces" use-value and concrete labor with the abstraction of exchange value and undifferentiated labor-power, the legal form replaces the multiplicity of concrete needs and interests with the abstractions of "will" and "rights," and the socially differentiated individual with the abstraction of the juridical

subject or the legal person.²

In other words, the reality of socially related and distinct individuals is cloaked by an ideology of separate, decontextualized and private individuals acting of their own "free will" and protected or governed by "natural" (rather than social) rights.

Drawing on Marx, Balbus of course applies this analysis to the way in which the liberal legal form masks the inequalities of class and inhibits class consciousness. But what about the encounter between family law and the nature of a family? Is the family a "little commonwealth," as Demos described the Puritan model, with the patriarch acting with the authority of the state and its members acting as decontextualized, independent citizens? If so, is it also divided by the class relations of capitalism, as Engels argues, in which the husband/father is the bourgeois and the mother and children are the proletariat?³ Or is it something entirely different, following neither the logic of the commodity form nor the liberal legal form?

To varying degrees, modern families are still the locus of social relatedness. The legal form described by Balbus

²ibid., pp.575-6.

³Frederick Engels, The Origin of the Family, Private Property and the State, ed. by Leacock, International Publishers, 1972, p.136-7.

in which each of us is a "citizen" must pause at the family doorstep, but it does not necessarily stay outside. I argue that both the commodity and legal forms move in and out of the family, articulating with more traditional and holistic social forms. Conflict and contradictions are generated at the intersections. The data of this study demonstrate both the fluidity or articulation of social ideas, and the conflicts among them. For example, the proponents of UMPA, while trying to reclaim an ethic of relatedness and sharing, find themselves trapped by the confusing ideals of equality and citizenship. It leads them to the false hope that more rights will create more sharing. The analysis above suggests that more rights signifies more separateness and less sharing. The interview data discussed below, on the other hand, will demonstrate the degree to which individuals hold onto principles of sharing and relatedness in the face of laws of separateness.

Balbus offers one other concept that raises an interesting question about the meaning of the interviews with individuals who have been divorced. He discusses the "fetishism" of the law as a function of the creation of the legal, or "absolute subject", as Althusser described it. Because the liberal legal form rests on the assumption of citizens acting out of their own free will, the individuals governed by this form of law must believe that their

actions are constrained not by a social system, but by a universal and natural order with a life of its own. He concludes:

Commodity fetishism and legal fetishism are thus two inseparably related aspects of an inverted, topsy-turvy existence under a capitalist mode of production in which humans are first reduced to abstractions, and then dominated by their own creations.⁴

In this model, people are not likely to question the legal order because, Balbus argues, this would "presuppose individuals who conceive of themselves as subjects evaluating an object which they have created and over which they have control."⁵

The interview data clearly show, as Balbus predicts, the unwillingness or inability of individuals to question the legal order. In fact, most informants unabashedly claimed little knowledge of - or even interest in -- family law. However, this result does not necessarily prove Balbus' position. An alternative explanation can be found in the perspective of social anthropologists such as Gluckman, Moore and Greenhouse who argue that a great deal of human behavior takes place outside of the explicit rules

⁴Balbus, op. cit., p.576.

⁵ibid., p.574.

of society. In other words, people might be making decisions regarding love, marriage, children and divorce without reference to the law. Much of the time, family law might simply be irrelevant to families.

Is liberal legal ideology regarding the family, then, maintained by a fetishism of the law under which privatized Subjects "freely" and unconsciously accept the natural order of things, or is it imposed on families held together by other traditional forces which continue on in private with little regard to the public posturing of state and law? The evidence suggests that both of these explanations must be true at the same time in order for the ideological system to continue. Indeed, history makes clear that new ideas most often take hold where they fit gently over old ones, and do not disrupt the daily lives and expectations of the population. In this case, as Dumont explained, liberal ideas about individuality and equality are quite different and relatively new. They must offer a new mechanism by which to mask contradiction and gain legitimacy, as Balbus argues. But they must also live alongside more traditional ideas and behavior.

I AM THE LAW

When I asked Nick Antonio, who had been divorced four years earlier, what he thought the legal definition of a family might be, he replied, "I really could care less because, when it comes to my family, I am the law." Not

meant as macho bravado, the comment expressed his strongly held belief that his value system and behavioral expectations about family life and obligations superceded anything contained in the law. Although he acknowledged the powerful and painful impact the legal system had had on his life through the divorce process, he still believed that the law was a world apart.

In the area of family law, many people neither know about the law nor care about it. They maintain this position before, during and after a divorce process in which laws and legal actors intervene in the most private aspects of their lives. Although some people become self-made legal experts as a result of their experiences with the courts, and many will confess that their divorces were "learning experiences," most of the people I interviewed maintained a staunch and unapologetic ignorance of actual legal rules, particularly in the area of property. Some of their responses indicated a "fetishism of the law" in which they simply believed that the law was immutable and beyond question, regardless of how unfair or painful their personal experience had been. Other responses -- often by the same people -- illustrated the many other, non-legal rules and processes by which people managed and understood their family lives and property.

Nick Antonio is white, 44 years old, and a plumber who works on construction sites. From his own report, Nick is

a model family man. He had gotten married at age 21 and divorced 18 years later. He described himself as a "traditionalist" who thought he was doing everything he was supposed to do according to a set of values about which he was clear. He and his wife had four children. He coached Little League, talked to his kids, and enjoyed family holidays. Much to his surprise, his wife grew dissatisfied with their marriage. His divorce, although painful and bitter, had not changed his mind about the rules which governed his life. Those rules had absolutely nothing to do with civil laws.

Being a traditionalist -- and that's the way I was always brought up -- you're supposed to be married when you're 20, 21 years old, and that's exactly what I did. And I guess the first thing we did was get a house, and then we had kids, and went through the whole gauntlet, just like it was supposed to go...I consider my whole life up until now the way it's supposed to be, according to the book.

Nick was never very explicit about who wrote "the book," but he was very firm in his belief that there are rules and values about families. He had been raised as a Catholic by happily married parents who, he told me, still go dancing every week. Like many middle-aged parents with teenagers, he talked about the "good old days" of his youth, when life seemed more "black and white. If my father said to do something, you either said yes or you got your head clipped."

Nick's definition of family was simple and personal: "A family is a unit of people who work and play together. And enjoy life." To him, bearing and raising children was the central purpose of family life. In his words, the most important part of his life had been "Raising a family. Having the kids and then raising them, getting them going, trying to teach them what your values are." In fact, he blamed his failed marriage on his over-attention to the lives of his four children, and his lack of attention to his conjugal relation, or, in his words, "the man-woman relationship stuff."

When I asked him directly what he believed the legal definition of a family might be, he answered, "I wouldn't even want to venture a guess what it is under the law." As his first comment made clear, his own definitions of family life were more real to him than legal ones. He described his experience with the legal system through the divorce process as a shock, but as with almost all informants, he expressed his reactions in personal and emotional terms:

All of a sudden you realize there's more rules to the game than you anticipated. Believe me, I was shocked. But it was a learning experience...It's amazing what you go through. I can understand how people get shot. I can understand how people commit suicide. I can understand how people get beat up.

However strong his feelings were, Nick turned down almost every opportunity in our conversation to make general

comments or criticisms of the legal system.

The one time that Nick did offer a criticism of the law, he immediately justified it. He forgave the law for its abuses, because he clearly believed that it served the positive function in society of protecting the majority of good people against the irresponsible behavior of a minority of bad people. More importantly, he believed that protective function had little to do with him: His life was personal and moral; the law was for other people. It existed in some public sphere which was not meant to touch him. To the extent that the legal system had hurt him, it was only because he was the innocent victim of a system designed for someone else:

I think laws are made to protect the people that are getting beat on all the time, and there is a silent majority of us people who aren't beat on all the time. And they're very hard on us as far as what we're supposed to do, what we're supposed to pay...[The laws are for] the guys who don't pay. The guys who come home and beat the shit out of their wives. I mean, I never touched my wife in 18 years...

We're getting a little bit screwed, yeah, but that's the way it is. And I'd much rather get a little bit screwed and see some sonofabitch who took off on his wife and six kids get crucified. I really would...I don't believe in that.

These statements illustrate a web of ideas that combine a measure of "law fetishism" -- i.e. the law is the way it is -- with a statement of personal boundaries that separate the speaker from the real meaning or purpose of civil laws.

This pattern was repeated in the responses of nearly every informant. Several people told me painful stories and described the financial and emotional losses they had suffered. But they were rarely angry about the law or the legal system. They tended to attribute appropriateness to the law and the courts, and to blame their troubles on themselves, their spouses or their lawyers. For example, one woman told me a story about losing a considerable share of money in her divorce because her successful husband had "hidden" much of it in his business. Not only did she not receive the share to which she felt entitled, but she was left with an enormous \$25,000 legal fee at the conclusion of her divorce. When I asked her whether her divorce had turned out the way she had expected, she said "No, not at all." When I asked her what had gone wrong, she blamed her own misconceptions about the courts, and her lawyer:

I think you're deluded if you think the judge cares what he did to make you want to get the divorce, so of course that part of the process was wrong in my thinking. I guess the process was okay because the court couldn't help me find his assets, couldn't help me prove his assets. That was up to my lawyer and he didn't do it.

You know, realistically, if I have to be honest about it, the court couldn't do any more for me than it did...I expected it to be more like on TV: Oh, he's wrong and I'm right, and I'm going to make out really, really well. Boy, was I wrong!

They didn't care. And they really shouldn't have. You know, who wants to air everyone's dirty linens?

She concludes with a familiar public/private distinction: The work of the courts is public, and people should keep their family disputes private.

Another informant took personal responsibility for his ignorance of the law, and blamed the rest of his misfortune on his attorney. When I asked him whether he had known anything about family law prior to his divorce, he flatly said no. Had he learned anything about the laws through the divorce process? "Yeah. Women win in this state." He bitterly described his divorce settlement in which his ex-wife had received the full value of the family home and been allowed to maintain the mortgage he had gotten as a benefit through the Veteran's Administration. He had retained his business, but still felt that he had gotten a bad deal. In his opinion, the laws were fair, but the attorneys caused problems.

When you're financially secure, as a male, and a woman goes into court, she gets just about any damn thing she asks for -- if she has a good lawyer. And the key is having a good lawyer.

I think [the laws] are necessary, but I think a lot of people use them to their advantage. And if one person has a better lawyer than the other person, they're used against the other person...The laws are really to make an equitable settlement. When they're used against you through your stupidity, ignorance, or your lawyer's inabilities, they're used against you. You are very dependent upon this lawyer to be in your best interest, and lots of times people get lawyers who just aren't in their best interests. It's almost like they work for the opposite side.

A female informant said nearly the same thing:

Getting back to the fact that I really didn't know what the laws were, I think you're at the mercy of your attorney. Whether he even tells you what you can and can't do. Court officers don't tell you what you could get or you couldn't get...Nobody's gonna tell you what you could have gotten if they can get rid of this case easily -- if the people in it are blind.

Another informant staunchly refused to apply legal principles to his conception of his marriage or his divorce. When I asked him about the role of the government and the laws, he responded as if these were considerations from some other sphere of existence, unrelated to his own. He drew a sharp line between his experience and "legal aspects."

They [the government] gotta look at how it pertains to the law and the Constitution -- what's legally right. And then they have to look at what's morally right for families. Sometimes its difficult for them to do that if they haven't been through it. They're looking more at the legal aspect. Even through mine [his divorce] I didn't have that much problem, but I felt it was more a legal proceeding than anything else.

Contract is a very legal word. I didn't think of it in legal terms. I thought of it in moral terms.

The moral terms were religious. You get married and you stay married. You live happily ever after, you get old, and that's it. That to me is the marriage contract.

There was one informant, however, who had strong words of criticism for the laws and legal system. Bill Green is a 35 year old African American man and he believes the

family law system is racist. The real object of the laws, in his opinion, is to keep minorities poor and powerless.

I think our laws today...I think a lot of it is organized genocide. I think they are trying to wipe out, get rid of the poorer part of the populace, the people they consider undesirables. I think they are purposely trying to get them off the street and get rid of them. They use a lot of civil means to do this. Child support is a very good way to do it. You go look at who they put in jail -- You find me one white doctor, lawyer, or one white blue collar worker with a job.

I think racism and genocide have largely motivated [the passage of these laws] -- [they are] the reasons why they have not changed the laws, which were good and applicable at one time, because women were being so badly discriminated against.

More than the other informants, Bill Green has consciousness. As an African American male in a white-dominated society, he is not able to believe the law is neutral or natural. Viewing a legal system dominated by white men, he is less likely to feel that he is an "absolute subject" among other absolute subjects who act freely. The "fetishism of the law" requires that relations of power be obscured and that daily life appear as a seamless canvas without coercion or discrimination. In fact, the function of fetishism, from a Marxist perspective, is to blind us to power relations and make inequality appear natural rather than social. This point of view is easier to adopt when one feels part of, and

comfortable in the "natural order." But the experience of racism sets one apart from the majority and makes inequality and the relations of power too obvious and personal to ignore. Bill's experience with the courts in his divorce seemed to him an obvious example of a power elite using the law to control a less powerful minority. From his point of view, it was neither his law nor natural law.

One feature of Bill's story was common to many stories, and appeared to be the only problem for which many informants were willing to blame the legal system: Informants with minor children were often angry and dissatisfied with arrangements for custody and child support and believed that the laws and the court system were either inadequate or inappropriate in addressing these problems. As discussed earlier, the "judicial patriarchy" has considerable control over family arrangements. As Bill's story illustrates, the judicial patriarchy can protect not only the male-dominated interests of the state, but the white-dominated interests as well. Moreover, by focusing on the intrusive and often ineffective role of the courts in controlling the relations between parents and dependent children, the stories below begin to demonstrate the contradictions between the legal principles of individuality and the human but non-legal relations of need and dependency.

THE WHITE JUDICIAL PATRIARCHY

Bill and his wife have one son. When they separated, they agreed that Billy, Jr. would get the best possible education. Bill said that his wife promised to send Billy to a private school. Although they had no legal separation agreement, Bill agreed to pay child support and maintained his relationship with his son. When Billy was ready to enter first grade, his mother changed her mind and decided to send him to the local public school. Bill promised he would help pay for private school, but his estranged wife did not agree. In anger over his inability to prevail and retaliation for his loss of control over decision-making, Bill stopped paying child support. His wife immediately filed for divorce, seeking court-ordered child support payments.

Although angry with each other, Bill and his wife still felt they could share parenting of Billy, Jr. With their lawyers, they worked out a novel joint custody agreement in which Billy, Jr. would be able to live in one neighborhood and his parents would take turns caring for him. They presented their agreement to the judge, who overruled them and ordered sole custody to the mother. He ordered Bill to pay child support, and granted him "reasonable" visitation rights. This was Bill's first encounter with the white judicial patriarchy:

Both lawyer's commended us and told us what a great thing we were doing. Then we got in front of this judge and this judge said, "Oh no, it will not be that way." The lawyer's both told us our agreement was outstanding, it would be a landmark case, and a judge said "No, no. I'm not going to allow this to happen. I don't like it."

I don't want these words to come out of my mouth, how I feel about this. Basically, I think it boils down to superiority complexes and all kinds of ego problems that I think some judges develop. I just don't think he was ready for a couple of little "picanninies" to come in there and set a precedent in his court. I think it was as simple as that.

Angry and disenchanted, Bill moved out of state.

Although he still sees his son for holidays and part of the summer, he has been irregular in making his child support payments. His ex-wife has taken him back to court to collect, and he has been threatened with incarceration for contempt of the court orders. At the time we spoke, Bill was grudgingly paying child support under conditions he thought were grossly unfair. Bill was particularly outraged at his loss of rights as a father, and the imposition of child support requirements.

Let me start by saying that I think child support is necessary and important. But I think the way the child support laws are written today are antiquated, barbaric and ridiculous. Because they take no account of the fact that the divorce laws are equally ridiculous, and take all rights away from a father. Whether he be good, bad or indifferent, a father is not considered an equal parent in a divorce. From the moment you set that precedent, it's almost like a form of indentured service. You set a precedent that a father is not

a good parent; you set a precedent that a mother is innately the best parent for a child, and then you set an amount that this man must pay for the rest of his life -- well, it seems that way at the time -- for 17 or 18 years until the child reaches 18 or 21, depending on the laws of the state. You take all rights away from this parent to have anything to say about his child...and then you wonder why most men don't pay it. I think it's the most ludicrous ridiculous thing in the world.

He believed that somehow this particular turn in the law was a mistake exacerbated by egotistical and racist judges, but that higher principles in the law would protect his rights. He said that when he "got back on his feet" financially, he wanted to appeal this decision to the Supreme Court. His loss of rights was "unconstitutional." However angry and disenchanted he felt, he still had not rejected his very "American" identity and his identification with the ideology of legal rights.

Somehow, someone should have taken it [child support] to court on constitutional grounds by now. How can it be constitutional to say, "You aren't as good a parent," and then say, "You have to pay money or go to jail." That sounds to me like going to jail for a debt.

Right away, I had such a taste in my mouth for the courts that was totally -- I'm such an American, I was just confused. I kept trying to make sense out of what [the judge] had said, and it never came back making sense.

He summarized the "white judicial patriarchy" in these words:

I think they [judges] begin to develop superiority complexes that get augmented when black people walk into the court but that were there anyway.

They sit up on that pedestal and, oh that effects them. Before you know it, they begin to feel too much like god. Then, if they actually have racial problems, too, its just terrible.

While he had more race and class consciousness than any other informant with whom I spoke, he still tended to characterize racism and power relations as the personal, psychological problems of individual judges, and to believe in his American rights. Dominant ideology can be very powerful, even for those who suffer its contradictions most harshly.

Although Bill's story is unique, his sentiments about the powers of judges and courts were echoed by most of the people with whom I spoke. Both women and men felt abused by the "judicial patriarchy" when it came to children and child support. But their anger came from different directions: Like Bill, the men tended to feel the courts were intrusive and over-reaching; courts had too much authority to control their lives and redistribute their income. Women, on the other hand, felt the courts were not strong enough because the legal system made inadequate child support awards and was so frequently unable to enforce them.

One white male informant put the man's point of view very bluntly:

I think [the courts] get in the way. Because they're trying to push themselves upon a very personal thing -- two people's lives. Two people who want to share a life together. What the hell business is it of their's?

Nick Antonio, who stressed that he would continue to support and raise his children with or without court orders, still maintained that the courts are "very hard on us [men], as far as what we're supposed to pay, what we're supposed to do." He felt the government was too intrusive:

I don't believe that old legislators should be creating family laws because they're looking at the world with different eyes...They should protect children. Period. Always. First and always. But they should let the adults be adults. They get carried away with the Big Brother thing.

They forget that there's more than one side to a story. Some mouthpiece [lawyer] will come in here with a real smooth line, and he can tell the judge something, and the poor guy that doesn't have a good lawyer gets crucified. And that happens. Happens every day.

The woman's point of view was articulated by several informants. One woman was surprised to find that the courts could not compel her ex-husband to help pay for the children's college education. Because the legal age of majority is 18 years in Connecticut, the court's jurisdiction over parental obligations ends when the child turns 18. Another woman told a horrible story about alcoholism and abuse from her first husband. In the end, she said, she was deceived by her lawyer and the courts:

My first lawyer gave visitation rights to my first husband when he was beating the shit out of me. They lied to me. I signed the decree without that paragraph and they typed it in afterwards. And then when I saw it, I said, "How could you do this to me?" and he said, "Well, the judge wouldn't have approved it without that in it, and I knew you'd get upset. So I put it in after you signed it.

In this instance, her lawyer had assumed the role of the courts to act in a paternalistic fashion and usurp her parental rights.

A third female informant acknowledged that, at the time of the divorce, she felt so emotionally distraught that she was unable to negotiate a fair property settlement:

I was a total and abysmal failure. I wasn't in the right frame of mind to negotiate property. Property became not important to me. And I listened to his bullshit and allowed it to happen to me.

In the end, knowing that the property settlement was unfair, she gave up and "let him go." In her case, as in many others, the personal and emotional dynamics of her failed marriage and family life were much more powerful than the legal proceedings. She candidly explains that her decision-making was shaped by her emotional disappointments concerning her social roles as wife and mother, and her very personal sense of hurt and betrayal. At that time in her life, property and the law were practically irrelevant.

This same woman noted with resignation that her affluent ex-husband had stopped paying child support and his share of the mortgage payments three months after their divorce. Because of the cost of legal action, she never bothered to pursue it. As I reported in Chapter Four, more than one fourth of the women from the telephone survey who were entitled to child support payments failed to receive them. In our survey, we asked respondents whether they had ever chosen not to go to court to enforce a court order with which their former spouse was not complying. Approximately one third of the women (31%) and 15% percent of the men said yes. The typical reasons given were "inability to afford a lawyer," "not worth it financially," and "emotional trauma." These data lend more support to the argument that the family law system (including the lawyers who practice family law) is perceived both as a powerful and an inaccessible system which is largely unsuccessful in its attempts to insure equity in the personal relations of dependency.

The person who spoke most eloquently about the inappropriateness of the "judicial patriarchy" was the man who is in charge of running a major component of it. The Director of the Family Relations Office supervises the counselors and mediators who work with a majority of couples in the divorce process to help them settle

property, custody and visitation disputes. They are available to meet with clients and their attorneys at several stages in the negotiation process. Often, before a judge will agree to allow a trial, he or she will order the plaintiffs to have a "pre-trial conference" with a family relations officer.

Although he acknowledged that some people need the protection of the courts and the adversarial system to work out their differences, the Director of the Family Relations Office felt strongly that the philosophy of court intervention in parenting arrangements was fundamentally wrong:

The basic premise of the law is that we are divorcing spouses, adults -- okay, we're going to end your spousal relationship. But, yet we say: Somebody has to be the custodian of the children...Unless there's a problem, it shouldn't even be raised by the court or the attorneys. Let the parents determine it. I mean, they were parents before. Did the court come to your house and say, "Where are the kids going to live?" When you separated, did the court run into your house and say, "Wait a minute, you can't separate?" I mean, the minute you separate, the state has to take over here and tell you what to do. Why can't you just go into court, and the judge would say, "what about your children?" and you would say, "Well, you know, we're both parents and we'll take care of it."

It shouldn't be a question...The court shouldn't have to get involved unless you raise it. I'm not even sure the court has any business asking me about my children and how I'm going to raise them.

Clearly, the Director of the Family Relations Office was uncomfortable with the ability of the court to cross the public/private divide to determine the relations between parents and children. He believed, as many other informants did, that parents were or, at least, should be motivated by the non-legal forces of family life, including love and obligation.

SHARING, NEED AND DEPENDENCY

In their well-known book about individualism and American culture, Robert Bellah and his colleagues assert that the "first language" of most Americans is the "moral vocabulary" of individualism, and that most of us share alternative "second languages" in which we can speak about community and caring.⁶ In a more recent and problematic work of comparative legal analysis, Mary Ann Glendon asks these provocative questions:

At what point does the language of individualism in a society or in a legal system begin crowding out other modes of discourse? Does a country or legal system which gives highest priority to individualistic values come to be inhabited only by persons who put those values above all others and act accordingly?

⁶Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton, Habits of the Heart, Harper and Row, New York, 1985, pp. 20-21.

⁷Mary Ann Glendon, Abortion and Divorce in Western Law, Harvard University Press, Cambridge, 1987, p. 114.

My research suggests the opposite conclusion from that feared by Glendon. In the face of a public ideology and a sometimes intrusive legal system promoting and protecting the value of individualism, the people I interviewed seemed to speak the language of sharing and dependency when they spoke of their marriages and families. Bellah and his colleagues may have it backwards: Sharing and community may be our first language -- the language we learn at home. Individualism and competitiveness may be the language we learn later in life as we move into the public sphere. Like any first language learned as a child, the sharing language remains familiar and firmly in our memories. It is, after all, the mother tongue.

The themes most consistently expressed in almost all the interviews concerned the nature of marriage as a partnership and the disappointments and confusion that resulted when needs were not met and contracts were broken. In one interview after another, informants described their ideas about marriage as "traditional" and "idealistic." They told me they believed that marriages should be based on trust, love and sharing, and that they should last a lifetime. They spoke fervently about the values of commitment to family even as they described their bitterness and loss. When I asked them about their expectations concerning property in marriage, all of them

proved the point argued by the proponents of the Uniform Marital Property Act: people believe that money and property should be shared equally in a marriage. Although several informants were cynical about how they would behave differently to protect themselves in the future, most maintained that their basic ideas about marriage and family were not changed by their experiences of divorce or their contact with the law.

In describing the break-up of their marriages, many spoke poignantly about the loss of trust and betrayal of promises. More significant was the obvious confusion about dependency and security. The section above describes the conflicts over child support as a battle over dependants. I also asked informants about growing older, facing the possibility of being alone, and their ideas about caring for and being taken care of by other family members. The different responses illustrate an ideological tension and contradiction: Informants spoke glowingly about family and sharing, and defensively about being independant and taking care of themselves.

Anna Forman met her husband Bob when she was 16. She dated him for five years, getting married at age 21. She says now that she was not sure she loved him when they were young, but that she liked him enough to marry him. Her father told her that "she used to love with her head and

not with her heart." The dream of the ideal American companionate marriage seems to have guided her choice. She explains it this way:

Everybody was getting married. It was just something that you did. You got married and you had kids.

I think what it was -- I felt that he was compatible. We were compatible. And I felt that we would have a good marriage. That's probably a strange reason, but that was what I felt. We liked a lot of the same things, we enjoyed being together, and when you're that age, what do you know about love anyway.

As she describes it, they had a good and long marriage during which she grew to love Bob and feel content. Despite less than romantic beginnings, Anna felt strongly about her marriage contract:

Well, when I got married -- For better or worse, I would have stuck with him. If the guy became ill, I would have helped him out. I would have stuck with him because it was a commitment that I had. Unless he was beating me or it was a crappy marriage...But it was pretty good. It was better than most of the ones I've seen.

The point is you try to keep something together. It's very easy to break something up. It takes a lot more to hold something together.

Anna also felt strongly that marriage entailed sharing and reciprocity:

I think if you're in a marriage, you give of yourself. You do. And you don't expect somebody to sit there with a calculator saying, "Well, I

gave you this. You give that." It's not like that...Sometimes one gives more than the other and sometimes maybe the other gives more. Y'know, it has to work. You have to be committed to the person. You've got to be willing to sacrifice.

After twenty five years of marriage, Bob fell in love with another woman, and left Anna. In her opinion, he was experiencing a typical "mid-life crisis." She said that, at first, she would have forgiven him for having an affair. She seemed most angry at him for being so willing to give up on the marriage and leave her. She also notes that her husband treated their family as "a job"; when he had raised his children to college age and therefore "finished the job," he wanted to move on:

I think he betrayed me...I thought our relationship was built on honesty, trust, decency, loyalty and friendship. He failed. But I did that. I placed my love and trust in him...He deceived me. That's the long and short of it.

When you have 25 years invested in something -- all right, so you had this affair. But that's not what he chose to do. He wanted out. And if he looks upon our marriage as a job, I wouldn't want him back. I didn't look upon it as a job. It was my life.

She was also angry at him for deserting their two teenage children, expressing her disbelief and confusion about how Bob was treating his parental obligations:

I mean, it's one thing to leave your wife. But you'll always be their father...What would possess someone not to consider their feelings? You tell me. I don't know.

I think it's part of responsibility. It's part of being an adult. It's part of being mature. You realize that if you decide to have children, it's your responsibility to take care of them. A lot of people don't look at it that way...Because society has changed, I know that...Many people shirk their responsibility. And I think Bob had reached the point where he wanted to dump his responsibility...And he just went and dumped it all on me.

For all the disappointment and bitterness following their divorces, informants stood by their beliefs about sharing, trust, and commitment. Even in the areas of property, most people placed their beliefs in direct contradiction to the governing laws of separate property, insisting that marital property should be shared. At the same time, however, most strongly endorsed an ethic of independence. That is, when asked about the possibility of their own dependence through illness or old age, most adamantly claimed that they would always be able to take care of themselves. They tended to express their feelings on this issue with ideological statements about the virtues of self-reliance and independence. In some cases, there was a measure of "macho" or masculine ideology mixed in to defend the position that "a man can take care of himself."

As a group of people recently disappointed in their expectations of trust and sharing, these informants might have explained their feelings in terms of vulnerability and fear regarding their needs in the future. But this would have required an acknowledgement of a failed ideological

system -- that is, the continued belief in the necessity of family, sharing and dependency in the face of knowledge that such beliefs can be betrayed. Instead, most tended to put two ideological systems side by side, using each to justify different components of their experiences.

Borrowing the metaphor suggested by Bellah, it seems that following a divorce, many people are bilingual in the languages of need and individuality.

Consider the comments of Joe Brown, who was angry at his wife for leaving him and their infant daughter. Throughout our discussion, he articulated a very traditional understanding of marriage and family, which he attributed to his Catholic upbringing:

What I wanted out of marriage was for it to last a lifetime. I come from the old-fashioned school, where I believe that it should last a lifetime...Even in a bad marriage, I was willing to stick with it and let it work, even though we had problems. But it didn't work out that way...

Regarding money and property, he was aware that his views might not be upheld by the laws, but he still firmly held them:

It's ours. It goes to one goal...It belongs to both of you. I guess if you get into the legal aspects, if I go through another divorce, that becomes another subject. But with the intention of being married for the rest of your life...it should be fifty/fifty.

When I asked him what he imagined might happen to him as he grew older, though, his perspective was quite different. He hoped for a certain degree of emotional support from his family, but did not expect any financial support. Where his own needs were concerned, sharing ended and independence began:

I thought I'd be on my own...What it all boils down to is this: I don't expect my children to be responsible for me. Then again, I don't expect them to throw me in a convalescent home and leave me there and not visit. I do feel that kind of support goes with the territory. But financially or whatever, you gotta prepare for yourself. You have to provide for yourself.

Another male informant articulated the most extreme positions on these themes. Shortly after his divorce, Adam Graham was in a severe car accident that left him paralyzed from the waist down. At the time of our interview, he was an energetic activist for the disability rights movement. Requiring a wheelchair, Adam lived alone and was able to drive and get in and out of his car without assistance. Concerning marriage and property, he said the following:

Marriage is a partnership. That's what it's all about. I still feel that's the way it should be...[A paycheck] is theirs, whether one person makes it or both make it. It's a joint effort and it's to be shared among the family, whether its just husband and wife or kids...You're a community. You're a little basic community, and you all work together.

But concerning his own needs, whether as a result of his disability or simply in terms of the marriage relationship, the concept of dependence was intolerable:

You want me to be very honest? If I couldn't take care of myself, I would take 30 Valium and drink a pint of liquor...As a matter of fact, the 30 Valium are put away...You just go to sleep...Not a burden to anybody else. That's probably the one thing that bothers me the most, even in marriage. Being a burden on somebody else.

Like Adam, several of the male informants expressed what seemed like divergent values at different points in our conversations without any apparent discomfort over the contradictions. Like parallel lines that never converge, each set of ideas made sense in its own terms, and appeared to help the informants make sense of a portion of their experiences. The ideologies of dependence and independence coexisted in their lives.

For the women, the ideologies coexisted but the tensions or contradictions between them were more severe. Because women in contemporary American society are more likely to be assigned a greater responsibility for meeting the family's personal and emotional needs, and are also given greater social permission to acknowledge those needs, they are more likely to feel the impact of the collisions between the ethic of sharing and the laws of individualism.⁸ This came through clearly in my

⁸There are now many bodies of literature that deal

conversations with Helen Wallace. I asked her what she thought the terms of a marriage were:

Well, that's a pretty deep question because things are going through my head that I grew up understanding through my mother. Well, in her mind, a marriage was where you got taken care of all your life...

I look at my daughter and son-in-law. I think they have an ideal marriage so far. Sharing. They share. And that's really nice. They share thoughts and dreams and hopes...

But Helen had seen a lot of disappointment. At the time of our conversation, she was in her second bad marriage with an alcoholic husband. She admitted to me that she was staying in the relationship because she and her husband were comfortably separate in their lives, and she did not want to risk losing any more money or standard of living through a divorce. When I asked her about the possibility of her own dependency, she became adamant:

with the division of sex roles in modern Western society, and the assignment of emotional and nurturing behavior to women in families. For an historical perspective, see Degler, At Odds, op. cit.; for a psychological perspective, see Nancy Chodorow, "Mothering, Male Dominance and Capitalism" in Eisenstein, Zillah, ed., Capitalist Patriarchy and the Case for Socialist Feminism, Monthly Review Press, New York, 1979, and Carol Gilligan, In a Different Voice, Harvard University Press, Cambridge, 1982; for classic anthropological treatments, see Elizabeth Bott, "Urban families: conjugal roles and social networks," Human Relations, vol. 8, 1955; Rayna Rapp, "Family and class in contemporary America: notes toward an understanding of ideology," and Barrie Thorne, "Feminist rethinking of the family," both in Thorne and Yalom, eds., Rethinking the Family, Longman Press, New York, 1982.

I kind of take care of myself...yea, I take care of me. [Would you ask for help?] No. [Would you ask your kids?] No. They would attempt to take care of me if they could, but I'd be less apt to call on them.

There was an amusing situation that happened to me a couple of weeks ago...something happened to one of my knees. I was really very angry with my husband because he called my daughter and her husband and he didn't know what to do for me and he was just out of it...And I was very angry at him. I didn't want their help. You know, I could take care of myself.

I asked her if she thought that being independent was the best way in which to live. Breaking into tears, she answered:

Oh, no, definitely not. It would be nice if you could depend upon somebody else...This is really painful.

As Bellah observed, the pain of human dependency in a society that extolls independence can be great. All of the people with whom I spoke felt that pain through their divorce experiences, although women were more likely to articulate it than men. Both women and men blamed their lawyers and spouses for their pain because those were people with whom they had visible social relations. The fetishized law, on the other hand, escaped blame. To many, it seemed empty of human relations and irrelevant to them. The next chapter offers some insight about how fetishism or mystification of the law is maintained.

Chapter Seven

RITUALS, COMPLEXITY AND MYSTIFICATION

When I began this research, I imagined that observing the activities that take place in the courtroom would be essential to understanding the power and significance of legal ideologies. Like any anthropological observer entering a strange culture, I soon learned that I was wrong. As anthropologists do, I discovered what is patently obvious to those who participate in the culture: To the majority of individuals going through a divorce, the courtroom is largely irrelevant and peripheral. Often, the parties to a divorce go to court only once or twice, where they sit bewildered by the swirl of unexplained activity around them, and they do or say very little. For the litigants, most of the action in the family law process is somewhere else.

Nevertheless, the courtroom, full of activity, ceremony and costumes, has meaning. It is, as I imagined, an arena for theatre and social drama. As a physical place, the courthouse makes a significant statement about the presence of the state. In the two cities where I conducted observations, the courthouses were large, ceremonial buildings in prominent places, staffed by guards and sheriffs and other expensive symbols of state authority. If these are not, as I originally imagined, structures and

rituals designed to create legitimacy and impose legal ideology on the citizenry, then what purpose do they serve?

I propose that the rituals, drama and physical prominence of the courts do, in fact, serve the purposes of legitimizing a culture and an ideology, but they do so for a sub-group, rather than for the community as a whole. Courthouses and courtrooms are for legal professionals: lawyers, judges, and other court officers. To legal professionals, the swirl of activity in the courtroom is intelligible and important, as cultural ritual is to any insider. In fact, these rituals and activities serve the larger function of separating or segregating the world of the legal insider from the world of her or his clients. They help to create and maintain boundaries.

In the classic anthropological theories of Durkheim, Gluckman and Turner, ritual activity is explained as a process of structuring experience and communication in order to contain or disguise social conflict and create a sense of community through emotional or transcendent experience. In Secular Rituals, anthropologists Moore and Myerhoff apply these ideas to modern, secular settings by arguing that ritual activity on the sports field or at the political rally serve to mask conflict and reinforce community just as they do in traditional or simple

societies.¹ Based on this research, I argue that the secular ritualism of the family courts serves to mediate or mask social contradiction, but not by creating a sense of a community of the whole. By contrast, I suggest, rituals in a complex society may manage social contradictions by reinforcing stratification and complexity. The survival of contradictory ideologies in a complex modern state may depend on the ritual maintenance of complexity -- rituals that keep groups and ideas apart. This process of ideological segregation is one concrete example of "mystification" at work.

The essential process is the same as that described by Turner and others. In fact, I am only proposing that the secular rituals of the courthouse have a second function after they have accomplished the first: That is, first they serve the traditional function of affirming the identity and solidarity of the insiders, the legal professionals. Then, they serve the second function of strengthening the boundaries between the insiders and the outsiders. As legal rituals create sense and security for judges and lawyers, they increase the lack of sense and insecurity for the litigants who must participate for a short but important time in their world.

¹Sally F. Moore and Barbara Myerhoff, eds., Secular Ritual, Van Gorcum, Assen/Amsterdam, The Netherlands, 1977.

It is by now a truism of modern sociology that professions flourish in sub-cultures marked by distinct jargon, symbolism, and internal hierarchies of power and prestige. This is certainly true of the legal profession and has been documented by others.² What is perhaps more remarkable about the culture of the courthouse is the degree to which it contrasts with the ideology of law as formal, rational and disciplined. In my experience, the courthouse was more like a village marketplace than the formal and orderly seat of justice that I had expected to find. Just as a traditional market can be the setting for noisy activity, diversity and complex interactions across class, race and other boundaries, so too, the modern family courthouse is a busy, disorderly central place.

A DAY IN COURT

At 9 a.m. every weekday morning, people begin to gather in the lobby outside the courtroom where family cases are heard. The Connecticut Superior courthouse is a large state building that houses offices and courtrooms for a variety of civil and criminal matters. The main family courtroom is located at the top of the stairs on the second floor. There is a small lobby with one bench outside the

²Cynthia Fuchs Epstein, Women in Law, Basic Books, New York, 1981; Eve Spangler, Lawyers for Hire, Yale University Press, New Haven, 1986.

swinging double doors. This is where people congregate to wait for their case to be called.

The start of official court business is not prompt. In fact, at 9 a.m., most of the people congregating in the lobby are clients anxiously waiting for their attorneys. There are not enough places for people to sit; many stand, smoke or pace.

At about 9:15, the lawyers begin to arrive. Often, they greet each other before greeting or acknowledging their clients. Some stand in small clusters, telling stories and jokes. Others are businesslike, reading papers and making notes. The interactions between lawyers and clients are often awkward and brief. In many cases, the lawyers and clients barely know each other, and have difficulty finding each other in the lobby. The clients are usually anxious and distressed. They do not know what to expect or what to do. Many have been told, either by their lawyers or by a court notice, that they have a court date that day, and that court begins at 9 a.m. They are uncertain as to why nothing seems to be happening. Some lawyers quietly explain things to their clients; others are curt and controlling, saying only, "Wait here," or "Go sit down," as they move through the area chatting or doing business. Because of the mix of clients and attorneys, the mood in the lobby is simultaneously tense and jovial.

At approximately 9:30, the Clerk and the Sheriff take their positions in the courtroom, signalling to the insiders that the Judge is about to enter. Lawyers motion their clients into the courtroom to take a seat. The Sheriff rises and says, "All rise" as the Judge enters to take his or her³ seat on the bench. As he does so, the Sheriff ceremoniously recites the opening chant of the day: "Hear ye, hear ye: This session of the Superior Court of the State of Connecticut is now open, the Honorable Judge James Smith presiding."

The Judge is wearing a black, flowing robe. The Sheriff is wearing the uniform of a law enforcement officer, with handcuffs and a nightstick on his belt, but no gun. He carries a portable radio, and stands or sits by a podium along the side of the room near the door. The Clerk, a young attorney who assists the Judge and keeps track of the files during the day, wears business clothes and sits at a table below the Judge. The stage is set.

Amid a considerable amount of bustle and activity as lawyers arrive late or confer with their clients, the Judge begins the morning by "calling the calendar." He calls off

³At the present time, the State of Connecticut has approximately 20 women judges out of approximately 150. I never had the opportunity to observe a woman judge. To accurately reflect my observations and the current majority of male judges, I will use the male pronoun in referring to the judge in the remainder of the text.

the names of the cases listed on the calendar for the day. If they are present, the lawyers call back "Ready." If nobody responds, the Judge says "Mark it off," which is an instruction to the Clerk that the case is "off" the calendar. Sometimes, a lawyer will respond with a brief request to the Judge that the case be continued or postponed to another day. Other times, the lawyers are late for this roll call, and their bewildered clients try to speak up or gain the Judge's attention when they hear their names called. If the Judge notices them, he generally asks them if they are "ready," to which they often timidly reply that they do not know where their lawyer is. The Judge says, "I'll mark it ready."

When the calling of the calendar is completed, the action begins. Attorneys move up to the front of the courtroom and cluster in the area between the gallery seats and the bench. Like buyers at an auction, they compete for the Judge's attention. The fastest and most assertive attorneys get heard first. The Judge sorts out those cases which are still contested -- that is, the parties have not yet reached a settlement -- and assigns them to one of three Family Relations Officers or Special Masters for a "pre-trial conference." As some attorneys and their clients leave the room to meet with a Family Relations Officer, the Judge seeks out those cases which are "ready to go." Although he works loosely from his printed

calendar, the order of business seems fluid, depending on who is there on time, who is "ready to go" and who has an urgent problem.

Sometimes, an attorney is in court representing more than one client on the same day. He or she may be unavailable at the moment the Judge is ready to hear his or her case. One attorney/client pair may be in the room and ready, while the other pair is not. "Where is Mr. Johnson, now?" the Judge may ask. "He's down the hall on another matter, your Honor," the opposing attorney may answer. "I'll go get him." As he does so, the Judge may agree to hear another case. An attempt is made to keep business moving and use time efficiently, but the order of business is unpredictable and somewhat informal. As the Judge and attorneys knowingly manage the flow of activity, the clients generally sit quietly in the courtroom or in the lobby, waiting to be summoned by their attorney. As the day goes on, many of them "catch on" to the pattern of activities and the predictable delays, and begin to take more opportunities to leave for a smoke, a snack or a walk.

Down the hall, another scene is unfolding. The Family Relations Officers and Special Masters who act as mediators in divorce actions have individual offices on a long hall around the corner from the main courtroom. The Family Relations Officers are full time staff members of the Family Division. The Special Masters, on the other hand,

are experienced attorneys who have been appointed by the court to periodically perform this function in order to help relieve the "log jam" of cases. On any given day, these senior "insiders" may be in court to act as Special Masters, to represent clients, or both.

The rooms on this hallway are numbered, but the names of the mediators may not be printed on the doors because they change from day to day. While calling the calendar, the Judge has assigned cases to mediators by name: "Franconi." "O'Neill." "Bergman." The clients come down the hall to find the mediator to whom they have been assigned; some are accompanied by an attorney while others are not. They look uncertainly up and down the hall. The hall is poorly lit. There is one bench. Often, the mediators have not arrived promptly in their offices. Some, if they are practicing attorneys, are "down the hall on another matter," or simply late. Sometimes, the full-time Family Relations Officers are engaged in staff meetings or other functions. By 10:00 a.m., approximately 15 to 20 people are standing along the hallway waiting. On one occasion that I observed, people stood in the hall until 11:30 before a secretary finally arrived to announce that the Family Relations Officer had had trouble with his car and would not come in that day. His cases were hastily reassigned to the other Special Masters, who already had full schedules.

Inasmuch as this hallway hosts several sets of divorcing couples in close quarters, the tension is high. Most husbands and wives avoid each other by turning their backs or finding separate places to stand. Often, as they wait, the attorneys "do business" in the hall: They review facts and information with their own clients, or they begin to posture or negotiate with the opposing attorney. The situation creates an odd performance requirement: The attorneys are there as advocates for clients who are often feeling angry, bitter or aggressive toward their spouse; it is an adversarial situation. On the other hand, as professionals and insiders, they are putting in another day of work with other attorneys who may be friends and colleagues. Although they must represent their clients, they are often strangers to them. The attorneys seem to feel greater kinship with each other.

This, of course, is true in most legal proceedings. Attorneys must often behave as aggressive adversaries toward individuals to whom they bear no ill will, or with whom they may actually be friends. However, the family law setting seems to accentuate this theatricality because the parties are involved in disputes that are more personal and emotional. As their advocates, the attorneys must assume at least the pretense of a supportive relationship with clients that often includes an unusual degree of intimacy. After all, in order to represent a client in a divorce, an

attorney must often hear about the finances, love affairs, and childrearing disputes that may enter into the settlement process. Moreover, the scenario in this little hallway, as I have described it, is drama in a small theatre: it demands skill and subtlety from the players.

The responses by attorneys to this requirement ranged from businesslike and respectful to flamboyant and rude. However, the interview data suggest that attorneys are not very good actors. As described in Chapter Six, many respondents blamed their attorneys for not genuinely representing their interests. Many actually said they believed their attorney was helping "the other side," or was more inclined to believe the other attorney than to believe the client. The courtroom drama, in this case, seemed to reinforce the insider status of the attorneys and increase the alienation of the outsider clients from the legal process.

On an ordinary day, the mediators begin to usher clients and attorneys into their offices by approximately 10:00 a.m., for negotiation sessions that last anywhere from fifteen minutes to two hours. If the parties do not agree on a settlement, their day in court is over. They leave the courthouse to await the next round of offers and counter-offers. If, however, they reach a complete settlement with the help of the mediator, they may return to the main courtroom to be heard by the Judge.

Meanwhile, back in the courtroom, the Judge is busy holding court. First, he hears the cases that are "ready" -- that is, cases where the parties arrive in court with all issues settled. In many of these cases, only one attorney and his or her client is present. In a no-fault state, the other party does not need to appear in court, as long as the Judge is satisfied that the defendant has been properly notified. In other cases, two sets of attorney/client pairs are present, and in some cases, one attorney is there to represent the plaintiff, and the other spouse is present without an attorney. The attorneys motion for their clients to step forward from the gallery seats, and all parties sit down at a table a few yards from the Judge.

The attorney for the plaintiff (the party who initiated the divorce) "puts on" the divorce. The attorney motions the client to take the stand, stage right. The Clerk motions to the Client to remain standing, raise her or his right hand, and repeat the oath of truthfulness. The client then sits, and is asked by the Clerk to state her or his name and address for the record. The Client recites this information, often being asked by the court stenographer to spell or repeat some information.

The attorney then begins to ask the short, standardized list of questions: "Is your name Mary Smith and were you married to the defendant on April 1, 1975?" "Yes." "And are

there two minor children, issue of this marriage, named Jonathan, aged 5 and Ellen, aged 3?" "Yes." "And are you stating here today that your marriage has broken down irretrievably and that you are therefore seeking a dissolution of your marriage from this court?" "Yes." The litany of questions is short. Through this series of yes/no questions, the attorney must establish the bare facts of the marriage, the desire for a divorce on the grounds of "irretrievable breakdown," the jurisdiction of the court (the plaintiff must have established residency in the state). The attorney must then present the terms of the settlement. If they are simple, he or she may recite them as yes/no questions to the plaintiff. If they are more complex, the attorney will make reference to the settlement agreement which has been handed to the Judge, and simply ask the client to acknowledge that he or she understands and agrees to the terms. As this litany of questions proceeds, the Judge often flips through the pages of the file, reviewing the paperwork and the settlement. Although this exchange is "on the record" and therefore bound by a certain degree of formality, the Judge has the most discretion to be conversational and to interrupt with questions or clarifications. If the attorney does not do so, he will always ask a client who is not requesting alimony: "Do you understand that by not requesting alimony today you waive your right to ever ask the court to order

alimony?" When all of the questions have been asked, and the Judge is satisfied that nothing is unusual or out of order, he says, "The dissolution may enter," as he hands the file to the clerk. The entire ritual takes less than five minutes.

There are some cases that vary slightly from the model described above. For example, if the mother is receiving welfare, the state becomes an official third party to the divorce. The state is then represented by an attorney from the state Attorney General's office who intervenes to ask the Judge to order the non-custodial parent (usually the father) to repay the state the money paid out as welfare benefits to the custodial parent (usually the mother). This, too, is a ritual formality. "The State" usually asks the Judge to order payments of \$5 per week. The location of the non-custodial parent is often unknown, and there is little expectation that the money will be paid. However, in order to establish its "right" to collect repayment of its welfare benefit, "The State" must have a lawyer present to represent its interests.

The courtroom ritual of divorce may vary in other small ways. If one party is present but unrepresented, the Judge may feel uneasy about the consent or understanding of that party and may choose to ask him or her a few questions. Sometimes, the Judge asks the unrepresented party to take the stand and be sworn in. Other times, he may simply ask

questions from the bench as if in conversation with the unrepresented party who remains seated at the table. Whatever variation takes place, no uncontested divorce takes more than ten minutes before the Judge.

In each of the variations described above, the Judge is quietly applying the rules of testimony and evidence in deciding when statements must be "on the record," when they must be under oath, and when informal conversation is sufficient. Presumably, the Judge and the attorneys share a mutual, unspoken understanding of how the rules are being manipulated in these brief exchanges. However, in my observations, this is never explained to the clients. To the naive participant, there are no clear rules as to whether or when it is appropriate to speak to the Judge, and whether or when the Judge will speak to you. As a moderately informed observer, I sometimes knew what was happening, and sometimes I did not. The rules of this ritual are known only to the insiders.

For the disputants, this five minute scene in the divorce drama is the ritual climax of the conflict between the public and the private, the family and the law. As the interview data suggest, many people expect that they will be able to tell their personal stories when they finally get their day in court. They expect an opportunity to tell the Judge that they were betrayed, cheated or hurt. When that day arrives, however, they learn that their personal

story has little place in this public ritual. It is irrelevant. As one of the women I interviewed explained, with deep resignation:

I think you're deluded if you think the judge cares what he did to make you want to get the divorce, so of course that part of the process was wrong in my thinking...They didn't care. And they really shouldn't have. You know, who wants to air everyone's dirty linens?

While this woman was clearly trying to make sense of her experience in court, the disillusionment she felt was clear.

The legal ritual is short, dry and impersonal. As it ends, the lawyers shuffle papers, close their briefcases and stride out of the courtroom. Their clients follow behind, often with tears in their eyes. However unhappy their marriage or bitter their divorce negotiations, the human bond of kinship has been severed in a few moments by the cold blade of the law. As they leave the courtroom, many people visibly feel the pain of the wound.

The courtroom proceedings I have described so far are those that ordinarily occur on days that are scheduled for "short calendar": the schedule of cases which can be handled quickly by the Judge. There are also trials in divorce cases which can take hours or even days of courtroom activity, and which can include a great deal of personal "dirty linen." These are scheduled on different days. Such trials come closer to the popular image of

divorce cases portrayed on television or in movies in which husbands and wives testify and accuse each other of cruelty, adultery, child abuse and so on. These trials may also include the testimony of "experts" such as psychologists, accountants and property appraisers. Such a trial will only occur in cases where the parties are unable to reach a settlement through negotiation and mediation, and must therefore argue before a judge about child custody or the division of property. A full-blown trial is also likely to occur only when the parties are sufficiently affluent to pay attorneys the considerable expense of a trial, or, in rare circumstances concerning custody or abuse of children, where the parties are represented by legal aid attorneys.

Although these trials offer a significant variation in the family law process, I have chosen not to focus on their content in this research. Statistics from the Connecticut courts indicate that only 11% of all family cases are ever scheduled for a trial; of those, many are settled before the trial concludes. In other words, complete trials are rare and affect only a small minority of divorcing couples. Moreover, while they contrast, on the surface, with the impersonal form of the brief, uncontested divorce ritual described above, I believe that they have little impact on the real application of the law in divorce settlements. As a family judge explained to me in private

during a break in an extended trial, he was cynical and hardened to the stories of betrayal and lost love. He said, "She'll cry and accuse him of this, and he'll accuse her of that, and in the end, they'll wind up with exactly what was recommended to them before the trial began." I suspect, therefore, that divorce trials are a "cultural survival," left over from the days when fault and moral failure were more central to family laws, and are most often used to meet the emotional needs of people who can afford them.

In the pages above, then, I have described much of what takes place in the first few hours of court on an ordinary "short calendar" day. After the Judge has heard the uncontested and "ready" divorce cases, and while other parties are busy around the corner, meeting with or waiting for mediators, the Judge will hear a stream of miscellaneous short motions. Once again, the courtroom resembles a marketplace, as attorneys hurry in and out, competing for the Judge's attention in no apparent order. The short motions may include requests for temporary support orders or resolutions of small, contested matters about finances or visitation. Occasionally, an attorney or an individual will appear seeking an immediate restraining order in a domestic violence case.

At approximately 11:00, the Judge often leaves the bench and the courtroom. He is sometimes out of the room for an hour. To the clients in the courtroom, he simply disappears without explanation, and they sit and wait for him to return. The lawyer/insiders, however, know that he has retired to his chambers where more business may get done.

BEHIND THE SCENES

I was granted unusual permission by a family law judge to sit in his chambers and observe several full days of activity "behind the scenes." I learned something that all insiders take for granted, but that few outsiders know: The Judge holds court, with lawyers, but without clients, in his office. This is standard operating procedure, and is governed by legal principles and rules. But, once again, they are rules known only to the insiders. When clients complain later, as they often do, that the attorneys and the Judge made a deal that they knew little about until the last minute, they are often right.

When I arrived to spend the day observing Judge Jones, he was usually busy at his desk, making phone calls, reading mail and reviewing files. When his Clerk arrived, he would briefly review the calendar with her, and discuss any potential scheduling problems or emergency situations. At 9:15 or 9:30, he would take the bench and the public day would begin.

A few hours later, after hearing 5 to 10 cases and motions and assigning the rest to mediators, Judge Jones would return to his chambers. He might return phone calls about other business to which a Judge must attend. But, as he settled in at his desk, attorneys and other court officials would cluster in the halls by his office. Judge Jones had two doors to his office. At times, the traffic in and out was dizzying.

To my surprise, attorneys sought out the Judge in his chambers, in an apparently ad hoc fashion, to seek his help in resolving difficult cases. They arrived without their clients. In fact, when I questioned Judge Jones about this, he explicitly told me that he does not see clients in his chambers because he does not think it helpful or appropriate. During these meetings, the Judge seemed to act in the capacity of a mediator. These meetings often began, as business meetings often do, with a short prelude of personal conversation or storytelling. Some attorneys seemed to know the Judge and feel at ease with him, while others did not. Once the real business of the session was raised, however, all the parties adopted a serious demeanor. The Judge listened, reasoned, cajoled and advised. When the discussion concerned property and support payments, he took out his calculator and put figures on the table. He cautioned attorneys and instructed them: "You can't really raise that argument,

Bill," "I won't order that unless you can show me some harder evidence." Through the course of my observations, I saw about half of these meetings end with an apparently successful resolution, and the other half end with the result that the attorneys would have to make their best case "on the record" -- that is, argue and put on evidence in open court.

Judge Jones was quite generous, and even eager to allow me to sit quietly and observe these discussions. He told me he was sometimes the most effective as an arbiter in this setting. In my observations, all the parties acted professionally and ethically, arguing as best they could in the interests of their clients. However, greater informality and candor were permitted among the lawyers in the Judge's chambers than in open court. Although they argued on behalf of their clients, they also were more candid about their opinions of their clients' personalities. "She's just not going to settle for that, your Honor. It's a lost cause," an attorney might say, rolling his eyes. Or, in one case I observed, the advanced terminal cancer of a husband in a divorce case was candidly discussed as the Judge and the attorneys tried to decide whether it was fair or compassionate to require him to testify.

I was observing the family law system "behind the scenes." It was, in a sense, the personal side of the public ritual. But it was personal for the insiders. Except for rare circumstances, outsiders were not allowed. In fact, for the sake of the public legal rules, this division between insiders and outsiders had to be strictly kept. While the Judge allowed me to sit in his chambers and to ask him questions as the day went on, he did not allow me to use a tape recorder or even take contemporaneous notes. That act of official record-keeping would have violated the privacy of the insiders. It would have created the legal possibility that something said "off the record" could officially be put "on the record."

It is not surprising that, in the end, the individual citizens who have been divorced have little to say about the laws or the courts, except to criticize their attorneys for not representing them well. As the evidence above shows, the courts are not really for them; they are, indeed, for the legal professionals who act in them. The system works to create greater kinship among lawyers than between lawyers and their clients. The sense that clients have of being "outside" the process is real. As I argued in the beginning of this section, the purpose of the rituals of the court is to keep groups and ideas apart. The practice of family law serves to fortify the boundary between the private worlds of families and the public world of property and the law.

Chapter Eight

CONCLUSIONS

Social life proceeds somewhere between the imaginary extremes of absolute order, and absolute chaotic conflict and anarchic improvisation. Neither the one nor the other ever takes over completely. There is endless tension between the two, and also remarkable synchrony.

Sally F. Moore and Barbara G. Meyerhoff¹

Law...is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent--vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that I have been calling a legal sensibility.

Clifford Geertz²

...law [is] a conjoint expression of power and ideology.

Colin Sumner³

The social world is an arena full of chaos, contradiction and uncertainty, in which humans construct order and seek meaning, making and unmaking rules as they go. Laws, like culture and religion, are part of the

¹Sally F. Moore and Barbara G. Meyerhoff, "Secular Ritual: Forms and Meanings," in Secular Ritual, Moore and Meyerhoff, eds., Van Gorcum, Amsterdam, the Netherlands, 1977, p. 3.

²Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in Local Knowledge, Clifford Geertz, Basic Books, New York, 1983, p.215.

³Colin Sumner, Reading Ideologies, op. cit., p.267.

stories we tell ourselves about who we are and what we are doing and, as Geertz points out, they are particular to the historical and geographical context in which they are formed. But the law is also a specific form of discourse or story in that it rests upon the social forces of coercion and consent. Law is inevitably about power, whether that power is maintained by social contract, naked force, or a combination of the two. To borrow an idea from Marx: Human beings may make their own laws, but not exactly as they wish.

The research described in the preceding chapters offers local knowledge about the practice and meaning of family laws and family values in one state in modern America. Telling the history of these laws and reporting the ways in which individuals, lawyers and public officials apply and interpret them opens a window on the inner dynamics of the ideologies about economy, family, and state authority in this particular time and place. The experiences and stories I have recounted provide a glimpse of the tensions and contradictions, the twisting and stretching of ideas that people hold to make sense of their lives. I have learned that "ideology" in a complex society is not a unified and bounded whole, but a working process of holding together.

I will not attempt a perfect definition of ideology, as many others before me have tried and failed. In his review of ideological studies of law, Alan Hunt concludes that

Ideology is and will remain a difficult, slippery and ambiguous concept, and there is little to be gained by searching for a "better" definition. Problems cannot be avoided, for ideology involves issues that go to the heart of the puzzling interrelationship between human subjectivity and social action.⁴

He agrees that "ideology is not a unitary entity" but functions instead as a grid or framework through which complex and diverse elements must pass. As he explains,

This view of ideology is particularly salutary in the field of legal analysis since it counsels us not to assume the coherence and consistency of legal discourse but to search out the resonances of the social, economic, and political struggles that reside behind the smooth surface of legal reasoning and judicial utterance.⁵

In a recent volume on law and ideology, the editors suggest further that an ideological interpretation of law helps to focus attention on the dialectical play of ideas and concrete conditions in shaping human relations. In their words,

Ultimately, an ideological framework may encourage a view of law as more than merely the product of ideas or the outcome of instrumental forces; it recognizes the importance of both symbols and

⁴Alan Hunt, "The Ideology of Law," op. cit., p.31.

⁵ibid., p.16.

structures in social relations and directs attention to the reception and recreation of law in society.⁶

Instead of attempting to define ideology as an abstract concept, then, I have sought to characterize specific ideologies and to examine the ways in which they succeed or fail to serve a social function. Legal discourse and behaviors have been situated in historical context so that "resonances of social, economic and political struggles" can be heard around them. I have travelled down the path mapped out by Moore, Greenhouse and others who argue that formal social control, whether it be the laws of the state, the chief or the gods, is only partial. As Moore concludes:

Established rules, customs, and symbolic frameworks exist, but they operate in the presence of indeterminacy, or ambiguity, of uncertainty and manipulability. Order never fully takes over, nor could it.⁷

IDEOLOGY UNDER CAPITALISM

In his study of the emergence of capitalist relations among plantation workers and tin miners in South America, Michael Taussig elaborates Marx's notion that it is in the nature of capitalist thought to create a "blindness" to the

⁶"Special Issue: Law and Ideology," Law and Society Review, Amherst Seminar on Law and Ideology, special issue editors, vol. 22:4, 1988, p. 635.

⁷Sally Falk Moore, Law as Process, op.cit., p.39.

social basis of products and exchange by elevating them to the abstracted commodity form. But this "blindness," like any ideology, is only partial. People introduced to the ideology of capitalism can, at times, see through it. At other times, they may simply look the other way. In at least some spheres of their experience, they may remember the social origin of things and relationships, and may speak the language of another ideology. In his ethnographic description of the rituals and the "devil pact" invoked by workers who are encountering wage labor for the first time, then, Taussig demonstrates the articulation of modes of meaning. That is, he describes the ways in which old and new ideologies can co-exist, and individuals can translate their experiences from one language to another.⁸

In this study of families and family law, people are articulating modes of meaning. They are translating between the language of individualism, private property and rights, and the language of collectivity, sharing and obligations. They accomplish this articulation, in large measure, by allowing their experiences to be ideologically divided into private and public categories, and by

⁸Michael Taussig, The Devil and Commodity Fetishism in South America, University of North Carolina Press, Chapel Hill, 1980.

reserving a different language for each category. Moreover, as Gluckman might have predicted when he noted that conflicts born of contradictions in the social rules themselves are managed by extra-legal rituals and divinations, the rituals of family law and court serve more to reinforce the boundaries between one category and the other and to keep their meanings apart, than they do to examine and resolve the individual conflicts between husband and wife.

The ideology of the capitalist marketplace requires concepts which are contradictory to the ideas of collectivity and sharing. The state, acting in the interests of the economy, codifies these ideological concepts into law. But the state must apply its laws to activities that occur in spheres other than the economy -- in this case, the sphere of kinship. The history and uses of family laws, then, demonstrate the battle between the state and the family for control over property and the social symbols that legitimate behavior.

My research suggests that the battle over the control of property is real and continuing. The battle over symbolism, however, is only fought in the public sphere, where leaders and intellectuals are concerned with the business of the state -- as in the debate over the Uniform Marital Property Act, discussed in Chapter Five. In the private lives of individuals, it would seem that the battle

over symbols and meaning is not engaged; instead, it is ignored and avoided. Instead of mediating conflict and contradiction, it would seem that the ideological divisions between public and private and the rituals of the court permit contradiction and complexity to exist.

The deconstruction of capitalist ideology by Marxist scholars helps make clear the ways in which this ideology challenges collectivity and kinship. Marx defined the law of contract as the juridic expression of exchange relations. Sumner defined the ideology of exchange as requiring three basic ideas: 1) the idea of ownership, which validates possession; 2) the concept of the legal personality, which establishes people as the valid representatives of their goods; and 3) the idea of contract, which presupposes freely given consent between equals in the marketplace of exchange. Balbus proposed that the republican idea of "citizen" cast individuals in the same mold as the capitalist idea of commodities in that it reduced the variety of human differences to create citizens viewed as interchangeable equivalences in the electorate. Both the legal and the commodity form are thus maintained, he argued, by a fetishism which makes relations which are social in origin appear natural and immutable.

The fetishism or "secret" of the law thus created is reinforced by another mechanism of liberal ideology: the elaboration of the "Absolute Subject." As Althusser

explained, ideology under capitalism invents the notion of the concrete individual as independent Self. Not only are people transformed into equivalent citizens, they are granted an individual personhood that frees them from the social authority of family, lineage or king. In this republican, capitalist world, people have inherent "rights" and act with "free will." Moreover, as Dumont pointed out, they act in their own best interests, comforted by the new economic morality of Calvin and Adam Smith: that the success of the individual demonstrates his or her worthiness and, ultimately, benefits the whole.

The analog between commodities in the marketplace and citizens in the republic helps illustrate how an ideology can strengthen the bonds between spheres of activity which have, in other ways, been divided. In a blossoming capitalist republic, the interests of the state are nearly synonymous with the interests of the market. The ideology of rights, free will and equality serve the needs of both; the concepts of citizenry and commodity exchange reinforce one another. The law, in this case, is an eco-political expression. As Sumner argued, in the historical competition of ideologies, it is merely "a question of political power, not economics, as to which version becomes legalized." It is not hard to see why this efficient set of ideas became the law of the land in early America.

IDEOLOGY, PERMEABILITY AND CHANGE

As they gained political dominance and were codified into law, however, the ideas of individualism, rights and equality did not obliterate other ideas. Both the historical and the ethnographic data of this research illustrate the continuing power of the family and ideas about collectivity and sharing. As in the Latin American example described by Taussig, people found ways to translate new ideas into the idiom of an old language and old ideas into a new language. For example, when New England Puritans of the 17th century absorbed the secular concept of contract and elevated it to a sacred level, they were articulating modes of meaning by translating the law of individual exchange into the basis for a moral and communal relationship with God. They translated the secular word "contract" into the sacred term "covenant." With a small rather than a radical transformation, the ideologies of religious morality and economic markets were made to fit together comfortably enough so that the marriage contract could be understood in either language. The boundaries around ideologies are real, but permeable.

Another example of permeability is the way in which state legislators and judges of the 19th century fashioned a "judicial patriarchy" to govern the relations of husbands, wives and children. In order to supercede the growing threat of individual liberty, they transferred

traditional family values about male dominance and patriarchal control into the public sphere. During this same period, however, ideas were flowing in both directions. Enactment of the Married Women's Property Acts was, at least symbolically, an attempt to inject greater individual liberty into the home. Degler makes the interesting point that the concept of romantic love is a profound elaboration of individualism, as it suggests that the only good reason to enter into a relationship of commitment and intimacy is to fulfill individual needs and personal preference. At the same time, then, that images and symbols of family relations were leaking into the public sphere, individualism was also changing the nature of the family.

The historical scholarship of Louis Dumont helps to put this process in a larger context. He located the origins of individualism in a period as early as the birth of Christianity, when a new theology placed the individual in direct relation to God. As he explained, however, it required more than a millenium of social history to shape this individualism into its current form, in which each individual is thought to embody the world within him or herself, and express its meaning through individual action. The original form of individualism, in Dumont's model, did not challenge the social nature of human relations because it was not concerned with life in this

world. The idea changed slowly over time, and it was not until the economics, the politics and the social forces of the Reformation era in Western Europe converged in a particular way that the ideology became one that glorified individual liberty and action in contrast to collectivity.

The lesson in Dumont's analysis is that ideology changes very slowly in history, and that changes begin with new ideas that do not disrupt old patterns of behavior. The process seems to be one of accretion. This research suggests that as ideas are added into the social repertoire, people adopt and adapt them to the ideas they held before. An ideology, then, is a paradigm in the sense proposed by Thomas Kuhn, which persists, filters, and gathers new ideas until the weight of its contradictions forces a paradigm shift.⁹ I would argue, though, that even the paradigm shifts occur primarily on the plane of public or political power relations, leaving individuals to manage their daily lives in the language they know best.

CAPITALISM, KINSHIP AND WOMEN

While the repertoire of ideas that included individualism, rights, free will and equality served the interests of the economy and polity, they did not serve the

⁹Thomas Kuhn, The Structure of Scientific Revolutions, International Encyclopedia of Unified Science, vol. 2:2, 1962.

needs of kinship, nor of women. They did not serve the needs of kinship because they were meant not to serve them. As many historians have shown, they were meant to loosen the bonds of kinship, increase the availability of wage labor, and enable the freer exchange of property. They did not meet the needs of women, in the first instance, because they were not associated with them. The republican rights of "liberté, égalité, fraternité" were originally reserved for white men.

They also did not meet the needs of families or of women for deeper, more symbolic reasons. As Balbus and other marxian scholars explained, the concepts of commodity, citizen and free will require a levelling of differences, so that people and products become equivalent and interchangeable. It is only in this context that the legal concept of equality can grow, as it requires assumptions of likeness. But, as Fineman points out, the human realities of need and dependency, which are the essence of family relations, are disruptive to the illusion of sameness and the ideal of equality. As she explains, "need demands an acknowledgement and evaluation of differences."¹⁰ The relationships of need and dependency are necessarily unequal. They may, at the same time, be

¹⁰Martha Fineman, "Implementing Equality," op. cit., p. 878.

caring and supportive. These are human relations which cannot be described in the language of the law.

In this discussion about need and dependency, it is important to avoid idealizing or stereotyping "the family," particularly as it is found in contemporary America. In fact, we know that many families do not meet the needs of dependency, and may be dysfunctional or violent. These are the sad facts of our society, some of which were described by the informants I interviewed. Moreover, we know that "families" take many shapes and forms. For the purposes of this discussion, I am proposing that relations of dependency, particularly between adults and children, are an essential human need which are arranged and managed in some form in every society. Without making assumptions about their size, shape or successfulness, it is simply these relations of dependency that I refer to as "family."

The requirements of need and dependency in the family are not necessarily synonymous with the requirements of women, but in the historical and ethnographic case under consideration, they tend to be bound together. Indeed, this is the basis for the arguments of Degler, Cott and others who demonstrate that the assignment of women to the private sphere of home and hearth puts them "at odds" with the expectations and benefits of the public sphere. The historical, economic and political reasons for this gender segregation, and the many ways in which the illusion of

seperate spheres has been dispelled, have been documented by others and cannot be reviewed here.

The ethnographic data of the research, however, illustrate an important point about gender, family laws, and relations of dependency. Based on my understanding of gender roles and family relations, I had expected to find women more "fluent" in the language of sharing, need and dependency, and men more fluent in the language of the marketplace. In fact, I found most of my informants equally bilingual. Both men and women could talk about money, property, intimacy and family. In the modern feminist era, both men and women may speak the languages of the public and the private spheres, and both may feel the conflict between the two in cases of divorce.

The economic differences between men and women, clearly demonstrated by the survey data in Chapter Four, are not strictly reinforced by ideologies or symbols. Instead, they are created and maintained by concrete conditions of dependency. That is, for women, need and dependency are not only symbols or ideas; they are small children in their arms and at their kitchen tables. Men, less encumbered by children, can pass more easily from one sphere to the other. In leaving their particular family, they can literally leave the sphere of family relations of dependency. The male gender role is a passport from one sphere to the other. They may speak, as many of my male

informants did, of relations of care and dependency, but they are rarely bound by them. They may suffer the emotional pain of their loss through divorce, but they tend not to suffer the economic consequences. One of the privileges of male gender in our society is to be bilingual and bicultural in the public and private spheres, and to enjoy an open border between them.

It is, thus, by focusing on women and the relations of dependency, that one can begin to see the inadequacies of a legal framework based on rights and equality. As Lucinda Finley argued, the sacred concept of "freedom" in liberal ideology can be understood as "noninterference from other individuals." In this framework, "Rights are seen as necessary to protect our glorious isolation." But, as she suggests in another essay:

... how many people really want that kind of freedom? The freedom most of us want is the freedom to establish relationships with whomever we want, to base those relationships on mutual respect and care rather than domination and dependency, and to live in a world where public institutions respect and appreciate the obligations created by relationships.¹¹

While I would argue with Finley on the grounds that dependency is both inevitable and welcome in human

¹¹Lucinda Finley, "Choice and Freedom: Elusive Issues in the Search for Gender Justice," The Yale Law Journal, vol.96:4, 1987, p. 943.

relations, I believe this research fully supports her contention that people want a kind of freedom that is separate from the law. Moreover, the analyses of this research demonstrate that public institutions tend not to respect or appreciate the obligations of relationships because the public sphere is designed to discourage and deny the relations of dependency.

Feminist legal scholar Catherine MacKinnon has gone further to argue that equality theory, the foundation of liberal legal thought, is inherently flawed and inadequate. In much the same way as Balbus critiqued the concept of "citizen," MacKinnon argues that equality theory requires a search for an illusory sameness. And, just as Sumner pointed out that power determines which ideology will become law, so, too, MacKinnon argues that power determines what standard will be used as the measure of sameness. In the history of Anglo-American jurisprudence, that standard has been elite, white males. In her words,

There is a politics to this. Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his

measure...masculinity, or maleness, is the referent for both.¹²

Her solution to this dilemma is a system in which inequality rather than sameness is taken as the starting point, and a just resolution to a question of equality derives from analyzing the distribution of power rather than measuring sameness and difference.

By examining women's experiences in the family and the relations of dependency, then, we are confronted by the reality of human differences and inequality. From this perspective, the contradictions and flaws of a legal theory based on sameness and equality become apparent. The social relations of power are exposed. The social origins of laws become visible. By beginning with a case study of marital property laws and divorce, we can begin to see what the ideology of capitalism has obscured.

¹²Catherine A. MacKinnon, "Difference and Dominance," Feminism Unmodified: Discourses on Life and Law, Harvard University Press, Cambridge, 1987, p. 34.

FACE SHEET FOR DIVORCE STUDY

PAGE 5338

NAME: [REDACTED]

CERT. NUM. 13481
DOCKET NUM. 050797DEMOGRAPHIC INFORMATION FOLLOWS
HUSBAND WIFE

	-----	-----
YEAR OF BIRTH	53	
RACE	1(WHITE)	1(WHITE)
PREVIOUS MARRIAGES	0	0
EDUCATION YEARS	14(SOME COL)	12(HS GRAD)

GENERAL INFORMATION

YEAR OF MARRIAGE: 77 (76-80)
MINOR CHILDREN: 1
PLAINTIFF: 1 (HUSBAND)
TOWN CODE: 111
YEAR OF DECREE: 80
DECREE: 5 (UNSTATED)
CUSTODY: 2 (DEFENDANT)

COURT CODE: 5(NEW HAVN)

3/23/87
Case Files

Code # _____
Coded by: _____
Date Coded: _____

1. Date filed _____
 2. Judge/Referee _____(1) M; _____(2) F name: _____
 3. Did the Defendant file an appearance? _____(1) Yes; _____(2) No
 4. Was the Defendant
____(1)served papers or
____(2)notified by publication?
-

Complaint

5. Children's birth dates:

/ / mo/day/yr (record at least the year)

6. W wants (check all which apply):

- ____(1)sole custody
- ____(2)joint custody
- ____(3)alimony
- ____(4)child support
- ____(5)sole use of residence
- ____(6)restraining order

7. H wants (check all which apply):

- ____(1)sole custody
- ____(2)joint custody
- ____(3)alimony
- ____(4)child support
- ____(5)sole use of residence
- ____(6)restraining order

WIFE

8. Financial affidavit?

☐ (1) Yes

☐ (2) No

If yes, copy and attach. (If there are more than one, copy and attach the first one and the last one in the file.)

9. Working? (check one):

☐ (1) full time

☐ (2) part time

☐ (3) unemployed

☐ (4) retired

☐ (5) retired, working part time

☐ (6) no

☐ (9) can't tell

10. If working, self-employed?

☐ (1) Yes

☐ (2) No

☐ (9) Can't tell or not applicable

11. Special circumstances:

☐ (1) none

☐ (2) poor health

☐ (3) disability

☐ (4) in school

☐ (5) other _____

☐ (9) can't tell

HUSBAND

12. Financial affidavit?

☐ (1) Yes

☐ (2) No

If yes, copy and attach. (If there are more than one, copy and attach the first one and the last one in the file.)

13. Working? (check one):

☐ (1) full time

☐ (2) part time

☐ (3) unemployed

☐ (4) retired

☐ (5) retired, working part time

☐ (6) no

☐ (9) can't tell

14. If working, self-employed?

- ☐ (1) Yes
☐ (2) No
☐ (9) Can't tell or not applicable

15. Special circumstances:

- ☐ (1) none
☐ (2) poor health
☐ (3) disability
☐ (4) in school
☐ (5) other _____
☐ (9) can't tell
-

PROCESS

16. For which calendar was the dissolution "claimed"?

- ☐ (1) uncontested
☐ (2) limited contested
☐ (3) fully contested
☐ (9) can't tell

17. Is there a "memorandum of decision" in the file?

- ☐ (1) Yes
☐ (2) No

18. Did W have attorney?

- ☐ (1) Yes ----- 19. If yes,
☐ (1) Male
☐ (2) Female
☐ (9) Can't tell

☐ (2) No
☐ (9) Can't tell or not applicable

20. Did H have attorney?

- ☐ (1) Yes ----- 21. If yes,
☐ (1) Male
☐ (2) Female?
☐ (9) Can't tell

☐ (2) No
☐ (9) Can't tell or not applicable

DIVORCE SETTLEMENT (Note: Please fill in the rest of this data sheet based on the information in the divorce decree or "Judgement".)

A. Property

22. Division of property was:

- ☐ (1) determined by agreement of parties
- ☐ (2) resolved by referee
- ☐ (3) recommended by Family Relations and ordered by Judge
- ☐ (4) resolved by Judge following trial
- ☐ (5) other _____
- ☐ (9) can't tell or not applicable

23. Alimony to H(1) _____ W(2) _____ none(9) _____?

24. Was alimony

- ☐ (1) lump sum
- ☐ (2) weekly
- ☐ (3) monthly
- ☐ (9) can't tell or not applicable

25. If alimony was "lump sum", how much was it?

- \$ _____
- ☐ (9) can't tell or not applicable

26. If alimony was periodic, how much was it per payment?

- \$ _____
- ☐ (9) can't tell or not applicable

27. If alimony was periodic, for how long?

- # of years _____
- ☐ (97) until remarriage
 - ☐ (98) until some other condition is met _____
 - ☐ (99) can't tell or not applicable

28. House: (check all that apply)

- ☐ (1) X to H --- what X _____
- ☐ (2) X to W --- what X _____
- ☐ (3) quit claim to H?
- ☐ (4) quit claim to W?
- ☐ (5) lien held by H for \$ _____
- ☐ (6) lien held by W for \$ _____
- ☐ (7) agreement to sell? describe: _____
- ☐ (9) Can't tell or not applicable

29. Apartment awarded to:

- ☐ (1) H
- ☐ (2) W
- ☐ (3) Neither
- ☐ (9) Can't tell or not applicable

30. Cars:

— # awarded to H

— Car 1 — (2) OLD (5 years or more)
— (3) NEW (less than five years old)
— (9) can't tell or not applicable
Car 2 — (4) OLD (5 years or more)
— (5) NEW (less than 5 years old)
— (9) can't tell or not applicable

Please add important
details here:

31. Cars:

— # awarded to W

— Car 1 — (2) OLD (5 years or more)
— (3) NEW (less than five years old)
— (9) can't tell or not applicable
Car 2 — (4) OLD (5 years or more)
— (5) NEW (less than 5 years old)
— (9) can't tell or not applicable

Other assets over \$500 awarded to:

Husband: Item Approx value (if known)

32. _____ Total approx. value awarded to H

Other assets over \$500 awarded to:

Wife: Item Approx. value (if known)

33. _____ Total approx. value awarded to W

34. Debts assigned to:

— (1) H _____ total amount
— (2) W _____ total amount
— (9) Can't tell or not applicable

35. Husband's pension:

- ☐ (2) % to W ---- what % _____
☐ (9) Can't tell or not applicable

36. Wife's pension:

- ☐ (1) % to H --- what % _____
☐ (9) Can't tell or not applicable

Insurance:

(1)	(2)	(3)	Can't tell/(9)
<u>W for H</u>	<u>H for W</u>	<u>Each has own</u>	<u>Not mentioned</u>

37. Medical _____

38. Homeowners _____

39. Auto _____

40. Disability _____

41. Life _____

41a. _____ If a life insurance policy is mentioned, what is amount?

H. Children

42. Custody agreement is:

- ☐ (1) H has sole custody
☐ (2) W has sole custody
☐ (3) joint legal custody, kids live with H
☐ (4) joint legal custody, kids live with W
☐ (5) joint legal custody, kids live half/half
☐ (6) custody of children is divided; please explain _____
☐ (7) other, please explain _____
☐ (9) can't tell or not applicable

43. Child Support ordered?

- ☐ (1) Yes
☐ (2) No
☐ (9) can't tell or not applicable

If yes, please fill out the Child Support Table and attach it.

44.

48. Please put the amount of money ordered in the box for each child, and the dates in the left-hand column. For example, if the judge orders the father to pay \$100 a week for a child who is now 2, and \$75 a week when she reaches age 5, enter: 8/86 - 8/89 \$100; 8/89 - 8/02 \$75. Assume that the last year of child support is the year a child turns 18. So, in this example, the dates were calculated by assuming that the father would pay \$75/week for another 13 years, while the child was between the ages of 5 and 18.

[illegible]

1. Fill out this grid from the point of view of payments to be made by the Husband. If the wife is ordered to pay for an item, then enter "0" for the Husband's share. If she is ordered to pay part of a cost, then enter the remaining cost as the Husband's share.
2. If an item is not mentioned at all, then leave the cell blank.
3. In some cases, the decree will list actual dollar amounts to be paid by the parties; in other cases, there may be a percentage. If the figure is a percentage, enter it as a decimal — for example, 60% should be entered as ".60". If it is a dollar amount, just write in the amount. (The computer will then be able to distinguish between dollars and percentages.) REMEMBER — ALWAYS WRITE IN THE AMOUNT THE HUSBAND HAS TO PAY, EVEN IF IT IS "0".

49.

[illegible]

50. Tax Deduction for Dependents

In each box below, mark an "H" or a "W" to show which spouse will be able to claim each child as a deduction for income tax purposes. If it is not mentioned, leave it blank.

[illegible]

Code # _____
Circle one: FIRST LASTTable 3
Financial Affidavit InformationWIFE ROUND OFF ALL FIGURES TO NEAREST DOLLAR

(For questions 52-55, see section V, Summary of Affidavit)

52. \$ _____ Total weekly net income (all sources)
53. \$ _____ Total cash value of all assets
54. \$ _____ Total liabilities
55. \$ _____ Total weekly expenses
56. \$ _____ Net weekly wages (I.a)
57. Assets:
- A. \$ _____ House - real equity (Value minus mortgage)
 - B. \$ _____ Other real property - real equity
 - C. \$ _____ Motor Vehicle(s) -- real equity
 - D. \$ _____ Personal property total
 - E. \$ _____ Savings total
 - F. \$ _____ Investments (excluding retirement)
 - G.1 \$ _____ Retirement, lump sums (e.g. IRA, trusts)
 - G.2 \$ _____ Retirement, monthly benefits (e.g. pension)
 - H. \$ _____ Insurance cash value

HUSBAND (For questions 58-61, see section V, Summary of Affidavit)

58. \$ _____ Total weekly net income (all sources)
59. \$ _____ Total cash value of all assets
60. \$ _____ Total liabilities
61. \$ _____ Total weekly expenses
62. \$ _____ Net weekly wages (I.a)
63. Assets:
- A. \$ _____ House - real equity (Value minus mortgage)
 - B. \$ _____ Other real property - real equity
 - C. \$ _____ Motor Vehicle(s) -- real equity
 - D. \$ _____ Personal property total
 - E. \$ _____ Savings total
 - F. \$ _____ Investments (excluding retirement)
 - G.1 \$ _____ Retirement, lump sums (e.g. IRA, trusts)
 - G.2 \$ _____ Retirement, monthly benefits (e.g. pension)
 - H. \$ _____ Insurance cash value

64. \$ _____ Children's assets
 _____ Can't tell or not applicable

65. Children's assets are controlled by
 ___ (1) husband
 ___ (2) wife
 ___ (9) can't tell or not applicable

DIVORCE STUDY

(SPEC #60)

Version of 29 February, 1988

Follow the general directions on the interview sheet. If the eligible respondent is the one to whom you are speaking, just begin the interview with the first question. If not, do not write anything on the questionnaire, but save it for later. If you actually start the interview, record the 7-digit phone number here (without hyphen).

col 1-7

TIME STARTED

NUMBER SHEET
(FOUR digits, col 8-11)

CALL NUMBER
col 12

DATE
col 13-14

NUMBER OF ADULTS
col 15

Q01. (Interviewer note, but DO NOT ASK) Sex

- (1) Male
(2) Female (16)

Q02. Just to check, did you get divorced in Connecticut at any time since January 1, 1980?

- (1) Yes
(2) No (17)
(9) DK, etc.

IF NO, THANK AND TERMINATE

Q03. When was the most recent time? ____/____/_____
(CODE MO/DAY/YEAR, USING 99 FOR DK, ETC.)

(18- 23)

Q04. In what court was that divorce granted? _____ (LOOKING
FOR GEOGRAPHIC LOCATION)

(24- 25)

Q05. When did the marriage begin? ____/____/_____
(CODE MO/DAY/YEAR, USING 99 FOR DK, ETC.)

(26- 31)

Q06. In what zip code did you live just before the divorce? (WE ARE LOOKING
FOR MOST RECENT COMMON HOME; IF THEY JUST GIVE TOWN, ENTER THIS AND USE ZIP
00000) ____-____-____

(32- 36)

Q07. Are you currently married?

- (1) Yes
- (2) No (37)
- (9) DK, etc.

Thinking back to the divorce you earlier mentioned...

Q08. Was your spouse living in Connecticut at the time of the divorce?

- (1) Yes
- (2) No (38)
- (9) DK, etc.

Q09. And is (he)(she) living in Connecticut at the present time?

- (1) Yes
- (2) No (39)
- (9) DK, etc.

Q10. Were you represented by an attorney during the divorce?

- (1) Yes
- (2) No (40)
- (3) Shared with spouse (vol.)
- (9) DK, etc.

Q11. Was your former spouse represented by an attorney?

- (1) Yes
- (2) No (41)
- (3) Shared with spouse (vol.)
- (9) DK, etc.

Q12. Before you and your former spouse split up, were there any minor children living with you? (KEY IS HH COMPOSITION WHEN HH WAS STILL INTACT).

- (1) Yes
- (2) No (42)
- (9) DK, etc. — GO TO Q24.

Q13. How many? — — (00=NA; 99=DK)

(43- 44)

Q14. Were all of those children from the marriage we have been talking about?

- (0) Not asked
- (1) Yes — GO TO Q16.
- (2) No (45)
- (9) DK, etc. — GO TO Q16.

Q15. (IF NOT ALL FROM MARRIAGE OF R AND EX-SPOUSE) How many were from that marriage? — — (00=NA; 99=DK) (95=NONE)

(46- 47)

NOTE: EVEN IF ALL KIDS WERE FROM FORMER MARRIAGE, THERE COULD BE VISITATION RIGHTS SO WE WANT TO ASK Q16-Q23.

Q16. Do you currently have legal custody of (the child) all the children, does your spouse or is there some other arrangement?

- (0) Not asked
- (1) R has custody of all
- (2) Spouse has custody of all (49)
- (3) Some other arrangement
- (4) All formerly minor children now adults (vol.)
- (9) DK, etc. GO TO Q24.

(IF SOME OTHER ARRANGEMENT) What is that? (FILL IN BELOW)

Q17. (NUMBER R HAS SOLE CUSTODY OF--00=NA;95=None;99=DK) — —
(49- 50)

Q18. (NUMBER SPOUSE HAS SOLE CUSTODY OF--00=NA;95=None;99=DK) — —
(51- 52)

Q19. (NUMBER JOINT CUSTODY--00=NA;95=None;99=DK) — —
(53- 54)

Q20. (NUMBER 3rd PARTY CUSTODY--00=NA;95=None;99=DK) — —
(55- 56)

IF ALL CHILDREN ARE JOINT CUSTODY, GO TO Q23.

Q21. Do you (does your former spouse) have any visitation rights?

- (0) Not asked
- (1) Yes
- (2) No (57)
- (9) DK, etc. GO TO Q23.

Q22. (If visitation rights) Would you describe it as frequent visits, occasional visits, or almost never?

- (0) Not asked
- (1) Frequent
- (2) Occasional (58)
- (3) Almost never
- (9) DK, etc.

Q23. (Regardless of visitation rights) Do you think this arrangement is fair?

- (0) Not asked
- (1) Yes
- (2) No (59)
- (9) DK, etc.

Q24. Overall, do you think the financial settlement at the time of your divorce was fair?

- (1) Yes
- (2) No (60)
- (9) DK, etc.

Q25. (IF SURE THERE WERE NO KIDS, CODE "4", OTHERWISE ASK) At the time of the divorce, were either you or your spouse ordered to pay child support?

- (0) Not asked
 (1) Yes
 (2) No — **GO TO Q33.** (61)
 (3) Unallocated child support and alimony (vol.)
 (4) No minor children (vol.)
 (9) DK, etc. — **GO TO Q33.**

(IF SO) What was the arrangement?

Q26. (TOTAL YEARLY AMOUNT TO BE PAID BY SPOUSE) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (62- 66)

Q27. (TOTAL YEARLY AMOUNT TO BE PAID BY R) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (67- 71)

Q28. Have there been any court-ordered modifications in the amount of payments?

- (0) Not asked
 (1) Yes
 (2) No — **GO TO Q31.** (72)
 (9) DK, etc. — **GO TO Q31.**

(IF SO) What is the present arrangement? (ENTER BELOW)

Q29. (TOTAL YRLY AMOUNT SPOUSE NOW TO PAY) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (73- 77)

Q30. (TOTAL YRLY AMOUNT R IS NOW TO PAY) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (78- 82)

Q31. (IF CURRENT ARRANGEMENT CALLS FOR PAYMENTS) How much is actually being paid now?

(TOTAL YEARLY AMOUNT BEING PAID) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (83- 87)

IF NO PAYMENTS GO TO Q33.

Q32. Are the payments all up to date, (If not) how much are they behind?

(TOTAL AMOUNT OF ARREARAGE) \$ _____
 (00000=NA; 95000=Nothing; 99999=DK)
 (88- 92)

Q33. At the time of the divorce, were either you or your spouse ordered to pay alimony?

- (1) Yes
 (2) No ————— **GO TO Q41.** (93)
 (3) Unallocated (treat as "NO")
 (9) DK, etc. —————

(IF SO) What was the arrangement? (CODE BELOW)

Q34. (TOTAL YEARLY AMOUNT TO BE PAID BY SPOUSE) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (94- 98)

Q35. (TOTAL YEARLY AMOUNT TO BE PAID BY R) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (99-103)

Q36. Have there been any court-ordered modifications in the amount of payments?

- (0) Not asked
 (1) Yes
 (2) No ————— **GO TO Q39.** (104)
 (9) DK, etc. —————

(IF SO) What is the present arrangement? (CODE BELOW)

Q37. (TOTAL YRLY AMOUNT SPOUSE NOW TO PAY) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (105-109)

Q38. (TOTAL YRLY AMOUNT R IS NOW TO PAY) \$ _____
 (00000=NA; 95000=None; 99999=DK)
IF NO PAYMENTS, GO TO Q41. (110-114)

Q39. (IF CURRENT ARRANGEMENT CALLS FOR PAYMENTS) How much is actually being paid now? (TOTAL YEARLY AMOUNT BEING PAID)
 \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (115-119)

Q40. Are the payments all up to date, (If not) how much are they behind?

(TOTAL AMOUNT OF ARREARAGE) \$ _____
 (00000=NA; 95000=None; 99999=DK)
 (120-124)

Q41. In addition, have there been any court ordered modifications in payments one of you makes to the other for health insurance, educational expenses, or anything else? (IF SO, what?)

- (1) Yes
 (2) No
 (9) DK, etc. GO TO Q45. (125)

(IF SO) How were the payments changed?

Q42. (HEALTH INSURANCE)

- (0) Not asked
 (1) R is better off (pays less, gets more)
 (2) R is worse off (126)
 (3) Otherwise changed
 (4) Not changed

Q43. (EDUCATIONAL BENEFITS FOR CHILDREN)

- (0) Not asked
 (1) R is better off (pays less, gets more)
 (2) R is worse off (127)
 (3) Otherwise changed
 (4) Not changed

Q44. (OTHER: IF MENTIONED ENTER AREA(S))

- (0) Not asked
 (1) R is better off (pays less, gets more)
 (2) R is worse off (128)
 (3) Otherwise changed
 (4) Not changed

Q45. Up to the time of your divorce, how many total years of paid work experience, if any, did you have? — (ROUND UP; 00=NONE, 99=DK)

IF NONE, GO TO Q50. (129-130)

Q46. (IF ANY) What was the highest annual salary you had ever earned before your divorce? — (000000=NA; 950000=None; 999999=DK)
 (131-136)

(IF ANSWERED, CODE HERE, IF NOT, AFTER PAUSE READ)

(PAUSE) Was it, under ten thousand dollars, between ten and twenty thousand dollars, twenty to thirty thousand, thirty to fifty thousand dollars, fifty to seventy-five thousand dollars, seventy-five to one hundred thousand dollars, or more than that?

- (0) Not asked (GAVE EXACT FIGURE)
 (1) Below \$10,000
 (2) \$10,000 to \$20,000
 (3) \$20,000 to \$30,000
 (4) \$30,000 to \$50,000 (137)
 (5) \$50,000 to \$75,000
 (6) \$75,000 to \$100,000
 (7) More than \$100,000
 (9) DK, etc.

Q47. What kind of work did you do in your highest paid job? _____
 (00=NA; 99=DK)

(138-139)

Q48. At the time of your divorce, were you working part-time, full-time, or didn't you have a paid job then?

- (0) Not asked
- (1) Part-time
- (2) Full-time
- (3) No paid job
- (9) DK, etc.

GO TO Q50.

(140)

Q49. (IF NO JOB AT TIME OF DIVORCE) How many years had you been out of the work force at the time of the divorce? — (ROUND UP; 00=NA; 99=DK)

(141-142)

Q50. Thinking back to the time just before your divorce, what was your own annual income from all sources? — (950000=Nothing; 999999=DK)

(143-148)

(IF ANSWERED, CODE HERE, IF NOT, AFTER PAUSE READ)

(PAUSE) Was it, under ten thousand dollars, between ten and twenty thousand dollars, twenty to thirty thousand, thirty to fifty thousand dollars, fifty to seventy-five thousand dollars, seventy-five to one hundred thousand dollars, or more than that?

- (0) Not asked (GAVE EXACT FIGURE)
- (1) Below \$10,000
- (2) \$10,000 to \$20,000
- (3) \$20,000 to \$30,000
- (4) \$30,000 to \$50,000
- (5) \$50,000 to \$75,000
- (6) \$75,000 to \$100,000
- (7) More than \$100,000
- (9) DK, etc.

(149)

Q51. And what was the total income for your household, again from all sources? — (950000=Nothing; 999999=DK)

(150-155)

(IF ANSWERED, CODE HERE, IF NOT, AFTER PAUSE READ)

(PAUSE) Was it, under ten thousand dollars, between ten and twenty thousand dollars, twenty to thirty thousand, thirty to fifty thousand dollars, fifty to seventy-five thousand dollars, seventy-five to one hundred thousand dollars, or more than that?

- (0) Not asked (GAVE EXACT FIGURE)
- (1) Below \$10,000
- (2) \$10,000 to \$20,000
- (3) \$20,000 to \$30,000
- (4) \$30,000 to \$50,000
- (5) \$50,000 to \$75,000
- (6) \$75,000 to \$100,000
- (7) More than \$100,000
- (9) DK, etc.

(156)

Q52. In the first full year after the divorce, what was your total income from all sources?

(950000=None; 999999=DK)

(157-162)

(IF ANSWERED, CODE HERE, IF NOT, AFTER PAUSE READ)

(PAUSE) Was it, under ten thousand dollars, between ten and twenty thousand dollars, twenty to thirty thousand, thirty to fifty thousand dollars, fifty to seventy-five thousand dollars, seventy-five to one hundred thousand dollars, or more than that?

- (0) Not asked (GAVE EXACT FIGURE)
- (1) Below \$10,000
- (2) \$10,000 to \$20,000
- (3) \$20,000 to \$30,000
- (4) \$30,000 to \$50,000 (163)
- (5) \$50,000 to \$75,000
- (6) \$75,000 to \$100,000
- (7) More than \$100,000
- (9) DK, etc.

Q53. During the separation, did either you or your spouse receive AFDC, welfare, or food stamps?

(IF SO) Which of you?

- (1) Neither
- (2) R only
- (3) Spouse only
- (4) Both (164)
- (5) R, DK about spouse
- (6) R did not, DK about spouse
- (7) No time interval (vol.)
- (9) DK, etc.

Q54. Before the divorce, did you and your spouse own your own home?

- (1) Yes
- (2) No (165)
- (9) DK, etc.

Q55. At the time of your divorce, did you and your former spouse have any joint debts such as unpaid loans or credit card bills?

- (1) Yes
- (2) No (166)
- (9) DK, etc. — GO TO Q58.

Q56. (IF Yes) Did the court order you to pay them, your spouse, both of you, or what?

- (0) Not asked
- (1) Respondent
- (2) Spouse (167)
- (3) Each had to pay some
- (4) NO court order
- (9) DK, etc.

Q57. And who actually paid these debts?

- (0) Not asked
- (1) Respondent paid/paying
- (2) Spouse paid/paying (168)
- (3) Each paid/paying some
- (4) Split, resp. paying MORE than planned
- (5) Split, resp. paying LESS than planned
- (6) Split, no information
- (7) NOBODY paid
- (9) DK, etc.

Q58. Right now, are you personally covered by health insurance?

- (1) Yes
- (2) No (169)
- (9) DK, etc. → GO TO Q60.

Q59. (IF yes) Do you pay for that yourself, are you covered through your job, is it paid for by your former spouse, or what?

- (0) Not asked
- (1) Respondent self
- (2) Resp. job
- (3) Former spouse (or job)
- (4) Present spouse (or job) (170)
- (8) Other _____
- (9) DK, etc.

Q60. (IF S U R E THERE WERE NO KIDS, CODE "4", OTHERWISE ASK) And are all the minor children from your former marriage covered by health insurance?

- (1) Yes
- (2) No → GO TO Q62. (171)
- (3) Some are/some aren't (vol.)
- (4) No children (vol.) → GO TO Q64; CODE "7" IN Q62, Q63.
- (9) DK, etc. → GO TO Q62.

Q61. (IF yes) Do you pay for that yourself, are you covered through your job, is it paid for by your former spouse, or what?

- (0) Not asked
- (1) Respondent self
- (2) Resp. job
- (3) Former spouse (or job)
- (4) Present spouse (or job) (172)
- (8) Other _____
- (9) DK, etc.

Q62. (IF S U R E THERE WERE NO KIDS, CODE "7", OTHERWISE ASK) Who pays for dental insurance and the cost of dental care for the children of your former marriage?

- (1) Respondent (self and/or insurance)
- (2) Former spouse (self and/or insurance)
- (3) Both (173)
- (4) Present spouse (alone or with respondent)
- (5) Can't afford/have no insurance
- (7) No children (vol.)
- (8) Other _____
- (9) DK, etc.

Q63. (IF SURE THERE WERE NO KIDS, CODE "", OTHERWISE ASK) Again thinking about the minor children--if any--from your former marriage, how will their education beyond high school be paid for?

- (1) No resources
- (2) Respondent's resources alone
- (3) Former spouse alone (174)
- (4) Present spouse alone
- (5) Combination including former spouse
- (6) Combination not including former spouse
- (7) No children
- (8) Won't go beyond high school
- (9) DK, etc.

Q64. Based on your current financial situation, do you think you will have any retirement benefits--not counting social security?

- (1) Yes
- (2) No (175)
- (9) DK, etc.

Q65. During your divorce proceedings, did your lawyer or any other professional discuss pensions and retirement benefits with you?

- (1) Yes
- (2) No (176)
- (9) DK, etc.

Q66. Since your divorce, have you been rejected for a bank credit card, or a loan?

- (1) Yes
- (2) No (177)
- (3) Haven't tried (vol.)
- (9) DK, etc.

Q67. And how much trouble do you have paying your monthly utility bill? A lot, some, only a little, or none at all?

- (1) A lot
- (2) Some (178)
- (3) Only a little
- (4) None at all
- (5) Don't pay utilities separately (vol.)
- (9) DK, etc.

Q68. Asking a different question, have you or your spouse ever gone to court to get some part of the financial settlement enforced? (THIS MEANS TO FORCE THE PARTNER TO FOLLOW THE AGREEMENT, NOT TO CHANGE IT)

- (1) Yes
- (2) No (179)
- (9) DK, etc. GO TO Q71.

Q69. (If so) What part of the settlement? _____ (00=NA; 99=DK)
(180-181)

Q70. What did the court order? _____ (DO NOT READ CATEGORIES)

- (0) Not asked
- (1) Attachment of wages "wage execution"
- (2) Contempt of court (182)
- (7) Other (MAKE SURE SPECIFIED)
- (8) Nothing/No change
- (9) DK, etc.

Q71. Has there ever been a point when you decided NOT to go to court even though your former spouse might not have been living up to the agreement?

- (1) Yes
- (2) No (183)
- (3) Always lived up to it (vol.) GO TO Q73.
- (9) DK, etc.

Q72. What was the biggest reason you did not go to court?

(00=NA; 99=DK)

(184-185)

Changing the subject slightly ...

Q73. Which of the following comes closest to how you approached your divorce?

- (a) Just ending the marriage was the most important thing.
 - (b) Making sure of a fair financial settlement was most important
- (1) Ending
 - (2) Financial settlement (186)
 - (3) Both equally (vol.)
 - (9) DK, etc.

Q74. Have you at any time since the divorce received welfare, AFDC payments, or food stamps?

- (1) Yes
- (2) No (187)
- (9) DK, etc. GO TO Q76.

Q75. (IF so) Are you currently receiving any such government assistance?

- (0) Not asked
- (1) Yes
- (2) No (188)
- (9) DK, etc.

Finally, just a few questions about you today...

Q76. Do you own the home you are now living in?

- (1) Yes
- (2) No (189)
- (9) DK, etc.

Q77. What is the highest level of schooling you have completed?

- (1) Less than HS graduate
- (2) High School graduate
- (3) Some College
- (4) College grad (190)
- (5) More than college degree
- (9) DK, etc.

Q78. Are you employed part-time, full-time, or don't you have a job at present?

- (1) Part-time
- (2) Full-time (191)
- (3) No job
- (9) DK, etc. — **GOTO Q80.**

Q79. (IF EMPLOYED) What is the annual salary you earn at this job?

— — — — — (000000=NA; 950000=Nothing; 999999=DK)
(192-197)

(IF ANSWERED, CODE HERE, IF NOT, AFTER PAUSE READ)

(PAUSE) Is it, under ten thousand dollars, between ten and twenty thousand dollars, twenty to thirty thousand, thirty to fifty thousand dollars, fifty to seventy-five thousand dollars, seventy-five to one hundred thousand dollars, or more than that?

- (0) Not asked (GAVE EXACT FIGURE)
- (1) Below \$10,000
- (2) \$10,000 to \$20,000
- (3) \$20,000 to \$30,000
- (4) \$30,000 to \$50,000 (198)
- (5) \$50,000 to \$75,000
- (6) \$75,000 to \$100,000
- (7) More than \$100,000
- (9) DK, etc.

Q80. NOT counting yourself or any boarders or tenants--how many other adults--people 18 years of age and older--are there in your household?

- (0) None — **GO TO Q82.**
- (1) One
- (2) Two
- (3) Three
- (4) Four
- (5) Five (199)
- (6) Six
- (7) Seven
- (8) Eight or more
- (9) DK, etc. — **GO TO Q82.**

Q81. (If any) How many of those other adults are employed?

- (0) None/Not asked
- (1) One
- (2) Two
- (3) Three
- (4) Four
- (5) Five (200)
- (6) Six
- (7) Seven
- (8) Eight or more
- (9) DK, etc.

Q82. What is the occupation of the person in your household who has the highest income? _____

(201-202)

Q83. How many children--that is persons under the age of eighteen--are living in your household at the present time? (DOES NOT MATTER WHICH MARRIAGE THEY COME FROM)

- (0) None
- (1) One
- (2) Two
- (3) Three
- (4) Four
- (5) Five (203)
- (6) Six
- (7) Seven
- (8) Eight or more
- (9) DK, etc.

Q84. In what year were you born? _____
(1923=23; 1900 or earlier=00; DK, etc.=99)

(204-205)

Q85. What is your race or ethnic background? Are you white, black, Hispanic, Asian, or something else?

- (1) White
- (2) Black
- (3) Hispanic (206)
- (4) Asian
- (5) Something else
- (9) DK, etc.

Q86. What is the zip code of your home address? (IF CHALLENGED, WE ONLY WANT THE ZIP, NOT THE ENTIRE ADDRESS; IF THEY JUST GIVE TOWN, ENTER THIS AND USE ZIP 00000) _ _ _ _ _

(207-211)

Q87. About how much was your TOTAL HOUSEHOLD INCOME last year before taxes, was it....

- (1) Less than \$10,000
- (2) \$10,000-\$20,000
- (3) \$20,000-\$30,000
- (4) \$30,000-\$50,000
- (5) \$50,000-\$75,000 (212)
- (6) \$75,000-\$100,000
- (7) More than \$100,000
- (9) DK, etc.

Q88. About how much do you spend PER MONTH on housing expenses--rent, mortgage payments, and so on? (IF UNCERTAIN, ASK FOR APPROXIMATE AMOUNT; IF GIVE A RANGE, CODE MIDPOINT).

(9595=None; 9999=DK)

(213-216)

Q89. About how much do you spend per month on heat and light? (NOT TELEPHONE) (IF UNCERTAIN, ASK FOR APPROXIMATE AMOUNT; IF GIVE A RANGE, CODE MIDPOINT).

(9999=DK; 9595=Nothing; 9888=Included in housing)

(217-220)

Q90. How about on medical and dental care, including insurance premiums?

(9595=None;9999=DK)
(9999=DK)

(221-224)

Q91. Paying off loans or credit card balances?

(9595=None;9999=DK)

(225-228)

Q92. Finally, about how much do you spend per month on educational expenses, either for you or someone else in your family?

(9595=None;9999=DK)

(229-232)

Thank you very much, you've been very helpful. We really appreciate your cooperation.

Q93. To get a better understanding of the issues we've been discussing, we would like to visit some of the persons we've called to talk about these matters in greater length. Would you be willing to be visited?

(1) Yes

(2) No

(9) DK, etc. THANK AND CONCLUDE

(233)

Q94. (IF YES)

So that you can be contacted about this, could you give me your name and mailing address?

Once again, thank you very much for your cooperation.

TIME COMPLETED

INTERVIEWER NAME

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