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DIVORCE LAW, FEMINISM, AND PSYCHOANALYSIS: IN DREAMS BEGIN RESPONSIBILITIES*

Barbara Stark**

INTRODUCTION

The high divorce rate, like women's increased labor force participation, reflects and reinforces a sea change in sex roles and family structure.¹ From a feminist perspective, divorce is a particularly

* In Delmore Schwartz's most famous short story:

A movie theatre becomes the site of dreams; the screen, a reflector of old events we know will soon be turning sour. The narrator watches father propose to mother at a Coney Island restaurant. Already, during the delights of courtship, they become entangled in the vanities and deceptions that will embitter their later years. But what can the audience do about it?

Howe, *Forward*, in D. SCHWARTZ, *IN DREAMS BEGIN RESPONSIBILITIES AND OTHER STORIES* viii (1978).

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1. M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 19 (1977) [hereinafter M. GLENDON, *STATE, LAW AND FAMILY*]; M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 2 (1990); see Jenson, *Changing Discourses, Changing Agendas: Political Rights and Reproductive Policies in France*, in *WOMEN'S MOVEMENTS IN THE U.S. AND WESTERN EUROPE* 64, 81 (M. Katzenstein & C. Mueller eds. 1987) [hereinafter *WOMEN'S MOVEMENTS*]; 5 *STATISTIQUE ANNUELLE/LES PROCES CIVILS* 1986-1987, at 41 [hereinafter *STATISTIQUE ANNUELLE*] ("La fréquence du divorce"). See generally, C. KAPLAN, *SEA CHANGES: ESSAYS ON CULTURE AND FEMINISM* 1 (1986); A. SWERDLOW, R. BRIDENTHAL, J. KELLY & P. VINE, *HOUSEHOLD AND KIN: FAMILIES IN FLUX* (1989);

intriguing rite of passage.² At divorce, a woman changes her relationship not only with an individual man but with a male-dominated society as well. In effect, she exchanges the intimate experience of intrafamilial patriarchy for the social experience of patriarchy without the buffer of wifely status.³ Divorce law may be understood as the state's mediation of that transition. It deserves our⁴ close attention not only as an "index of social relations"⁵ between the sexes, but also because it is for the most part an appalling failure for the divorced spouses, their children, and societies increasingly comprised of those whose lives are affected by divorce.⁶

infra note 6 (divorce rates in the United States and Europe); *infra* note 103 (statistics regarding women's labor force participation). As Professor Glendon has noted, this phenomenon is not limited to the United States. This article draws freely on French divorce law and the work of French feminists to indicate the cross-cultural scope of its premise. See *infra* text accompanying note 15; cf. L. STONE, ROAD TO DIVORCE, ENGLAND 1530-1987 (1990) ("[T]he metamorphosis of a largely non-separating and non-divorcing society, such as England from the Middle Ages to the mid-nineteenth century, into a separating and divorcing one in the late twentieth, is perhaps the most profound and far-reaching social change to have occurred in the last five hundred years.").

2. See generally Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984). In 1816, Louis de Bonald explained why divorce had to be outlawed in France: "Just as political democracy, 'allows the people, the weak part of political society, to rise against the established power,' so divorce, 'veritable domestic democracy,' allows the wife, 'the weak part,' to rebel against marital authority." J. SCOTT, GENDER AND THE POLITICS OF HISTORY 47 (1988); see also R. PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY (1988).

3. See G. LERNER, THE CREATION OF PATRIARCHY 123-40 (1986) ("[F]or women, class is mediated through their sexual ties to a man". Lerner distinguishes "respectable" women (those who are attached to one man) from "not respectable" women (those not attached to one man or free of all men)); C. HEILBRUN, REINVENTING WOMANHOOD 175 (1979); Silver, *Salon, Foyer, Bureau: Women and the Professions in France*, in CLIO'S CONSCIOUSNESS RAISED: NEW PERSPECTIVES ON THE HISTORY OF WOMEN 72, 81 (Hartman & Banner eds. 1974) (discussing French law entitling "all women over the age of 25 . . . to be addressed as 'Madame,' even if unmarried" and creating a legal action for slander for any woman over 25 who is persistently addressed as "Mademoiselle"); see also Guillaumin, *The Question of Difference*, in FRENCH CONNECTIONS: VOICES FROM THE WOMEN'S MOVEMENT IN FRANCE 64 (C. Duchén trans. & ed. 1987) [hereinafter FRENCH CONNECTIONS].

4. As Martha Minow has noted, "A difficulty here, as always, is who is 'we.'" Minow, *Forward: Justice Engendered, The Supreme Court 1986 Term*, 101 HARV. L. REV. 10, 15 (1987); see also Resnik, *Complex Feminist Conversations*, 1989 U. CHI. LEGAL F. 1, 7. In this paper, "we" or "our" refers to all of us, men as well as women.

5. L. WEITZMAN, THE DIVORCE REVOLUTION xv (1985) (quoting English legal scholar Kevin Gray).

6. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Marital Status and Living Arrangements: March 1988*, in CURRENT POPULATION REP., Ser. P. 20, No. 433, at 3 (1989); Wetzel, *American Families: 75 Years of Change*, MONTHLY LAB. REV., Mar., 1990, at 417. About half of American first marriages end in divorce; the corresponding ratio in Europe ranges from one in three to one in four. Sorrentino, *The Changing Family in International Perspective*, MONTHLY LAB. REV., Mar. 1990, at 41, 44. For

This paper will explore some of the reasons for this predicament. My central thesis is that the glaring inadequacies of divorce laws are less a function of badly devised rules⁷ or misconceptions as to the proper role of the state,⁸ than of deeply held beliefs about female and male roles. These attitudes cannot be reconciled with the demands of the real world and the real needs of the parties at divorce.

I approach the problem from a "psycho-feminist" perspective.⁹ While several legal scholars have recognized the relevance of feminist psychoanalytic theory in the context of divorce law,¹⁰ it has not yet been fully developed as a basis for a feminist critique of divorce. I hope that this paper will become part of the ongoing dialogue among feminists in different disciplines.¹¹ Feminists have urged us

discussion of some of the ways in which divorce law fails us, see *infra* text accompanying notes 212-219.

7. See L. WEITZMAN, *supra* note 5; Fineman, *Implementing Equality: Ideology, Contradiction and Social Change—A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

8. See generally Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *Family and Market*]; Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985) [hereinafter Olsen, *Myth of State Intervention*].

9. Those engaged in any aspect of the psychoanalytic critique of patriarchy will be referred to as "psycho-feminists" throughout this paper. I was afraid that I had coined this term until I saw it in Barr, *Introduction*, in DISCONTENTED DISCOURSES 1 (M. Barr & R. Feldstein eds. 1989); N. CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY 15-16 (1989); authorities cited *infra* note 89.

10. Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 41 n.128 (1986); Olsen, *The Politics of Family Law*, 2 LAW & INEQUALITIES 1, 19 n.73 (1984). See generally Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1907 & n.104 (1988) (noting psychodynamic focus of some feminist theorists); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13 (1988) (describing "cultural feminists" as those for whom "the important difference between men and women is that women raise children and men don't").

Charles Lawrence makes the point explicitly in the context of race discrimination, noting the pertinence of his analysis to gender bias. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 n.22 (1987).

11. For notably effective uses of an interdisciplinary approach in legal scholarship, see Minow, *"Forming Underneath Everything That Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819 (drawing on the work of feminist and family law historians as well as the "law and society" school of historians); Heilbrun & Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913 (1990); West, *Communities, Text and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMANITIES 129 (1988); West, *Economic Man and Literary Women: One Contrast*, 39 MERCER L. REV. 867 (1988). Like *Toward a History of Family Law*, this Article relies heavily on

to listen to women themselves, rather than to experts.¹² Psychoanalysis has endeavored to make a science of listening.¹³ Its methods may help us make sense of what is being said, especially in the cacophony of divorce.¹⁴ A deeper understanding of divorce may enable us not merely to reform, but to rethink, its purposes and process.

The Article is divided into three parts. The first Part provides an overview of divorce law for the general reader. Examples from French as well as American law will be used to suggest the cross-cultural applicability of the thesis. The observations about the psychological underpinnings of divorce law apply broadly to legal systems in western cultures, where the primary caretakers are almost invariably women. As Professor Mary Ann Glendon has noted, France and America, two industrialized western democracies which have undertaken substantial divorce law reform within the last twenty years, are similar enough to invite productive comparison.¹⁵

the work of feminists in other disciplines to "advocate and undertake an inquiry that peers beneath the traditional view of [family law]." Minow, *supra*, at 820.

For consideration of some of the ways in which psychoanalysis has infiltrated the human sciences, see the essays collected in *THE TRIAL(S) OF PSYCHOANALYSIS* (F. Meltzer ed. 1987).

12. Armstrong, *Ideal Freedoms, Real Fears*, in *WOMEN'S REV. BOOKS*, Nov. 1990, at 9, 10, at col. 2. As Robin West has explained, "it is feminism's most crucial insight that *our experience* must be primary—and not be trumped by posited ideals or definitions." West, *infra* note 142, at 115–16; see also C. HEILBRUN, *WRITING A WOMAN'S LIFE* 20 (1988); Lyons, *Listening to Voices We Have Not Heard*, in *MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL* 30 (C. Gilligan, N. Lyons & T. Hanmer eds. 1990); *Introduction: Learning About Women and Their Work Through Their Own Accounts* in *THE EXPERIENCE AND MEANING OF WORK IN WOMEN'S LIVES* 1 (N. Chester & H. Grossman eds. 1990).

13. See S. FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS*, reprinted in *FREUD: THE STANDARD EDITION* 19–20 (1966). This is particularly true of psychoanalysis as practiced and interpreted by feminists, who have used its own methods to expose the deep gender bias of traditional psychoanalysis. See *infra* notes 84, 87–91; see also Abel, Book Review, 10 *SIGNS* 152, 153 (1984) ("[Gallop] . . . suggests that feminist polemics threaten to become rigid, authoritarian, and phallic, while psychoanalytic attention to the specifics of desire, in contrast to the universalizing thrust of theory, is subversive, disruptive and feminine").

14. Bohannon, *The Six Stations of Divorce*, in *LOMBARD, infra* note 114, at 4 ("[E]motional stimulation is so great [at divorce] that accustomed ways of acting are inadequate. The usual way for the healthy mind to deal with trauma is to block it out, then let it reappear slowly, so it is easier to manage. . . . On a social level we do something analogous, not allowing ourselves to think fully about divorce as a social problem. Our personal distrust of the emotions that surround it leads us to consider it only with traditional cultural defenses.").

15. My point is not to suggest concrete divorce reforms, but to question the terms of the discourse itself by "unpacking" divorce from a psycho-feminist perspective. See Jones, *Writing the Body: Toward An Understanding of "L'écriture féminine"*, 7 *FEMINIST STUD.* 247–63 (1981) (discussing Kristeva's idea that women should question ex-

The second Part, which draws liberally on the work of feminists in other disciplines, briefly describes the gendered social context in which divorce functions. I argue that we cannot understand divorce without understanding both its underlying norms and the ways in which these norms are internalized. I rely on the work of psycho-feminists to make these internalized norms explicit. The third Part suggests a framework for a psycho-feminist critique of divorce law. I submit that divorce law not only incorporates, but is structured by, subconscious notions of gender. If we are to constructively recast rights and responsibilities under divorce law, we have to understand the "dreams"—the subconscious reality—in which they begin.¹⁶

isting discourse rather than attempt to create an alternative); *infra* text accompanying notes 237–245. See generally *COMPARATIVE LAW OF MATRIMONIAL PROPERTY* (A. Kiralfy ed. 1972).

One of feminism's major strengths is the inclusiveness of its vision, its willingness to embrace rather than eradicate difference. Resnick, *supra* note 4, at 7; see Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 16–17 (1988); Minow, *supra* note 4; Luttrell, Book Review, 15 SIGNS 635, 636 (1990) (noting "a pluralism that flourishes within feminist thinking"). Comparative studies add dimension to this vision by requiring us to shift perspective and to see ourselves as "different".

Professor Glendon cites Kahn-Freund's factors supporting family law comparison in developed countries (including France and the United States) such as:

[G]radual cultural assimilation . . . people in . . . New York and Paris read the same kind of newspapers and weekly news, magazines, watch similar (or the same) television programs . . . gradual economic assimilation . . . [they] earn their living in ways almost indistinguishable from one country to another and that their manner of spending their earnings follows similar patterns owing to the evolution of trade, mass production and advertising . . . One might add to this list the apparently declining influence of formal religion, the apparent increase in family disorganization and . . . the [increased] labor force participation rates of women.

M. GLENDON, *STATE, LAW AND FAMILY*, *supra* note 1, at 18–19.

16. This may be seen as part of a larger feminist project described by Coppélia Kahn:

In *The Interpretation of Dreams* Freud says, "There is at least one spot in every dream at which it is unplumbable—a navel, as it were, that is its point of contact with the unknown." For the first psychoanalyst, the "navel" of psychic development is identification with the mother. It is "unknown" to him not because it is unknowable but because he is a man, because manhood as patriarchal culture creates it depends on denying, in myriad ways, the powerful ambivalence that the mother inspires. Part of our task as feminist critics, I suggest, is to excavate that gray, shadowy region of identification, particularly male identification with the mother, and trace its influence on perceptions and depictions of women in patriarchal texts.

Kahn, *The Hand That Rocks the Cradle: Recent Gender Theories and Their Implications*, in *THE (M)OTHER TONGUE: ESSAYS IN FEMINIST PSYCHOANALYTIC INTERPRETATION* 12, 88 (S. Garner, C. Kahane, & M. Sprengnether eds. 1985).

I. AN OVERVIEW OF FRENCH AND AMERICAN DIVORCE LAW

Marriage establishes a legal relationship between a woman and a man. The state legally terminates that relationship through divorce.¹⁷ Regulation of marriage and divorce substantially defines the relationship between the state and the family, the primary unit of social organization.¹⁸

Divorce has become widely available in the U.S. and France over the last twenty years.¹⁹ In response to changing mores,²⁰ divorce almost became (as critics contended) available on demand in France and the U.S. in the 1970s. Two generalizations about contemporary divorce are especially pertinent for our discussion. First, most divorces involve minor children.²¹ As Professor Glendon points out, "[i]n France, as elsewhere, children remain with their

17. Cf. Pateman, *The Shame of the Marriage Contract*, in *WOMEN'S VIEWS OF THE POLITICAL WORLD OF MEN* 69, 97 (J. Stiehm ed. 1984) (arguing that contract is unnecessary in personal life and that the "theory and practice of a feminist social order lies beyond both status and contract." See generally Friedman, *supra* note 2, at 649 ("Marriages can rot, [and] love can fade . . . without any contribution . . . from the legal system. Divorce is a legal act, and it changes the legal status of the partners.").

18. See Olsen, *Family and Market*, *supra* note 8; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); see also Marx & Engels, *The German Ideology*, in *MARX & ENGELS: BASIC WRITING ON POLITICS AND PHILOSOPHY* 248 (Feuer ed. 1959).

19. Before then, it was available under very limited circumstances in most American states. See Friedman, *supra* note 2, at 652-64. For a concise description of the "eventful and colorful" history of French divorce, see M. GLENDON, *STATE, LAW AND FAMILY*, *supra* note 1, at 202-204. In 1792, liberal divorce law was instituted in France, substantially restricted in 1804, and abolished entirely in 1816. In 1884, divorce was reestablished but granted only for adultery, "condemnation to an infamous punishment and grave violation of marital duties." *Id.* at 202. Professor Glendon discusses divorce as one of the battlegrounds in the ongoing struggle between "les deux Frances," "one conservative, Catholic, and family-oriented and the other characterized by the liberal individualistic ideas of the Enlightenment." *Id.*

20. See E. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES* 5-9 (1986) (discussion of United States Supreme Court's role in facilitating social change and analysis of pivotal family law cases between 1968 and 1973 in which the Supreme Court "overturned legal doctrines that were impeding the adjustment of law to changes already well advanced"); Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 179 (1982).

21. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 93 (1988) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Divorce, Child Custody and Child Support*, in *CURRENT POPULATION REP., SPECIAL STUDIES*, Series P. 23, No. 84, at 8 (1979)). See generally Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *VA. L. REV.* 9, 14 (1990) (suggesting different regimes for divorce depending on whether minor children are involved); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 *U.C. DAVIS L. REV.* 471 (1979).

mothers after divorce in the great majority (about 85 percent) of cases."²² Second, the woman's standard of living generally plummets after divorce. As Professor Weitzman has noted, American women experience "a 73 percent decline in standard of living in the first year after divorce."²³

A. *The Purposes of Divorce*

The purposes of divorce are to divide the parties' property fairly between them,²⁴ to set the amount and time period for any continuing support obligations,²⁵ and to determine their respective rights and responsibilities with regard to their children, including custody,²⁶ visitation, and child support.²⁷ Finally, divorce frees the parties from the bonds of matrimony, permitting each to remarry.²⁸ The terms of the divorce are usually established through negotia-

22. M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW*, *supra* note 1, at 215.

23. L. WEITZMAN, *supra* note 5, at 36; *see infra* notes 191 & 194 and accompanying text.

24. Freed & Walker, *Family Law in the Fifty States: An Overview*, 22 *FAM. L.Q.* 367, 393-94 (1989) (table showing property distribution by state). For a description of the basic systems of property distribution in the United States, see J. AREEN, *CASES AND MATERIALS ON FAMILY LAW*, 595-602 (2d. ed. 1985); *cf.* L. WEITZMAN, *supra* note 5, at 87 *passim* (discussing with approval English practice of considering the welfare of the children first in dividing marital property).

25. Although there is no longer any alimony under French law, the difference between the *prestation compensatoire* and alimony is probably academic. The *compensatoire* is a lump sum settlement, intended to compensate the spouse in the disadvantageous position at the termination of the marriage. Since the payor (almost invariably the husband) is often unable to make a lump sum payment, he may be permitted to pay the settlement in installments. M. GLENDON, *supra* note 21, at 84. *See generally* Meulders-Klein, *Financial Agreements on Divorce and the Freedom of Contract in Continental Europe*, in *THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* 297, 304 (J. Eekelaar & S. Katz ed. 1984).

26. By "custody," I mean actual physical custody as well as "legal" custody, which refers to shared decisionmaking responsibility. *See also infra* note 186. For a concise compilation of authorities on the varieties of custodial arrangements, see Bartlett & Stack, *supra* note 10, at 11 n.7.

27. *See generally* Fineman, *Dominant Discourse, Professional Language and Legal Change in Custody Decisionmaking*, 101 *HARV. L. REV.* 727, 732 (1988) ("The dominant rhetoric no longer describes divorce as a process that terminates the relationship between spouses, establishing one as the custodial parent with clear responsibilities. Rather, divorce is now described as a process that, through mediation, restructures and reformulates the spouses' relationship, conferring equal or shared parental rights on both parents . . .").

28. As Glendon has pointed out, in French cases of unilateral nonfault divorce (what Dorothy Stetson notes has been referred to as "divorce by repudiation," D. STETSON, *infra* note 32, at 92), the plaintiff "obtains little more than legal permission to remarry, so completely is he bound to the economic obligations of the old marriage." M. GLENDON, *supra* note 21, at 85.

tion, mediation,²⁹ and judicial intervention.³⁰ The final judgment typically incorporates the agreed upon or judicially determined terms and conditions of the divorce, and it may set forth the grounds upon which the divorce was granted.

Prior to the enactment of the no-fault statutes in the 1970's,³¹ divorce laws required a party to assert grounds, such as adultery, cruelty, or desertion, in order to obtain a divorce. This gave bargaining leverage to the so called "innocent" spouse, that is, the one who had not committed any acts constituting legal "fault," without whose consent or acquiescence there could be no divorce.

B. *The Process of Divorce*

Since the 1970's, French and American couples have had a number of options for terminating marriage.³² In both countries, divorce may be by mutual consent³³ or for "cause" (including traditional "fault" grounds, such as desertion, cruelty, and adultery). In both countries, moreover, unilateral divorce; that is, divorce at the

29. Mediation is negotiation in the presence of an intermediary. See *infra* text accompanying notes 151-171.

30. In the U.S., family court judges may simply "rubberstamp" a settlement arrived at by the parties. If the American spouses are unwilling to negotiate with each other, the terms of the divorce will be decided by the judge after a plenary hearing. In France, the judge is expected to play an active role in this process. See *infra* text accompanying notes 172-173. This often takes the form of putting pressure on the parties to resolve matters independently. *Id.*

31. See generally Friedman, *supra* note 2, at 664-69 for a discussion of the legal history of no-fault divorce in the United States. For introductory overviews of no-fault divorce laws, under which "irreconcilable differences," "breakdown of the marriage," or "incompatibility" are among the grounds for divorce, see J. AREEN, *supra* note 24, at 267-75; H. CLARK & C. GLOWINSKY, DOMESTIC RELATIONS CASES AND PROBLEMS 747-58 (4th ed. 1990); W. WADLINGTON, DOMESTIC RELATIONS CASES AND MATERIALS 1052-60 (2d ed. 1990). See generally L. WEITZMAN, *supra* note 5.

Professor Areen has recently pointed out, "It appears that courts in states with both fault and no-fault grounds are beginning to construe the fault grounds more narrowly again, no doubt because there is less pressure for broad constructions." J. AREEN, FAMILY LAW CASES AND MATERIALS 85 (2d ed. Supp. 1991).

32. The American "breakdown of the marriage" divorce is basically the equivalent of the French divorce by mutual consent. D. STETSON, WOMEN'S RIGHTS IN FRANCE 91 (1987). For a table of grounds for divorce in the fifty states, see Freed & Walker, *supra* note 24, at 385-86. Since all of the states have some form of no-fault divorce, grounds are rarely the focus of litigation. *Id.* at 372, 383. For descriptions and breakdowns of "Les cas de divorce" in France, see STATISTIQUE ANNUELLE, *supra* note 1, at 43-44.

33. For a discussion of "living separate and apart," which is a no-fault ground for divorce in twenty-two states, see H. CLARK & C. GLOWINSKY, *supra* note 31, at 746-47; see also *supra* note 32. Divorce by mutual consent is increasingly common in France. Rubellin-Devichi, *France: The New Principles of Family Law—Liberty, Equality and Fraternity*, 28 J. FAM. L. 491, 492 (1989-90).

behest of only one of the spouses without allegations of fault, is available. In France, a spouse may obtain unilateral divorce only after six years separation, and at considerable financial cost, on the grounds of "prolonged disruption of the life in common."³⁴ In the U.S., no-fault divorce laws generally permit unilateral divorce after a much shorter period of separation.³⁵ Thus, a spouse may now obtain divorce in both countries notwithstanding the lack of consent from the other spouse.

The choice of one method of divorce over another may have some economic consequences.³⁶ Egregious fault on the part of one spouse may lead the court to view the other more sympathetically, for example. With the notable exception of unilateral divorce in France,³⁷ however, the economic difference in outcome typically depends more on the parties or judge than on the legal basis for divorce.³⁸

C. *Problems with Divorce in France and the U.S.*

Courts have long recognized that the financially dependent spouse usually requires continued economic assistance from the supporting spouse at divorce, and that the former is almost always the wife and the latter is almost always the husband.³⁹ Divorce laws which required that the spouse seeking divorce establish fault on the part of the other party traditionally functioned, in part, as a mechanism for redress.⁴⁰ An innocent wife could keep the marriage intact until—and unless—her husband agreed to terms acceptable to her. This leverage, however, was often dearly bought, requiring the innocent spouse to remain married to the philandering, abusing

34. Glendon, *The French Divorce Reform Law of 1976*, 24 AM. J. COMP. L. 199, 203 (1976).

35. See Freed & Walker, *supra* note 24, at 385–86 (19 states require that the parties live apart 2 years or less; the longest period of separation required is 5 years [Idaho]); see also Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 5 nn.19–20, 6 n.22 (1987) (describing "pure" no-fault and two forms of mixed fault/no fault regimes in the states).

36. For tables showing states in which fault is a factor in equitable distribution or alimony, see Freed & Walker, *supra* note 24, at 408–409.

37. See Glendon, *supra* note 34.

38. See *infra* text accompanying notes 166–171.

39. L. WEITZMAN, *supra* note 5, at xi–xiv.

40. See Melli, *Constructing a Social Problem: The Post Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759, 762.

or absent spouse.⁴¹ The fault requirement also imposed practical, moral and psychological barriers to divorce.⁴²

Critics claimed the fault requirement was unresponsive to changing social standards. It left unhappily married people few alternatives to collusive fabrication of fault grounds and a resultant contempt for the law.⁴³

No-fault divorce has been condemned for different reasons, but with equal vehemence.⁴⁴ It has been blamed for depriving women of the only real leverage they had in divorce proceedings, for treating men and women the same when the world does not, and for contributing to the "feminization of poverty"⁴⁵ by making divorce

41. See *id.* at 770 (criticizing Weitzman for ignoring the dilemma of such women). As Professor Melli has noted, women who decided to end a marriage also suffered the economic hardship of a guilty spouse, that is, a spouse whose acts amounted to "fault" grounds under the law.

42. L. WEITZMAN, *supra* note 5, at 9, 14; see Friedman, *supra* note 2, at 653 (discussing historical conflict in divorce law between "two genuine social demands. . . . One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."); Sackett & Munyon, *Alimony: A Retreat From Traditional Concepts of Spousal Support*, 35 DRAKE L. REV. 297, 303 (1985-86) (attributing adoption of no-fault divorce to societal perception that moral issues of divorce "did not belong in the courtroom" and that the fault system was hypocritical).

43. D. STETSON, *supra* note 32, at 90 (France); L. WEITZMAN *supra* note 5, at 10 (U.S.).

44. M. GLENDON, *supra* note 21, at 108 ("The no-fault terminology fit neatly into an increasingly popular mode of discourse in which values are treated as a matter of taste, feelings of guilt are regarded as unhealthy, and an individual's primary responsibility is assumed to be to himself."); L. WEITZMAN, *supra* note 5; Fineman, *supra* note 7. Few, however, would seriously suggest a return to fault divorce. L. WEITZMAN, *supra* note 5, at 383; accord Sackett & Munyon, *supra* note 42, at 306; see Kay, *An Appraisal of California's No-fault Divorce Law*, 75 CALIF. L. REV. 291 (1987); Kay, *supra* note 35.

It should be noted that, notwithstanding widespread and impassioned criticism of divorce, women and men report that their lives are "better and more satisfying" after divorce. Melli, *supra* note 40, at 767; cf. Wallerstein, *Women After Divorce: Preliminary Report from a Ten-Year Follow-Up*, 56 AM. J. ORTHOPSYCHIATRY 65, 68 (1985) (divorced women were more likely than divorced men to consider their quality of life improved following divorce, in a study of mostly white, middle class Northern California families). See generally C. RIESSMAN, *DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS* (1990).

45. This phrase refers to the fact that female-headed households comprise a burgeoning underclass. See L. WEITZMAN, *supra* note 5. The poverty rate for black mothers is about three times that of white mothers. Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 33 (1989). But cf. N.Y. Times, Dec. 22, 1986, at A21, col. 3 (citing congressional study challenging Reagan administration's position that the decade's rise in poverty is attributable to an increase in teenage pregnancies and single parent households; high unemployment and falling wages found to be the factors most responsible); *American Women: Three Decades of Change: Hearings Before the Joint Economic Comm.*, 98th

easier to obtain and cheaper for men.⁴⁶ The post-reform divorce process itself has been condemned for being drawn out, expensive, unpredictable, and unfair.⁴⁷

Even if this is all true, I believe that the most egregious consequence of divorce is that it perpetuates and exacerbates the effects of patriarchy, or, to use Gayle Rubin's apt phrase, the sex/gender system.⁴⁸ What is most deplorable about the legal process of divorce is that it masks this. It is the sex/gender system, rather than divorce, that is responsible for women's impoverishment. Divorce exaggerates the already sharp contrast between the family and marketplace obligations of a husband and wife, and increases the disparity in their respective economic situations.⁴⁹ Upon divorce, women usually get physical custody of the children, and the attendant expenses⁵⁰ and impediments to their own career advancement and

Cong., 1st Sess. 58-59 (1983) [hereinafter *American Women*] (noting that from 1959 to 1979 women increased as a percentage of poor adults, but that a declining percentage of all women were poor).

46. L. WEITZMAN, *supra* note 5, at xi-xiv.

47. See, e.g., L. WEITZMAN, *supra* note 5; Fineman, *supra* note 7; Stark, *Burning Down the House: Toward a Theory of More Equitable Distribution*, 40 RUTGERS L. REV. 1173, 1191-93 & nn. 79-84 (1988); *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 129, 150-51, 155-65 (1986) [hereinafter *Women in the Courts*].

48. Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157, 168 (R. Reiter ed. 1975) ("[I]t is important—even in the face of a depressing history—to maintain a distinction between the human capacity and necessity to create a sexual world, and the empirically oppressive ways in which sexual worlds have been organized. Patriarchy subsumes both meanings into the same term. Sex/gender system . . . is a neutral term which refers to the domain and indicates that oppression is not inevitable . . .").

49. Cf. L. WEITZMAN, *supra* note 5, at 11 (observing that "traditional divorce perpetuated the sex based division of roles"). See generally Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 776 (1982) ("[The] system stands in need of reform . . . [M]arriage [should not] entail . . . strikingly disparate post divorce wealth."). An unemployed single mother of two subsists on half of the net average of a production worker's salary in the U.S. While social benefits bring her French counterpart's income up to at least 67% of the average production worker's, she too is part of a growing underclass. As Professor Glendon warns, "The situation of a female head of a family with minor children is precarious everywhere." M. GLENDON, *supra* note 21, at 91; see also B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-71 (1984) (discussing the need to extend and enrich legal paradigms through the construction of a broad temporal frame). Ackerman assumes that "the obvious problem . . . serves as a symptom of a potentially larger problem of social disorganization." *Id.* at 54. Here, "the obvious problem" is the difference in post-divorce responsibilities of the man and woman, and it is symptomatic of the larger problem of the gender-based division of labor.

50. As Carolyn Bruch has observed, "[E]very time a judge overlooks expenses related to a child's needs or underestimates costs involved in child-raising, the burden falls entirely on the custodial parent." M. GLENDON, *supra* note 21, at 87 (construing

financial autonomy. Men are charged with some continuing financial responsibility, although their payments usually taper off,⁵¹ and they are rarely expected to assume a significant care-giving role.

II. PUTTING DIVORCE IN CONTEXT

A. *The Sex/Gender System*

Patriarchy has been described as "any kind of group organization in which males hold dominant power and determine what part females shall and shall not play."⁵² Feminist analyses of such group organizations—including legislative bodies,⁵³ economic units (from the nuclear family⁵⁴ to international cartels⁵⁵), social clubs,⁵⁶ the

Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 50-52 (1982)). Child support is consistently inadequate. See Child Support Enforcement Amendments of 1984, 42 U.S.C. § 667(a) (1988) (requiring each state to establish guidelines by law, judicial or administrative action, for child support awards); Hunter, *Child Support Law and Policy: The Systemic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983). Such guidelines need not be binding. 42 U.S.C. § 667(b) (1988). The statute neither requires nor encourages consistency among the states. See generally T. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* (1984); NATIONAL CENTER FOR STATE COURTS, *CHILD SUPPORT GUIDELINES: A COMPENDIUM* (ABA 1990); Giampetro, *Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results, and Hidden Policies*, 20 FAM. L.Q. 373, 374 (1986); Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 FAM. L.Q. 281 (1987). Noncompliance with support orders is also a significant problem. See *infra* text accompanying notes 220-236.

51. Support is received for less than half of the 600,000 children in France for whom it has been ordered. D. STETSON, *supra* note 32, at 99. In the U.S., a 1981 Census Bureau survey showed that less than half of the women who were awarded child support received it as ordered; approximately 30% received partial payment; 25% received nothing. L. WEITZMAN, *supra* note 5, at 283.

52. Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 83 (1980). See generally B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 87-117 (1981); G. LERNER, *supra* note 3.

53. S. DE BEAUVOIR, *THE SECOND SEX* 139 (1974) (French women could not vote until 1945); see also *infra* note 143.

54. L. TILLY & J.W. SCOTT, *WOMEN, WORK AND FAMILY*, 41-53 (1987); see Olsen, *Family and Market*, *supra* note 8; Olsen, *Myth of State Intervention*, *supra* note 8; *infra* notes 101, 102, & 191-192.

55. C. ENLOE, *BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* (1989).

56. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (upholding state's compelling interest in assuring women equal access to public accommodations); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (state may compel club to admit women); Tiger Inn v. Edwards, 636 F. Supp. 787 (D.N.J. 1986) (Princeton male-only eating clubs challenged); Bell, *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEX. L. REV. 733 (1981); Rogers, *The Private Clubs Problem: Getting in the Front Door*, 4 GEORGETOWN J.L. ETHICS 129 (1990); N.Y. Times, Nov. 19, 1989, § 4, at 22, col. 1 (criticism of Senate Judiciary Committee ap-

judiciary,⁵⁷ academia,⁵⁸ the Catholic church,⁵⁹ and the military⁶⁰—suggest the ubiquity of patriarchy.⁶¹ Feminist anthropologists, noting the “endless variety and monotonous similarity, cross-culturally and throughout history [of the oppression of women],”⁶² have described the basic features of the sex/gender system.⁶³ Males acquire dominance in such a system through “‘the principle of legitimacy,’ a de facto or de jure law that birth should not occur to a woman who is not attached to a man.”⁶⁴ Control of female sexuality is a core tenet of the sex/gender system, because it is through such control that the male can be certain that his heirs are his own blood descendants.⁶⁵ Male control of female sexuality, while not the sole

proval of nomination of Vaughn Walker, despite his longstanding membership in a club that excludes women and only recently admitted black men).

57. Kessler, *Forward, Symposium: National Association of Women Judges*, 14 GOLDEN GATE U. L. REV. 473 (1984); see *infra* text accompanying notes 178–182 and authorities cited in notes 181–185.

58. C. HEILBRUN, *The Politics of Mind: Women, Tradition, and the University*, in HAMLET'S MOTHER 213 (1990); D. HOLLAND & M. EISENHART, *EDUCATED IN ROMANCE: WOMEN, ACHIEVEMENT AND COLLEGE CULTURE* (1990); Chused, *The Hiring and Retention of Minorities and Women on American Law Faculties*, 137 U. PA. L. REV. 537 (1988); *Pedagogy, Law, Theory, and Practice, Women in Legal Education*, 38 J. LEGAL EDUC. 1 (1988).

59. U. RANKE-HEINEMANN, *EUNUCHS FOR THE KINGDOM OF HEAVEN: WOMEN, SEXUALITY AND THE CATHOLIC CHURCH* (1990).

60. C. BARKALOW & A. RAAB, *IN THE MEN'S HOUSE: AN INSIDE ACCOUNT OF LIFE IN THE ARMY BY ONE OF WEST POINT'S FIRST FEMALE GRADUATES* (1990).

61. *Special Issue: The Ideology of Mothering: Disruption and Reproduction of Patriarchy*, 15 SIGNS 441 (Spr. 1990).

62. Rubin, *supra* note 48, at 160.

63. This descriptive project is a limited one and does not attempt to ascertain the origins of the sex/gender system. Given the complexity of the system and the interdependence of its components, the quest for an explanation of its beginnings has little urgency, especially when it is acknowledged that gender arrangements are not biologically determined. See N. CHODOROW, *supra* note 9; *infra* notes 74–76.

64. Moen, *Women's Rights and Reproductive Freedom*, 3 HUM. RTS. Q., Spr., 1981, at 53, 58 & n.19; accord Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism, and Constitutional Change*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 303, 309 (J. Lobel ed. 1988). See Justice Scalia's opinion in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) (holding that conclusive presumption that child born during marriage is the husband's child does not violate rights of biological father). Compare Justice Brennan's thoughtful dissent (“Even if we can agree . . . that ‘family’ and ‘parenthood’ are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do”). *Id.* at 2351. See generally Filhiol, *Michael H. v. Gerald D.: Upholding the Marital Presumption Against a Dual Paternity Claim*, 50 LA. L. REV. 1015 (1990); Note, *Michael H. v. Gerald D.: The Constitutional Rights of Putative Fathers and a Proposal for Reform*, 31 B.C.L. REV. 1173 (1990); Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939 (1989–90).

65. As Professor Glendon has observed, “[T]he worldwide transformation of the status of children born out of wedlock has gone far toward depriving marriage of one of

factor, is a major cause of women's social subordination.⁶⁶ Equally important, the sex/gender system is characterized by a gender-based division of labor⁶⁷ in which women assume almost total responsibility for childcare.⁶⁸

its traditionally most important effects: that of distinguishing the family through which rank and wealth could be transmitted." M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW*, *supra* note 1, at 285. See generally, F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 125 (1884).

66. Moen, *supra* note 64. Rape and limits on reproductive choice vividly exemplify the ways in which male control of female sexuality results in women's social subordination. Women defer to husbands and boyfriends not only to deter intramarital and date rape, but to keep them as "protectors" against strange men. See West, *supra* note 10, at 45 ("The woman denies her need for physical individuation because she refuses to risk the reenactment of rape"); J. KAUFFMAN, *PLACES IN THE WORLD A WOMAN COULD WALK* (1983); Celis, *Date Rape and a List at Brown*, N.Y. Times, Nov. 18, 1990, § 1, at 26, col. 1; cf. Rubin, *supra* note 48, at 163 (women in the Amazon Valley and the New Guinea highlands "are frequently kept in their place by gang rape when the ordinary mechanisms of masculine intimidation prove insufficient."). See generally Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217 (1989).

The image of women as "barefoot and pregnant" epitomizes social subordination. Males control female reproductive capacity in countless ways, from court decisions stressing the (usually male) doctor's role in deciding when abortion should be permitted (*Roe v. Wade*, 410 U.S. 113, 163-64 (1972)) to the actual control of reproductive technology and aggregate decisionmaking regarding population growth. B. HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS* (1987); *REPRODUCTIVE LAWS FOR THE 1990S* (S. Cohen & N. Taub eds. 1989).

67. See *infra* notes 99-107 and accompanying text.

68. This leads to the breadwinner/nurturer dichotomy and the devaluation of nurturing work. Although this takes myriad forms, this paper focuses on "the typical pattern [in middle class families in the West] of babies attended by one lone mother." J. BENJAMIN, *THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM AND THE PROBLEM OF DOMINATION* 75 n.* (1988). Benjamin notes, however, that "patterns of childrearing have been changing in favor of paternal participation—in these families." *Id.* See generally E. JANEWAY, *CROSS SECTIONS: FROM A DECADE OF CHANGE* (1982). For descriptions of varied family experiences in the United States, see Minow, *supra* note 11, at 860-64.

Theorists of patriarchy have been criticized for being ahistorical, in that their analysis "rests on a physical difference . . . [which] takes on a universal and unchanging aspect." J. SCOTT, *supra* note 2, at 34. The consequences of any "physical difference" change radically when women control their own reproductive capacity. Where women have access to contraception, including abortion and reproductive technology such as artificial insemination or in vitro fertilization, it becomes possible (at least physiologically) for them to choose not to have children, to have them only with men who assume active parenting responsibility, or to have children without men. Thus, the "difference" on which patriarchy is predicated is not fixed and ahistorical, but may take innumerable forms, several of which undermine patriarchy. See generally S. FIRESTONE, *THE DIALECTIC OF SEX* (1970); C. HEILBRUN, *TOWARD A RECOGNITION OF ANDROGYNY* (1973); *POWERS OF DESIRE* (A. Snitow, C. Stansell & S. Thompson eds. 1983); *REPRODUCTIVE LAWS FOR THE 1990S*, *supra* note 66; Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States*, in *CLIO'S CONSCIOUSNESS RAISED*, *supra* note 3, at 54; Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, 8 CAPITAL AND CLASS 1 (1979).

Divorce law is permeated by the values of the sex/gender system, not only because it evolved within a patriarchal context, but because it addresses precisely those relationships which form the nucleus of the system.⁶⁹ Women as well as men internalize these values.⁷⁰ How can we analyze that in which we are immersed? How can we think about a sex/gender system when it determines our modes of thinking?⁷¹ Although patriarchy is pervasive, it is not hermetic.⁷² Feminists have used psychoanalysis as a method of ripping open the system and exposing its most fundamental premises. By delving into the unconscious, they have undertaken the painstaking analysis of the dominant discourse.⁷³

69. It has been suggested that "law" itself "refers to patriarchy, the law of the father." Gallop, *The Father's Seduction*, in *THE (M)OTHER TONGUE*, *supra* note 16, at 33, 46; see also Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 *LEGAL STUD. F.* 287, 288 (1986). As Catherine Mackinnon has explained, "The law sees and treats women the way men see and treat women." MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 *SIGNS* 635, 644 (1983). Robin West argues that "all of our modern legal theory . . . is essentially and irretrievably masculine" because it is predicated on "the claim that we are individuals 'first' . . . that what separates us is epistemologically and morally prior to what connects us—while 'trivially true' of men, . . . [this is] patently untrue of women." West, *supra* note 10, at 2.

70. See BERGER, *WAYS OF SEEING* (1977) (showing how, in art as well as in advertising, women are portrayed from a male perspective, which female as well as male viewers internalize); Kaplan, *Is the Gaze Male?*, in *POWERS OF DESIRE*, *supra* note 68, at 309 (analyzing how women are portrayed in films).

71. Deconstructionist, as well as feminist, philosophers, linguists, and legal scholars have struggled with this concept. Articles providing a useful introduction to subjects barely touched upon here include: J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); J. DERRIDA, *OF GRAMMATOLOGY* ix-xxxvii (C. Spivak trans. 1976); Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987) (introduction to Derrida's ideas for legal readers).

See also Minow, *supra* note 4, at 13 & n.15 (discussing assumptions about race and gender embedded in the "very structure of our language"); Williams, *supra* note 20, at 190 & nn.80-81 (noting that the "tender years" presumption and joint custody of children after divorce are areas where "the move toward equality of the sexes might come into collision with cultural limits, both in judicial opinions and in ourselves"); cf. K. MARX, *THE GERMAN IDEOLOGY*, reprinted in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 405-416 (L. Easton & K. Guddat eds. 1967) (discussing ideology, or false consciousness).

For a feminist critique of critical social theory, see West, *Feminism, Critical Social Theory and Law*, 1989 *U. CHI. L. F.* 59, 61 (Foucault's emphasis on discourse frustrates the recognition of patriarchy as fundamentally nondiscursive and "pervasively violent").

72. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 875 (1990). For perceptive and acute fictional treatments of ways in which women deal with apparently "closed" sex/gender systems, see M. ATWOOD, *THE HANDMAID'S TALE* (1986); M. KINGSTON, *THE WOMAN WARRIOR* (1977).

73. See Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 10, 11 (quoting Catherine Belsey, "A discourse is a domain of language-use, a particular way of talking (and

B. *Psychoanalysis and Gendered Intrapsychic Constructs*

We no longer assume that nurturing behavior is biologically determined.⁷⁴ There is no "nurturing" hormone produced along with mother's milk. There is no "nurturing" gene located in the extra X chromosome.⁷⁵ If anatomy is not destiny, the sex/gender system is not immutable. If neither female nurturing nor male breadwinning is predetermined, role should become a matter of

writing and thinking). A discourse involves certain shared assumptions which appear in the formulations that characterize it." (emphasis in original)); Elshtain, *Feminist Discourse and its Discontents: Language, Power, and Meaning*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 127 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1281 (1987) (describing the "French feminists [who] attack language more explicitly, finding in the disruption of male language the only possible expression of a female voice."); see also Fineman, *supra* note 27 (arguing for a return to a rights approach in custody disputes); cf. Lawrence, *supra* note 10, at 326 (drawing upon theories of unconscious motivation to explain ideology). Gender constructs may well function on the "collective unconscious" level described by Professor Lawrence, but my focus here is more on individual, albeit common, intrapsychic patterns.

74. R.W. Connell has suggested that although it became clear in the 19th century that sexual and gender arrangements were not biologically determined, sociopolitical forces precluded a critical sociology. R.W. CONNELL, *GENDER AND POWER* (1987). Such a sociology is now widely recognized. See, e.g., R. BLEIER, *SCIENCE AND GENDER* 80-109, 109 (1984) ("As many others have said . . . the range of variation is far greater among males or among females than between the two sexes." (emphasis in original)); N. CHODOROW, *THE REPRODUCTION OF MOTHERING* 13, 30 (1978) (countering the "prevalent assumption among nonfeminist theorists that the structure of parenting is biologically self-explanatory." Chodorow presents data from studies of the effect of female chromosomes and hormones on nurturing behavior, concluding that, "the extensive and nearly exclusive mothering role [that women] have is a product of a social and cultural translation of their childbearing and lactation capacities. It is not guaranteed or entailed by these capacities themselves."); Shapiro, *Guns and Dolls: Scientists Explore the Differences Between Girls and Boys*, *Newsweek*, May 28, 1990, at 56 (cover story). See generally Williams, *supra* note 20, at 185 n.58 (discussing male aggression).

The idea that biology does not determine parenting capacity has been acknowledged in the U.S. courts. See *Freeman v. Freeman*, 163 Mich. App. 493, 414 N.W. 2d 914 (1987) (appellate court reversed trial court's award of joint custody on grounds that custody would have been awarded to the father but for an unsubstantiated biological preference in favor of granting the mother custody of her daughter). But see S. GOLDBERG, *THE INEVITABILITY OF PATRIARCHY* 78 *passim* (1973).

A critical difference between French and American feminists is that the French are "more convinced . . . of the difference between male and female; they are more imbued with notions of sexual specificity." NEW FRENCH FEMINISMS, *infra* note 90, at 36. Some North American feminists share the French perspective. Robin West, for example, argues that women's actual physical experiences of attachment are not dependent on nurturing roles. Resnik, *supra* note 10, at 1915. See generally R. HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* (1990); T. LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

75. "At most there may be a temporary hormonal response associated with childbirth that prompts females to nurture their young." Shapiro, *supra* note 74, at 59.

choice. In theory, and in the expectations of many feminists, the sex/gender system would collapse as its foundations eroded.⁷⁶

The contemporary recognition that roles are not innately gendered has supported an expanded jurisprudence of equality in the employment context. Legislatures and courts have increasingly recognized the rights of women to participate in male-dominated economic spheres.⁷⁷ Traditional stereotypes about the proper role of women have undergone a radical, if incomplete, transformation.⁷⁸ But although women have entered some professions, their opportunities remain limited. As Professor Martha Fineman has shown, women have not necessarily benefitted from "equality" oriented reforms.⁷⁹ Women remain nurturers, by and large, regardless

76. See generally E. BADINTER, *L'UN EST L'AUTRE: DES RELATIONS ENTRE HOMMES ET FEMMES* 191-240 (1986) (discussing "la mort du patriarcat"). I am not suggesting that there are no differences between male and female. Rather, there are few enough to give us ample scope to refuse the "dichotomous trap" and instead, to make the "case for equality as a relative matter of justice. . . not as an absolute question either of science, social science or nature." Scott, *The Pitfalls of Scientific Feminism* (Book Review), 4 *TIKKUN* 90 (1989) (criticizing *Deceptive Distinctions* by Cynthia Fuchs Epstein for attempting to base political claims on "nature and objectivity").

77. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); Cowan, *Women's Rights Through Litigation: An Examination of the ACLU Women's Rights Project, 1971-76*, 8 *COLUM. HUM. RTS. L. REV.* 373 (1976); Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986*, at 109 (H. Schwartz ed. 1987). This is not to suggest, of course, that parity has been attained. Scholarship deploring and explaining the continuing absence of parity is far too vast to be distilled in one footnote. See, e.g., Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 *N.Y.U. L. REV.* 1003, 1015 (1986); Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 97 *YALE L.J.* 914 (1987); Taub & Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation From the Existing Social Structure?*, 37 *RUTGERS L. REV.* 825, 830 n.23 (1985) (distinguishing special treatment from affirmative action); see also D. STETSON, *supra* note 32, at 146-48 (describing French policy set forth in 13 July 1983 law of *rattrapage* ["catch-up"] which encourages positive discrimination); Silver, *supra* note 3, at 73 (labor force participation is an "ambiguous" indicator of equality between the sexes). But cf. T. SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* (1990) (criticizing affirmative action in general for, inter alia, demoralizing its recipients). Legislatures, while uncertain about the underlying cause, have tried to address the consequences. See Kilborn, *Wage Gap Between Sexes is Cut in Test, but at a Price*, *N.Y. Times*, May 31, 1990, at A1, col. 1.

Commentators have expressed concern regarding the impact on women of the Supreme Court's decisions in *Wards Cove Packing v. Atonio*, 109 S. Ct. 2115 (1989) and *Martin v. Wilkes*, 109 S. Ct. 2180 (1989). See Coyle, *How Far Will The Court Go?*, *Nat. L.J.*, June 26, 1989, at 1, 46. See generally *Employment Discrimination and Affirmative Action: Have Civil Rights Been Eroded?*, 1989 *Supreme Court Decisions*, 7 *N.Y.L.J. HUM. RTS.* 1 (1990).

78. See e.g., Cole, *To Each Her Own*, in *TIME*, Fall 1990, at 46 (Special Issue Women: The Road Ahead); *infra* notes 103-107.

79. Fineman, *supra* note 7; Fineman, *supra* note 27; Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 *AM. B. FOUND. RES. J.* 781 [hereinafter *Illusive*

of their marital status,⁸⁰ family law reforms,⁸¹ or economic consequences.⁸² Their continuing responsibility in the home limits their choices as well as their advancement.⁸³ Since we assume that nurturing is neither innate nor gender-specific, we are baffled and irritated when tinkering with the social environment fails to produce gender neutral results.

A feminist psychoanalytic approach offers explanations. Psycho-feminists have adopted much of the method, while questioning or rejecting the values of traditional psychoanalysis.⁸⁴ A

Equality]; Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987); Sheppard, *Women, Families and Equality: Was Divorce a Mistake?*, 12 WOMEN'S RTS. L. REP. 137 (1990).

80. See *infra* notes 98, 116 & 191.

81. L. WEITZMAN, *supra* note 5, at 215-18.

82. See *infra* notes 191-195.

83. This has been described for women in business as a "glass ceiling." Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65. Schwartz criticizes the term "glass ceiling" as a way of glossing over the real factors; i.e., different values and social roles responsible for the differences in male and female job performance and opportunities. She is less interested in the reasons for gendered social roles than in pragmatically accommodating them.

84. Freud has been criticized by feminists since Karen Horney, who questioned his precept that "anatomy is destiny," N. CHODOROW, *supra* note 74, at 141 (citing S. FREUD, *THE DISSOLUTION OF THE OEDIPUS COMPLEX* (1924)), his emphasis on "instinct," and his resultant views on feminine psychology. K. HORNEY, *NEW WAYS IN PSYCHOANALYSIS* 24, 38-39 (1939). Freud contended, for example, "that mothers' greater identification with daughters in the pre-Oedipal stage stimulates the development of an ego whose boundaries are more permeable than those of sons and a self more defined by attachment to others." While feminists such as Nancy Chodorow agree with this basic postulate, they reject Freud's conclusion that it renders women psychologically inferior. Luepnitz, *Psychoanalysis and/or Feminism*, WOMEN'S REV. BOOKS, May 1990, at 17, col. 2. See C. HEILBRUN, *Freud's Daughters*, in *HAMLET'S MOTHER*, *supra* note 58, at 31, 33 (discussing the cost to early female analysts of "their acceptance of and suffering with [Freud's] fatal gender bifurcation").

According to some feminist analysts,

psychoanalytic theory makes several questionable assumptions about the role of gender and family in the formation of the ego. First, the assumption that the sexual division of labor, gender personality, and heterosexuality rest on a biological and instinctual basis. Second, that proper ego development requires a nuclear family with authority vested in the father and "an inevitable and necessary single mother-infant relationship." Third, that (as Adrienne Rich says), "the two-person mother-child relationship is by nature regressive, circular, unproductive, and that all culture depends on the father-son relationship. . . . Through the resolution of the Oedipal complex, the boy makes his way into the male world . . . of patriarchal law and order."

Kahn, *supra* note 16, at 74 (citing A. RICH, *infra* note 88, at 197); see also Goleman, *Stereotypes of the Sexes Persisting in Therapy*, N.Y. Times, Apr. 10, 1990, at C1, col. 1. (psychotherapy and psychoanalytic diagnosis are still used to "enforce" gender norms and brand as mentally ill those who do not conform). Elizabeth Abel sensibly concludes that: "It is better for feminism to challenge [psychoanalysis] resistance to 'the

key premise of psychoanalysis is that the child's early experiences of intimacy establish the patterns (or "constructs") for those that follow.⁸⁵ These patterns are neither innate nor unalterable, but they are unlikely to change until the adult recognizes them for what they are.⁸⁶ Adult attitudes and behavior are shaped by the pre-rational, pre-verbal desires of infancy and early childhood.

Feminist analysts have argued that the sex/gender system is rooted in this internal landscape, or as Dorothy Dinnerstein described it, "that stubborn wordless level of adult feeling which is continuous with infant feeling and with the emotional realm of early childhood."⁸⁷ The infant's and young child's relationship with his or her mother is seen as a major, although certainly not the exclusive,⁸⁸ source of gender constructs.⁸⁹ As Gayle Rubin observed,

social'] than to renounce psychoanalysis entirely or succumb to its seductions." Abel, *Race, Class and Psychoanalysis? Opening Questions*, in CONFLICTS IN FEMINISM 184, 199 (M. Hirsch & E. Keller eds. 1990).

For a description of some of the schisms within psycho-feminism, see DISCONTINUED DISCOURSES, *supra* note 9, at 1; see also E. BARUCH & L. SERRANO, WOMEN ANALYZE WOMEN (1988); Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1389, 1392 (1986) (urging the law to recognize "psychological substructures of gender" but criticizing Dinnerstein for looking at the "role of women from a patriarchally sanctioned place").

85. K. HORNEY, *supra* note 84, at 18 ("I regard as the most fundamental and most significant of Freud's findings his doctrines that psychic processes are strictly determined, that actions and feelings may be determined by unconscious motivations and that the motivations driving us are emotional forces"). An intrapsychic analysis focuses on the individual's subconscious, as opposed to her actual relations with others. "[T]he intrapsychic perspective conceives of the person as a discrete unit with a complex internal structure. . . . The crucial area we uncover with intrapsychic theory is the unconscious." J. BENJAMIN, *supra* note 68, at 20. The existence of the unconscious is generally acknowledged today. Lawrence, *supra* note 10, at 329 & n.47.

86. This is a complex and difficult process. "[U]nconscious motivations remain unconscious because we are interested in not becoming aware of them." K. HORNEY, *supra* note 84, at 21 (emphasis added); accord, A GENERAL SELECTION FROM THE WORKS OF SIGMUND FREUD 11-12 (J. Rickman ed. 1957).

87. D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE 39 (1977). The idea of gender roles is as profoundly ingrained in patriarchal culture as it is in the individual subconscious. See Foster, *supra* note 69.

88. As Nancy Chodorow concludes, "[A]n open web of social, psychological, and cultural relations, dynamics, practices, identities, beliefs, in which I would privilege neither society, psyche, nor culture, comes to constitute gender as a social cultural and psychological phenomenon." N. CHODOROW, *supra* note 9, at 5.

89. See J. BENJAMIN, *supra* note 68; N. CHODOROW, *supra* note 74, at 9; N. CHODOROW, *supra* note 9; D. DINNERSTEIN, *supra* note 87; J. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMAN (1976); A. RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976); Kahn, *supra* note 16. But see Dworkin, *Compulsory Heterosexuality and Lesbian Existence*, in THE SIGNS READER 139, 146 (1980).

"[P]sychoanalysis is a feminist theory manque."⁹⁰ Juliet Mitchell was among the first to realize its significance for feminists: "Psychoanalysis explores the primary interrelationships between individual animals that make them human beings. By its very definition it is an analysis of the most basic social formation—that which finds its expression in the various forms of family"⁹¹ Perhaps poet Adrienne Rich expressed it best: "motherhood is the great mesh in which all human relations are entangled, in which lurk our most elemental assumptions about love and power."⁹² Women assume responsibility for taking care of children, and men resist doing so, not because female nurturing is innate, but because of the intrapsychic constructs⁹³ formed during our own infancies and childhoods, when we were cared for by mothers or other women.

This is obviously a very simplified fragment of a rich and complex theory. While I do not claim any expertise in this area,⁹⁴ it

90. Rubin, *supra* note 48, at 185. Edith Kurzweil has pointed out that in the 1970s, "French feminists, academics and intellectuals . . . were thoroughly steeped in . . . psychoanalysis." Kurzweil, *The Uses of Psychoanalysis by Feminist Critics* 4 (Feb. 18, 1990) (unpublished manuscript on file with the author). See "notice" of the group "politique et psychoanalyse" in *THE NEW FRENCH FEMINISMS: AN ANTHOLOGY* 32 (E. Marks & I. de Courtivron eds. 1981) [hereinafter *NEW FRENCH FEMINISMS*]. Described as the cultural and intellectual center of the "Mouvement de Liberation des Femmes," this group "is committed to the exploration of woman's unconscious and the radical subversion of society." The group said that its "grounds are in question by analysis." *Id.* at 32. See also S. FREUD, *THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT* 65 (1967) (noting the lack of an early following in France); A. Jones, *supra* note 15, at 247-49.

91. J. MITCHELL, *WOMAN'S ESTATE* 171 (1971); accord N. CHODOROW, *supra* note 74, at 39 ("Psychoanalysis . . . provides a systematic, structural account of socialization and social reproduction."). See generally Flax, *Mother-Daughter Relationships: Psychodynamics, Politics and Philosophy* in *THE FUTURE OF DIFFERENCE* 20, 22 (H. Eisenstein & A. Jardine eds. 1980) (contributions of psychoanalysis to feminism, and of feminism to psychoanalysis).

92. A. RICH, *ON LIES, SECRETS AND SILENCE* 260 (1979). This is consistent with Freud's description of society as structured by the Oedipal situation. S. FREUD, *THE INTERPRETATION OF DREAMS*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 307-309 (A. Brill ed. 1938); S. FREUD, *THREE CONTRIBUTIONS TO THE THEORY OF SEX*, in *THE BASIC WRITINGS OF SIGMUND FREUD* 617 & n.1, 618 (A. Brill ed. 1938); see also S. FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* (1920); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930). See generally O. MANNONI, *FREUD* (1971).

93. Intrapsychic constructs are simply internalized, subconscious patterns formed by the infant/child's actual experience of intimacy. See *supra* notes 84-85.

94. In addition to the authorities cited *supra* notes 84-90, informative background material may be found in J. GALLOP, *THE DAUGHTER'S SEDUCTION: FEMINISM AND PSYCHOANALYSIS* (1982); E. KURZWEIL, *THE FREUDIANS* (1989); Gallop, *Psychoanalysis in France, 7 WOMEN & LIT.* 57-63 (1979). Those seeking a terse description of the ways in which the French and American schools of feminist psychoanalytic theory differ should see J. SCOTT, *supra* note 2, at 37. For purposes of this Paper, which purports to be no more than a preliminary inquiry, the differences in emphasis between the two

seems to me that the work done by the psycho-feminists is invaluable for those of us seeking to "unpack"⁹⁵ divorce law. The next section examines some of these analysts' fundamental insights and their general relevance to divorce.

C. *Women as Mothers*

Three major propositions that emerge from the work of the psycho-feminists are particularly germane to divorce. All three derive from the core premise that in cultures where women are exclusively responsible for child rearing, women are generically perceived and treated as mothers.⁹⁶ First, it has been suggested that women internalize the values of the domestic sphere (which thereby become "feminine" values);⁹⁷ second, that women as well as men fear and hate powerful women; and third, that the dynamics of dominance and submission are gendered.

I will sketch these concepts and then explain how they illuminate two phenomena central to the debacle of French and American divorce. The first is that women remain primarily responsible for

schools are far less important than their common "concern with the processes by which the subject's identity is created. . . [and] focus on the early stages of child development for clues to the formation of gender identity." *Id.*

95. See Copelan, *supra* note 64; Jones, *supra* note 15.

As Martha Fineman has argued, "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." Fineman, *Illusive Equality*, *supra* note 79, at 785. But see *infra* text accompanying notes 186-219 (challenging idea that women "must" do so).

96. Women are not, of course, considered *exclusively* as mothers. On the contrary, as Simone de Beauvoir observed, women are cast in countless roles: "[Woman] is all that man desires and all that he does not attain. . . . She is all, that is, on the plane of the inessential; she is all the Other." S. DE BEAUVIOR, *supra* note 53, at 223. I simply agree with the authorities cited above that infants' experience of their mothers affects their later adult conceptions and expectations of women in general. See *supra* notes 84-94.

97. Anne Sexton has shown us that women may not only internalize but come to embody these values:

Housewife

Some women marry houses.
It's another kind of skin; it has a heart,
a mouth, a liver and bowel movements.
The walls are permanent and pink.
See how she sits on her knees all day,
faithfully washing herself down.
Men enter by force, drawn back like Jonah
into their fleshy mothers.
A woman *is* her mother.
That's the main thing.

A. SEXTON, *ALL MY PRETTY ONES* 48 (1962).

their children,⁹⁸ while men drift away from them, often remarrying and starting new families. The second is that women usually have grave financial problems after divorce, in part because they contribute far more to the support of the children (mainly in terms of time but often in monetary terms as well) and in part because of discrimination in the marketplace.

1. The Private Sphere

The ancient idea of separate spheres for men and women⁹⁹ received fresh impetus from the advent of capitalism, when the means of production were transferred from the self-sustaining farm to the owner's premises.¹⁰⁰ Men went to work in the factories.¹⁰¹ Women, most of whom remained at home with the children, assumed primary responsibility for the household.¹⁰² The dichotomy between the domestic sphere and the public, civil world remains pro-

98. In the United States, ninety percent of the children in single-parent families live with their mothers. *WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET* 3 (E. Mulroy ed. 1988) [hereinafter *WOMEN AS SINGLE PARENTS*].

99. Rifkin, *supra* note 52, at 91 & n.53 (citing ARISTOTLE, *POLITICS*). As Virginia Held has noted, "a long line of thinkers [including Aristotle, Kant, Hegel, Levi-Strauss, Arendt] have associated the 'public' sphere with the distinctively human, the 'private' with the natural[.]. . . the family as focused on particularistic and hence inferior concerns, often in conflict with the superior and more universal concerns of the 'public' sphere." Held, *Birth and Death*, 99 *ETHICS* 362, 377 (1989). The classic formulation of separate sphere ideology in American jurisprudence appears in Justice Bradley's infamous concurrence in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139-41 (1872); cf. Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* 97 (1984); Katzenstein, *Comparing the Feminist Movements of the U.S. and Western Europe: An Overview*, in *WOMEN'S MOVEMENTS*, *supra* note 1, at 3, 17 n.6 (placing "public" and "private" in quotations, "because they are, and should be, distinctions under challenge.").

100. Rifkin, *supra* note 52, at 92-95. The public/private sphere dichotomy also refers to the distinction between the domain of the state and that of private individuals. The latter would include private business as well as private family life. See generally Olsen, *Family and Market*, *supra* note 8; cf. Omolade, *Black Women and Feminism*, in *THE FUTURE OF DIFFERENCE*, *supra* note 91, at 247, 248-50 (noting that the foregoing analysis does not apply to black women in tribal society).

101. Rifkin, *supra* note 52, at 92-93 (explaining that women were excluded from working in trades by law and by the internal regulations promulgated by the guilds). For a thoughtful and comprehensive analysis of the history of women's work in France and England, see L. TILLY & J. W. SCOTT, *supra* note 54, at 6-8 (reassessing the idea that capitalism precipitated a "sharp break in women's experience from the household to the workplace").

102. See Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *THE PUBLIC AND PRIVATE IN SOCIAL LIFE* 281, 286 (S. Benn & G. Gaus eds. 1983). Juliet Mitchell has suggested that women were "kept out of the labor force not because they were physically weak but because they were needed in the family to please men sexually,

foundly gendered even though American and French women have entered the labor force in unprecedented numbers.¹⁰³

Instead of eradicating gender differences, the stereotyped division of labor is duplicated in the marketplace.¹⁰⁴ Although women have attained higher representation in some occupations, there remains a disproportionate concentration of women in certain fields—e.g., clerical, nursing, child care—that pay far less than comparable jobs in fields which are dominated by men.¹⁰⁵ Moreover, notwithstanding their work outside the home, American women still do

to bear children, and to socialize them." E. KURZWEIL, *supra* note 94, at 161. See generally Chused, *Gendered Space*, 42 FLA. L. REV. 125 (1990).

Some women, of course, joined the industrial labor force. See, e.g. THE LOWELL OFFERING: WRITINGS BY NEW ENGLAND MILL WOMEN (1840-1845) (B. Eisler ed. 1977); Minow, *supra* note 11, at 869-77. As Bell Hooks reminds us, black women in the U.S. have always worked outside their own homes, "in the fields, in the factories, in the laundries, in the homes of others." B. HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 133 (1984). They still assumed responsibility for traditional "wifely" duties. Scales-Trent, *supra* note 45, at 28. See generally K. MARX, *GERMAN IDEOLOGY*, excerpted in E. FROMM, *MARX'S CONCEPT OF MAN* 205-56 (1976) (describing the division of labor within the family unit).

103. The increase in workforce participation by women is part of a clear long term economic trend. V. FUCHS, *HOW WE LIVE* 127 (1983) (noting that, except for a temporary spurt during World War II, America's female labor force participation increased since 1890 at the rate of approximately 3 percentage points per decade until 1950, and since 1950 at the unprecedented rate of 9 percentage points per decade). But see Uchitelle, *Women's Push Into Work Force Seems to Have Peaked for Now*, N.Y. Times, Nov. 24, 1990, at A1, col. 1 (citing weak economy and higher birth rate).

In France, women have comprised an increasing percentage of the labor force in recent years, climbing from 34.3% of the labor force in 1962 (compared to 33.8% in the U.S.) to 42.4% in 1984 (compared to 43.4% in the U.S.). D. STETSON, *supra* note 32, at 130. See generally *id.* at 129-59. The largest area of new jobs for French women has been in white-collar clerical jobs. L. TILLY & J.W. SCOTT, *supra* note 54, at 215.

104. See generally A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982); J. MATTHAEI, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM* (1982).

105. Of 44 million working women in the U.S. in 1985, approximately 80% were employed in the service industry. In 1982, health services ranked second in the proportion of women workers, 36th in average hourly wages. NOW-NJ NEWSBREAKS, July 1987, at 3 (reprinted from AFL-CIO News citing study by Professor Karen Brodtkin Sacks); Madden, *The Persistence of Pay Differentials: The Economics of Sex Discrimination*, in 1 *WOMEN AND WORK: AN ANNUAL REVIEW* 76 (L. Larwood, A. Stromberg & B. Gutekim eds. 1985) [hereinafter *WOMEN AND WORK*]. But see *The Job Market Opens Up for the 68-Cent Woman*, N.Y. Times, July 26, 1987, at E6, col. 4.

Professors Tilly and Scott have pointed out that the "baby boom" in France, although less dramatic than that in the U.S., contributed to "an expansion of the tertiary sector and thus to the demand for female workers. More nurses and teachers were needed, for example, to care for increasingly large numbers of young children . . ." L. TILLY & J.W. SCOTT, *supra* note 54, at 217.

most of the necessary work within the home as well.¹⁰⁶ This division of labor is for the most part even sharper in France.¹⁰⁷

At the core of the notion of separate spheres is the *idée fixe* that taking care of other people, especially children, is women's real work.¹⁰⁸ As Chodorow points out, this is a self-perpetuating system:

Because of their child-care responsibilities, women's primary social location is domestic. . . . Men's location in the public sphere, then, defines society itself as masculine. It gives men power to create and enforce institutions of social and political control, important among these to control marriage as an institution that both expresses men's rights in women's sexual and reproductive capacities and reinforces these rights.¹⁰⁹

Children soon learn to distinguish the gendered spheres of influence and activity inhabited by the adult men and women in their homes, in their day care centers and schools, in the television programs they watch, and the stories they are told. They quickly realize their own position in a gendered system. Gayle Rubin's paraphrase of Lacan neatly describes the process, "In Lacan's scheme, the Oedipal crisis occurs when a child learns of the sexual rules embedded in the terms for family and relatives. The crisis begins when the child comprehends the system and his or her place in it; the crisis is resolved when the child accedes to it."¹¹⁰

106. See E. BADINTER, *MOTHER LOVE: MYTH AND REALITY* 303, 308 (1980); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WOMEN IN THE AMERICAN ECONOMY*, Ser. P.23, No. 146, at 7 (1986) (noting that "most working women meet the usual demands of housework and family care in addition to their work in the labor force"); D. STETSON, *supra* note 32, at 138-39 (France); Kulzer, *Law and the Housewife: Property, Divorce and Death*, 28 U. FLA. L. REV. 1 (1975); Ms., Feb. 1988, at 19 (citing B. F. Kiker, data from Panel Study of Income Dynamics conducted by Survey Research Center, Institute for Social Research, U. Mich.); *infra* notes 191 & 194.

107. See Silver, *supra* note 3, at 77.

108. For development of the proposition that "maternal power in the nursery defines gender so as to foster patriarchal power in the public world," see Kahn, *supra* note 16, at 75; see generally BUREAU OF THE CENSUS, *supra* note 106, at 7 (noting that "[m]any [working women] choose work that will fit around . . . their family responsibilities, a complication and impediment to occupational advancement not faced by most men").

109. N. CHODOROW, *supra* note 74 at 9; cf. N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 128 (1984) (suggesting a biological and material basis for mothering). Chodorow has been criticized by psychoanalyst and historian Peter Loewenberg, among others, for "ignoring biological reality." E. KURZWEIL, *supra* note 94, at 172. But see *supra* notes 74-76.

110. Rubin, *supra* note 48, at 188-89; see L. COTTIN POGREBIN, *GROWING UP FREE: RAISING NON-SEXIST CHILDREN* (1980); Ayim & Houston, *A Conceptual Analysis of Sexism and Sexist Education*, in *PHILOSOPHY OF EDUCATION: CANADIAN PERSPECTIVES* 145 (D. Cochrane & M. Shiral eds. 1982); Bem, *Gender Schema Theory and its Implications for Child Development: Raising Gender-Aschematic Children in a Gen-*

Women's relegation to the private sphere has readily apparent implications in the context of divorce.¹¹¹ Because she is responsible for maintaining harmony in the home, she is blamed when the marriage fails. Whether she initiates the divorce, or is merely unable to prevent her husband from doing so, it is presumably her failure.¹¹²

Another consequence of the separate sphere dichotomy is that divorced women are less likely than men to remarry. The woman does not need a man to have a home since she creates and maintains the domestic sphere. She is self-sufficient in this regard and remarriage does not have the same urgency for her that it does for a man.¹¹³ Furthermore, since she usually seeks, and is granted, custody of the children, she does not need to remarry to have a family. This is just as well because it is usually more difficult for her to find a second husband than for a man to find a second wife. As a practical matter, a second husband is more likely than a second wife to find himself contributing to the support of the children of the first marriage.¹¹⁴ Perhaps more significant, he has to compete with his step children for their mother's love and attention.

What the divorced woman does need, of course, is money. Her niche is in the domestic sphere; she is regarded as an interloper in the public sphere. She is likely to find herself restricted to the "pink collar ghetto" of the service industry, clerical or nursing work¹¹⁵ where that perception, and her compensation, will be less. Her con-

der-Schematic Society, 8 SIGNS 598 (Summer 1982); Mussen, *Early Sex Role Development*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH (D. Goslin ed. 1969).

111. See generally Olsen, *Family and Market*, *supra* note 8, at 1499-1500 (discussing the glorification of the private sphere).

112. Fault grounds for divorce, under which women's entitlement to alimony is contingent upon establishing the "fault" of the husband, in part serve as a device for overcoming this presumption. See L. WEITZMAN, *supra* note 5, at 16-17.

113. See A. SEXTON, *supra* note 97; Wallerstein, *supra* note 44. Both former spouses may have other reasons to marry again. As Chodorow observes, the need to be in relationships may be at least as important a motivation as innate aggression and sexuality. N. CHODOROW, *supra* note 9, at 114-53.

114. D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979) excerpted in READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES 107, 109 (F. Lombard ed. 1990) [hereinafter LOMBARD]. Legally, the trend is toward gender neutral support duties. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 41 (1984).

115. See L. TILLY & J.W. SCOTT, *supra* note 54, at 2, 3; Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 349 (1980) (suggesting that "attitudinal factors figure significantly on both the supply and demand sides of the picture"); *supra* note 105. See generally Gilder, *Women in the Work Force*, THE ATLANTIC, Sept. 1986, at 20.

tinuing child care and homemaking responsibilities,¹¹⁶ moreover, weaken her attachment to the labor force.¹¹⁷ Both the prevalent depreciation of women's work¹¹⁸ and this weak labor force attachment result in economic dependence on former husbands or the state.

2. The All-Powerful Mother

Women's role as caregivers is critical to the development of children's attitudes toward gender. Dorothy Dinnerstein has argued that the infant's relationship with her mother effectively establishes the basic terms in which that infant, and all mother-reared children, view women.¹¹⁹ A mother-reared culture subconsciously sees women from the distorted, dependent, pre-rational perspective of the infant. The perception of woman-as-mother affects the ways in which the parties behave toward each other during the divorce process, how they are dealt with by the decisionmaker, and how they are treated by the law itself.

Because of the equation of "women" with "mothers," men and women who are the products of exclusive female parenting (until recently the ideal in France and America)¹²⁰ tend to hate and fear powerful women. In a mother-reared society, Dinnerstein explains, powerful women too vividly evoke the "helplessness of infancy," for women as well as men:

The crucial psychological fact is that all of us, female as well as male, fear the will of women. Man's dominion over what we

116. Increased labor force participation of married mothers of young children has been especially dramatic. See BUREAU OF THE CENSUS, *supra* note 106, at 8. Sixty-two percent of all mothers of school age children were in the labor force in 1980. *American Women*, *supra* note 45, at 2. By 1986, most mothers (72%) who worked were employed full-time. STAFF OF SENATE COMM. ON FINANCE, 100TH CONG., 1ST SESS., DATA AND MATERIALS RELATED TO WELFARE PROGRAMS FOR FAMILIES WITH CHILDREN 159 (Comm. Print 1987).

117. Weak labor force attachment refers to a work history characterized by part-time work, seasonal work, or work interrupted by sometimes lengthy periods of child-care. See WOMEN AND WORK, *supra* note 105.

118. See Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 404-5 (1984-85).

119. D. DINNERSTEIN, *supra* note 87, at 28-34; see also Burke, *Re-thinking the Maternal*, in THE FUTURE OF DIFFERENCE, *supra* note 91, at 107-14 (predicating theory of female difference on motherhood, and comparing American and French feminist readings of Freud).

120. See generally E. BADINTER, *supra* note 106; *Myth and Reality*, in S. DE BEAUVIR, *supra* note 53, at 540-88; B. FRIEDAN, THE FEMININE MYSTIQUE (1963).

think of as the world rests on a terror that we all feel: the terror of sinking back wholly into the helplessness of infancy.¹²¹

Abandonment by a wife can hardly be compared to abandonment by a husband in either the United States or France. The husband who leaves his wife and family is viewed as an irresponsible child; he is "running away" or "cheating". The wife who leaves her family—and this is not uncommon in both the United States and France as women attain greater economic autonomy¹²²—is viewed in an entirely different light. She is the psychological equivalent of the mother who abandons; she is a monster.¹²³ Even if she desperately seeks custody of her children, ironically, to her husband and her community she is still a rejecting mother.

This has a direct impact on the terms of the divorce because the former husband, notwithstanding his economic self-sufficiency, is perceived as vulnerable and needy. The image of the literally "helpless" single man is ubiquitous in France as well as in the United States.¹²⁴ He simply cannot manage the daily tasks stereotypically done by women. He cannot cook, clean, organize a household or take care of a child. Indeed, he needs someone to take care of him.¹²⁵ This also explains, in part, both the far higher re-

121. D. DINNERSTEIN, *supra* note 87, at 161 (emphasis in original); accord N. CHODOROW, *supra* note 74, at 181 ("mothers represent regression and lack of autonomy").

122. See *infra* note 149. Carolyn Heilbrun has suggested that, "The real tension . . . between the fleeing woman and those who struggle to preserve the family, is the tension between order and change. . . . It is most evident within marriage, where the man desires order and the woman change." C. HEILBRUN, *supra* note 3, at 178.

123. Freud considered the wife's assumption of a maternal role essential to a "secure" marriage: "[A] marriage is not made secure until the wife has succeeded in making her husband her child as well and in acting as a mother to him." Gallop, *supra* note 69, at 37 (citing S. FREUD, NEW INTRODUCTORY LECTURES 133-34 (1964)). Gallop notes that according to Irigaray's reading of Freud, it is "woman's destiny . . . to become her husband's mother." *Id.*; cf. Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229, 232-33 (1982) (noting that mothers who "take [their] place in the larger community" as workers may so affront decisionmakers as to jeopardize their claims to custody).

124. In the popular French and American versions of the movie *Three Men and a Baby* (Touchstone Pictures, 1987), the heroes begin to appreciate the value of nurturing work and to acquire some basic skills. It still takes three of them to do the work of one woman.

125. C. HEILBRUN, *supra* note 3, at 172 ("In fact, who Norm is, who all the husbands are, is clear: those who need someone to take care of their domestic, cooking, cleaning, sexual, breeding needs while they are out attending to civilization and their own appreciation of life.") (discussing M. FRENCH, THE WOMEN'S ROOM). See B. HOOKS, *supra* note 102, at 103; THE POLITICS OF HOUSEWORK (E. Molos ed. 1982). Male incompetence is generally portrayed humorously, since it is made clear that the man is fully capable in the public sphere, the sphere that matters. Rather than master these tasks, he is expected to find some woman to do them for him.

marriage rates for men than women,¹²⁶ and why sequential monogamy is condoned for men while it is barely tolerated for women.

Under Dinnerstein's analysis, sequential monogamy for women may be disfavored because sharing the "mother" is as intolerable to us as adults as it was to us as infants.¹²⁷ For almost 70 years there was no legal divorce in France under the Napoleonic code, which "entrapped woman in the institution of marriage, where her only right was the duty to obey her husband."¹²⁸ This did not deter men, nor was it intended to, from extramarital liaisons. Even today, French divorce law prohibits a woman from remarrying within 300 days of the divorce decree.¹²⁹

In the United States, support is frequently terminated, often with the court's approval, upon the former wife's cohabitation.¹³⁰ This is justified by the notion that the cohabitor is contributing to her support, or that the former husband is in effect subsidizing her

126. In the U.S., "[i]n the 25-44 age range, the remarriage rate of divorced men is almost double that of divorced women." Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241 n.51. (1982). The belief that men need women to take care of them may be well-founded. Statistically, married men are healthier and live longer than single men, the opposite being true for women. B. EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* 10 (1983) (citing J. BERNARD, *THE FUTURE OF MARRIAGE* 18 (1972)); accord, N.Y. Times, Oct. 18, 1990, at A15, col. 5 (citing study by researchers at University of California at San Francisco which found that men between the age of 45 and 64 who live alone or with a person other than a wife are twice as likely to die within 10 years as men who live with their wives).

127. As Luce Irigaray has noted, "Mythology long ago assigned this [virgin mother] role to her in which she is allowed a certain social power as long as she is reduced, with her own complicity, to sexual impotence." Irigaray, *This Sex Which Is Not One*, in *NEW FRENCH FEMINISMS*, *supra* note 90, at 99, 104. Compare this with Julie Kristeva's suggestion that patriarchal culture harshly represses "la mere qui jouit" ("the mother who has sexual pleasure"). *Id.* at 38. See generally Dunlap, *Toward Recognition of "A Right to Be Sexual,"* 7 WOMEN'S RTS. L. REP. 245 (1982) (differences in judicial attitudes toward sexuality of women and men). Sequential monogamy for women may also be disfavored, of course, because it can give rise to questions about paternity. See sources cited *supra* note 64.

128. D. STETSON, *supra* note 32, at 30; see also *NEW FRENCH FEMINISMS*, *supra* note 90, at 17.

129. Glendon, *supra* note 34, at 225. The intent, Glendon suggests, is to avoid "confusion of paternity."

130. See, e.g., CAL. CIV. CODE § 4801.5 (West Supp. 1990) (cohabitation with person of opposite sex gives rise to rebuttable presumption of decreased support needs). Compare *Berg v. Berg*, 116 R.I. 607, 611, 359 A. 2d 354, 356 (1976) ("It is recognized in Rhode Island and many other jurisdictions that the expenses incurred by a divorced father's remarriage may be considered in determining whether child support payments should be reduced, terminated, or increased.") with *State ex rel. New York v. Hasbun*, 27 Or. App. 423, 426, 556 P.2d 166, 167 (1976) (presumption that divorced father "had in mind his obligation to his children by the first marriage when he assumed the further obligations of his second marriage.").

new lover. But there may also be a punitive element.¹³¹ As Gayle Rubin has explained, in patrilineal cultures a woman may not pass from man to man; she may only *be passed* among them. A bride, for example, may be "given away" by her father to her husband. When the woman does the choosing, without even symbolic deference to male authority, she risks being stigmatized or worse.¹³²

3. Submission and Domination

Women's role as primary caregivers establishes the terms for the relationships at the heart of the sex/gender system. The American psychoanalyst Jessica Benjamin has brilliantly described the process in her book, *The Bonds of Love*.¹³³ In essence, boys realize their identity through the repudiation of their mothers, who passively accept rejection. Girls have no similar opportunity for renunciation because, for them, mothers are the role models whose passivity they learn to emulate. As a result, patterns of male domination and female subordination are learned by children at an early age.

Like Dinnerstein and Chodorow, Benjamin traces much of our gendered behavior to exclusive female parenting. She breaks new theoretical ground, however, with her discussion of "intersubjectivity," which has its origins in Jurgen Habermas' social theory. Habermas uses the term "intersubjectivity of mutual understanding" to refer to both the individual's capacity to recognize another as separate and autonomous and the social domain created by that mutual recognition.¹³⁴ "Intersubjectivity" refers to "what happens in the field of self and other."¹³⁵ This approach enables Benjamin to focus on the child's acquisition of relatedness skills as well as her acquisition of autonomy.¹³⁶

131. See Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 116 (1978).

132. Rubin, *supra* note 48, at 206-207; see also Shrager, *Should Feminists Oppose Prostitution?*, 99 ETHICS 347 (1989).

133. J. BENJAMIN, *supra* note 68.

134. *Id.* at 19 n.*.

135. *Id.* at 20; see K. HORNEY, *supra* note 84, at 9; cf. M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW*, *supra* note 1, at 297 (arguing that family laws in the United States and Western Europe suggest that "dependency is somehow degrading, and implicitly deny . . . the importance of human intersubjectivity").

136. Compare with Gilligan's criticism of Kohlberg's theory of moral development. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24-63 (1982). But see J. SCOTT, *supra* note 2, at 40 (criticizing Gilligan's formulations as "ahistorical, defining woman/man as a universal, self-reproducing bi-

Benjamin finds her paradigm in Hegel's description of domination; the paradox that "at the very moment of realizing our own independence, we are dependent upon another to recognize it."¹³⁷ She suggests that children of both sexes confront this paradox when they realize that the primary love object must be renounced and that they must separate from their caretaker. According to Benjamin, the male and female patterns of domination and submission originate in and replicate the separation of each from the original caretaker, who is almost always a woman in France and America: "Male children achieve their masculinity by denying their original identification or oneness with their mothers. . . . The premise of [the boy's] independence is to say 'I am nothing like she who cares for me.'"¹³⁸ Benjamin argues that the female-mother's experience complements the male-child's. Just as he refuses to recognize her, she accepts being objectified, and is willing to recognize him anyway. "The classic maternal ideal of motherhood—a paragon of self-abnegation—is only a beautification of [the woman's lack of subjectivity]."¹³⁹

Central to Benjamin's thesis is the idea that the mother is a "subject whose independent center must be outside her child if she is to grant him the recognition he seeks."¹⁴⁰ She attributes women's submissiveness to both their identification with their mothers and their mothers' lack of subjectivity. Since the mother is the daugh-

nary opposition"); see also *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986).

Benjamin uses intersubjectivity to criticize the intrapsychic bias of psychoanalysis, but she stresses it as complementary, rather than in opposition, to the intrapsychic model. J. BENJAMIN, *supra* note 68, at 10, 19.

137. J. BENJAMIN, *supra* note 68, at 33; see also Minow, *supra* note 4, at 74 & n.294.

138. J. BENJAMIN, *supra* note 68, at 75-76; accord N. CHODOROW, *supra* note 9, at 49; C. HEILBRUN, *supra* note 3, at 192. In Hegel's notions of "absoluteness. . . and alone[ness]" ("There is nothing outside of me that I do not control"), Benjamin finds the basis for domination and the master-slave relationship. J. BENJAMIN, *supra* note 68, at 33; see also Kristeva, *Matière, sens, dialectique*, 44 TEL QUEL, Winter 1971, at 17-34 (reconsideration of Hegel's dialectical materialism, using a linguistic/ psychoanalytic framework) (cited in V. THORNDIKE HULES, *FRENCH FEMINIST CRITICISM: WOMEN, LANGUAGE AND LITERATURE* (1982)).

139. J. BENJAMIN, *supra* note 68, at 78. Gilligan refers to this as the second of "two equations that have prevailed and have formed a self-enclosed system. The first is the equation of human with male. . . . The second equation, which has sustained the first, is the equation of virtue for women, or caring by women, with self-sacrifice." DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 45-46 (1985) [hereinafter *Mitchell Lecture*].

140. J. BENJAMIN, *supra* note 68, at 24. See generally J. BERNARD, *THE FUTURE OF MOTHERHOOD* (1974).

ter's "mainstay of identity," the daughter fails to distinguish herself from her mother and "becomes unable to distinguish what she wants from what mother wants."¹⁴¹ This would not necessarily lead to submission if the mother were a subject. As Benjamin explains, however, "[t]o the extent that the mother has sacrificed her own independence, the girl's attempt at independence would represent an assertion of power for which she has no basis in identification."¹⁴²

The dynamic of dominance and submission described by Benjamin has serious and clearly observable consequences during the process of divorce. First, mother-reared cultures, like those of France and America, adamantly refuse to recognize women as subjects.¹⁴³ Thus, the real focus of the law, as well as the court, is more likely to be on the husband's "rights"¹⁴⁴ or the children's welfare,¹⁴⁵ than on the woman's needs¹⁴⁶ at divorce. Second, the archetype of male domination is reinforced at every phase of the divorce process, whether the woman is being bullied by her ex-husband, patronized by her typically male lawyer, or having her fate decided by what will almost certainly be a male judge.¹⁴⁷ Third, under Benjamin's analysis, the woman is likely to collaborate unconsciously in both

141. J. BENJAMIN, *supra* note 68, at 79.

142. *Id.*; accord N. CHODOROW, *supra* note 9, at 65 ("[G]irls [need to grow up] around women who, in addition to their child-care responsibilities, have a valued role and recognized spheres of control"); cf. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L.J. 81, 85 (1987) (suggesting that women "trivialize" their own suffering because "[a]n injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality").

143. For descriptions of married women's lack of "subjectivity" see, e.g., C. HEILBRUN, *supra* note 3, at 175; Silver, *supra* note 3, at 81 (during debates in the French Assembly after World War I, it was argued that married women should not be enfranchised because they "could not be 'political individuals' with wills other than those of their husbands").

144. See, e.g., Urviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1978) (describing men's increasing assertion of custody rights); see also Molinoff, *Life with Father: How Men are Winning Custody of their Kids*, N.Y. Times, May 22, 1977, § 6 (Magazine), at 13.

145. I am not suggesting that children's welfare is in any sense adequately addressed at divorce, merely that courts and legislatures are more likely to focus on it, at least rhetorically. See, e.g., S. LEVITAN & R. BELOUS, WHAT'S HAPPENING TO THE AMERICAN FAMILY? (1981); Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); *infra* note 215.

146. It has been suggested that a *rights* paradigm, as opposed to a *needs* paradigm, itself precludes or trivializes consideration of women's needs. See authorities cited *infra* notes 238-242. The point here is that the refusal to recognize women as subjects is consistent with a pinched construction of their rights.

147. See *infra* text accompanying notes 178-182.

the denial of her subjectivity and her domination by the men, or the "male" institutions, involved in the process.¹⁴⁸

III. TOWARD A PSYCHO-FEMINIST CRITIQUE OF DIVORCE LAW

The preceding section explains why intrapsychic constructs—gendered in accordance with a pattern of infant and child care provided almost exclusively by women—play a significant, if indeterminate, part in how we perceive and treat divorce. Divorce, especially women-initiated divorce,¹⁴⁹ means that the woman has failed at her primary function of maintaining harmony in the domestic sphere. Since the destruction of the private sphere is her fault, she should bear the consequences. Even more grievous, from the husband's (male) perspective, divorce means that woman-as-mother is gone. Regardless of actual fault, she is perceived as an abandoning mother, whose appalling desertion of her husband-child should be punished. The notion of woman-as-mother also underlies our expectation and condonation of sequential marriages by men and our corresponding discouragement of multiple families by women. Moreover, deeply ingrained patterns of domination and submission facilitate men's imposition of— and women's capitulation to— male values, standards and interests.

This section explores the impact of the intrapsychic constructs described above on specific aspects of both the divorce process and its aftermath. It should be emphasized that here, as in the preceding section, I do not mean to suggest that the patterns described are universal, or that they necessarily manifest themselves as grossly as I have outlined. Rather, enough of these patterns are observable, with enough clarity, enough of the time not only to justify their recognition, but to mandate a systemic response.¹⁵⁰

148. Cf. Resnik, *supra* note 4, at 4 ("One of the central aspects of feminism is an understanding that much of the activity in women's lives is directed toward seeking approval, permission, power and legitimation from men.")

149. In France, as of 1984, "[s]ixty percent of the petitions are brought by only one spouse: three of four times it will be the wife." D. STETSON, *supra* note 32, at 92; accord STATISTIQUE ANNUELLE, *supra* note 1, at 49 ("L'initiative du divorce: surtout féminine"). In the U.S., women filed 61.5% of the divorce petitions acted on in 1986, men filed 32.6% of the petitions, and 5.9% were jointly filed. *New Data on Divorce Filing*, N.Y. Times, June 15, 1989, at C8, col. 3. In Wallerstein's study, 65% of the women (compared to 35% of the men) had sought divorce over the objection of their spouses. Wallerstein, *supra* note 44, at 68. As Nadine Taub has pointed out, some of these petitions may be attributable to the chivalrous custom of allowing the wife to file first. N. Taub, Comment on July 17, 1989 draft of this Article.

150. My purpose here is not to suggest specific proposals for reform, but to demonstrate the need for judges, lawyers and spouses, who are involved in the divorce process,

A. *Implications for the Divorce Process*

1. Negotiation and Mediation

Negotiation and mediation are methods through which parties resolve disputes without formal adjudication.¹⁵¹ In negotiation, the parties attempt to do so by themselves.¹⁵² In mediation, they have the assistance of a third party.¹⁵³ In France, although negotiation between the parties plays a central role in most divorces, the parties return to court several times before the divorce is granted. The process through which they agree to the terms of support, visitation and property distribution is generally subject to more formal supervision than it is in the United States.¹⁵⁴

In the U.S., as in France, almost all divorces are resolved through negotiation and/or mediation.¹⁵⁵ Professor Frank Sander has succinctly summed up the advantages of an "open-ended, problem solving process that looks to the future; . . . [that is] flexible . . . crafted by the parties themselves . . . [and] avoids the winner-loser syndrome. . . . [D]isputants . . . have a strong commitment to the result that is reached."¹⁵⁶

to be aware of these intrapsychic patterns. Only then can we begin to devise appropriate ways to deal with them. Specific proposals would be premature.

151. AMERICAN BAR ASSOCIATION, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982).

152. See, e.g., Melli, Erlanger & Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133 (1988).

153. "Rooted in African moots, socialist comrades' courts, psychotherapy and labor mediation rather than Anglo-American jurisprudence, mediation stresses informality, open and direct communication, reinforcement of positive bonds and avoidance of blame." Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, in LOMBARD, *supra* note 114, at 171; see, e.g., R. FISHER & W. URY, *GETTING TO YES* (1981); Cornblatt, *Legal Essay: Matrimonial Mediation*, 23 J. FAM. L. 99 (1984-85); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982).

154. Peigne, *Financial Arrangements on Divorce in France*, in THE RESOLUTION OF FAMILY CONFLICT, *supra* note 25, at 322, 324-25 (describing the judge's responsibilities); accord M. GLENDON, *supra* note 21, at 85.

155. No official count is kept of mediated divorces, but by 1988 approximately 120 programs were operating in the U.S. and some states have made it mandatory, at least in the first instance. Brannigan, *Warring Couples Shun Divorce Mediators and Opt Instead to Battle it Out in Court*, Wall St. J., Mar. 27, 1990, at B1, col. 4. Mediation is mandatory, for example, in contested cases involving custody or visitation in California. CAL. CIV. CODE. § 4607 (West Supp. 1990). For a systematic exploration of the consequences of using mediation in the context of custody and visitation, see Pearson & Thoennes, *supra* note 153. See also White, *Mediation in Child Custody Disputes and a Look at Louisiana*, 50 LA. L. REV. 1111 (1990).

156. Sander, *Introduction: Towards a Functional Analysis of Family Process*, in THE RESOLUTION OF FAMILY CONFLICT, *supra* note 25, at xi, xiii; see also Brotsky, Steinman & Zimmelman, *Joint Custody Through Mediation—Reviewed*, 26 CONCILIATION

To the extent that the law itself is "male," representing and incorporating male values,¹⁵⁷ negotiation may permit women to avoid or minimize the official imposition of those values. James Foster has suggested, for example, that "the quintessential male world of law [is] profoundly shaped by the formal-rational, contractarian . . . underpinnings of American social reality, and . . . by the psycho-sexual roots of patriarchy."¹⁵⁸ Since compliance is generally greater with an agreement the parties have devised themselves, enforcement, and the legal machinery it involves, is likely to be less of a problem.¹⁵⁹ Similarly, negotiation may allow women to limit the utilization of the adversarial, reductionist methods¹⁶⁰ which infuse legal culture.

Finally, negotiation not only allows but encourages consideration of the parties' concerns, including those too personal or idiosyncratic to be found on a legal checklist. Its adherents claim it affords women a greater opportunity for the full expression of their needs.¹⁶¹ Women in both France and the U.S. have opted for negotiation or mediation over litigation.¹⁶² Carol Gilligan, among others, has suggested that women are more skilled at and more comfortable with negotiation than they are with outright conflict.¹⁶³ But while women may be more comfortable with these constructs

CT. REV., Dec. 1988, at 53, 58 (concluding that "[j]oint custody appears to be working out well for these families and their children who had needed considerable assistance to work out an agreement"). See generally Hobbs, *Facilitative Ethics in Divorce Mediation: A Law and Process Approach*, 22 U. RICH. L. REV. 325 (1988).

157. See *supra* notes 69 & 78. As Robin West has pointed out, autonomy, independence, and separation are liberal as well as "male" values. West, *supra* note 10, at 4-7.

158. Foster, *supra* note 69.

159. Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985); accord Pearson & Thoennes, *supra* note 153, at 177.

160. Some feminists have argued that these are "male" methods. Foster, *supra* note 69; Rifkin, *supra* note 52. Many believe that the law is "inherently patriarchal." Olsen, *supra* note 10, at 5 & n.13; *supra* note 58. See generally Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1170 (1989) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987)) (grand theory criticized for "suppress[ing] the complexity and ambiguities of life in order to fit lived experiences into these tidy categories.").

161. See Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Advocates be Wise Negotiators?*, 34 UCLA L. REV. 863, 873 (1987) (describing the "messy richness" of the context cultivated by the "wise negotiator").

162. For a thought-provoking study of the ways in which such choices may be shaped, see Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 109-16 (1986).

163. See generally C. GILLIGAN, *supra* note 136; Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984). But see MacKinnon, *infra* note 165.

than they are with a more formal legalistic process,¹⁶⁴ they do not always benefit from these methods.¹⁶⁵

Reducing the law's role in the process leaves more to be determined by the gendered intrapsychic constructs described above.¹⁶⁶ Gendered dynamics of domination and submission are almost inevitable at divorce, when the context reinforces gendered identities such as "wife/husband" and "mother/father."¹⁶⁷ Because of their usually accurate perception of their relative lack of power, and what are often for them intolerably high stakes, women are typically more "risk-adverse" during the divorce process than men particularly when custody is involved.¹⁶⁸ This makes women not only more inclined to choose negotiation, but more likely to capitulate within its framework.¹⁶⁹ Most women will freely bargain away support and property, for example, in exchange for greater control over custody and visitation.¹⁷⁰ Moreover, while private ordering may facilitate richer discussion, it impedes the recognition of gendered constructs as such. Indeed, as a "private" process, it encourages the parties to see themselves more as individuals than as members of subordinate or dominant groups. Since there is no precedential value to settlements, one woman's successful articulation of her concerns does little for the next woman. Negotiation does not pur-

164. It has been pointed out that "[m]ediation generates a great deal of user satisfaction." Pearson & Thoennes, *supra* note 153, at 172.

165. See Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in A LESS THAN PERFECT UNION, *supra* note 64, at 56, 61 ("[T]his failure of rights discourse does not logically mean that informal systems will lead to better outcomes."). MacKinnon has remarked that "it makes a lot of sense that [women] should want to negotiate, since we lose conflicts." *Mitchell Lecture*, *supra* note 139, at 27. In the divorce context, women "lose" negotiations as well.

166. See *supra* text accompanying notes 96-148.

167. See Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985). See generally Scanzoni, *A Historical Perspective on Husband-Wife Bargaining Power and Marital Dissolution*, in DIVORCE AND SEPARATION 20, 31 (G. Levinger & O. Moles eds. 1979). But cf. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993 (1979) ("There may well be cases in which one spouse (stereotypically the husband) is highly sophisticated in business matters, while the other spouse is an innocent lamb being led to the slaughter. But married couples more typically have similar educational and cultural backgrounds, and most individuals perceive very well their own financial interests and needs at the time of divorce.").

168. L. WEITZMAN, *supra* note 5, at 311-312.

169. *Women in the Courts*, *supra* note 47, at 169-70 (referring to "concern that the woman litigant was more susceptible to intimidation in the mediation process than was the male litigant").

170. L. WEITZMAN, *supra* note 5, at 243 n.82 (quoting Nancy Polikoff).

port to establish, and may even inhibit the development of any mechanism for establishing, normative weight for such concerns.¹⁷¹ Although in some cases negotiation may be constructive, from a psycho-feminist perspective it poses significant risks.

2. Judicial Discretion

If the parties are unable to resolve their differences, the task falls to the court. Judges have tremendous discretion in divorce cases in both France and the United States. In French *divorce-convention* (divorce upon the joint petition of the spouses), for example, even approval of a settlement to which the parties agree may be withheld under provisions which "give the judge so much discretion . . . that [he] can in effect force the parties to adopt an agreement of which he is indirectly the author."¹⁷² The *juge aux affaires matrimoniales* (J.A.M.)

intervenes at all stages For divorce by consent, in particular, he assumes the whole procedure. He hears the parties, first alone and then with their advocates, at least twice, and he pronounces the final decision of which he alone is sole judge. . . . [h]e alone decides when in the future he should amend certain provisions of the judgment.¹⁷³

Similarly, American matrimonial judges have broad equitable powers and commensurate leeway.

The point of this extraordinary discretion is to permit the court to take into account all aspects of the marital situation in order to reach a fair decision.¹⁷⁴ It represents a deliberate focus on the context of the dispute and an attempt to compensate for the lack of "messy richness"¹⁷⁵ in the legal system, and what some feminists have criticized as its failure to recognize women's own perceptions

171. See Schafran, *The Success of the American Program*, in *EQUALITY AND JUDICIAL NEUTRALITY* 41 (S. Martin & K. Mahoney eds. 1986).

172. Glendon, *supra* note 34, at 205.

173. Peigne, *supra* note 154, at 325; see also *STATISTIQUE ANNUELLE* *supra* note 1, at 51 ("Intervention du juge après le divorce"). See generally Meulders-Klein, *supra* note 25, at 299.

174. See generally Freed & Walker, *supra* note 24, at 413-18, 445-47 & 450 (typical judicial and statutory guidelines for determining property distribution and support); cf. Stark, *supra* note 47, at 1194 (urging explicit consideration of gender roles as well).

It has been observed that this adds uncertainty to an already unpredictable proceeding. See generally Ford, *Rehabilitative Alimony: A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285, 288 (1984); Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415 (1981).

175. Hyman, *supra* note 161, at 873.

of their needs.¹⁷⁶ Thus, judicial intervention should, in theory, address a major concern raised by negotiation. But it is unlikely that increasing the court's role and authority improves the situation.¹⁷⁷ At least 39 states have task forces investigating the impact of gender bias in the courts.¹⁷⁸ All of the nine which have published reports to date have found that "gender bias detrimental to women permeates every aspect of marital dissolution and child support."¹⁷⁹

It is difficult to distill what West has called "women's gender specific suffering"¹⁸⁰ from the endless details of a broken marriage. A judge who is oblivious to the sex/gender system is unlikely to do so. It is easier for a judge to remain oblivious if he is male. In this psychologically loaded context, discretion permits the judge's own bias, reflecting his own place in the patriarchy, to serve as the unexamined predicate for his decision.¹⁸¹ Divorce is governed not by law, but quite literally by the men who comprise the vast majority of family court judges in both countries.¹⁸²

176. West, *supra* note 10, at 37; cf. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1954 (1988) ("what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment").

177. See generally Freeman, *Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?*, in THE RESOLUTION OF FAMILY CONFLICT, *supra* note 25, at 1, 15 (stressing the pertinence to family law of Max Weber's observation that law intended to protect the weak must be "confined by rules").

178. See PROCEEDINGS OF THE NATIONAL CONFERENCE ON GENDER BIAS IN THE COURTS (D. Knoebel & M. McCoy eds. 1990); Schafran, *Gender and Justice: Florida and the Nation*, 42 FL. L. REV. 181, 186 & n. 18 (1990).

179. Schafran, *supra* note 178, at 187.

180. West, *supra* note 142, at 84.

181. See Bartlett & Stack, *supra* note 10, at 25 & n.74 (discussing judicial bias in custody determinations); Schafran, *supra* note 171, at 412. See generally *supra* note 86. For a succinct history of the gender bias in the courts task force movement, see Schafran, *supra* note 178, at 183-86; see also Karlan, *Towards the Elimination of Gender Bias in the Florida Courts*, 11 NOVA. L.J. 1569 (1987); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URBAN L.J. 15 (1986-87); *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745 (1990); Gold, *Sex Bias is Found Pervading Courts*, N.Y. Times, July 2, 1989, at 14, col. 1 (reporting that women have "serious difficulty in obtaining legal assistance after divorce . . . [and] that alimony and child support payments were often inadequate" in Massachusetts, and noting that these "findings are similar to those reported by studies in recent years in New Jersey, New York, Rhode Island, Maryland and Nevada").

For an excellent discussion of the specific problems of deciding custody, see Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

182. See EQUALITY AND JUDICIAL NEUTRALITY, *supra* note 171; Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1977); Will Women Judges Really Make a Difference?, Fourth Annual Barbara Betcherman Memorial Lecture delivered by Mme. Justice Bertha Wilson, Supreme Court of Canada (Feb. 8, 1990) [hereinafter Wilson Lecture]. Explicit guidelines would

Female judges may make some difference if their experiences enable them to understand and empathize with the needs of the women whom they judge.¹⁸³ Female judges, however, are a self-selected group. They have maneuvered—and acquired power—within a male dominated system and have necessarily assimilated some of the values of that system in the process. They are constrained by the notions of judicial “objectivity” and “neutrality,”¹⁸⁴ (criticized by some commentators as a preemptive expression of the dominant discourse) which may be understood as aspects of the intrapsychic constructs underlying the concept of judging itself.¹⁸⁵

B. *Some Post Divorce Consequences of Intrapsychic Constructs*

1. Custody Arrangements

The gendered intrapsychic constructs described above are reinforced and perpetuated where divorce leaves women with more parental responsibility, and men with less. Yet women passionately oppose joint custody,¹⁸⁶ in practice¹⁸⁷ as well as in theory, and men

probably be appreciated by some family court judges. In France, for example, one spouse may be required “to compensate [the other], so far as possible, for the disparity which the disruption of the marriage created in the conditions of their respective lives.” CODE CIVIL art. 1134 (Fr.). Absent specific directives, this seems to require an inordinately subjective determination on the part of the Court.

183. See Abramson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE L. REV. 489 (1984); Resnik, *supra* note 10, at 1932–33 n.223; Sherry, *The Gender of Judges*, 4 LAW & INEQUAL. 159 (1986); Wald, *Disembodied Voices—An Appellate Judge's Response*, 66 TEX. L. REV. 623 (1988); Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, 4 LAW & INEQUAL. 3 (1986); Wilson Lecture, *supra* note 182, at 20–21; see also Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 587 (1982) (“Those who don't see [the decisionmaker] as ‘one of us’ will suspect, the minute he begins to speak of distribution, that he is more of a player than a referee, and those of his own group begin to worry that he will go over to the enemy.”).

184. See generally Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987); Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31 (1990).

185. Development of this theme is beyond the scope of this article, but would be likely to require consideration of judge as father, high priest, and mediator. See generally R. SENNETT, *AUTHORITY* (1980); Curtis & Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987); *supra* notes 154–155.

For a comparative discussion of judicial roles in different countries, see M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

186. By “joint custody”, I mean shared decisionmaking authority, child-rearing responsibility and shared physical custody after divorce. Steinman, *The Experience of Children in a Joint-Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981) excerpted in LOMBARD, *supra* note 114, at 148; see *supra* note 26.

187. See generally Albiston, Maccoby & Mnookin, *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167 (1990).

are usually threatened by it. This reflects the urgency and forcefulness of gendered intrapsychic constructs in this context.¹⁸⁸ This is hardly surprising, since it is through the custodial, intimate nurturing of children that gendered intrapsychic constructs replicate themselves. The three constructs of "woman-as-mother" discussed above; i.e., the private/public dichotomy, the dynamics of submission and domination, and the hostility of both sexes toward the "all-powerful mother"; are overwhelming in this context. These constructs have a profound influence on custody arrangements.¹⁸⁹

This explains, in part, our otherwise mysterious acceptance of a post-divorce gender based division of labor. We all chafe from the "straightjacket of gender."¹⁹⁰ Feminists have exhaustively described the inequities of this division of labor *during* marriage,¹⁹¹ but many women tolerate these inequities in order to keep the marriage together. As Levi-Strauss acutely observed, "The sexual division of labor is nothing else than a device to institute a reciprocal

188. See Z. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 74-75 (1988).

189. I agree with David Chambers that "[t]he movement to encourage joint physical custody is wise but the movement to permit courts to impose joint custody is not." Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479 (1984); Uviller, *supra* note 131, at 129 (courts are properly reluctant to order joint custody against the wishes of either parent). The focus here is on the reasons parents reject such arrangements.

190. D. DINNERSTEIN, *supra* note 87, at 45.

191. See A. HOCHSCHILD & A. MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (arguing that women suffer the consequences of a "stalled revolution" that propelled women into the marketplace but failed to inspire men to assume commensurate responsibilities in the home); L. TILLY & J.W. SCOTT, *supra* note 54, at 221 (describing "double burden of working wives" in France); Koretz, *Economic Trends*, BUSINESS WEEK, Dec. 24, 1990, at 14 (citing economist June O'Neil's work on the "sudden marked narrowing of the wage gap between women and men." O'Neil predicts that "future progress will depend less on eliminating discrimination than on reducing persistent gender differences in the priorities placed on work and family responsibilities); Cowan, *Women's Gains on the Job: Not Without a Heavy Toll*, N.Y. Times, Aug. 21, 1989, at A14, col. 5; see also Cowan, *A Case Study of Technological and Social Change: The Washing Machine and the Working Wife*, in CLIO'S CONSCIOUSNESS RAISED, *supra* note 3, at 245; Girard, *Working Hours and Time Schedules: The Time Budget of Married Women in Urban Centers (France)*, in EMPLOYMENT OF WOMEN, International Seminars 1968, No. 2, at 185-214 (Paris: OECD, 1970) (cited in Cowan, *supra*, at 253 n.13); *supra* notes 106-111. It took enormous political effort, and creative breakthroughs in employment law, for women to begin to enter previously sex-segregated workplaces. It is likely to require an even more radical transformation of the family, and family law, before men assume their fair share of nurturing responsibilities within the family. See Quinlen, *Bears with Furniture*, N.Y. Times, Oct. 18, 1990, at A15, col. 5; Dionne, *Struggle for Work and Family Fueling Women's Movement*, N.Y. Times, Aug. 22, 1989, at A18, col. 1; cf. Silver, *supra* note 3, at 81 (observing that in France, "[the] lower the social class, the more likely men are to help in domestic tasks").

state of dependency between the sexes."¹⁹² As discussed above, the woman assumes responsibility for keeping the home together and maintaining connectedness among family members.¹⁹³ But at divorce, when the household divides, the justifications for this "reciprocal state of dependency" no longer exist.

Economic considerations alone cannot explain the woman's post-divorce childcare responsibilities. Although the husband is almost invariably the higher wage-earner (even when the wife works full time),¹⁹⁴ his higher wages rarely benefit the family after divorce. He is not abstaining from taking care of his children so that he can earn more money for their support.¹⁹⁵

An analysis based on intrapsychic constructs of "woman-as-mother" suggests explanations for the post-divorce persistence of the gender-based division of labor. First, women are concerned that men cannot or will not take care of children properly, that is, as women would. We expect women, in general, to be good at mothering. They usually have plenty of practice. Recognizing that their world is gendered, little girls begin imitating their mothers and other women early. They soon learn to place high values on "connectedness"¹⁹⁶ and to practice interpersonal and nurturing skills in interminable play with dolls.¹⁹⁷

Second, women resist ceding any of the limited territory where their hegemony is generally acknowledged.¹⁹⁸ Nurturing children

192. C. LEVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 347-48 (1969); cf. L. TILLY & J.W. SCOTT, *supra* note 54, at 53 (historically, the survival of the family in France "depended on the work of both partners. The household division of labor reflected the social definition of difference between husband and wife: tasks performed were complementary. . . . The family economy reproduced itself as the basic economic unit of production.").

193. See *supra* text accompanying notes 108-112 & 136.

194. As many commentators have noted, the woman is doubly disadvantaged by the gender-based division of labor. In the marketplace, she still earns approximately 68¢ to her husband's \$1.00. See Concoran, Duncan & Hill, *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 *SIGNS* 232, 239 (1984) (noting that differences between women and men, such as education, work experience, work continuity, job restrictions, and absenteeism, "explain only about one-third of the wage gap between white men and white women and only about one-quarter of the wage gap between white men and black women"); *supra* note 105. At home, women assume extra responsibilities, in part rationalized by their lower monetary contribution to the household. See *supra* note 191. From a psycho-feminist perspective, we may all prefer to believe that women do this work for "love." See generally A. OAKLEY, *WOMAN'S WORK: THE HOUSEWIFE PAST AND PRESENT* 7, 9 *passim* (1974).

195. L. WEITZMAN, *supra* note 5; see *infra* notes 228-229.

196. See Lyons, *supra* note 12; *supra* text accompanying notes 85-93.

197. C. GILLIGAN, *supra* note 136, at 24-63; Lyons, *supra* note 12.

198. B. HOOKS, *supra* note 102, at 139.

is one area in which women's skills are recognized. Yet, despite their expertise, mothers, and women in general, have had little input in creating enforceable standards for the post-divorce welfare of their children.¹⁹⁹ They have had few options for assuring their children's safety and well-being other than sole physical custody.²⁰⁰ In theory, it should not be difficult to generate acceptable alternatives. If nurturing is truly learned behavior, for example, joint custody could be conditioned upon ongoing "remedial" training for parents with inadequate skills.²⁰¹

199. See Czapskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 659 (1989) (suggesting a "dual parent/dual responsibility formula"); West, *supra* note 71, at 66. Criminal sanctions, rarely imposed in this context, may be appropriate for negligent behavior. See also Harmer, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, 4 B.Y.U. J. PUB. L. 239 (1990); cf. Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059, 1084 & nn.155-61 (1984) (noting selective effectiveness of jailing as a sanction for failure to comply with support orders; and concluding that the value of criminal sanctions in this context is more in the threat than in the actual jailing. *Id.* at 1085 & n.164.). For an overview of issues raised by imposing limits on parental conduct, see J. AREEN, *supra* note 24, at 462-72.

200. Goldstein, Freud & Solnit's classic, *Beyond the Best Interests of the Child*, supports the proposition that it would be desirable for the custodial parent to have control over the circumstances under which the child is raised. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1969). But see Dembitz, Book Review, 83 YALE L.J. 1304, 1310-11 (1974).

201. Courses in nurturing are already a part of the curriculum in many public schools. See, e.g., Wilson, *Family Life Education: Needed Now More than Ever*, N.Y. Times, July 1, 1990, at 20, col. 1 (N.J. ed.) (21 states have compulsory family life and sex education programs, focusing on interpersonal relationships, human growth development and sexuality, responsible personal behavior, and building strong families); Schrenk, *Grade-School Babying*, N.Y. Times, Apr. 8, 1990, § 4a, at 19.

Like driver education, such courses could be made mandatory, if we decide that handling children is as important and requires as much skill as handling cars. "You can't legislate a parent to have a good relationship with a child," as David Liederman, executive director of the Child Welfare League of America, has pointed out. Lewin, *Father's Vanishing Act Called Common Drama*, N.Y. Times, June 4, 1990, at A18, col. 1, col. 4. Where the parent yearns for and is working toward such a relationship, however, much can be done to facilitate it. There is a vast literature which could be tapped to design workable programs for teaching fathers interpersonal nurturing skills. It has been observed, for example, that adults do not respond like children do to "extrinsic" motivators, such as grades. "Intrinsic" motivators, such as "the need for self-esteem" or broadened responsibilities, are generally more effective. Knowles, *Adult Learning*, in TRAINING AND DEVELOPMENT HANDBOOK: A GUIDE TO HUMAN RESOURCE DEVELOPMENT 168 (R. Craig 3d ed. 1989). See generally L. SEGAL, SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN (1990) (arguing that psycho-feminist theories explaining male resistance to change are insufficient without an analysis of class).

I am not suggesting that such programs could be easily implemented. Because of the prevalence of child abuse, for example, men who want to take care of children are more likely to be met with mistrust than support. Nordheimer, *Caring for Children*,

A major impediment here, of course, is the concern to maintain the privacy of the private sphere, translated into the "legal tenet that the state should refrain from crossing the threshold of the home of the functioning family, especially where the upbringing of children [is] concerned."²⁰² Another significant factor is women's historically marginal role in the law making process.²⁰³

But while social and political determinants cannot be ignored, a focus on intrapsychic constructs of domination, submission and hostility toward powerful women helps explain the failure of the law to even consider alternatives to exclusive post-divorce female parenting which address women's concerns for the welfare of their children.

As discussed above, men (including family court judges and especially ex-husbands) do not take orders from women. Just as they achieved their masculinity by asserting their independence from their mothers, they affirm it by demonstrating their independence from their wives.²⁰⁴ When a father assumes custodial responsibility, he does so on his own terms.²⁰⁵ From the mother's point of view, this is too often to the child's detriment.²⁰⁶ A distinct, but related, reason for the failure to adopt feminine standards is that such standards include an ethic of self-sacrifice that men reject.²⁰⁷ Family court judges and even ex-husbands, for the most part, believe that a woman, especially a mother, can be counted on to put the interests of the children above her own.²⁰⁸

Men Find New Assumptions and Rules, N.Y. Times, Aug. 5, 1990, at A1, col. 1, A16, col. 2.

202. M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW*, *supra* note 1, at 291 (discussing French and United States family law).

203. For our purposes, this may be categorized as "public sphere" activity from which women, for the most part, have been excluded. *See supra* text accompanying notes 99-118.

204. *See supra* text accompanying notes 138-148.

205. *See generally* Grief, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311 (1979). When women enter the marketplace, in striking contrast, they are held to a pre-existing (male) standard. In addition to the economic incentives for accepting that standard, it is consistent with an internalized construct of male domination. This is one reason why the model developed by feminists in connection with employment discrimination cannot easily be applied in the family law context. *See supra* text accompanying notes 77-84, 138-142.

206. *See* P. CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* (1986).

207. *See supra* text accompanying notes 138-140. *See generally* Nelson, *Mothering Others' Children: The Experiences of Family Day-Care Providers*, 15 SIGNS 586 (1990).

208. *See supra* note 139 and accompanying text.

Although joint custody raises troubling questions for most of us,²⁰⁹ it becomes increasingly appealing,²¹⁰ individually²¹¹ and collectively, as gender roles become more fluid. We recognize the problems associated with exclusive female parenting. It not only puts women in a precarious financial situation,²¹² but impedes the development of an autonomous "subjective" self.²¹³ For children, sole female custody after divorce not only reinforces gender stereotypes and misogyny,²¹⁴ but results in often severe material deprivation, since they share in the "feminization of poverty."²¹⁵ For men, it not only deprives them of a strong nurturing relationship with their children, but their desire for a family²¹⁶ may lead them to incur financial obligations toward two or more households,²¹⁷ jeopardizing their own finances as well as the welfare of those dependent on them.

209. The issue remains a divisive one for feminists. See Kay, *An Appraisal of California's No-fault Divorce Law*, 75 CALIF. L. REV. 291, 308 (1987); Post, *Arguments Against Joint Custody*, 4 BERKELEY WOMEN'S L.J. 316 (1989-90); *Joint Custody Bill Opposed by [N.O.W.] State Board*, NOW-NJ Newsbreaks, July 1989, at 3, col. 3 (N.O.W. State Board arguing that proposed joint custody bill would result in smaller support awards for women and insurmountable implementation and enforcement problems).

210. Joint custody is authorized in several states. See, e.g., CAL. CIV. CODE § 4600.5 (Deering 1990); GA. CODE ANN. § 19-9-1 (1990); TENN. CODE ANN. § 36-6-101 (1990); Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 542-544 (1979). For a breakdown of custodial arrangements in France, see STATISTIQUE ANNUELLE, *supra* note 1, at 282-83.

For cogent reviews of the literature, see Chambers, *supra* note 189, at 527-38; Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 741-42 (1983). See generally Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985).

211. The gendered division of labor prevents us from becoming "intact self-created human[s]." D. DINNERSTEIN, *supra* note 87, at 272.

212. See *supra* note 194.

213. See *supra* notes 137-142. But cf. Fineman, *supra* note 27, at 735 (objecting to the critique of motherhood advanced by social workers and psychologists dealing with custody issues).

214. See Shapiro, *supra* note 74, at 65 (discussing Yale study of families in which fathers assume primary responsibility for child care and mothers work). Carolyn Heilbrun makes the provocative argument that since the gendered division of labor makes "impossible the companionship of men and women," the survival of marriage as an institution depends on its restructuring. C. HEILBRUN, *supra* note 3, at 189.

215. See *supra* note 45. For children in the United States, divorce is the strongest single predictor of poverty. Concoran, Duncan & Hill, *supra* note 194, at 244.

216. See *supra* note 113 and text accompanying notes 124-126.

217. See *supra* text accompanying notes 113-114.

For society, exclusive post-divorce female parenting not only contributes to the growth of a new underclass,²¹⁸ but to the exclusion of nurturing values from a public sphere that desperately needs them. Because of their assumption of devalued nurturing responsibilities, women lack the money, status, power, as well as the institutional or organizational support necessary for meaningful access to, and participation in, the public sphere. Those for whom nurturing values are most important have little opportunity to promote them in a political context, to our collective detriment.²¹⁹ In short, we have ample incentives to overcome our own ambivalence, our own internalized ideas of gender, and begin to analyze and address the intrapsychic constructs that underlie the post-divorce gendered division of labor.

2. Enforcement of Support Awards

Compliance with the support provisions of divorce judgments, which are almost invariably in favor of women and directed against their higher-earning former husbands, is astonishingly low in both France and America.²²⁰ Why do otherwise law-abiding men disobey court orders requiring them to support their former wives and children? While a voluminous literature addresses this question²²¹ (with varying degrees of success), a psycho-feminist critique sug-

218. BUREAU OF THE CENSUS, *supra* note 106, at 36-38; D. STETSON, *supra* note 32, at 99-100; L. WEITZMAN, *supra* note 5, at 323. The penury of women and children may be more appropriately viewed as a persistent condition, rather than a new phenomenon. See L. TILLY & J.W. SCOTT, *supra* note 54, at 51-52.

219. D. DINNENSTEIN, *supra* note 87, at 160-197; S. RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989) (taking care of small children develops capacities for creative, nonviolent conflict resolution sorely lacking in most (male) world leaders); Gordon, *A National Care Agenda*, *THE ATLANTIC*, Jan. 1991, at 64; Held, *supra* note 99, at 388. This is a recurring theme for women's movements. Jenson, *supra* note 1, at 70 (women's suffrage in France was expected to "inject social concerns into a political process"); cf. D. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY IN THE MAKING* (1990) (male aggressiveness and machismo—even to the point of self-destruction—were useful, from an anthropological point of view, to preserve societies threatened by hostile invaders or scarcity; constructs of manhood, like those of womanhood, reflect values of self-sacrifice for the sake of the community).

220. M. GLENDON, *STATE, LAW AND FAMILY*, *supra* note 1, at 276-79; D. STETSON, *supra* note 32, at 99-101; L. WEITZMAN, *supra* note 5, at 262. See generally Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 *FAM. L. REP. (BNA)* No. 50, at 3051 (Oct. 23, 1984).

221. See, e.g., D. CHAMBERS, *supra* note 114; Cox, *Economic Support of Children by Fathers Following Divorce: Some Theoretical and Empirical Considerations*, in *THE PARENTAL CHILD-SUPPORT OBLIGATION* 157, 164-68 (J. Cassetty ed. 3d. ed. 1983); Czapanskiy, *supra* note 199; Note, *supra* note 199.

gests a shift in focus. Otherwise inexplicable behavior begins to make sense when we take into account women's ongoing responsibility in the private sphere, the virtually universal resentment of powerful women, and the gendered dynamics of dominance and submission.

As discussed above, the mother is usually granted physical custody of the children while the father is granted visitation. Even if he has cultivated close relationships with his children while he was living with them,²²² it is hard for the father to sustain such relationships in his new capacity.²²³ Since visitation is often difficult, awkward and even painful,²²⁴ it is not surprising that the visits usually taper off.²²⁵ The father's role is unclear and men may be particularly inept at dealing with the troubling ambiguities of the situation.²²⁶ He is likely to blame his former wife for his problems with the children since he holds her responsible for harmony in the domestic sphere.²²⁷ Although the correlation between visitation and support is problematic,²²⁸ the less of a relationship a man has with

222. Intimacy between children and fathers is hardly facilitated by the intrapsychic constructs described above. See *supra* text accompanying notes 96-148. While such intimacy is not taken for granted, it may be established to the satisfaction of a court. See *Caban v. Mohammed*, 441 U.S. 380 (1979) (unwed father's adoption veto may not be precluded where substantial relationship with child has been established); *Stanley v. Illinois*, 405 U.S. 645 (1972) (as a matter of due process, unmarried father is entitled to a hearing on fitness before children can be taken away).

223. Andre Dubus poignantly describes one father's dilemma in *The Winter Father*:

He saw that, in his eight years as a father, he had been attentive, respectful, amusing; he had taught and disciplined. But no: not now: when they were too loud in the car or they fought, he held onto his anger, his heart buffeted with it, and spoke calmly, as though to another man's children, for he was afraid that if he scolded as he had before, the day would be spoiled, they would not have the evening at home, the sleeping in the same house, to heal them; and they might not want to go with him next day or two nights from now or two days.

A. DUBUS, *SELECTED STORIES* 27 (1988).

224. See, e.g., Wallerstein & Kelly, *Effects of Divorce on the Visiting Father-Child Relationship*, 137 AM. J. PSYCHIATRY 1534, 1536-37 (1980). See generally Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235 (1982).

225. See Furstenberg & Harris, *The Disappearing American Father? Divorce and the Waning Significance of Biological Parenthood* (Mar. 1990) (unpublished paper on file with the author); Lewin, *supra* note 201.

226. C. GILLIGAN, *supra* note 136, at 39 *passim*; see also Wallerstein & Kelly, *supra* note 224, at 1536. This is often complicated by geographic distance, remarriage or difficulty in arranging visitation with the former spouse. See Lewin, *supra* note 201, at A18, col. 2.

227. See, e.g., Lewin, *supra* note 201, at A18, col. 5.

228. McIsaac, *Editorial: Joint Custody Retrospective*, 26 CONCILIATION CT. REV. iii, iv (June 1988). But see Bruch, *And How Are the Children? The Effects of Ideology*

his children, the less concerned he is likely to be with their welfare and the less likely he is to contribute to their support.²²⁹

The husband's reluctance to comply with his support obligations can be attributed, in part, to intrapsychic constructs of gender. As a product of a mother-reared culture, he expects a woman to provide psychological support, domestic harmony, and a refuge from the marketplace. This is the quid pro quo for his financial support. After divorce, he loses his privileged status in the domestic hierarchy. Indeed, he may no longer have access to his former home, or, if he does, only upon terms controlled by his former wife. He feels completely justified in stopping payments from which he no longer derives any benefit, especially since he not only has to pay for his own housing, but must cope with the endless petty details of housekeeping as well.

In this context, moreover, compliance with support obligations represents submission to an all-powerful woman. As Dinnerstein and others have observed, we are sympathetic to the plight of men resisting the control of women.²³⁰ Popular culture is replete with images of alimony harpies pursuing hapless former husbands.²³¹ The law consistently underestimates the extent of the former husband's resentment and fails to grapple with its consequences, especially in the United States. Finally, noncompliance with support orders may afford the former husband his only remaining opportu-

and Mediation on Child Custody Law and Children's Well-Being in the United States, 2 INT'L J. L. & FAM. 106 (1986). See generally Bartlett & Stack, *supra* note 10, at 35 n.109; Chambers, *supra* note 189. Although courts chastise women for denying visitation when support payments are late, it is one of the most frequent forms of self-help. See Note, *supra* note 199.

229. J. AREEN, *supra* note 24, at 676 (citing Cherlin & Furstenberg, *Fathers Who Don't Pay*, Wash. Post, April 13, 1984, at A23, col. 1); D. CHAMBERS, *supra* note 114, at 108-109; see Czapanskiy, *supra* note 199; Miller, *Joint Custody*, 13 FAM. L.Q. 345, 364-65 (1979); Comment, *Child Support v. Rights to Visitation: Equity, Economics and the Rights of the Child*, 16 STETSON L. REV. 139 (1986). Andrea Remez has pointed out that given the mother/wife equation, the father may resent the children as rivals. If he did not seek the divorce—and woman-initiated divorce is increasingly common—he may even blame them for taking the mother away from him. Telephone interview with Dr. Andrea Remez (Apr. 12, 1990).

But see Bruch, *supra* note 228, at 109 (noting that "research results do not as yet support claims [that joint custody enhances both paternal involvement and paternal financial support]"); cf. Scott, *supra* note 21, at 34 n.76 (enforcement of child support is difficult because 1) supporting parents cannot afford payments and/or 2) locating non-custodial parents and collecting payment presents special problems outside of jurisdiction where the support order was issued).

230. See *supra* text accompanying notes 119-121.

231. See, e.g., B. EHRENREICH, *supra* note 126, at 107, 159; WOMEN AS SINGLE PARENTS, *supra* note 98, at 39.

nity to dominate his former wife. He affirms his independence by refusing to recognize his former wife as a person with needs of her own, just as he refused to recognize his mother.²³²

In both France and the United States it is the woman, rather than the state, who initiates support enforcement proceedings.²³³ Under French divorce law, unlike the American system, the state assumes the role of guarantor, albeit to a limited degree. If support is not paid under the French "maintenance advance" system, the state provides the custodial mother with child support to a maximum amount set by law while simultaneously seeking to compel the husband's compliance with the support order.²³⁴ Compliance is somewhat higher under this arrangement. Although its posture as guarantor may spur the state to greater efforts against recalcitrant husbands, the fact that it is the state that is seeking the payment not only legitimates support but may weaken the husband's resistance to it. Submission to the state is less psychologically loaded than yielding to a former spouse.

In short, from the husband's point of view, he is being required to keep up his end of the bargain (to provide financial support) while his former wife is allowed to walk away from hers (to provide emotional support and a comfortable home). This typically evokes a response somewhere on a continuum between frustration and rage,²³⁵ and male judges are apt to be empathetic.²³⁶ Withholding support, or torturing the supported spouse with late or sporadic payments, violates the law. It seems no worse to the husband, however, than the wife's legally condoned behavior, which violates norms deeply rooted in intrapsychic constructs. These norms may be ignored or even formally repudiated by the enforcement process,

232. D. CHAMBERS, *supra* note 114.

233. Cf. Freed & Walker, *supra* note 24, at 491-92 (table showing states which allow—but do not compel—wage assignments, income deductions, or direct payment to court for support). An exception to this general rule in the U.S. would be the assignment of her right to seek support to an agency by a mother receiving welfare.

234. M. GLENDON, *supra* note 21, at 89; cf. Moynihan, *Another War—the One on Poverty—Is Over, Too*, N.Y. Times, July 16, 1990, at A15, col. 1 (interagency group convened by White House considered, but rejected, national standards for child support, the 'gap between the minimum benefit and the amount paid by the absent father (sic)' to be filled by government funding).

235. M. GLENDON, *supra* note 21, at 108.

236. See Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 109, 114-15 (1986).

but they remain deeply ingrained in the larger context of the sex/gender system.

Despite the appearance of a range of alternatives, the end results of negotiation/mediation and adjudication are virtually indistinguishable. The smorgasbord of divorce options provided by French law, like the myriad choices available in the fifty states, do not alter the usual outcome because they do not address its underlying causes. In both countries, the dynamics of negotiation and the tremendous latitude given typically male judges assure the *de facto* perpetuation of male norms and the unspoken, unchallenged assumptions of patriarchy. Even where the law supports gender neutral results, direct state intervention at the enforcement stage is too little, too late. The financial consequences of divorce remain devastating for women. From a psycho-feminist point of view, it is difficult to see how it could be otherwise.

CONCLUSION

We cannot begin to generate alternatives to the divorce and post-divorce scenarios which I have described until we identify the intrapsychic frameworks which underlie divorce. It has been the purpose of this paper to begin that task. The collective process of consciousness-raising, as Professors Katherine Bartlett and Elizabeth Schneider among others have astutely pointed out, is probably the most effective method for exposing the profoundly gendered premises of our culture.²³⁷ Feminist family law scholars have already applied some of the insights gained through consciousness-raising, rigorously analyzing the ways in which family law incorporates assumptions about gender.²³⁸

237. Bartlett, *supra* note 72; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); see also J. MITCHELL, *supra* note 91, at 61 (describing consciousness raising as "transforming pain into politics"); Klein, *The Diffusion of Consciousness in the United States and Western Europe*, in WOMEN'S MOVEMENTS, *supra* note 1, at 23; cf. Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217, 245 (1988) (noting that "consciousness-raising itself may . . . possibly lead women away from, rather than toward, the discovery and expression of their authentic selves").

238. Ground-breaking examples include: Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Fineman, *The Politics of Custody and the Transformation of American Custody Decision-Making*, 22 U.C. DAVIS L. REV. 829 (1989); Kay, *supra* note 35; Olsen, *Family and Market*, *supra* note 8; see also Bartlett, *supra* note 72, at 865 & nn. 156-157 (insights of feminist consciousness raising applied in "normative accounts of legal process and legal decision-making").

We must bring consciousness-raising to the court room if we are to continue to uncover the intrapsychic constructs of divorce. Analysis has limited impact, however, unless it is expressed in a social context and actually made part of the law structuring social relations. The feminist project to redefine family law²³⁹ is an ambitious undertaking²⁴⁰ and necessarily an incremental and dialectical one.²⁴¹ Divorce law is both a part and a function of the transformative process²⁴² through which our conceptions about social roles, including parenting roles, are already being altered.²⁴³ Change becomes possible when we recognize and articulate the ways in which we unthinkingly conform to the precepts of a sex/gender system that oppresses us all.²⁴⁴ Change becomes real when we apply these insights in a social context and use them to reinvent divorce law.²⁴⁵

239. Fineman, *supra* note 27; Olsen, *Myth of State Intervention*, *supra* note 8; Scott, *supra* note 21, at 10-11 & n.7; see also authors cited in *supra* note 238. Feminists who are redefining the law in other contexts include: C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665 (1990) (battered women); Olsen, *Statutory Rape: A Feminist Critique of Rights*, 63 TEX. L. REV. 387 (1984); Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Taub, *supra* note 115; West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); REPRODUCTIVE LAWS FOR THE 1990s, *supra* note 66; *Sexual Harassment Brief Bank and Bibliography*, 8 WOMEN'S RTS. L. REP. 267 (1985) (sexual harassment); see also Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Stark, Book Review, 12 WOMEN'S RTS. L. REP. 51 (1990).

240. It may well require massive re-education of decisionmakers, and I would argue, the explicit incorporation of psycho-feminists' insights into the standards applied at divorce. See Kay, *supra* note 209, at 310 & n.155 (noting with approval Weitzman's proposal for judicial education and citing pending legislation that explicitly includes "instruction on the effects of gender bias on family law proceedings"); Stark, *supra* note 47 (urging matrimonial judges to consider the extent to which the parties conformed to gender stereotypes during the marriage in dividing matrimonial property); Taub, *supra* note 115 (suggesting that administrative tribunals consider stereotyping in determining employment discrimination); Wikler, *Identifying and Correcting Judicial Gender Bias*, in *EQUALITY AND JUDICIAL NEUTRALITY*, *supra* note 171, at 12.

241. Schneider, *supra* note 237. For a description of the ways in which litigation itself may function as a form of consciousness-raising, see Bartlett, *supra* note 72, at 864-65 & n.144; Minow, *supra* note 4, at 16 (urging "struggles over descriptions of reality").

242. Olsen, *supra* note 10, at 3 ("Family law both reflects and helps create an ideology of the family—a structure of images and understandings of family life.").

243. See, e.g., J. STACEY, *BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHOHEAL IN LATE TWENTIETH-CENTURY AMERICA* (1990).

244. Bartlett, *supra* note 72, at 876.

245. Weitzman & Dixon, *supra* note 21, at 520 ("To overcome the pervasive weight of traditional male and female roles we have to change the material conditions of men's and women's lives, and the costs and benefits of custody for fathers and for mothers."); West, *supra* note 10, at 71 ("Feminists must first and foremost counter a profound

power imbalance, and the way to do that is through law and politics.”); Luttrell, Book Review, 15 SIGNS 635, 640 (1990) (discussing “the risky yet necessary step of advancing feminist theory from a discursive to a political practice”). This is obviously a complicated process. Some major contemporary scholars who have attempted to describe it are set forth in Bartlett & Stack, *supra* note 10, at 29 n.94.