THE EVOLUTION OF EQUITABLE DISTRIBUTION IN NEW YORK

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INTRODUCTION

The law in general, and family law in particular, embodies social values.[1] In 1980, the New York State Legislature enacted Domestic Relations Law section 236 part B, which implemented equitable distribution as the means by which judges should distribute property upon divorce.[2] One of the bill's supporters hailed the legislation as achieving "the adaptation of law to current social values."[3] The new law sought to eradicate financial inequities suffered by divorcing women by distributing marital assets without regard to which spouse held title. Equitable distribution embraced the modern concept of marriage as an economic partnership and allowed wives to receive a share of the marital assets upon divorce because of their contributions as a homemaker.[4] A New York Task Force Report on Women in the Courts six years later concluded that most judges implementing the law failed to award women an adequate share of the marital property.[5]

This Note attempts to explain the law's inability to bring about change in its first six years of existence and to highlight its success after those years. Equitable distribution law embodied contemporary social values that conflicted with long-standing cultural and legal assumptions about women and marriage. The legislators specifically intended to infuse the law with modern social values, yet

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1. Joan M. Krauskopf, *Partnership Marriage: Legal Reforms Needed*, *in* WOMEN INTO WIVES: THE LEGAL AND ECONOMIC IMPACT OF MARRIAGE 93 (Jane Roberts Chapman & Margaret Gates eds., 1977).

2. 1980 N.Y. Laws 434 (codified at N.Y. DOM. REL. LAW § 236B (McKinney 1980) (amended 2003).

3. G. BURROWS, ASSEMBLY MEMORANDUM, *reprinted in* 1980 N.Y. LEGIS. ANN. 129, 130 [hereinafter Burrows Memorandum].

4. N.Y. DOM. REL. LAW § 236B(5)(d)(6).

5. UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 121 (1986) (internal quotations omitted) [hereinafter Task Force Report].

they also gave an enormous amount of discretion to the judiciary.[6] Some judges likely felt that change through a series of small steps would be better than a blind leap into uncharted waters. Other judges were unconsciously guided by the deeply embedded cultural assumptions called into question by the modern equitable distribution statute. Still other judges benevolently intended to help women achieve formal equality, yet ironically ended up reinforcing economic dependence. Despite the law's initial failures, the slow process of change took hold in the late 1980s when judges began to consistently award women adequate shares of marital property.

The history of equitable distribution in New York manifests the interdependent relationship of law and society[7]: a law intended to bring about social change initially reinforced traditional social values that later succeeded in implementing modern cultural norms. This story also highlights the differing nature of the roles of the legislature and the judiciary. Although hailed as a radical change, the equitable distribution statute was actually a political compromise between reformers who wanted to establish a system of equal distribution and those who did not want to change the property distribution scheme at all. Due to political constraints, the legislature would have been unable to enact a regime of equal distribution or a presumption of equality, the more radical change. Equitable distribution would nevertheless become synonymous with equal distribution only ten years after the law's passage. A politically accountable legislature could not enact a change as radical as equal distribution, but the judiciary reached that reform after ten years of practice.

Part I of this Note will explain the law governing property distribution before 1980 and the changes that the equitable distribution law made. Part II will review the results of the Task Force Report. Part III will examine long-standing cultural and legal assumptions about women and marriage, and will argue that equitable distribution initially failed because it embodied modern social values that radically conflicted with traditional beliefs. Part IV will examine how equitable distribution changed after 1986.

6. *See* N.Y. DOM. REL. LAW § 236B(5)(d)(13) (allowing the court to rely on "any other factor which the court shall expressly find to be just and proper").

7. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV 957, 965 (2000).

I.
"THE MOST SWEEPING REFORM"[8]

Before 1980, New York law governing the distribution of property upon divorce remained in the "middle ages."[9] New York was one of only a handful of states that retained a title system which awarded each spouse only the property held in his or her own name.[10] Because property was often held in the man's name, this rule led to inequitable results for women. Any property bought in the husband's name or with his assets belonged solely to him upon divorce.[11] The financial status of men often improved after divorce as their ex-wives' status declined.[12] Alimony, not property distribution, was the primary means by which a wife received economic support upon divorce.[13] Nonetheless, courts infrequently awarded alimony, and when it was awarded, men often did not pay.[14] Divorced women were left with inadequate financial resources, and households headed by single women often lived below the poverty line.[15]

As early as 1971, New York women's organizations began to fight for a property distribution scheme that would lead to fairer results for women.[16] After almost a decade, the legislature, despite its "long tradition of conservatism on marriage and divorce law,"[17] enacted Domestic Relations Law section 236 part B, now known as the Equitable Distribution Law.[18] The law recognized that mar-

8. Jessica Pincus, *How Equitable Is New York's Equitable Distribution Law?*, 14 COLUM. HUM. RTS. L. REV. 433 (1982-83) (quoting 1980 N.Y. LAWS 1863 (Governor's Memorandum of Approval)).

9. *Id.*

10. *Id.* at 434; *see also* Recent Developments, *Equitable Distribution in New York*, 45 ALB. L. REV. 483, 484 (1981) [hereinafter Recent Developments].

11. Pincus, *supra* note 8, at 434; *see also* Recent Developments, *supra* note 10, at 492. R

12. *See* Address by Lillian Kozak, Chairperson, NOW/NYS Marriage & Divorce Task Force, Law Women Symposium, at 5 (New York University School of Law, Apr. 26, 1980), *reprinted in* BILL JACKET OF N.Y. EQUITABLE DISTRIBUTION LAW, 1980 N.Y. LAWS (on file with the NYU Annual Survey of American Law) [hereinafter Kozak Address].

13. *See generally* Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375 (1988-89).

14. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 623, 629 (1991).

15. *Id.* at 625.

16. Marcus, *supra* note 13, at 439.

17. Henry H. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 72 (1981).

18. 1980 N.Y. Laws 434 (codified at N.Y. DOM. REL. LAW § 236B (McKinney 1980) (amended 2003).

riage is an economic partnership, giving judges the flexibility to divide marital property fairly, regardless of who held title.[19] The distribution scheme created was based on a number of factors, including the wife's contributions as a homemaker.[20] Equitable distribution embraced the notion that a woman's contributions to the home were as important as her husband's contributions through earned wages. The law intended to value the career opportunities women relinquished in order to stay home and take care of the house and children. Thus, even if most of the marital assets were purchased with the husband's earnings, the wife was entitled to an equitable portion of those assets. In contrast to equal distribution, equitable distribution did not mean that marital property must be split equally; the legislature specifically rejected that idea.[21] Rather, equitable distribution required the courts to divide the assets fairly, based on the facts of each particular case. Under the statute, judges had the discretion to "distribute marital property in accordance with their perceptions of the equities of the particular case."[22]

The divisions among supporters of equitable distribution, supporters of equal distribution, and those who did not want any change made passage of the law difficult. The first bill was introduced in 1972; legislators continued to introduce new proposals for eight years until the final bill was enacted.[23] Some of the bills proposed equitable distribution of marital property, while others advocated a rebuttable presumption of equal distribution.[24] The two distribution schemes are very different. Under equitable distribution the division of marital assets only has to be fair, not equal; under equal distribution, the division must be equal unless "justice and equity require a different division."[25] Equal distribution was seen as more radical because it required the judge to divide the marital property fifty-fifty in nearly every case. By contrast, equitable distribution gave the particular judge discretion to decide how to distribute the marital assets. By 1974, pressure from critics who did not want to change the property distribution scheme from the

19. Burrows Memorandum, *supra* note 3, at 129-30; Recent Developments, *supra* note 10, at 487-88; Marcus, *supra* note 13, at 445.

20. N.Y. DOM. REL. LAW § 236B(5)(d)(1-9); *see also* Marcus, *supra* note 13, at 444.

21. Marcus, *supra* note 13, at 445.

22. Garrison, *supra* note 14, at 623.

23. Marcus, *supra* note 13, at 440.

24. *Id.* at 440-41.

25. *Id.* at 441 n.264 (quoting S. 597*l*, 204th Sess., 1981 N.Y. LAWS 300 (introduced by Senator Linda Winikow)).

status quo made equitable distribution the only feasible political compromise.[26] The New York State Assembly passed versions of the equitable distribution law in 1976 and 1978, yet the bills failed to make it out of the Senate Judiciary Committee until 1980.[27] The United States Supreme Court's 1979 decision in *Orr v. Orr*,[28] which held that statutes that only provided alimony for wives violated the Equal Protection Clause,[29] created a renewed impetus for change.[30] As a result, New York's alimony statute was defective under *Orr* and required revision. The "pressing need to revise the alimony section . . . accelerated the drive for a more extensive reform than *Orr* required."[31]

Reformers again struggled over exactly what changes should be made.[32] Meanwhile, lawmakers, activists, and lawyers—many of them female—renewed their advocacy for a rebuttable presumption of equal distribution. Two legislators proposed a bill with a rebuttable presumption of equality as a counter-proposal to the equitable distribution law.[33] Lillian Kozak, Chairperson of the Marriage and Divorce Task Force of the New York State National Organization for Women, supported a rebuttable presumption of equal distribution because of the many "inequities" found under equitable distribution.[34] Kozak believed that courts should not be given the broad discretion they received under equitable distribution because women's economic troubles after divorce were "due largely to societal perception of the homemaker . . . that work in the home is not productive work—that we watch the soaps all day or we coffee klatch or yak on the phone—and yes, of course, that

26. *Id.* at 441. For example, the Family Law Committee of the Brooklyn Bar Association argued that "there was no need for equitable distribution because the property arrangements determined by title reflected the desire of the parties." Letter from the Family Committee of the Brooklyn Bar Association to Members of the Senate Judiciary Committee (May 13, 1977), *quoted in* Marcus, *supra* note 13, at 441 n.266. Other groups against the equitable distribution bill included Operation Wake-Up, the Organization of Women's Groups United to Defeat ERA and Defend Existing Rights, and the Committee for Fair Divorce and Alimony Laws. *Id.* (citing Recent Developments, *supra* note 10, at 489 n.22).

27. Marcus, *supra* note 13, at 441.

28. 440 U.S. 268 (1979).

29. *Id.*

30. Marcus, *supra* note 13, at 442.

31. *Id.* at 443.

32. *Id.* at 445.

33. *Id.* Indeed, "[m]any of Winnikow's supporters preferred no reform to passage of the equitable distribution bill without the presumption." *Id.* at 445 n.275.

34. Kozak Address, *supra* note 12, at 1.

we most enjoy dissipating our husbands' hard-earned paychecks."[35] Additionally, Kozak feared that judges would use their discretion to downplay a woman's role as a homemaker and award her an inadequate share of the marital assets.[36] Doris Sassower expressed support for the rebuttable presumption of equality at a Women's Lobby Day Convocation on May 6, 1980. Sassower pointed to the results of equitable distribution reforms already underway in other states, arguing that proponents of equitable distribution hide the "evidence that under . . . equitable distribution laws, the property division women get is 'equitable' in name only."[37]

Proponents of equitable distribution fought back, arguing that because each marriage is different, judicial discretion is necessary to ensure fair results.[38] Senator May B. Goodhue, a supporter of equitable distribution, praised its flexibility: "If there was no difference in the various marriages around this state, then we should have equal distribution, but . . . there are not two marriages alike."[39] Equitable distribution was seen as a praiseworthy political compromise because it allowed judges to award women assets in exchange for their contributions in the home.[40] The "beauty of equitable distribution for reform-coalition purposes was that it could be interpreted to please a wide range of constituents."[41] Men believed they would benefit because they no longer had to support their ex-wives permanently, and women would benefit from potentially being able to receive a share of marital property held solely in their husbands' names.[42]

Equitable distribution had become the only possible compromise in a politically charged debate between reformers who wanted

35. *Id.* at 3.

36. *Id.*

37. Doris L. Sassower, Esq., Statement in Support of the Presumption of Equality in the Distribution of Marital Assets in connection with a Women's Lobby Day Convocation in Albany, N.Y. (May 6, 1980), *in* BILL JACKET OF N.Y. EQUITABLE DISTRIBUTION LAW, ch. 281, 1980 N.Y. LAWS 4 (on file with the NYU Annual Survey of American Law) [hereinafter Sassower Statement].

38. Marcus, *supra* note 13, at 448; *see also* Pincus, *supra* note 8, at 435 ("[T]he most significant characteristic of the new law is its flexibility.").

39. Recent Developments, *supra* note 10, at n.20 (quoting N.Y. S. REC. 4061, (June 3, 1980); *see also* Burrows Memorandum, *supra* note 3, at 130 ("An important aspect of this legislation is the flexibility which is incorporated due to the tremendous variations in marital situations. . . . Flexibility, rather than rigidity is essential for the fair disposition of a given case.").

40. N.Y. DOM. REL. LAW § 236B(5)(d)(6) (McKinney 1980) (amended 2003).

41. Marcus, *supra* note 13, at 449.

42. *Id.* at 444. Under the new statutory scheme, equitable distribution replaced long-term alimony.

to enact an equal distribution scheme and those determined to preserve the status quo. G. Oliver Koppell, a member of the legislature in 1980, later stated, "[M]any of us from the very beginning believed that the distribution of property should be equal, not equitable, or at least there should be a presumption of equality. . . . Equitable was essentially the result of a compromise with those members who opposed any change."[43] In 1980, the New York State Legislature enacted a compromise bill.[44]

The compromise bill made significant changes. Upon divorce, all property acquired separately or jointly during the marriage became marital property subject to equitable distribution by the court.[45] The original statute contained nine specific factors on which judges could rely in distributing marital property, including the wife's contributions as a homemaker, and a tenth catchall, which allowed judges to consider "any other factor which the court shall expressly find to be just and proper."[46] The legislature did not

43. G. Oliver Koppell, *Commentary*, 57 BROOK. L. REV. 777, 778 (1991).

44. N.Y. DOM. REL. LAW § 236(B)(5)(a).

45. Recent Developments, *supra* note 10, at 490; *see also* N.Y. DOM. REL. LAW § 236B(1)(c) ("The term 'marital property' shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held. . . ."). The statute defined separate property as "property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than a spouse; compensation for personal injuries; property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; [and] property described as separate property by written agreement of the parties pursuant to subdivision three of this part." N.Y. DOM. REL. LAW § 236B(1)(d)(1-4).

46. N.Y. DOM. REL. LAW § 236B(5)(d)(1)-(9). The factors are:

1. The income and property of each party at the time of the marriage, and at the time of commencement of the action;

2. The duration of the marriage and the age and health of both parties;

3. The need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

4. The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

5. Any award of maintenance under subdivision six of this part;

6. Any equitable claim to, interest in or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

7. The liquid or non-liquid character of all marital property;

8. The probable future financial circumstances of each party;

weigh or prioritize the factors, thereby giving judges enormous discretion in dividing the assets according to whichever statutorily enumerated factors they thought fair.[47]

The idea of marriage as an economic partnership was an underlying assumption of the statute.[48] On a conceptual level, it meant that all property acquired during the marriage was marital property, regardless of who held title.[49] Upon divorce, each party was entitled to a portion of the capital product of this partnership because each party contributed to it, either as breadwinner or homemaker.[50] The law went into effect on July 19, 1980, and was expected to change the economic status of divorced women in New York and to reinforce new social values regarding marriage and women.

II.
THE BEST-LAID PLANS

These hopes were soon dashed. A 1986 New York Task Force on Women in the Courts reviewed decisions under equitable distribution law and concluded that the law resulted in "unfairness and undue hardship on women."[51] The Honorable Lawrence H. Cooke, then Chief Judge of the State of New York, created the Task Force in 1984.[52] Judge Cooke established the Task Force in order to "examine the courts and identify gender bias and, if found, make recommendations for its alleviation."[53] The Task Force, which consisted of twenty-three judges, law professors, lawyers, and legislators, spent twenty-two months investigating "the status and treatment of women who (a) appear before the courts as litigants, (b) practice in

9. The impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party.

The statute was later amended to include the tax consequences to each party; the wasteful dissipation of assets by either spouse; and any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration. *See* N.Y. DOM. REL. LAW § 236B(5)(d)(10)-(12).

47. Marcus, *supra* note 13, at 448 n.284.

48. *See* Burrows Memorandum, *supra* note 3, at 129-30 ("The basic premise for the marital property . . . reforms . . . is that modern marriage should be viewed as a form of partnership.").

49. Recent Developments, *supra* note 10, at 488.

50. N.Y. DOM. REL. LAW § 236B(5)(d)(6).

51. Task Force Report, *supra* note 5, at 98.

52. *Id.* at 1-2.

53. *Id.* at 2 (internal quotations omitted).

the courts as attorneys, and (c) are employed by the courts as non-judicial personnel."[54] Of its twenty-three members, eleven were women. The Task Force reviewed "all aspects of the [court] system, both substantive and procedural[,] to ascertain whether there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in the courts."[55]

The Task Force examined many areas of the law that affect women, including domestic violence, rape, equitable distribution, maintenance, and child support. Additionally, the Task Force made detailed findings about the status and treatment of female litigants, attorneys, and court employees.[56] The Task Force's conclusions were disheartening: "Cultural stereotypes of women's role in marriage and in society daily distort[ ] courts' application of substantive law. Women uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility."[57]

With respect to equitable distribution law, the Task Force concluded that many "judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership."[58] Many lower court decisions "ignore[d] the irretrievable economic losses women incur when they forego developing income-generating careers . . . to become homemakers . . . . Rather than recognizing the economic partnership of marriage, some judges appear predisposed to ensure that the EDL does not 'make reluctant Santa Clauses out of ex-husbands.'"[59] Echoing Kozak's earlier concerns, Judge Betty Ellerin testified, "[T]he value of a homemaker/wife's contribution to a marriage is again all too often valued in terms of societal attitudes that deprecate women's role or contribution."[60] One reason why judges were unable to properly value a woman's contributions as a homemaker was that some judges could not "conceive of a woman

54. *Id.* at ii-vi.

55. *Id.* at 2 (internal quotations omitted). The Task Force read scholarly literature, *id.* at 8; selected expert advisors, *id.* at 9; conducted public hearings in which witnesses "with special expertise in matters affecting women in the Courts" testified, *id.* at 10; met with lawyers and judges all over the state, *id.* at 11; held "listening sessions" where "lay residents . . . offered their views on how the courts affect the welfare of women," *id.* at 12-13; and studied the status of women who work in the court system, *id.* at 14-15.

56. *Id.* at 8-9.

57. *Id.* at 5.

58. *Id.* at 121.

59. *Id.* at 99-100 (internal citations omitted).

60. *Id.* at 107-08.

having a right to a share of 'the man's business' . . . . [although] [u]nder equitable distribution it should be thought of as 'their business. . . .'"[61]

A Task Force survey showed that seventy-two percent of women felt that "equitable distribution awards 'sometimes,' 'often,' or 'always' reflect a judicial attitude that property belongs to the husband and a wife's share is based on how much he could give her without diminishing his current lifestyle."[62] Seventy percent of women said that "sometimes," "often," or "always," judges "refuse to award . . . [fifty] percent of property or more to wives even though financial circumstances are such that even with such an award husbands will not have to substantially reduce their standard of living but wives will."[63]

Another reason stressed by some witnesses for equitable distribution's failure was that "the judiciary is overwhelmingly male and may have little understanding of what homemaking involves."[64] The Task Force concluded that some "judges appear unaware of the economic opportunity cost to the one who has devoted long years to unpaid labor for her family."[65] One witness testified that the "[m]ale perspective on family life has skewed perceptions in equitable distribution cases. The perception of most men—and the judiciary is mostly male—is that care of the house and children can be done with one hand tied behind the back."[66] Other judges did not properly understand the difficulty of returning to the work force after a long absence. Rather, some thought "any woman—no matter her age or lack of training—can find a nice little job and a nice little apartment and conduct her later years as she might have done at age 25."[67]

In a separate study conducted in the 1980s, Marsha Garrison used statistical analysis to examine the results of property distribution cases two years before the passage of equitable distribution and four years after.[68] Using a random sampling of cases throughout New York, Professor Garrison concluded that "[p]roperty division . . . does not appear to have been affected in any major way."[69]

61. *Id.* at 108-09 (internal citations omitted).
62. *Id.* at 109.
63. *Id.* at 109-10.
64. *Id.* at 110.
65. *Id.*
66. *Id.*
67. *Id.*
68. *See generally* Garrison, *supra* note 14.
69. *Id.* at 725.

Moreover, there was no appreciable difference between the percentage of marital property awarded to wives under the old regime, under which division was based on title alone, and under equitable distribution.[70] Professor Garrison's empirical analysis supported the conclusion reached by the Task Force: equitable distribution initially failed to reach its goal of awarding wives more property upon divorce.

III.
THE CULTURAL ASSUMPTIONS

The next part of this Note examines longstanding cultural and legal assumptions about marriage and women in an attempt to explain how a statute that specifically embraced modern social values failed to introduce those values into the law. Law and society have an interdependent relationship—social values affect the law and the law in turn influences society.[71] Cultural beliefs are embedded in legal doctrines and judicial decisions. Judges in the early 1980s were still influenced by traditional social values which starkly conflicted with the modern cultural assumptions embodied by equitable distribution. Initially, they clung to these traditional beliefs and failed to embrace the modern concepts.

The discretion given to judges under equitable distribution allowed longstanding cultural and legal assumptions about women and marriage to block progress. While both society and the law embody a myriad of values, this section focuses on three socio-legal assumptions that affected the results of equitable distribution awards. The first assumption is that marriage is the most important institution in our society because married couples infuse society with good morals.[72] The second assumption is a fear that wives must perform certain marital obligations in order to receive support from their husbands.[73] The third assumption is a fear that a deceitful woman may be out to steal an innocent man's money.[74] Finally, this Note examines how the feminist movement of the 1960s and 1970s had a counterproductive effect on judicial decision-making.[75] Some unsympathetic judges used the movement's articulation of equality as an additional reason to deny them support, reasoning that they did not need it if they were truly equal.

70. *Id.*
71. *See generally* Dubler, *supra* note 7, at 965.
72. *See infra* notes 77-102 and accompanying text.
73. *See infra* notes 103-29 and accompanying text.
74. *See infra* notes 130-45 and accompanying text.
75. *See infra* notes 146-62 and accompanying text.

Other judges genuinely wanted to help women achieve formal equality, but even this had negative financial consequences for women. These judges did not want to award women large amounts of support for fear of perpetuating the notion that they needed help from their husbands. Thus, traditional cultural and legal values and the feminist movement itself contributed to equitable distribution's initial failure.

A. Marriage as the Most Important Institution in Society

New York divorce cases reveal much about judges' views on the social significance of marriage. Traditionally, the law views marriage as much more than an economic partnership.[76] According to the Supreme Court in *Maynard v. Hill*, marriage represents,

> the most important relation in life, [and has] more to do with the morals and civilization of a people than any other institution. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[77]

Because marriage as an institution is so important to our society, "there are three parties to every marriage contract—the two spouses and the state. Each has an interest in the maintenance of its integrity and the nation itself should have a greater interest in so doing."[78] The "married couple cannot do as they please with the marriage contract . . . [T]he law does not view marriage lightly or leave it to them to destroy at will."[79] In the eyes of the law, marriage "is something more than a mere contract . . . . Other contracts may be modified, restricted, or enlarged, or entirely released upon the

76. *But see* Dubler, *supra* note 7, at 997-98 (arguing that the idea of companionate marriage emerged in the early twentieth century).

77. Maynard v. Hill, 125 U.S. 190, 205, 211 (1888). *See generally* Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506 (1952) (marrying for money insufficient for annulment of marriage); Shonfeld v. Shonfeld, 260 N.Y. 477 (1933) (Crane, J., dissenting); Belandres v. Belandres, 395 N.Y.S.2d 458, 460 (App. Div, 1977); Vanderhorst v. Vanderhorst, 123 N.Y.S.2d 115, 117 (App. Div. 1953); Rabinowitz v. Rabinowitz, 321 N.Y.S.2d 934 (Sup. Ct. 1971); Helfond v. Helfond, 280 N.Y.S.2d 990, 993 (Sup. Ct. 1967); Schumer v. Schumer, 128 N.Y.S.2d 119, 123 (Sup. Ct. 1954).

78. *Rabinowitz*, 321 N.Y.S.2d at 940 (quoting Matter of Lindgren, 43 N.Y.S.2d 154, 154 (1943)); *see also Belandres*, 395 N.Y.S.2d at 460; Zoske v. Zoske, 64 N.Y.S.2d 819, 836 (Sup. Ct. 1946); Butler v. Butler, 190 N.Y.S. 394, 394 (App. Div. 1923) (A marriage contract is more than a "mere civil agreement between the parties . . . [but rather a] matter of public policy in which the body of the community is deeply interested."); *Helfond*, 280 N.Y.S.2d at 993.

79. *Shonfeld*, 260 N.Y. at 487 (Crane, J., dissenting).

consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations."[80] Judges recognized that "the marriage contract can never be on par with other civil contracts because of its very nature."[81]

Equitable distribution rested on the assumption that marriage was in part an economic partnership, which sharply conflicted with these long-standing notions. Viewing marriage as an economic partnership meant that the state lost a tremendous amount of power it possessed under the old view. Because marriage was such an important social institution, the "care of the offspring as well as the moral well-being of both the parties to the [marital] contract and their children are matters of great concern to the State . . . not only for the protection of the parties to the contract, but to safeguard society by . . . enforcing proper moral standards."[82] Judges could interfere with the individual couple's marriage contract in order to preserve it and ensure that it was being executed properly, even if both spouses wanted to end the marriage. If judges abandoned this view of marriage, "many couples, who now . . . [are married and attentive] to their common offspring and to the moral order of civil society, might have been at this moment living in . . . a state of the most licentious and unreserved immorality."[83] As late as 1970, one judge opined that "courts will continue to insist upon a high level of moral conduct . . . and will never succumb to the 'Hollywood' type of morality so popular today, which seems to condone and encourage the dropping of our moral guard."[84] By removing marriage's sacred status, equitable distribution threatened the power of judges both to set and enforce moral standards.

One area about which judges were particularly concerned was sexual relations. As one judge declared, marriage "is the only lawful relation by which Providence has permitted the continuance of the race."[85] Married couples had to engage in sexual relations not only to procreate but also because "[s]exual relations between man and woman are given a socially and legally sanctioned status only

80. *Maynard*, 125 U.S. at 210-11; *see also* Garlock v. Garlock, 18 N.E.2d 521, 522 (N.Y. 1939); Sweinhart v. Bamberger, 2 N.Y.S.2d 130, 134 (Sup. Ct. 1937); Hanfgarn v. Mark, 8. N.E.2d 47, 48 (N.Y. 1937); *Rabinowitz*, 321 N.Y.S.2d at 939-40; Mitchell v. Mitchell, 117 N.Y.S. 671, 673 (Sup. Ct. 1909).

81. *Shonfeld*, 260 N.Y. at 488 (Crane, J., dissenting).

82. Cervone v. Cervone, 280 N.Y.S. 159, 165-66 (Sup. Ct. 1935) (quoting Shonfeld v. Shonfeld, 258 N.Y.S. 338, 341 (N.Y. App. Div. 1932)).

83. *Id.* at 167 (quoting Evans v. Evans, 161 Eng. Rep. 466, 467 (1790)).

84. *In re* H Children, 317 N.Y.S.2d 535, 536 (Fam. Ct. 1970) (quoting *In re* Anonymous, 238 N.Y.S.2d 422, 423 (Fam. Ct. 1962)).

85. *Rabinowitz*, 321 N.Y.S.2d at 939 (quoting 2 Kent Com., 75).

when they take place in marriage and, in turn, marriage is itself distinguished from all other social relationships by the role sexual intercourse . . . plays in it."[86] By elevating marriage to the most sacred institution in our society and legitimizing only marital sex, judges were able to suppress other sexual relationships. The higher marriage stood in the eyes of a judge, the greater the distance he would see between legitimate (marital) and illegitimate (all other) sexual relations. Marital sex was placed on the pedestal next to marriage itself, and all other sexual relationships were debased by comparison. As Queens County Supreme Court Judge Frank O'Connor stated in 1971, "In this enlightened and permissive era of . . . 'gay unions' such official concern for public and private morality will appear . . . to some . . . as quite trite . . . [yet marriage must be] 'regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.'"[87]

As some segments of society began to more readily accept premarital, extramarital, and homosexual relations, judges continued to uphold marriage's status as the most important civil institution in an effort to repress these new sexual values. The New York Court of Appeals denied custody to a wife who "in open court[ ] has stated her considered belief in the propriety of indulgence, by a dissatisfied wife such as herself, in extramarital sex experimentation."[88] The judge argued that while no "court can restore this broken home or give these children what they need and have a right to—the care and protection of two dutiful parents . . . a decision there must be, and it cannot be one repugnant to all normal concepts of *sex*, family and marriage."[89] In 1962, another judge held that a mother's "entertain[ing of] male companions in the apartment and in the presence of the children" amounted to statutory neglect.[90] Both judges argued that "[o]ur whole society is based on the absolutely fundamental proposition that: 'Marriage . . . [is] the most important relation in life.'"[91] Thus, to some judges, the conception of marriage as a mere economic partnership would legitimize other sexual relationships, thereby costing judges their ability to repress unconventional sexual norms.

86. Diemer v. Diemer, 8 N.Y.2d 206, 210 (1960).

87. *Rabinowitz*, 321 N.Y.S.2d at 939 (quoting Wade v. Kalbfleisch, 58 N.Y. 282 (1874)).

88. Bunim v. Bunim, 298 N.Y. 391, 394 (1949).

89. *Id.* (emphasis added).

90. *In re* Anonymous, 238 N.Y.S.2d 422, 423 (Fam. Ct. 1962).

91. *Bunim*, 298 N.Y. at 394 (quoting *Maynard*, 125 U.S. at 190).

Because they saw marriage as the most important institution in our society, judges sought to preserve marriages at all costs. Judges severely restricted divorces in the decades leading up to the enactment of equitable distribution. Before 1967, adultery was the sole ground for divorce in New York. Yet in *Cohen v. Cohen*, the court refused to grant the wife a divorce even though her husband had been convicted of sodomizing another male.[92] Justifying its decision, the court held that the Penal Law's definition of adultery controlled, and subsequently did not grant the divorce because sodomy did not constitute adultery under the statute.[93] Separations could be granted for cruelty or abandonment but were very difficult to obtain. A few isolated acts of violence by a husband did not constitute cruelty.[94] Even where the couple was "unable to live with one another in harmony," a judge refused to grant a separation in the hopes that remaining married would force the couple to work out their differences.[95] "Incompatibility of temper" and "[t]he misery arising out of domestic quarrels" were insufficient grounds for divorce or separation.[96]

When the legislature expanded the grounds for divorce in 1967, judges continued to prevent unhappy couples from ending their marriages. Some judges refused to grant divorces on the ground of incompatibility alone,[97] although "[i]mplicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status . . . ."[98] As late as 1971, one judge held that although the wife "has proven that her marriage was marked by lack of harmony, frequent quarrels and occasional strife, all adding up to a degree of incompatibility," she was not entitled to a separation.[99] The judge further opined:

> [T]he stability of the marriage contract has always been a prime concern of . . . [the] judicial branches of government. . . . From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that

92. 103 N.Y.S.2d 426 (Sup. Ct. 1951).

93. *Id.* at 427-28.

94. *See* William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 517 & n.444 (1996).

95. Marino v. Marino, 145 N.Y.S.2d 571, 581 (Sup. Ct. 1955).

96. Anonymous v. Anonymous, 24 N.Y.S.2d 613, 617 (Fam. Ct. 1940).

97. *See* Middleton v. Middleton, 316 N.Y.S.2d 583, 584 (App. Div. 1970); Rabinowitz v. Rabinowitz, 321 N.Y.S.2d 934, 940-41 (Sup. Ct. 1971).

98. Gleason v. Gleason, 26 N.Y.2d 28 (1970).

99. *Rabinowitz*, 321 N.Y.S.2d at 937.

> happy, successful marriages constitute the fundamental basis of the general welfare . . . .[100]

In 1979, a court refused to grant a divorce to a wife who alleged that her husband had been "cruel and inhuman by refusing to have social contact with others, by humiliating her in the presence of others, by throwing furniture about, and by threatening to kill her with a knife."[101] The court concluded that the evidence "merely showed discord . . . and fits of temper and irascibility on the part of [her husband] . . . [and the court should] give heed to the admonition and interest in 'for better or worse.'"[102]

Equitable distribution threatened these judges' rationale for keeping unhappy couples together. If marriage was seen more as an economic partnership than as a sacred bond, judges would lose their justifications for regulating marriage and restricting divorce. Moreover, traditionalists feared that if marriage lost its status as a singularly important social institution, the doors would be opened to rampant divorce, child-neglect, promiscuity, and homosexuality.

B. A Wife Must Perform Her Marital Obligations in Order to Receive Support

Just as the New York courts considered marriage not an ordinary contract, they also determined that men and women were not free to decide their marital roles. The legal obligations imposed upon husband and wife mirrored their cultural duties. Men entered the public sphere and earned wages to support their families; women stayed in the home and cared for their husbands and children.[103] Women made tremendous gains in the public sphere throughout the twentieth century, yet these nineteenth-century cultural assumptions remained. Judge Mary J. Mangan stated in 1967, "A husband who looks to his wife for support is put in an unnatural relationship. Traditionally, the husband is the breadwinner and provides for the family."[104] As late as 1977, another judge recognized that it "offends the personal views of some that a man should

100. *Id.* at 940.

101. Phillips v. Phillips, 419 N.Y.S.2d 573, 575 (App. Div. 1979).

102. *Id.* at 575-76 (quoting Hessen v. Hessen, 308 N.E.2d 891, 895 (N.Y. 1974)).

103. *See* Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 90 (1998).

104. Anastasiadis v. Anastasiadis, 279 N.Y.S.2d 936, 937 (Sup. Ct. 1967).

collect support money from a woman."[105] Legally and culturally, men were required to support their wives.

Judges believed that a wife's "right to support from her husband is zealously guarded in law."[106] While the wife could have held a job outside the home "as a sideline activity in order to keep her mind occupied,"[107] the law imposed on the "husband the duty to support and maintain his wife . . . ."[108] That duty "[sprang] from the marital relationship itself, and . . . [could] neither [have been] avoided nor diminished."[109] This duty remained even if the couple divorced or separated. Any separation agreement in which the wife accepted a lump-sum payment in lieu of lifelong alimony was void because a couple could not waive the husband's duty of support.[110]

Yet the husband's duty to support his wife was only "zealously" protected if she fulfilled her own legal obligations to take care of her husband, children, and home. A wife who "leaves a home which the husband has provided without just cause . . . cannot compel her husband to support her."[111] Just cause included proof "that it had become impossible or unsafe . . . to continue living with her husband."[112] Without a showing of just cause, the husband's duty to support his wife ended when she left the marital home.[113]

Just cause was a difficult legal standard to meet. "[F]requent quarrels and separations" and testimony by the husband that on one occasion he "may have given her a slap" were not enough to constitute just cause.[114] When a wife left her husband's house for these reasons, she was not entitled to support or divorce, and it was hoped she would "put aside [her] childish whims and caprices and think and act as a woman . . . and discharge her part of the [marital

105. Thaler v. Thaler, 391 N.Y.S.2d 331, 337 (Sup. Ct. 1977), *order rev'd*, 396 N.Y.S.2d 815 (App. Div. 1977).

106. Winburn v. Winburn, 192 N.Y.S. 280, 282 (App. Div. 1922); *see also* Marino v. Marino 145 N.Y.S.2d 571, 580 (Sup. Ct. 1955) (citations omitted); Jokai v. Jokai, 121 N.Y.S.2d 517, 519 (Fam. Ct. 1953); Gimbel Bros., Inc. v. Steinman, 114 N.Y.S.2d 603, 610 (Fam. Ct. 1952).

107. *Gimbel Bros., Inc.*, 114 N.Y.S.2d at 607.

108. Garlock v. Garlock, 18 N.E.2d 521, 522 (N.Y. 1939).

109. Haas v. Haas, 80 N.E.2d 337, 338-39 (N.Y. 1948).

110. *See, e.g.*, Henderson v. Henderson, 405 N.Y.S.2d 857, 858 (App. Div. 1978); *see also* Height v. Height, 187 N.Y.S.2d 260, 262 (Sup. Ct. 1959) (noting the settled proposition that a wife cannot relieve her husband of his obligation to support her).

111. *Marino*, 145 N.Y.S.2d at 580 (quoting *Jokai*, 121 N.Y.S.2d at 519-20).

112. Sternheim v. Sternheim, 20 N.Y.S.2d 823 (Fam. Ct. 1940).

113. *See, e.g.*, *Marino*, 145 N.Y.S.2d at 573.

114. *Id.* at 573, 578.

obligations]."[115] Even where a husband was "undoubtedly both immature and difficult," "had outbursts of temper," and "resented his wife's attentions to the children and sought to make her choose between them and him,"[116] the Court of Appeals still held that his wife was not justified in leaving the marital residence and therefore not entitled to his support.[117]

Likewise, leaving a husband's home solely because one or both of his parents lived with the couple was not considered just cause.[118] However, a husband could not be forced to live with his wife's relatives.[119] A wife who lived in her father's home with her husband was not justified in refusing to leave that home with her husband, yet he was justified in leaving her there alone.[120] Thus, a wife could only receive support from her husband upon separation or divorce if she could show that she had been "ready and willing to perform the duties she owes to her husband, to live with him and make a home for him."[121]

The husband also did not have to support his wife if she remained in the marital home yet refused to perform her other legal obligations. The duty to support disappeared if the wife exhibited "[l]awless repudiation of duty, an attitude and spirit of mere rebellion or defiance . . . ."[122] Wifely duties included making a home for her husband and engaging in sexual relations,[123] and the "law implie[d] proper sex relations in every contract of marriage."[124] A desire for a religious ceremony in addition to a civil one was not a reasonable excuse for a wife's refusal to have sexual relations with

115. *Id.* at 581-82.

116. Schine v. Schine, 286 N.E.2d 449, 452 (N.Y. 1972).

117. *Id.* at 452-53.

118. *See, e.g.*, Martin v. Martin, 32 N.Y.S.2d 860, 863 (Fam. Ct. 1942).

119. *See, e.g.*, Downes v. Downes, 225 A.D. 886 (N.Y. App. Div. 1929); Anonymous v. Anonymous, 24 N.Y.S.2d 613, 617 (Fam. Ct. 1940); Field v. Field, 139 N.Y.S. 673 (Sup. Ct. 1913); Meyer v. Meyer, 9 N.Y.S.2d 28 (Sup. Ct. 1939).

120. *Anonymous*, 24 N.Y.S.2d at 618.

121. Gimbel Bros., Inc. v. Steinman, 114 N.Y.S.2d 603, 610 (Fam. Ct. 1952); *see also* Reischfield v. Reischfield, 166 N.Y.S. 898, 900 (Sup. Ct. 1917); Sturm v. Sturm, 141 N.Y.S. 61, 65 (Sup. Ct. 1913).

122. Campbell v. Campbell, 118 N.Y.S.2d 17, 21 (App. Div. 1952), *aff'd*, 115 N.E.2d 685 (N.Y. 1953).

123. *See, e.g.*, Diemer v. Diemer, 168 N.E.2d 654, 657 (N.Y. 1960) (engaging in sexual relations); Mirizio v. Mirizio, 150 N.E. 605, 607-08 (N.Y. 1926) (same); Barnier v. Barnier, 349 N.Y.S.2d 113, 114 (App. Div. 1973) (same); *Gimbel Bros., Inc.*, 114 N.Y.S.2d at 610 (making a home for her husband); Lembo v. Lembo, 86 N.Y.S.2d 206, 208 (Sup. Ct. 1949) (engaging in sexual relations).

124. *See Lembo*, 86 N.Y.S.2d at 209 (quoting Coppo v. Coppo, 297 N.Y.S. 744, 753 (Sup. Ct. 1937)) (internal quotations omitted).

her husband.[125] In 1973, a husband was allowed to divorce his wife if she refused to have sex with him.[126]

Theoretically, equitable distribution focused less on whether a wife actually carried out her traditional responsibilities than did the previous law of support. Equitable division of assets acquired during the marriage replaced alimony, the traditional method of support. The purpose of equitable distribution was to "recognize that when a marriage ends, each of the spouses . . . has a stake in and a right to a share of the marital assets accumulated while it endured."[127] In contrast to earlier law, a wife did not have to prove that she took care of the home and had sexual relations with her husband in order to receive a fair share of the marital property under equitable distribution.[128] Her contributions as a homemaker were one of many factors that judges could rely on in equitably distributing the assets. For example, under the previous law, if a wife committed adultery, her husband was not required to support her, regardless of need.[129] This sharp conceptual change is another reason judges initially failed to properly implement equitable distribution and award wives a fair share of the marital property.

C. Manipulative and Deceitful Women

One consequence of the nineteenth century's feminist movement was more fear and suspicion of women. As women began to fight for social, political and economic rights, there was "a larger socio-legal reevaluation of the nature of femininity . . . . Women came to represent the potential for deceit and manipulation."[130] It is a trope that can be traced back to Eve and the serpent: strong women can only bring disaster, and they must be prevented from doing so.[131]

125. *See, e.g.*, *Diemer*, 168 N.E.2d at 658; *Mirizio*, 150 N.E. at 605.

126. *See, e.g.*, *Barnier*, 349 N.Y.S.2d at 115.

127. O'Brien v. O'Brien, 489 N.E.2d 712, 717 (N.Y. 1985) (quoting Wood v. Wood, 465 N.Y.S.2d 475, 477 (Sup. Ct. 1983)).

128. *Cf.* Desnoyers v. Desnoyers, 530 N.Y.S.2d 906, 908 (App. Div. 1988) (noting that equitable distribution "was not designed to punish parties for their actions but to treat the marriage as an economic partnership and recognize each party's contribution thereto").

129. *See* Miller v. Miller, 314 N.Y.S.2d 855 (Fam. Ct. 1970) (holding that a husband was not inherently required to support his wife, although she was in danger of becoming a public charge, because she had committed adultery).

130. Dubler, *supra* note 7, at 996.

131. *See id.*; *see generally* Amy M. Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005); Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993); Lea S. VanderVelde, *The Gendered Origins of the*

The cultural assumption that women were dishonest and untrustworthy was reflected in legal rules embodying that assumption. Ariela Dubler shows how the "danger of women preying on unsuspecting men"[132] led to the abrogation of the doctrine of common law marriage in New York. Many men believed that common law marriage "favors the harlot and the adventuress and paves the way for them to claim the rights of common law widow upon the death of some man of wealth."[133] Jane Larson documents a similar suspicion of female plaintiffs in seduction suits. The tort of seduction initially protected innocent females from the "male sexual brute."[134] Yet as women in the early twentieth century fought for and received some degree of political, social, and economic equality, "popular debate [became] dominated by speculation that the female complainants were lying . . . [and] the condemnation of male sexual aggression that had shaped earlier public opinion began to wane, and male defendants were increasingly perceived as innocent targets of scheming and hypocritical blackmailers."[135] Amy Adler argues that the U.S. Supreme Court's recent decisions requiring nude dancers to wear pasties and a g-string can be traced to an innate fear of the naked female body.[136] Thus, a variety of legal rules developed from the vision of deceitful femininity created by men who feared strong women.

This suspicion of women manifested itself in several mid-twentieth century decisions. In *Anonymous v. Anonymous*, a wife sought to compel her husband to support her while they were separated.[137] They had lived together in her father's home.[138] When the wife's father demanded that they leave, the husband left, while she remained.[139] The court concluded that he did not abandon his wife because the husband has the right to choose the marital home.[140] Therefore, she abandoned him by remaining at her father's house and was not entitled to support.[141] A fear of willful, ambitious wo-

Lumley Doctrine: Binding Men's Conscience's and Women's Fidelity, 101 YALE L. J. 775 (1992).

132. Dubler, *supra* note 7, at 1001.

133. *Id.* at 1000 (quoting Errol Clarence Gilkey, *Validity of Common-Law Marriages in Oregon*, 3 OR. L. REV. 28, 46 (1923)).

134. Larson, *supra* note 131, at 388.

135. *Id*. at 393.

136. Adler, *supra* note 131, at 1111.

137. 24 N.Y.S.2d 613 (Fam. Ct. 1940).

138. *Id.* at 614.

139. *Id.* at 616.

140. *Id.* at 617.

141. *Id.* at 618.

men is revealed in the way the court describes the parties. The court portrays the husband as "a plodding, industrious man, of limited intelligence and a narrow range of social interests but simple and straightforward and truly fond of his wife."[142] The judge depicted the wife as the "self-centered of the two" who had shown "only her own sense of superiority" and, "like countless other wives at mid-channel, disappointment over her choice of mate," and who craved the "active social life" she found in her father's home.[143] The court concluded that the wife "bewails the limitations of the man she happened to marry . . . and is coldly indifferent to . . . [her husband's] yearning for her society and the comforts of his own home."[144] The judge's depictions of the parties and ultimate conclusion that the wife was not entitled to her husband's support reflects the court's underlying "vision of a dangerous femininity, of conniving and gold-digging women preying on the goodwill of innocent men."[145]

This longstanding cultural and legal fear of manipulative women determined to steal an innocent man's hard-earned wages likely contributed to the initial failure of equitable distribution. Equitable distribution required a judge to award marital property to a wife, even if owned by the husband and bought with his wages. The fear of gold-digging women might have prevented judges from awarding wives an adequate share of the marital assets because a deceitful woman could marry a man with the intention of later divorcing him to get a share of property acquired by him during the marriage.

D. Equality Movement Backfired

In addition to traditional cultural assumptions that prevented the initial success of equitable distribution, the feminist struggle of the mid-twentieth century also worked to the detriment of women during equitable distribution's early years in New York.

A change in judicial perception of alimony that began in the 1950s shows the attitudinal changes wrought by the feminist movement.[146] As judges began to view women as being equal to men, they questioned the rationale underlying alimony. Under English common law, "the very being or legal existence of the woman [was]

142. *Id.* at 615.

143. *Id.* at 615-16.

144. *Id.* at 617.

145. Dubler, *supra* note 7, at 964.

146. *See, e.g.*, Palmieri v. Palmieri, 168 N.Y.S.2d 48 (Sup. Ct. 1957); Doyle v. Doyle, 158 N.Y.S.2d 909 (Sup. Ct. 1957).

suspended during the marriage" and the husband was obligated to support his wife.[147] Early English courts could only grant limited divorces, and thus the husband remained obligated to support his wife for life because technically the couple remained married.[148] When absolute divorce became available in New York, "society demanded that even a divorced wife should be appropriately maintained by her ex-husband. . . . Hence, alimony was created as a statutory substitute for the marital right of support."[149] But one judge writing in 1956 recognized that "[t]he position of the wife has changed. . . . Her role as a frail, sheltered, ineffectual person . . . is as much a thing of the past as her crinoline and whalebone."[150] Until the 1950s, "a divorced wife had little prospect of being able to work and earn a livelihood, and it was essential to a well-ordered society that she be appropriately maintained by her estranged husband so that she would not become a charge on the community. Times have now changed."[151] Because the nation had entered into "an era where the opportunities for self-support by the wife are so abundant," the notion that a husband should be required to support his wife for life, even if the divorce was his fault, had lost its force.[152]

Court recognition of the idea that the modern divorced woman could be self-sufficient continued throughout the 1970s. In *Doyle v. Doyle* the court called for a substantive reform of alimony.[153] The court recognized that the "married woman . . . is no longer the Victorian creature, 'something better than her husband's dog, a little dearer than his horse.' She is now the equal of man, socially, politically and economically."[154] The court in *Dulber v. Dulber*[155] cited a statistic that thirty-six percent of the workforce in 1968 were women and then concluded,

> From her old position as an identity merged in him and not separable from him, she has advanced to a position of independence. . . . Since women in today's society are in most respects

147. Phillips v. Phillips, 150 N.Y.S.2d 646, 648 (App. Div. 1956) (quoting Blackstone, Commentaries on the Laws of England, *442 (1758)).

148. *Id.* at 648-49.

149. *Id.* at 649.

150. *Id.*

151. *Id.*

152. *Id.* at 650.

153. 158 N.Y.S.2d 909 (Sup. Ct. 1957).

154. *Id.* at 912.

155. 311 N.Y.S.2d 604 (Sup. Ct. 1970).

> fully equal to that of men, they must, wherever possible, share the economic burden of a dissolved marriage.[156]

Judges paradoxically used equality to justify limiting alimony awards.

The converse of this view also appears in judicial opinions of this era. Some judges expressed concern that women would never be able to achieve actual equality if they were awarded large amounts of alimony. Such awards, they believed, would only serve to perpetuate female dependence. One judge opined, "[t]he edge of sex discrimination has two sides. Philosophically, a benevolent grant to women . . . may help the women immediately affected[,] but the implicit condescension . . . in the end produces the attitude that somehow women are not equal to men."[157] These judges appear influenced by a genuine urge to further feminist goals. Yet the smaller alimony awards they gave were in reality crippling for many women, who still faced discrimination in the workforce. When equitable distribution replaced long-term alimony, judges who accepted these notions were freer than under the old regime to put them into effect by awarding women too little of the marital property to allow them to financially support themselves.

Alongside these benevolent attempts to help women also grew negative, malignant socio-legal assumptions about women. Fear of the "alimony drone," a woman who refused to support herself and instead lived off of her husband's payments, arose around the same period. The court in *Doyle*[158] questioned,

> Why should ex-wives and separate women seek a preferred status in which they shall toil not, neither shall they spin. Alimony was originally devised by society to protect those without power of ownership or earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones.[159]

Other judges shared the *Doyle* court's fear of alimony drones.[160] If a wife left her husband without "adequate reasons"

156. *Id.* at 606 (quoting Robert W. Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROBS. 186 (1939)) (citation omitted).

157. Thaler v. Thaler, 391 N.Y.S.2d 331, 333 (Sup. Ct. 1977), *order rev'd*, 396 N.Y.S.2d 815 (App. Div. 1977).

158. *Doyle*, 158 N.Y.S.2d at 112.

159. *Id.*

160. *See, e.g.*, Brownstein v. Brownstein, 268 N.Y.S.2d 115, 121-22 (App. Div. 1966); Phillips v. Phillips, 150 N.Y.S.2d 646, 650-51 (App. Div. 1956); *Dulber*, 311 N.Y.S.2d at 606-07.

and did not need his support, the husband was relieved of his duty to support her out of "fairness."[161] Finally, "alimony has the effect of hindering a woman from 'putting herself in a position where she would be induced to reorganize her life. . . . She does not work and she develops no talents. She can neither reject the past, accept the present, nor anticipate the future.'"[162] Thus judges from the 1950s through the 1970s were hesitant to award large amounts of alimony for fear that the women who received such awards would become lazy and useless. When equitable distribution replaced long-term alimony in 1980, judges who feared the alimony drone were likely to award women an inadequate share of the marital assets for fear of creating "equitable distribution drones."

IV.
THE TRIUMPH OF EQUAL DISTRIBUTION

The story of the initial years of equitable distribution in New York shows the tension between the need for change and the desire for continuity. Furthermore, it illuminates the problem of using the judiciary to bring about social change, especially in an area of the law heavily laden with traditional cultural assumptions and moral values. After reaching the compromise of equitable distribution, the legislature attempted to use its powers to introduce new social values into the law. The judiciary used its powers, albeit inadvertently, to reinforce old cultural norms. The desire for social stability trumped the need for change.

The story does not end there, however. Judicial discretion, the feature of equitable distribution that resulted in its initial failure, ultimately brought about change in a way that even the legislature could not. By the late 1980s, equitable distribution became synonymous with a presumption of equality.[163] The New York State Bar Association, Family Law Section, and the American Academy of Matrimonial Lawyers, New York chapter, issued a joint position paper in 1990 that stated, "[e]xamination of recent decisional law clearly reveals that . . . most property divisions are equal."[164] Suzanne Reynolds studied property division cases in six equitable distribution states, including New York, and concluded that courts

161. *Brownstein*, 268 N.Y.S. at 121-22.

162. *Dulber*, 311 N.Y.S.2d at 606-07 (quoting *Doyle*, 159 N.Y.S.2d at 909).

163. Christopher J. Mega, *Commentary*, 57 BROOK. L. REV. 781, 781 (1991).

164. *Id.* at 783 (quoting Timothy M. Tippins, *The Koppell Bill (A.7433-D): An Assault on the Fabric of Family Law* 8 (Position Paper of The New York State Bar Association Family Law Section and The American Academy of Matrimonial Lawyers, New York Chapter) (undated)).

rarely deviated from equal distribution and, when they did, the departures were slight.[165] Marsha Garrison conducted an extensive empirical analysis of the numerical results of property divisions during equitable distribution's first ten years in New York.[166] Professor Garrison concluded that while property divisions varied, by the latter half of the decade there was an "equal division norm"[167] and that "judicial outcomes . . . exhibited a strong tendency toward equality."[168] Professor Garrison's data showed that, by 1990, judges "agree[d] on relatively equal division as a prototypical outcome."[169] Judges went from awarding women inadequate shares of marital property in the early 1980s to equal division as the prototypical norm by the end of that decade.

Two events help explain this sudden switch in course. The first is the impact of the Task Force Report. The Report recommended that court administration "[t]ake the necessary steps to assure that judges are familiar with the statutory positions governing and the social and economic considerations relevant to equitable distribution . . . including studies, statistics, and scholarly commentary on the economic consequences of divorce."[170] The Report also recommended that judicial screening committees "[m]ake available to all members information concerning the economic consequences of divorce similar to that recommended for judges."[171] In order to implement all of the recommendations of the Task Force Report, the Court of Appeals created a Judicial Committee on Women. Since 1986, the Committee has organized educational programs for New York judges, planned conferences and forums on a wide range of topics, published pamphlets and books, issued periodic reports, advocated for change in court practices, and created a network of local gender fairness and gender bias committees.[172] The Task Force Report, which concluded not only that judges were improperly implementing equitable distribution but also that gender bias permeated every aspect of the court system, might have played a significant role in the evolution of equitable distribution. In fact,

165. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 830 n.11, 855 (1988).

166. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996).

167. *Id.* at 466.

168. *Id.* at 452.

169. *Id.* at 505.

170. Task Force Report, *supra* note 5, at 123.

171. *Id.* at 124.

172. *Judicial Committee on Women in the Courts*, http://www.courts.state.ny.us/ip/womeninthecourts/bandh.shtml (last visited Oct. 10, 2006).

some judges specifically referenced the Task Force Report's conclusions about pervasive gender bias in the court system in their opinions.[173]

Another possible reason for the change is the guidance of the New York Court of Appeals. A landmark case handed down in late 1985 broadened the definition of marital property in order to give effect to the concept of marriage as an economic partnership and recognize the importance of the wife's contributions as a homemaker. In *O'Brien v. O'Brien*,[174] the husband's medical license was the couple's only significant asset.[175] Both husband and wife were teachers when they married in 1971.[176] Mrs. O'Brien gave up her opportunity to obtain permanent certification in New York so that her husband could attend medical school in Mexico.[177] Mrs. O'Brien taught in Mexico and used her earnings for the couple's living and educational expenses.[178] She also performed household work and managed the couple's finances.[179] Mr. O'Brien filed for divorce two months after he received his license to practice medicine in New York.[180] The trial court held that Mr. O'Brien's medical license was marital property subject to equitable distribution.[181] The Appellate Division, Second Department overturned the trial court.[182]

The Court of Appeals unanimously held that the medical license was marital property subject to equitable distribution and reinstated the trial court's award to Mrs. O'Brien of forty percent of its value.[183] Classifying a medical license as marital property was consistent with the concept underlying the equitable distribution statute, that marriage is an economic partnership to which both parties contribute equally through their roles as parent, homemaker, and wage earner.[184] The court opined,

173. *See* Principe v. Assay Partners, 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992); Match v. Match, 553 N.Y.S.2d 626, 628 (Sup. Ct. 1990); People v. Irizarry, 536 N.Y.S.2d 630, 638-39 (Sup. Ct. 1988), *rev'd*, 560 N.Y.S.2d 279 (App. Div. 1990); People v. S.R., 517 N.Y.S.2d 864, 866 (Sup. Ct. 1987).

174. 489 N.E.2d 712 (N.Y. 1985).

175. *Id.* at 713.

176. *Id.*

177. *Id.* at 713-14.

178. *Id.* at 714.

179. *Id.*

180. *Id.*

181. *Id.* at 713.

182. *Id.*

183. *Id.* at 713-14.

184. *Id.* at 716; *see also* David Kaufman, *The New York Equitable Distribution Statute: An Update*, 53 BROOK. L. REV. 845, 878 (1987).

> [F]ew undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license.[185]

The court stated that the purpose of equitable distribution is to "recognize that when a marriage ends, each of the spouses . . . has a stake in and a right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity."[186] To award Mrs. O'Brien temporary support rather than a share of the medical license's value was "contrary to the economic partnership concept underlying the statute."[187]

The *O'Brien* decision's importance was felt immediately. A front page article in *The New York Times* called the opinion "historic."[188] An editorial in the same paper proclaimed that

> New York's highest court has sent a message of fairness across the country to lawyers, judges, husbands — and especially wives . . . . [T]he Court of Appeals lends powerful weight to the proposition that when marriages crash, the pieces must be divided reasonably, not just ritually . . . . The result is sure to make for fairer divorces . . . . [Previously, t]he judiciary persistently refused to give due weight to the contribution of the spouse who wasn't the main breadwinner. For a long time men and women accepted this implicit judgment of each party's economic worth. But then came Loretta O'Brien.[189]

185. *O'Brien*, 489 N.E.2d at 716.

186. *Id.* at 717 (quoting Wood v. Wood, 465 N.Y.S.2d 475, 477 (Sup. Ct. 1983)).

187. *Id.* At the time of the *O'Brien* decision, future Chief Judge Kaye was the only female on the Court of Appeals. Judge Simons wrote a majority opinion that all seven judges joined; Judges Meyer and Titone also filed separate concurring opinions. Courts in other equitable distribution states had declined to extend the definition of marital property to professional licenses. *Id.* at 715.

188. David Margolick, *Court Rules Ex-Spouse is Entitled to a Part of Medical-License Value*, N.Y. TIMES, Dec. 27, 1985, at A1.

189. Editorial, *Sharing the Spoils of Divorce*, N.Y. TIMES, Dec. 31, 1985, at A14.

The ABA Journal predicted that *O'Brien* would "have a national impact."[190] Another article in *The New York Times* argued that "Dr. O'Brien unwittingly became the symbol of the law's attempt to deal fairly in dividing the property of the partners to a marriage that has broken up," and it further argued, "[T]he Court of Appeals has done justice to Mrs. O'Brien and thousands of divorcing spouses who will come after her."[191]

O'Brien is a landmark case not only because the decision broadened the definition of marital property, but also because the Court expressly embraced the concept of marriage as an economic partnership and stressed the importance of the contributions of the homemaker. As a result, lower courts were "encouraged to show due concern for the value of homemaking services when determining a distributive award. Judges can no longer allow a spouse-homemaker to leave a marriage without being adequately compensated for such services."[192] Regardless of who owns the asset, each spouse is entitled to share in the fruits of the marriage.

The Court in *O'Brien* did not award the wife an equal share of the medical license, nor did it advocate equal distribution. Yet the Court of Appeals' explicit endorsement of marriage as an economic partnership led lower court judges towards adopting an equal division norm. In a 1987 case, the Appellate Division increased the trial court's award to a wife from twenty percent of the marital assets to fifty percent because of "the length of the marriage, the wife's dual role of homemaker and major contributor to the family expenses, her present poor health and poor future economic prospects."[193] In 1988, the Appellate Division upheld a nearly equal distribution of the marital assets because although the husband was "responsible for the major share of economic contributions to the marriage," the wife's "noneconomic contributions as full-time parent, spouse and homemaker were also substantial throughout the parties' lengthy marriage."[194] In 1989, the Appellate Division upheld an equal division of the assets because "the wife had contributed to the economic partnership as a parent and homemaker and had delayed development of her career potential in favor of the advancement of the husband's profession and in order to raise the

190. *Sharing the Fruits: M.D. License Marital Property*, 72 A.B.A. J. 25, Mar. 1, 1986.

191. Virgina Knaplund, *Equal Distribution: Justice Has Arrived*, N.Y. TIMES, Mar. 23, 1986, at WC22.

192. Kaufman, *supra* note 184, at 878.

193. Biamonte v. Biamonte, 521 N.Y.S.2d 421, 422 (App. Div. 1987).

194. Marcus v. Marcus, 525 N.Y.S.2d 238, 240 (App. Div. 1988).

parties' four children."[195] The Appellate Division held that after *O'Brien*, marriages were presumed to be economic partnerships even when the husband's earnings were ten times that of the wife in the early part of the marriage.[196] An equal division of the marital assets was warranted because the marriage was an economic partnership.[197]

Why did this embrace of the idea of marriage as an economic partnership lead to an equal division norm? As Professor Garrison has written, the idea of marriage as an economic partnership "offers a clear decision-making principle . . . . Equal partnership implies equal treatment. Given this underlying statutory principle, it is not hard to see why judges gravitated to an equal division norm."[198] Although the legislature explicitly rejected the idea that an equitable distribution had to be an equal one, once judges recognized the underlying concept of marriage as an economic partnership, they began to rule that equal distributions were often equitable. Equitable distribution became almost synonymous with equal distribution.

CONCLUSION

The law simultaneously shapes and is shaped by social values.[199] The history of equitable distribution is initially a story of how a law meant to bring about social change initially reinforced traditional cultural values because of the inordinate discretion it gave judges. Yet this same discretion ultimately brought about a more radical change than the legislature intended. The equitable distribution statute had been a political compromise between reformers who pushed for equal distribution and those who wanted no change at all. Although the legislature specifically rejected an equal distribution scheme, by the end of the law's first decade, equitable distribution had come to mean equal distribution due to the active role of the judiciary.

The first decade of equitable distribution in New York is a powerful example of the interdependent relationship between law and society. Using the law to bring about social change is not simply accomplished by the legislature's decision to pass a statute. Even when the purpose of the law is to reflect modern social values, the

195. Rosenberg v. Rosenberg, 547 N.Y.S.2d 90, 92 (App. Div. 1989).
196. Thomas v. Thomas, 535 N.Y.S.2d 736, 737 (App. Div. 1988).
197. *Id.*
198. Garrison, *supra* note 166, at 507.
199. *See* Dubler, *supra* note 7, at 965.

courts may not easily achieve these results. These changes often take time and require the persistent efforts of those who are committed to equality and are ready to incorporate modern social values into the law.