

Marital Property Discrimination: Reform for Legally Excluded Women

June Miller Weisberger
University of Wisconsin Law School

In American legal history, there are numerous examples of law-sanctioned discrimination against women (i.e., the right to vote, to enter all occupations, to serve on juries, to hold public office, to contract, and to conduct business). Exclusions were typically based upon a rationale of special "protections" needed for women, particularly because of their homemaking and child-bearing functions, and references to the "law of nature." Although many of these legal barriers have been removed, the common law property system for determining the rights of married couples has only recently been identified as the last, major legal area of discrimination based upon gender. In 1984, Wisconsin became the first common law state to enact comprehensive marital property reform. It adopted legislation based upon the key community property principle of automatic property sharing by husband and wife. Similar legislation based upon the Uniform Marital Property Act is now being considered by a number of other common law property states. Some reasons for the success of Wisconsin's marital property reform movement in reversing prior rules of discrimination and exclusion are noted, particularly the existence of politically organized women voters and bipartisan legislative leadership by respected male and female legislators. This case study illustrates how prior substantive legal reforms eliminating discrimination based upon gender have in turn resulted in additional, comprehensive legal reforms designed to bring women into the mainstream of economic power and legal rights.

INTRODUCTION

Marital property discrimination and the attempts leading to reform for women who have been previously deprived of equal rights in this field of law may be seen as examples of the law's acceptance of prevailing social judgments that are based in large part on a religious – ideological – cultural foundation. In this context the following discussion illustrates how, through the course of our recent history, legislators and judges based their decisions – some of which will be

Received September 14-16, 1984; revised March 19, 1986.
Address reprint requests to: June Miller Weisberger,
University of Wisconsin Law School, Madison, WI 53706.

Ethology and Sociobiology 7:353-365 (1986)
© Elsevier Science Publishing Co., Inc., 1986
52 Vanderbilt Ave., New York, New York 10017

205(353)
0162-3095/86/\$03.50

quoted -on what they accepted as biological facts or rules of nature with respect to the abilities, rights, and duties of women.

Lately, it has been suggested that property rights have a biological origin and that respect for possession is present in the family structure of nonhuman primates (Gruter 1977). In the early evolutionary history of human primates, the physically stronger, i.e., males, had advantages in claiming and protecting their rights within their group. With the growing importance of intellectual abilities for group survival, physical force was no longer the single determinant in group conflicts, including those concerning property rights, and females made their own claims. Although law did not incorporate these changing perceptions of property rights simultaneously, the property rights of individuals today -be they physically strong or weak, male or female have been incorporated in practically all legal systems. Of course, it is a long way from viewing women as the property of men or as legally subordinate to men to giving women equal rights in owning and possessing chattels and real estate. Much remains to be done. However, with the growing acceptance of the findings of evolutionary biology, societal attitudes and, therefore, rules and court decisions are changing.

HISTORICAL EXAMPLES OF LEGAL EXCLUSION OF WOMEN

Until very recently, numerous legal rights granted to men were withheld from women. Exclusion based upon gender permeated the fields of citizenship, employment, and contractual rights. Areas where legalized discrimination based upon gender have a long history include: the right to vote,¹ the right to enter all occupations,² the right or duty to serve on juries,³ the right to hold elected or appointed office,⁴ the right of married women to contract and to conduct business (Johnson 1972), and the right to establish a domicile separate from her husband's.⁵ A variety of consistent assumptions supported these exclusions and relegated women to the domestic world of housekeeping, childbearing and childrearing services. A classic statement of the assumptions that sustained historical gender discrimination is found in Justice Bradley's concurring opinion in *Bradwell v. Illinois*,⁶ an 1873 case upholding Illinois' right to prevent Myra Bradwell from practicing law solely because she was a woman:

¹ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875).

² *Goesaert v. Cleary*, 335 U.S. 464 (1948). See discussion at footnote 8.

³ *Strauder v. West Virginia*, 100 U.S. 303 (1879).

⁴ See *Opinion of the Justices*, 150 Mass. 586, 23 N.E. 850 (1890).

⁵ *In re Daggett's Will*, 255 N.Y. 243, 174 N.E. 641 (1931).

⁶ 83 U.S. (16 Wall.) 442 (1873). See also *In the Matter of the Motion to Admit Miss Lavinia Goodell to the Bar*, 39 Wis. 232 (1875).

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

...and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

Thus, women's biological functions required a special legal status that emphasized the childbearing function. Also, women were generally viewed as inferior to men intellectually, physically, and morally, not suited for participation with men in governmental or occupational pursuits. Accordingly, women needed "protection" by the legal system.

These themes are also present in the first United States Supreme Court decision of the twentieth century dealing with gender discrimination, *Muller -v. Oregon*.⁷ Just 3 years before *Muller*, the Supreme Court declared that a

Ryan, C.J. This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.

....

So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well-being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destined and qualified the female sex for the bearing and nurture of the children of our race and, for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours.

⁷208 U.S. 412 (1908)

New York law setting maximum hours of work for all bakery employees was inconsistent with the constitutional right to contract. In 1908 in *Muller*, the Court upheld the constitutionality of an Oregon statute setting maximum hours of work for women. The decision states:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when the eyes are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tend to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habit of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure an equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions are political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions - having in view not merely her own health, but the well-being of the race - justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This

*difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.*⁸

In a more recent constitutional challenge to official gender discrimination, Justice Frankfurter, writing for a majority of his Supreme Court colleagues in 1948, concluded in *Goesaert v. Cleary*⁹ that Michigan was free to restrict the employment opportunities of women working in a bar. He started with the general point that Michigan unquestionably had the right to forbid all women from bartending. He then stated that:

Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature.

In 1961 in *Hoyt v. Florida*,¹⁰ the Supreme Court upheld a Florida statute that required men and women to serve on juries but provided that women would not be called for jury service unless they registered a desire to serve. The decision observed that "woman is still the center of home and family life."

The assumptions reflected in the above judicial opinions were repeated by Senator Sam Ervin of North Carolina when he testified in 1970 against the federal Equal Rights Amendment.¹¹

When he created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women. To justify their belief, they assert that women possess an intuitive power to distinguish between wisdom and folly, good and evil.

....

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a ..state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable

⁸ For a more detailed discussion of the points relied upon by the Court in *Muller*, see Gruter (1977, p. 211).

⁹ 335 U.S. 464 (1948).

¹⁰ 368 U.S. 57 (1961).

¹¹ 116 Congressional Record 29670, 29672 (1970).

their wives to make the habitations homes, and to furnish nurture, care and training to their children during those early years.

....

For this reason, any country which ignores these differences when it fashions its institutions and makes its law woefully lacking in rationality .

Even the most recent line of Supreme Court equal protection decisions, beginning with *Reed v. Reed*,¹² which have held gender discrimination unconstitutional, have refused to apply the analysis developed for race discrimination to gender discrimination. Although official acts of race discrimination are subject to a strict judicial scrutiny test, such is not true for judicial review of legislative classifications based upon gender. For these later cases, the strict scrutiny test has been rejected and a lesser, intermediate approach has been formulated and applied: classifications based upon gender must serve important governmental objectives and must be substantially related to the achievement of these objectives.¹³

Because of constitutional amendments, statutory enactments, and changing judicial doctrines, women are no longer legally excluded from the right to vote, to serve on juries in the same manner as men, to hold public office, to practice law and enter other traditionally male professions and jobs, and to receive equal opportunities in public educational institutions. Exclusion or unequal treatment based upon gender continues, however. Many relate to employment. Current legal controversies concern employment opportunities for women in the military,¹⁴ treatment of pregnancy as a disability,¹⁵ pension plan payments,¹⁶ and exclusion of women from certain jobs because of fetal vulnerability.¹⁷ In addition, as the rate of participation of women in the work force continues to grow, wage discrimination issues have shifted from "equal pay for equal work" to the issue of "comparable worth,"¹⁸ a concept designed to provide a remedy for low pay for traditional "women's jobs."

Based upon the above, it is clear that the focus of much litigation in this century has been to remove barriers to the full participation of women as citizens and as paid employees in the work force. Until recently, however, there has been very little attention paid to barriers in American property law which exclude or discriminate against married women.

COMMON LAW PROPERTY SYSTEMS

Existing property laws in 41 American states and the District of Columbia may be directly traced to the English feudal system. When a man and woman

¹² 404 U.S. 71 (1971).

¹³ *Craig v. Boren*, 429 U.S. 190 (1975).

¹⁴ *Rostker v. Goldberg*, 453 U.S. 57 (1981).

¹⁵ *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

¹⁶ *Norris v. Arizona Governor's Committee*, 459 U.S. 904 (1982).

¹⁷ *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982)

¹⁸ See, for example, *County of Washington v. Gunther*, 452 U.S. 161 (1981).

married, the "two became one" and "he was the one." A married woman lost almost all of the property rights she would have had as an unmarried woman. A husband had the right to the use and profit of all his wife's real property during their marriage. As to his wife's personal property, upon marriage a husband received ownership as well as management and control. A husband also had the right to collect and use his wife's personal earnings. In return for her property rights lost upon marriage, a wife received no interest in her husband's real or personal property except that, if she survived him, she was entitled to a life estate in one-third of her husband's real property. A wife had no rights of heirship if her husband died without a will.

Beginning in Mississippi in 1830, these common law disabilities imposed upon married women were significantly modified or abolished in all the common law states by various Married Women's Property Acts. Wisconsin's version of the Married Women's Property Act,¹⁹ originally enacted in 1850, was a fairly typical example of such legislation. It did not create any interest for a wife in her husband's property during their marriage or when the wife died first. Certain protections at death for a wife were available only if she survived her husband.

Traditional common law also imposed a contract upon all named persons that could not be modified. A husband had a duty to support his wife, usually at a level determined by the husband.²⁰ If a wife was able to persuade a merchant to supply her with "necessaries," a common law action was available to the creditor to collect from her husband. With this exception, little legal theory was available in a common law jurisdiction to enforce a husband's duty to support. In exchange for the duty to support owed to a wife by her husband, the wife owed to her husband child-rearing, domestic, and sexual services.²¹

Thus, despite enactment of the Married Women's Property Acts, a traditional married homemaker with no wages of her own and no assets given to her or acquired prior to marriage has no recognized property rights under common law property principles. A housewife is not creditworthy on her own. She is unable to make lifetime gifts or gifts at death, if she dies first. Only if she survives her husband does the law "protect" her and recognize that she has contributed to the acquisition of spousal property, and then only in a limited, arbitrary way through the concept of a statutory share (where there is a valid will that does not provide her with a minimum share)

¹⁹ See now old Chapter 766 of the Wisconsin Statutes (repealed effective January 1, 1986). The Wisconsin legislation did not remove all legal disabilities of a married woman. See for example Wisconsin Statute section 766.05, which stated that the earnings of a married woman were "subject to her husband's control and liable for his debts if those earnings came from employment by her husband. See also Wisconsin Statute section 767.06 (repealed effective January 1, 1986) restricting when a married woman may transact business in her own name.

²⁰ *Maguire v. Maguire*, 157 Neb. 226 (1958).

²¹ Under the common law, there could be no spousal rape. Several states have recently amended their criminal codes to make spousal rape criminal behavior. Several courts have also refused to follow the traditional common law rule.

or intestate share (where there is no valid will disposing of all of the husband's property). A lesser wage earning spouse (usually a wife) is also disadvantaged vis-à-vis the higher wage-earning spouse (usually a husband). Moreover, there are many legally recognized methods by which a husband may circumvent even these limited rights of a surviving wife by lifetime gifts and by numerous will substitutes for the benefit of others (such as insurance, joint tenancy with a third person, living trusts, POD bank accounts, etc.).²²

Only in the field of divorce has there been increasing legal recognition of the economic contributions of both spouses to the accumulation of spousal property whether by services or money.²³ Otherwise, the common law property system continues to affect adversely the non wage-earning spouse or lesser wage-earning spouse, usually a woman, both during an ongoing marriage and at death. These gender inequities are an integral part of the common law property system even though the legal system appears sex neutral on its face.

COMMUNITY PROPERTY SYSTEMS

A very different property system, derived from Spanish and French civil law, exists in the eight American community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington). Under a community property system, marriage is viewed quite differently from the common law's merger of the legal personalities of the husband and wife with the wife losing her identity. Community property law from its origins (prior to English common law) viewed husband and wife as comprising a marital partnership or "community." There was no dominant or servient legal personality. Property acquired by spouses or either of them by "onerous title" (acquired by spousal efforts) was shared equally by husband and wife. Property acquired by "lucrative title" (acquired by gift) remained the separate property of the acquiring spouse. Property brought to the marriage was also separate property. Community property doctrine assumes as a matter of law that spouses contribute equally to the acquisition of community property even though one spouse actually acquired it while the other devoted his or her time to unpaid services in the home. Equal ownership of community property is recognized at divorce and death, regardless of the order of death.

²² *The augmented estate concept contained in the Uniform Probate Code - "captures" many nontestamentary transfers for the purpose of enlarging the pool of assets against which the surviving spouse may assert a right to elect one third. Several jurisdictions that have not adopted the Uniform Probate Code have also attempted to reach certain nontestamentary transfers, but for most date have been modest.*

²³ *Many common law states refer to the property which a court may divide at divorce as "marital property." Several states including Illinois and New York have specific statutory definitions of "marital property" in the context of property division at divorce which parallel definitions of community property.*

From the earliest times, however, the husband managed and controlled his wife's separate property. Enactment of Married Women's Property Acts in the majority of community property states resulted in the reduction of some of the husband's exclusive management and control rights over community property and his wife's separate property.

During the past 15 years or so, management and control rules governing community property have been drastically reformed in all American community property states and traditional exclusive male management has been eliminated. Except for Texas, which has its own unique management and control rules,²⁴ all the American community property states have adopted equal management and control legislation.²⁵ These reforms, together with federal and state equal credit opportunity laws now make homemakers in community property states as credit worthy as their wage-earning spouses since there is now equal ownership of community property and equal management and control rights.

COMMUNITY PROPERTY AS A MODEL PROPERTY SYSTEM

Modern community property (with equal management and control) currently serves as an attractive model for reformers in common law states since community property sharing principles have already been widely accepted as an integral part of recent divorce law reform in all common law states. They are further attractive because community property sharing principles provide a consistent legal framework that recognizes a marital partnership concept not only at divorce when the marital partnership is to be dissolved, but during the ongoing marriage and when the partnership dissolves due to death of a spouse, regardless of which spouse dies first. Because of its attractiveness, the community property model is now receiving increased attention and acceptance by those seeking property law reforms in the common law states. In all the common law states, in the absence of voluntary sharing by the wage-earning or propertied spouse (usually the husband), the non-propertied or lesser-propertied spouse (usually the wife) has few enforceable rights. These legal inequities are addressed by a community property system "where the order of death of spouses is immaterial and where property sharing of marital assets at death as well as during lifetime is an integral part of the basic system. In Wisconsin, those seeking reform drafted a bill for comprehensive marital property reform based upon a community property

²⁴Texas was the first state to move away from traditional male management and control. It authorizes each spouse to manage his or her uncommingled earnings (community property). Commingled funds are subject to joint management and control by both spouses.

²⁵Louisiana was the last community property state to adopt equal management and control rules for community property. See also *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), which arose under Louisiana's traditional male management rule.

model. This legislation was first introduced into the Wisconsin legislature in 1979. Subsequent Wisconsin proposals were also based upon community property sharing principles although the new property system is called "marital property." The drafters of the Uniform Marital Property Act, adopted by the National Conference of Commissioners of Uniform State Laws in July of 1983, also relied heavily upon well established community property sharing principles for their proposal.²⁶

THE UNIFORM MARITAL PROPERTY ACT (UMPA) AND THE WISCONSIN MARITAL PROPERTY ACT: BASIC LEGAL CHANGE

In July 1983, after much study, discussion, and numerous drafts, the Uniform Marital Property Act (UMPA) was adopted by the National Conference of Commissioners on Uniform State Laws.²⁷ This model legislation, which incorporates community property principles of equal property ownership by spouses, is now being introduced into the legislatures of various states, particularly common law states. UMPA has been proposed not only because it incorporates a more equitable property system, but because of the desirability of uniformity of married persons' property rights from state to state. Particularly since married persons may move many times during their marriage and a married couple in one state may own real property in another state, the existing variety of state property laws makes the determination of married persons' property rights incredibly complicated.

In early 1984, the Wisconsin legislature passed, and the Governor signed, a new Wisconsin Marital Property Act to be effective January 1, 1986.²⁸ The Wisconsin legislation repeals Wisconsin's mid-nineteenth-century Married Women's Property Act and substitutes a new property system based upon the Uniform Marital Property Act and community property principles. Both the Uniform Act and the Wisconsin legislation received broad support from a variety of women's groups, such as the League of Women Voters, NOW, Older Women's League, and farm and business women's groups. The Wisconsin Act was sponsored by both Republicans²⁹ and Democrats.

²⁶ Attachments or affiliative behavior have long been the subject of ethological studies (Eibl-Eibesfeldt 1976). The sociobiological concept of reciprocal altruism (Trivers 1971) has recently been introduced to explain the success of sharing principles. The integration of such principles in the law seem to indicate an acceptance of biological reality.

²⁷ During its drafting, UMPA was reviewed by a number of diverse legal groups. Representatives from various American Bar Association sections were heavily involved. In August 1984, the House of Delegates of the American Bar Association endorsed UMPA "as an appropriate act for those states desiring to adopt the substantive laws suggested herein."

²⁸ 1983 Wisconsin Act 186, amended by 1985 Wisconsin Act 37.

²⁹ Senator Donald Hanaway, a Republican from DePere, and Senator Lynn Adelman, a Democrat from New Berlin were prominent Senate sponsors of the UMPA based bill.

ocrats, with several women legislators as prominent supporters. ³⁰ The legislation was officially opposed by the State Bar of Wisconsin, although that organization went on record as supporting the goals of marital property reform. Editorials appearing in several prominent Wisconsin newspapers supported the legislation.

KEY FACTORS IN SECURING INCREASED PROPERTY RIGHTS FOR MARRIED WOMEN: SOME SPECULATIONS

As might be suspected, the success of the Wisconsin marital property reform movement is attributable to a variety of reasons. First, the adverse effects upon women caused by the common law property system were well publicized. "Horror" stories based upon real people and actual litigation were widely distributed and discussed. Second, the political power of women voters was mobilized by a highly sophisticated umbrella organization, the Wisconsin Women's Network. With divorce reform incorporating community property principles already enacted in 1977, this lobbying group was able to capitalize effectively on the irony that legally required spousal property sharing in Wisconsin was restricted to divorce only. Also, marital property reform was not viewed as solely a "feminist" issue. It appealed to, and brought together, a broad spectrum of people from conservatives to liberals because it was widely perceived that the primary group that would benefit from the legislation would be homemakers and working wives who earned less than their husbands. Third, there were several key and highly respected legislators who sponsored the legislation and effectively persuaded others to also support the legislation. These legislators were personally convinced that the proposed system was "right" while the present system was "wrong." ³¹ Fourth, the idea of marital property reform became more respectable in Wisconsin in 1983 when the Uniform Marital Property Act was officially adopted and the Wisconsin proposal was redrafted to contain Uniform Act provisions. In addition, since the proposed marital property system was heavily based upon community property rules already in existence in one or more of the community property states, the reform could be viewed as a conservative incremental change since one quarter of the American population already lived under community property rules and Wisconsin would be able to benefit from existing practices in the community property states. Fifth, as is true with other pieces of major legislation, there were... strange but helpful bedfellows supporting this reform. Supporters included (several important creditor groups who saw business benefits in making more women creditworthy. Sixth, the State Bar was the most prominent group in

³⁰ Rep. Mary Lou Munts, a Democrat from Madison, was an early and active Assembly sponsor of various community property reform bills.

³¹ The sense of right or wrong, or the sense of justice as motivation for legal behavior or legislation has been the subject of several papers.

opposition to the legislation. Although its opposition had some impact, the Bar's opposition was not persuasive because its alternative legislative proposal for marital property reform was not well formulated. Also, one of the Bar's key arguments in opposition to community property based reform was that the reform bill would provide lawyers with a lot of work. This argument was viewed with much skepticism. Moreover, the official position of the State Bar was openly opposed by some lawyers who supported the legislation. Finally, Wisconsin has a long history of 'pioneering', social legislation. That tradition was explicitly referred to during the marital property reform public discussion and legislative debates.

Knowledgeable observers believe that at least several of the above factors must be present before there is a significant chance for similar legislation to be enacted elsewhere. The two key Wisconsin factors that led to reform success, in this observer's view, were organized women voters and bipartisan support by politically prominent and respected legislators of both sexes.

CONCLUSION

The recent successful enactment of marital property reform in Wisconsin presents an instructive case study for those concerned with exclusions based upon law, one form of social ostracism. Although the common law property system governing the rights of married persons is currently stated in sex neutral terms, its history and present application adversely affect spouses, usually wives, who do not have an income comparable to that of the other spouse for the entire period of their marriage. This legal (and economic) exclusion of many women has finally been reversed in Wisconsin by the adoption of a community property (marital property) legal system. This occurred only after many of the other forms of legal discrimination or exclusion based upon gender had been addressed at a national and state level. The cumulative nature of marital property reform is particularly worth noting.

Discrimination based on gender is influenced by opinions of the general public and the degree of knowledge held by legislators and judges vis-à-vis research data coming from the social and natural sciences. Here is one of the focal points where intellectual "connections" between the sciences and legal policy can and should be made. Although this case study served to illustrate ostracism, exclusion, and denial of legal rights eventually replaced by legislation incorporating sharing principles, other "connections" were also noted, e.g., cooperation, coalition building, and reconciliation. These latter "connections" play key roles in many nonhuman and human social and "legal" institutions.

If contributions to law from the sciences are to be increasingly recognized, as I believe they should be, it is critical that the beginnings encouraged by the symposium for which this article was written be nurtured.

REFERENCES

- Danielli, J.F. Altruism and the internal reward system or the opium of the people. *Journal of Social Biological Structures* 3:87 -94,1980.
- Eibl-Eibesfeldt, I. *Die Ko-Buschmann Gesellschaft*. 1976, p.56.
- Gruter, M. Law in Sociobiological perspective. *Florida State University Law Review* 5:196,1 977.
- In *Law, Biology, and Culture*, M. Gruter and P. Bohannan (Eds.). Santa Barbara, CA: Ross -Erikson, 1982.
- Hoebel, B. In *Law, Biology, and Culture*. M. Gruter and P. Bohannan (Eds.). Santa Barbara, CA: Ross-Erikson, 1982.
- Johnston, J. Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Towards Equality. *New York University Law Review* 47:1033,1046,1972.
- Trivers, R.L. The evolution of reciprocal altruism. *Quarterly Review of Biology* 46:35,1971.