Divorce Reform and Gender Justice

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DIVORCE REFORM AND GENDER JUSTICE

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The modern shift from fault-based to no-fault divorce has disappointed those who expected the no-fault system to eliminate economic inequality between divorced women and men. The fact that women and their dependent children invariably experience economic hardship after a divorce has caused Lenore Weitzman and other commentators to romanticize the "good old days" of fault-based divorce. Professor Singer attacks the logic of this nostalgia by demonstrationg that women were not *better off under the fault-based system. She then proposes an investment partnership model of post-divorce allocation which would insure a fair result for both spouses.*

Close to fifty percent of American marriages now end in divorce.[1] Each year more married couples across the country end their unions in dissolution than in death.[2] Experts predict that if current divorce rates hold steady, almost half of all children born in the 1980s will spend at least part of their childhood in a household headed by a divorced parent.[3] For ninety percent of these children, that single parent will be their mother.[4]

These statistics underscore the tremendous impact of divorce on American family and economic life. In particular, decisions about how resources are allocated at the time of divorce profoundly affect the economic opportunities and material well-being of both this generation and the next. Allocation decisions have a striking aggregate impact as well: households headed by divorced and separated mothers constitute the fastest growing segment of the American poor.[5]

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1. Welch & Price-Bonham, *A Decade of No-fault Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411, 411 (1983).

2. I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW: CASES, TEXT, PROBLEMS 207-08 (1986).

3. Wallerstein, *Children of Divorce: An Overview*, 4 BEHAV. SCI. & L. 105, 107 (1986); Welch & Price-Bonham, *supra* note 1, at 411.

4. Spanier & Glick, *Marital Instability in the United States: Some Correlates and Recent Changes*, 30 FAM. REL. 329, 332 (1981); Welch & Price-Bonham, *supra* note 1, at 411. As of 1986, 24% of all children under 18 were living in single parent families. An additional 9% of children were living with one biological parent and one stepparent. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 100TH CONG., 1ST SESS., U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS 12 (Comm. Print 1987) [hereinafter SELECT COMM. ON CHILDREN].

5. Ehrenreich & Piven, *The Feminization of Poverty: When the Family Wage System Breaks Down*, 31 DISSENT 162, 162 (1984); *see* Pearce & McAdoo, *Women And Children: Alone and in Poverty*, in FAMILIES AND CHANGE: SOCIAL NEEDS AND PUBLIC POLICY 161 (R. Genovese ed. 1984). Approximately two-thirds of the more than 13 million female-headed families in the United States are headed by women who are divorced or separated from their husbands. Less than one third are headed by never-married mothers. SELECT COMM. ON CHILDREN, *supra* note 4, at 14. More than 50% of the children living in these female-headed households are living below the pov-

Growing recognition of the economic impact of divorce has led to a number of recent and ongoing studies designed to examine the effects of current divorce law and practice on individuals and families.[6] Virtually all of these studies have found that no-fault divorce is financially devastating for women and the minor children in their households. This finding, in turn, has begun to provide the impetus for important legislative and judicial reforms.[7] The publicity surrounding the studies, however, has created risks for women as well. In particular, the perceived attack on no-fault divorce and on equality-based divorce reform threatens to reinforce old stereotypes about the proper roles of men and women and to fuel public nostalgia for a return to the "good old days" (before women's liberation) when fathers worked, mothers stayed home, and virtuous parents never got divorced. To address these risks and to identify exactly where current divorce laws fall short, it is necessary to focus attention on what really happened to divorced women and their children under the *old* divorce regime, as well as what they experience under the current no-fault system.

I. THE DIVORCE REVOLUTION: FAULTING NO-FAULT

The starting point for virtually all of the current research on the economic consequences of no-fault divorce is Lenore Weitzman's 1985 book, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. In it, Weitzman purports to examine the impact of California's no-fault divorce revolution on the post-divorce lives of men, women, and children. She finds that the no-fault standards "have shaped radically different futures for divorced men on the one hand, and for divorced women and their children on the other."[8] Divorce impoverishes women and the minor children in their households, both absolutely and in relation to their ex-husbands and fathers. Although women's standard of living drops dramatically as a result of divorce, men's standard of living typically improves.

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erty line. *Id.* at 28. Between 1960 and 1981 the number of persons in impoverished households headed by women increased 54% while the number in poor households headed by white men *decreased* nearly 50%. UNITED STATES COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUB. NO. 78, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN 2 (1983). These statistics led the National Council on Economic Opportunity to observe in 1980 that "[a]ll other things being equal, if the proportion of poor in female-headed households were to continue to increase at the same rate as it did from 1967 to 1978, the poverty population would be composed solely of women and their children before the year 2000." Ehrenreich & Piven, *supra*, at 162.

6. *See, e.g.*, L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); McGraw, Stern & Davis, *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443 (1981-82); McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Welch & Price-Bonham, *supra* note 1; Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986).

7. For example, California recently amended its divorce statutes to require that courts retain jurisdiction indefinitely over spousal support orders where the marriage has been of long duration. CAL. CIV. CODE § 4801(d) (West Supp. 1988). For additional legislative proposals, see FINAL REPORT OF THE [CALIFORNIA] STATE SENATE TASK FORCE ON FAMILY EQUITY ES-5 to -10 (June 1, 1987). For a description of recent appellate court efforts to counter inadequate alimony awards by state trial courts, see Krauskoph, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, in ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE 65, 70-74 (American Bar Association, Section of Family Law 1988) [hereinafter ALIMONY: NEW STRATEGIES].

8. L. WEITZMAN, *supra* note 6, at x.

Weitzman blames these disparities on the shift from a fault-based to a no-fault system of divorce.[9] She claims that the no-fault divorce laws "worsened women's condition, improved men's condition, and widened the income gap between the sexes."[10] Relying largely on evidence gathered during a ten-year study of California's no-fault divorce system, Weitzman details the shortcomings of the current no-fault standards that govern grounds for divorce, awards of alimony, property division, child custody, and child support.[11]

Many of Weitzman's criticism's of current divorce law and practice are well taken, although some are now slightly out of date. Weitzman, however, fails to provide the critical *comparative* evidence to support her indictment of the no-fault divorce revolution. Although Weitzman explores in depth the effects of the current no-fault system on men's and women's post-divorce lives, her book contains only scant information on what actually happened to men and women under the old, fault-based regime. Moreover, what little information the book does contain about the experiences of men and women under the fault-based regime suggests that women (and their children) were no better— and may well have been considerably worse—off under the old system. Although Weitzman ultimately rejects a return to a fault-based system of divorce, she strongly implies at several points in her analysis that women and their children were "better off" under the fault-based system. Other commentators have echoed this suggestion.[12] This position is both flawed and potentially dangerous. It is flawed because it ignores the often disastrous experience of women and children under the old system of marriage and divorce. It is potentially dangerous because it provides ammunition to those who urge women to reject equality and to return to the "safety" of traditional family structures. Moreover, Weitzman's indictment of the no-fault divorce revolution, which was supported by a number of women's rights advocates,[13] casts doubt on other important legal reforms achieved in the name of sex-based equality. In the light of the continuing debate over both divorce reform and sex-based equality in this country, it is important to examine critically Weitzman's claims.

A. *The Facts*

Weitzman appears most nostalgic in her discussion of alimony—often re-

9. L. WEITZMAN, *supra* note 6, at 358, 365, 378.

10. L. WEITZMAN, *supra* note 6, at 378.

11. Weitzman's data, collected between 1968 and 1978, consisted of court records from 2500 divorces granted in San Francisco and Los Angeles counties, and interviews with judges, matrimonial lawyers, and divorced men and women. L. WEITZMAN, *supra* note 6, at xviii-xxi. Although most of this data was collected in California, Weitzman claims her findings "are relevant to the entire United States because the major features of the California law have been adopted by other states." *Id.* at xix.

12. *See, e.g.*, Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 886; Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, 1 FAM. ADVOC., Spring 1979, 10, 15; *cf.* Peters, *No-Fault Divorce and Bargaining Over the Divorce Settlement*, in ALIMONY: NEW STRATEGIES, *supra* note 7, at 18, 30 (laws permitting unilateral divorce produce lower alimony and child support payments).

13. *See* Kay, *Equality and Difference: A Perspective On No- Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 57 & n.285 (1987).

ferred to today as "spousal support." She argues that the no-fault divorce revolution transformed the concept of alimony from a lifetime entitlement based on the husband's duty to support his wife, to a minimal transition payment designed to force divorced women to become self-supporting as soon as possible.[14] Thus, Weitzman suggests that although the old system allowed a man to divorce his wife, it did not permit him to abandon his financial obligations toward her. Weitzman also claims that the traditional standards for alimony encouraged commitment and marital sharing by protecting a woman's devotion to her family, even in the event of divorce.[15] By contrast, the new rules undermine traditional notions of sharing and partnership by fostering a "me first" attitude among married partners and by leaving wives and children to fend for themselves after divorce.[16]

1. The Prevalence of Alimony

A number of things are wrong with this picture. First, despite the prevalence of what Weitzman correctly terms the "alimony myth," only a small minority of divorced women ever received alimony under the old fault-based system. Data collected nationally by the United States Census Bureau indicate that "only 9.3 percent of divorces between 1887 and 1906 included provisions for permanent alimony, as did 15.4 percent of those in 1916, and 14.6 percent of those in 1922."[17] Historical data from individual states paint a similar picture: wives received alimony in only 6.6% of 3000 Maryland divorce cases in 1929 and 16.5% of 6800 Ohio cases in 1930.[18] These figures are particularly striking when one remembers that women, particularly married women, were significantly less likely to be employed outside the home (and thus significantly more likely to need continuing financial support) in 1919 or 1930 than they are today.[19]

Perhaps more important, Weitzman's own California data refute the notion that no-fault reform has been responsible for a significant reduction in alimony awards.[20] Weitzman's data show that in 1968, under the fault-based system, less than 19% of divorcing women in California were awarded alimony; in 1977, under no-fault, the figure was 16.5%—a drop of less than 2.5%.[21] These figures indicate that the husband's continuing "duty of support" has always been more

14. L. WEITZMAN, *supra* note 6, at 145, 149.

15. L. WEITZMAN, *supra* note 6, at 143.

16. L. WEITZMAN, *supra* note 6, at 214.

17. L. WEITZMAN, *supra* note 6, at 180.

18. L. WEITZMAN, *supra* note 6, at 180-81.

19. In 1920 9.0% of married women were in the paid labor force. In 1930 that figure was 11.7%. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION, PART 2, at 133 (1975).

20. Weitzman herself made this point in a 1981 article reporting the preliminary results of her California research. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1221-22 (1981) ("The data clearly do not support the widely held assumption that no-fault divorce laws (and the women's liberation movement) have been responsible for a drastic reduction in alimony awards.").

21. L. WEITZMAN, *supra* note 6, at 169 (Table 13).

myth than reality for most divorced women. They also undermine the suggestion made by Weitzman and others that the fault-based divorce system somehow enabled women to use their status as "innocent" or nonconsenting parties to a divorce to bargain for favorable alimony settlements.[22]

Weitzman's indictment of the no-fault revolution becomes even less compelling when one compares the distribution of alimony awards under the fault and no-fault systems. Under the fault-based regime, women in long-term marriages were actually *less* likely to be awarded alimony than they are under today's no-fault system. Weitzman's data indicate that in 1968, before the adoption of no-fault, approximately 27% of women divorced in California after more than nine years of marriage were awarded alimony; in 1977 more than 36% of these women received some post-divorce spousal support.[23] Weitzman's data also show that for women whose marriages lasted between five and nine years the no-fault regime produced no appreciable change in the likelihood of receiving alimony. Only for women married less than five years has the no-fault divorce revolution in California significantly reduced the likelihood of an alimony award.[24]

The comparisons are even more striking when the occupation of the divorcing wife is factored into the equation. Under the fault-based system, less than half (43.5%) of the divorcing California homemakers whose marriages lasted more than ten years were awarded alimony. Under the no-fault system, nearly two-thirds of these same homemakers were awarded spousal support, an *increase* of more than twenty percent.[25] A close look at Weitzman's own data thus reveals that the move to a no-fault divorce regime may have increased, rather than decreased, the availability of alimony to those women most likely to need it— homemakers and other women who have invested in long-term domestic careers.

2. The Duration of Alimony

In addition to producing a decrease in the overall percentage of divorcing women awarded alimony, Weitzman maintains that the no-fault revolution has dramatically reduced the duration of most alimony awards.[26] Indeed, Weitzman characterizes the shift from permanent to short-term alimony as "[t]he most important change in the pattern of alimony awards following the introduction of no-fault divorce."[27] She notes that prior to 1970 most alimony awards were designated as permanent or open-ended. According to Weitzman, "[t]his reflected the old law's assumption that the wife would remain dependent on her former husband for an indefinite period of time—'his or her life.' "[28] By con-

22. *See* L. WEITZMAN, *supra* note 6, at 8-9, 27-29; Fineman, *supra* note 12, at 801-02.

23. L. WEITZMAN, *supra* note 6, at 169 (Table 13).

24. L. WEITZMAN, *supra* note 6, at 169 (Table 13). Couples married less than five years constituted approximately half of Weitzman's data sample in both 1968 and 1977. *Id.*

25. *See* L. WEITZMAN, *supra* note 6, at 177 (Table 15).

26. L. WEITZMAN, *supra* note 6, at 164.

27. L. WEITZMAN, *supra* note 6, at 164.

28. L. WEITZMAN, *supra* note 6, at 164.

trast, under the new law the governing assumption is that both parties can and should become self-supporting after divorce.[29] According to Weitzman, this assumption has led to a far greater percentage of "time-limited" or "transitional" alimony awards.[30]

Weitzman certainly is correct with respect to legal labels. A far greater percentage of alimony awards today are for an explicitly limited time period than was the case under the fault-based regime. Moreover, Weitzman's research convincingly demonstrates the unfairness and inaccuracy of assuming the instant self-sufficiency of many categories of divorcing women, particularly longer-married housewives and custodial mothers.[31] Once again, however, Weitzman fails to look behind the legal labels to see what really happened under the prior fault-based rules.

It is true that most alimony awards under the old system were labeled "permanent" or "indefinite," rather than "temporary" or "transitional." But reality diverged sharply from these legal labels. Under the old system a woman's "permanent" alimony could be terminated or reduced for any number of reasons. Most commonly, alimony ended upon a woman's remarriage or her cohabitation with another man, regardless of whether her financial needs had changed as a result of the new relationship.[32] In addition, an ex-wife's "permanent" alimony might be terminated or reduced if her ex-husband remarried, on the theory that his support obligations to his new family were more important than the claims of a former spouse.[33] Because, as Weitzman notes, a high percentage of divorced

29. L. WEITZMAN, *supra* note 6, at 164.

30. L. WEITZMAN, *supra* note 6, at 164-65.

31. Both the California courts and the California legislature have recognized—and moved to remedy—this unfairness. In 1978 the California Supreme Court held that trial courts may not terminate jurisdiction over spousal support awards following lengthy marriages "unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction." *In re* Marriage of Morrison, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978). In 1987 the California legislature extended *Morrison* by requiring California courts to retain jurisdiction indefinitely over orders for spousal support if the marriage has been one of "long duration," which the statute presumptively defines as 10 years or more. *See* CAL. CIV. CODE § 4801(d) (West Supp. 1988). For a discussion of the efforts of appellate courts in other states to curb trial courts' over-reliance on inappropriately short alimony awards, see Krauskoph, *supra* note 7, at 70-74.

32. *See, e.g.*, Giant v. Giant, 52 Cal. App. 2d 359, 362, 126 P.2d 130, 132 (1942); H. CLARK, LAW OF DOMESTIC RELATIONS 457-58 (1st ed. 1968); *see also* ALA. CODE § 30-2-55 (1975) (requiring termination of alimony upon proof that receiving spouse has remarried or is cohabiting with a member of the opposite sex).

33. *See, e.g.*, Werner v. Werner, 120 Cal. App. 2d 248, 252, 260 P.2d 961, 963-64 (1953) (ex-wife's improved financial condition and ex-husband's remarriage justify reduction of alimony payments); Lamborn v. Lamborn, 80 Cal. App. 494, 499, 251 P. 943, 944 (1926) (proper to consider husband's "laudable" wish to remarry in granting request for reduction in alimony, because husband should not be precluded financially from establishing another home); Mark v. Mark, 248 Minn. 446, 450-52, 80 N.W. 621, 624-25 (1957) (proper for court to consider rights and needs of innocent children born of husband's remarriage in evaluating application for reduction of alimony); H. CLARK, *supra* note 32, at 459.

> [I]f enforcement of the alimony decree as originally granted would impose sacrifices on the second wife, the alimony should be reduced to the point necessary to put both wives on the same footing. If it is not reduced, the second wife will often go to work herself, and the law is then in the highly undesirable position of forcing the second wife to help pay the first wife's alimony.

Id. (footnotes omitted).

men remarry—many within the first few years after divorce—this constituted a severe limitation on the permanence of a wife's alimony award under the fault-based regime.

Moreover, although Weitzman contends that an award of "permanent" alimony was based on the old law's assumption that an ex-wife was likely to remain financially dependent on her ex-husband for the rest of her life, judges did not always see it that way. In particular, judges often reduced or terminated the "permanent" alimony awards of divorced women who attempted to make ends meet by seeking employment outside the home.[34] Similarly, husbands often successfully argued, either at the initial divorce hearing or shortly thereafter, that their formerly dependent ex-wives did not need permanent (or any other) alimony because they were fully capable of self support.[35] Leading domestic relations scholars strongly endorsed these self sufficiency arguments.[36]

3. Alimony and Post-Divorce Behavior

Under the fault-based system, alimony was also used by ex-husbands and judges as a way of controlling a woman's behavior after the termination of her marriage. For example, fault-based divorce decrees sometimes contained a provision freeing the husband from the duty of contributing to his ex-wife's support if she engaged in "unchaste" behavior or committed any other immoral act.[37] An ex-wife who gambled or otherwise "squandered" her alimony payments sim-

34. *See, e.g.*, Garlington v. Garlington, 246 Ala. 665, 667-68, 22 So. 2d 89, 90 (1945) (ex-wife's employment justified reduction in alimony despite ex-husband's increased earnings); Ross v. Ross, 1 Cal. 2d 368, 369, 35 P.2d 316, 316 (1934) (wife's employment justified complete suspension of alimony payments until further court order); Rilcoff v. Rilcoff, 57 Cal. App. 2d 888, 889, 135 P.2d 687, 687 (1943) (wife's post-divorce employment as substitute teacher is sufficient to support decision terminating husband's alimony obligation); *Mark*, 248 Minn. at 452, 80 N.W.2d at 625 (ex-wife's employment, coupled with husband's remarriage, sufficient to warrant reduction in alimony). *See generally* Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or Maintenance*, 18 A.L.R.2D 10, 59-67 (1951) (reviewing cases and concluding that "[t]he fact that the wife was not employed when the decree for alimony or maintenance was entered but secured employment later is often an important consideration in determining whether to reduce or terminate the payments").

35. *See, e.g.*, Baytop v. Baytop, 199 Va. 388, 394, 100 S.E.2d 14, 18 (1957) (reversing alimony award to wife who was unemployed at time of divorce but who court found "was interested in and would most probably be able to accept re-employment" as teacher); Crouch, *Denial of Alimony to Solvent Wife*, 5 WM. & MARY L. REV. 205, 205 (1964) (wife's substantial earning capacity will entirely excuse a transgressing husband from any obligation to pay alimony); *cf.* H. CLARK, *supra* note 32, at 444-45 ("If the wife is able to work, her earnings should enter into the calculation of alimony . . . ."). Indeed the increasing frequency and success of such arguments during the decade immediately preceding the adoption of no-fault suggests that the move from "permanent" to short-term alimony would probably have occurred regardless of the shift to a no-fault divorce system.

36. *See* H. CLARK, *supra* note 32, at 460.

> Thus the cases are correct in considering the wife's earnings (in conjunction with other factors) as a ground for modification of the [alimony] decree. A court may even be justified in going a step further and holding that if the wife is able to work and refuses to, her alimony should be reduced. She ought not to be supported by her husband in idleness where this causes him appreciable hardship or inconvenience.

Id. (footnotes omitted).

37. Desvernine, *Grounds for the Modification of Alimony Awards*, 6 LAW & CONTEMP. PROBS. 236, 246 (1939); *see* Blakely v. Blakely, 261 Ky. 318, 318, 87 S.W.2d 628, 628 (1935) (divorce decree provided that wife receive permanent alimony "so long as she remains single 'and demeans herself in a proper manner' ").

ilarly risked forfeiting her right to support.[38]

Moreover, courts traditionally held that a woman who was awarded alimony as part of a legal separation or limited divorce owed a continuing duty to her husband to refrain from conduct, such as sexual relations with other men, that would ordinarily entitle him to a divorce against her. Any failure to observe this duty extinguished her right to alimony payments, regardless of her husband's misconduct during the marriage or after the separation.[39] Even a wife who was awarded "permanent" alimony as part of an absolute divorce risked having her post-divorce behavior—particularly her sexual conduct—used as grounds for reducing or terminating her alimony award.[40] Both husbands and judges thus used their power to bestow or withhold alimony as a means to control women's behavior after divorce.

4. Alimony and Fault

Perhaps the most severe limitation on the award of alimony under the fault-based system was that it generally was available only to innocent spouses.[41] Thus, a woman deemed to be at fault in a divorce ordinarily was not entitled to *any* alimony, regardless of her contribution to the marriage and regardless of her financial need. Weitzman acknowledges this limitation, but fails to appreciate its significance for women, perhaps because of her unsupported assumption that women were generally the "innocent" spouses under the fault-based regime.[42]

This assumption regarding women's "innocence" in divorce proceedings ignores the sex discriminatory nature of the most common grounds for a fault-based divorce. Under the fault-based system the standards for judging marital misconduct reflected both the gender-based expectations of the traditional marriage contract and the double standard applied to men's and women's sexual

38. *See, e.g.*, Christiano v. Christiano, 131 Conn. 589, 597, 41 A.2d 779, 783 (1945); Daniels v. Daniels, 82 Idaho 201, 207, 351 P.2d 236, 240 (1960); Annotation, *Divorced Wife's Subsequent Misconduct as Authorizing or Affecting Modification of Decree for Alimony*, 6 A.L.R.2D 859, 870 (1949).

39. *E.g.*, Courson v. Courson, 213 Md. 183, 188, 129 A.2d 917, 920 (1957); Gloth v. Gloth, 154 Va. 511, 532, 153 S.E. 879, 887 (1930); *see* Desvernine, *supra* note 37, at 246.

40. *See, e.g.*, Atkinson v. Atkinson, 13 Md. App. 65, 71, 281 A.2d 407, 410 (1971) (court notes majority rule that ex-wife's flagrant misconduct after divorce may justify revocation or modification of prior alimony award); Lindbloom v. Lindbloom, 180 Minn. 33, 35-36, 230 N.W. 117, 118 (1930) (trial court properly considered ex-wife's post-divorce sexual behavior as factor supporting termination of husband's alimony obligation); Weber v. Weber, 153 Wis. 132, 136, 140 N.W. 1052, 1055 (1913) (when ex-wife "deliberately chooses a life of shame and dishonor," court may terminate or reduce alimony); *see also* Taake v. Taake, 70 Wis. 2d 115, 129, 233 N.W.2d 449, 452 (1975) (citing *Weber* with approval). A 1949 A.L.R. annotation summarized the state of the law at that time as follows:

> There is a marked conflict of authority on the question whether the fact that a divorced wife is guilty of immoral conduct after the divorce is a ground for reducing or terminating alimony payments. Perhaps a majority of the courts state that such conduct is a ground for modification, although some of the decisions are mere dicta.

Annotation, *supra* note 38, at 860; *see also* Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or With Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3D 453 (1980) (analyzing cases addressing whether a woman's misconduct is an independent or cumulative ground for modification of alimony decree).

41. *See* H. CLARK, *supra* note 32, at 445-46.

42. *See* L. WEITZMAN, *supra* note 6, at 13-14.

behavior. In many instances, for example, a woman's failure to conform to the traditional role of wife and mother was sufficient to give her husband grounds for divorce, thus extinguishing any alimony claim.[43] By contrast, a husband's behavior would not rise to the level of divorce-inducing misconduct unless he repeatedly abused his wife physically (one violent incident generally was not enough) or completely abandoned her financially, in which case her prospects for collecting alimony were slim.[44] Similarly, some states allowed a man to divorce his wife on the basis of a single instance of adultery, but required a woman to prove multiple infidelities on the part of her husband to obtain a divorce.[45] In other states a wife's pre-marital unchastity provided grounds for a fault-based divorce, although a husband's sexual conduct before marriage was irrelevant.[46] Marital fault thus was both more complicated and more gender-biased than Weitzman or other critics of the no-fault system have acknowledged.

As a result of the fault-based limitations on alimony and the gender-biased standards for determining fault, a significant percentage of divorcing women found themselves ineligible for alimony even if the husband's behavior precipitated the divorce. Nor could these women bargain effectively for alimony outside the courtroom, as Weitzman's own California data show. Moreover, the restriction of alimony to innocent spouses meant that a woman who could not (or who could not afford to) establish grounds to divorce her husband often faced an unenviable choice: either remain in an unsatisfactory and sometimes intolerable marriage or break the marriage contract herself and forfeit any entitlement to spousal support.

The fault-based system of divorce and alimony had an additional important

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43. For example, a woman who refused to live in the domicile chosen by her husband was guilty of desertion, unless the husband's choice was plainly unreasonable. *See* Bennett v. Bennett, 197 Md. 408, 412, 79 A.2d 513, 515 (1951); H. CLARK, *supra* note 32, at 339. Similarly, a wife's neglect of her household duties could constitute cruelty sufficient to justify a divorce. *See, e.g.*, Cawood v. Cawood, 329 S.W.2d 567, 568 (Ky. 1959) (wife's preoccupation with social and club activities and failure to prepare husband's meals constituted marital cruelty); Humphreys v. Humphreys, 200 S.W.2d 453, 455 (Tex. Civ. App. 1947) (wife's indifference to husband and "failure to discharge the duties that would be expected of a wife" justified divorce to husband on grounds of cruelty); Ryan v. Ryan, 17 Utah 2d 44, 45, 404 P.2d 247, 247 (1965) (evidence that wife belittled husband in front of others and was frequently away from home in the evening supported granting of divorce to husband); Guibord v. Guibord, 114 Vt. 278, 283, 44 A.2d 158, 160 (1945) (wife's refusal to clean house and prepare meals for husband entitled husband to fault-based divorce).

44. *See* H. CLARK, *supra* note 32, at 345 (single act of violence or threat of violence generally does not amount to cruelty sufficient to obtain divorce); Annotation, *Single Act as Basis of Divorce or Separation on Grounds of Cruelty*, 7 A.L.R.3D 761, 780-89 (1966) (same).

45. *E.g.*, KY. REV. STAT. § 403.020 (1969) (husband entitled to divorce for wife's adultery or for "such lewd, lascivious behavior on her part as proves her to be unchaste without actual proof of an act of adultery"; wife must prove that husband is "living in adultery" to obtain divorce) (repealed in 1972 by enactment of no-fault divorce statute); *see* H. CLARK, *supra* note 32, at 328 & n.9 (discussing other statutes and cases).

46. As of 1971, 13 states included as a ground for divorce a wife's pregnancy by a man other than her husband at the time of marriage. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 950 & n.178 (1971) (listing statutes). No comparable ground existed for husbands. *Cf.* B. v. S., 99 N.J. Super. 429, 432-34, 240 A.2d 189, 190-92 (1968) (granting annulment to husband, despite husband's engagement in pre-marital intercourse, when wife had concealed her pregnancy by another man at time of marriage). Under Virginia's fault-based divorce regime, a husband could divorce his wife if she had been a prostitute prior to marriage. VA. CODE ANN. § 20-91(8) (Cum. Supp. 1970) (repealed 1975).

shortcoming. It deceived women about what they could expect from marriage and divorce. The promise of lifetime spousal support that the system held out to virtuous wives turned out to be unenforceable during marriage[47] and largely illusory upon divorce. Weitzman's interviews with divorced homemakers highlight the bitterness and acute sense of betrayal caused by this illusory promise. Moreover, the legal system's false promise of lifetime spousal support helped perpetuate the widely-accepted myth that "nearly every divorced woman was awarded alimony."[48] This myth, in turn, diverted public attention from what really happened in most fault-based divorces and stifled efforts to improve the economic status of divorcing women and their children.

B. *Ideological Implications of the Fault-Based System*

Reliance on traditional notions of fault and alimony as a means of achieving economic justice for divorcing women not only lacks a basis in historical fact, but is also flawed at a deeper ideological level. Historically, alimony statutes were part and parcel of a larger family law regime that stripped women of legal and economic independence by "removing them from the world of work and property and 'compensating' them by making their designated place secure."[49] A divorced woman's "entitlement" to alimony derived from her husband's duty of support during marriage. Only husbands were responsible for support; wives had other marital obligations. Weitzman, in her earlier book, *The Marriage Contract*, described these reciprocal obligations: the husband is head of household and responsible for the financial support of his wife and children, while the wife supports her husband by providing childcare and other domestic services.[50]

A woman who fulfilled her marital obligations—who cheerfully performed domestic services, devotedly cared for the couple's children, and refrained from challenging her husband's primacy as head of household—theoretically was entitled to her husband's continued economic support, even in the event of a divorce. But a woman who failed to perform her marital duties—who, for example, refused her husband's sexual demands or protested his unilateral choice of domicile—was guilty of a marital offense and thus forfeited her right to spousal support. Moreover, couples that, by private agreement, tried to alter the gender-based obligations of the traditional marriage contract could not look to the courts to enforce their agreement. Contracts to change the "essential incidents" of marriage, defined as the husband's support duties and the wife's domestic obligations, were deemed illegal and hence unenforceable.[51] In a very

47. *See, e.g.*, McGuire v. McGuire, 157 Neb. 226, 238, 59 N.W.2d 336, 342 (1953) (considerations of public policy bar judicial enforcement of husband's duty to support his wife during ongoing marriage).

48. L. WEITZMAN, *supra* note 6, at 143.

49. Orr v. Orr, 440 U.S. 268, 279 n.9 (1979).

50. L. WEITZMAN, THE MARRIAGE CONTRACT 2 (1979); *see* H. CLARK, *supra* note 32, at 181. One of the wife's domestic obligations was sexual intercourse with her husband. Because the wife's "consent" to sex was part of the traditional marriage contract, a husband was deemed legally incapable of raping his wife. *See* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986).

51. RESTATEMENT OF CONTRACTS § 587 (1933) ("A bargain between married persons or per-

real sense, therefore, the theoretical obligation to support a dutiful wife was the price men paid for legal and economic dominance during marriage; conversely, the promise of lifetime spousal support was the carrot the legal system held out to women to persuade them to sacrifice their legal and economic independence in favor of a long-term domestic career.

Locating alimony in its historical context helps reinforce a point that Weitzman and other critics of no-fault conveniently ignore. Laws that "reward" women for devoting themselves to domestic tasks traditionally have been a two-edged sword. To be sure, such laws "reinforce[ ] the value of a woman's domestic activities";[52] but they also restrict women's options outside the home and risk hurting women in the long run by suggesting that the causes and cures for gender inequality lie solely in the domestic sphere. If, by virtue of their sex, women are entitled to support within the family, then why should employers make room for women in the workplace? Similarly, if men but not women are generally responsible for supporting a family, then why should employers or the state not be permitted to adopt policies favoring male workers or to pay men a higher "family" wage?

These are not far-fetched rhetorical questions. As recently as 1983 a high-level presidential advisor was asked about the Reagan administration's efforts to help working women. The advisor explained that the administration's policy in this area "was to lick inflation and encourage the economy to grow so that men could once more earn a family wage."[53] Once men earn a family wage, the advisor explained, "all those women can go home and look after their own children in the way they did when I was growing up."[54]

The point of this analysis is not to argue that the current divorce and alimony standards adequately or equitably serve the needs of divorcing women and their children. They unquestionably do not. But the attempt of Weitzman and others to blame the law's inadequacies on the shift from a fault-based to a no-fault divorce regime misses the mark: women were not "better off" under the old, fault-based divorce system. Indeed, in many ways they fared considerably worse.

II. DIVORCE REFORM AND POST-DIVORCE FINANCIAL SHARING

Weitzman and other critics of no-fault divorce have complained that the new divorce regime, particularly the requirement that marital property be divided equally, has not produced the equality of results that the reformers promised.[55] But the reformers never promised equality of results.[56] What the new law promised was treatment without regard to marital fault and results that

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sons contemplating marriage to change the essential incidents of marriage is illegal."); *see* Graham v. Graham, 33 F. Supp. 936 (1940); Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951); H. CLARK, *supra* note 32, at 227.

52. L. WEITZMAN, *supra* note 6, at xv.

53. S. HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 231 (1986) (describing interview with Faith Whittsley, then-assistant to the President for public liaison).

54. *Id.*

55. L. WEITZMAN, *supra* note 6, at 357.

were "equitable" in the eyes of the mostly male reformers.[57] The task for feminists and other policy-makers concerned with economic justice for divorced women and their children is to provide a theoretical basis for insisting that *equal results* for divorcing women is an essential component of any equitable divorce regime.

Weitzman's book fails to provide such a theoretical basis, and the more recent studies that Weitzman has inspired largely eschew theoretical analysis. Thus, although many of Weitzman's complaints have merit, her critique is not grounded in any new theory of marriage or divorce. This lack of grounding, in turn, detracts from the coherence and persuasiveness of Weitzman's and other critics' analyses.

A. *An Investment Partnership Theory of Marriage*

One promising theory for achieving more equal and equitable results for divorcing women is an investment partnership model of marriage and divorce. Unlike either the traditional state-imposed marriage contract, which viewed all marital assets as belonging to the primary wage earner, or the fault-based system of divorce, which divided marital property according to sex-based notions of guilt and innocence, an investment partnership model would view each spouse as making an equal (although not necessarily identical) investment in a marriage. As an equal investor, each spouse would be entitled, in the event of a divorce, to an equal share of the fruits of the marriage. Note that the emphasis of such an investment partnership model is not on formal *equal treatment* of the spouses at the time of divorce, but on each spouse receiving *equal benefits* from the marriage.

Equitable division of marital property represents an initial application of such an investment partnership theory.[58] The New York Court of Appeals recently stated: " 'Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker.' "[59] But the fruits of a mar-

56. *See* Kay, *supra* note 13, at 2, 26 ("The achievement of equality between divorcing marital partners was not among the goals of the divorce reform movement, at least in its early stages.").

57. California's no-fault law was passed by a legislature that was almost entirely male. The twenty-member Governor's Commission that proposed the new law included only four women. No organized women's groups participated in the debate over the new law. L. WEITZMAN, *supra* note 6, at 364-65 & n.30. Indeed, according to one member of the Governor's Commission "[t]he only organized interest group involved in the California reform effort was an association of divorced men who felt they had been treated unfairly and who thought divorce should be removed from the courts." Kay, *supra* note 13, at 56.

58. California, as one of the nation's eight community property states, has long provided for asset sharing in the event of a divorce. By contrast, most American jurisdictions traditionally relied on common-law title principles to apportion property upon divorce. Application of these principles generally resulted in awarding most of the property to the income producing spouse, because his income purchased the property and because the property was most likely titled in his name. *See* Prager, *Shifting Perspectives on Marital Property Law*, in FAMILIES, POLITICS, AND PUBLIC POLICY 111 (I. Diamond ed. 1983). The rise of partnership notions that accompanied the no-fault divorce revolution has led virtually all common-law property states to provide for some form of asset sharing in the event of a divorce. *See* I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 2, at 234-35.

59. Price v. Price, 69 N.Y.2d 8, 14, 503 N.E.2d 684, 687, 511 N.Y.S.2d 219, 222 (1986) (quot-

riage typically include much more than the tangible assets a couple has accumulated. Indeed, Weitzman's research shows that most divorcing couples have little or no tangible property to divide.[60] This is because married couples generally invest most heavily not in traditional forms of property, but rather in what Weitzman calls "career assets." Career assets include such things as education and professional training, job seniority, employment security, and future earning capacity.[61]

Although some couples invest equally in each spouse's career assets, most couples do not. Instead, "[m]ost couples give priority to one career—that of the husband."[62] Women are still far more likely than men to have primary responsibility for homemaking tasks and to leave the workplace to care for children.[63] Even when wives are employed outside the home "they frequently restrict their job hours, limit the geographical range of their work options, and forego opportunities for advancement" in order to accommodate family responsibilities and the demands of their spouse's employment.[64] Women are also more likely than men to postpone or sacrifice their own career goals in order to invest in their spouse's education or professional training. Furthermore, there are strong economic incentives for couples to continue to make such gendered marital investments: as of 1986, women working full time outside the home still earned only sixty-four percent of what their male counterparts earned.[65]

Because courts generally do not recognize career assets as marital property, current property division rules, even those that ostensibly require an equal division of marital assets, do not result in anywhere near an equal sharing of the fruits of most marriages. Instead, the primary wage-earner, generally the husband, is permitted to keep most of the assets accumulated during marriage, while the wife who has invested in her family and her husband's career is deprived of a return on her marital investment. Moreover, by reducing her labor market participation to care for children, or postponing her education to invest

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ing O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985)) (emphasis omitted).

60. L. WEITZMAN, *supra* note 6, at 55; *see* McLindon, *supra* note 6, at 384.

61. L. WEITZMAN, *supra* note 6, at 111. Other commentators have described these assets as investments in human capital. *See* Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201, 205-06 (1982); Krauskoph, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 381-82 (1980).

62. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, in ALIMONY: NEW STRATEGIES, *supra* note 7, at 45, 47-48; *see* Beninger & Smith, *supra* note 61, at 203.

63. *See* S. BERK, THE GENDER FACTORY 7-10 (1985) (extensive empirical evidence shows that husbands participate minimally in household labor and child care, regardless of wives' employment status); Goldfarb, *supra* note 62, at 47-48 ("Despite the fact that over half of married women are in the paid labor force, a recent study indicated that 82% of women do all or most of the housework." (footnotes omitted)).

64. Goldfarb, *supra* note 62, at 48. Approximately one-third of all employed married women have only part-time jobs. *Id.* at 59 n.37 (citing Bureau of Labor Statistics, U.S. Dep't of Labor, *Half of Mothers with Children Under 3 Now in Labor Force*, News Release, U.S.L.D. 86-345, at Table 3 (Aug. 20, 1986)).

65. Goldfarb, *supra* note 62, at 54. Indeed, some economists have argued that the traditional family structure, in which the husband is the primary breadwinner and the wife remains in the home during a large portion of their married life, maximizes the family's overall welfare. *See, e.g.*, Krauskopf, *supra* note 61, at 386 (1980); Landes, *Economics of Alimony*, 7 J. LEG. STUDIES 35 (1978).

in her husband, the wife has sacrificed the opportunity to maintain and enhance her own career assets.[66]

Weitzman offers two solutions to this problem. First, she suggests that the definition of marital property be expanded to include such intangible career assets as job seniority and future earning capacity.[67] Second, perhaps recognizing the shortcomings of this proposal, Weitzman argues for a reinvigoration of alimony as a means of equalizing post-divorce standards of living.[68]

Neither of Weitzman's suggestions provides a workable or theoretically sound solution to the marital investment problem. First, courts are highly unlikely to expand notions of marital property to encompass assets such as job seniority and future earnings, which possess few of the traditional attributes of property.[69] Indeed, courts have been extremely reluctant to characterize as marital property even the most tangible type of career asset— a professional degree earned during marriage.[70] Expanding the definition of marital property

66. Beninger & Smith, *supra* note 61, at 206-08; Krauskoph, *supra* note 61, at 386-87. In economic terms, the husband's human capital has appreciated considerably as a result of the couple's continued investment in it, while the wife's human capital has depreciated because of her absence from the labor market and her failure to reinvest in her marketable skills.

67. L. WEITZMAN, *supra* note 6, at 141-42.

68. L. WEITZMAN, *supra* note 6, at 380-81.

69. Courts increasingly have recognized as marital property one such intangible asset—unvested pension benefits earned during marriage. *See, e.g.*, Courtney v. Courtney, 256 Ga. 97, 98, 344 S.E.2d 421, 423 (1986); Poe v. Poe, 711 S.W.2d 849, 856 (Ky. App. 1986); Berry v. Meadows, 103 N.M. 761, 767-68, 713 P.2d 1017, 1023-24 (1986). *But see* Charles v. Charles, 713 P.2d 1048, 1051 (Okla. App. 1985) ("Division of even vested property subject to contingencies is unauthorized by law."). *See generally* Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis.* 33 UCLA L. REV. 1250, 1251-79 (1986) (discussing generally the marital property treatment of wage replacement benefits).

A number of courts have also recognized as divisible marital property the goodwill value of an ongoing professional practice. *See, e.g.*, Wisner v. Wisner, 129 Ariz. 333, 336-38, 631 P.2d 115, 118-20 (Ariz. Ct. App. 1981); *In re* Marriage of Fenton, 134 Cal. App. 3d 451, 460-63, 184 Cal. Rptr. 597, 600-02 (1982); Dugan v. Dugan, 92 N.J. 423, 433, 457 A.2d 1, 6 (1983). *But see* Powell v. Powell, 231 Kan. 456, 459-63, 648 P.2d 218, 222-24 (1982) (professional practices have no good will). *See generally* I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 2, at 301 ("the prevailing view today is that the goodwill of a professional practice will be subject to division at divorce").

70. *See, e.g.*, Archer v. Archer, 303 Md. 347, 357-58, 493 A.2d 1074, 1079-80 (1985) (husband's medical degree and license not marital property); Drapek v. Drapek, 399 Mass. 240, 243-45, 503 N.E.2d 946, 948-50 (1987) (professional degrees and licenses earned during marriage are not property subject to division on divorce); Mahoney v. Mahoney, 91 N.J. 488, 495-99, 453 A.2d 527, 530-33 (1982) (husband's MBA degree does not constitute property subject to equitable division upon divorce); Stevens v. Stevens, 23 Ohio St. 3d 115, 116-17, 492 N.E.2d 131, 132-34 (1986) (neither husband's veterinary degree nor present value of his enhanced earning capacity are marital assets subject to distribution on divorce); Hodge v. Hodge, 513 Pa. 264, 267-69, 520 A.2d 15, 16-17 (1986) (neither an advanced degree nor a medical license is property subject to equitable division under the divorce code); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984) (master's degree in accounting not divisible marital property). *See generally* Freed & Walker, *Family Law In The Fifty States: An Overview*, 21 FAM. L.Q. 417, 487-89 (1988) (collection of recent cases); Kay, *supra* note 13, at 74-76 n.368 (collection of cases).

New York is virtually the only state that characterizes professional degrees as marital property. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 580-81, 583-89, 489 N.E.2d 712, 713, 714-18, 498 N.Y.S.2d 743, 744, 746-49 (1985) (husband's medical license is marital property subject to distribution under New York's Domestic Relations Law). Recent New York decisions have cast some doubt on the breadth of this characterization, however. *See* Marcus v. Marcus, 137 A.D.2d 131, 139-40, 525 N.Y.S.2d 238, 242-43 (1988) (medical license of divorcing husband with well-established medical practice should not be valued separately, but should be deemed "merged with and subsumed by" his

to include less tangible forms of career assets such as education and future earnings is likely to present courts and legislators with insurmountable problems of conceptualization and valuation. Moreover, defining career assets as marital property may further disadvantage some divorcing women. For example, a woman who marries a man with an established career and obtains a social work degree during marriage might be forced to share her post-divorce earnings with her ex-spouse, even if he earned considerably more than she.[71]

Nor is alimony, at present, a workable or theoretically sound way of apportioning the benefits and costs of marriage. No matter how it is dressed up, alimony still connotes the *transfer* to a financially needy and deserving wife of assets *belonging* to her ex-husband. Alimony thus fails to recognize a wife's *ownership* interest in her husband's career assets.[72] Moreover, modern alimony law's emphasis on self-sufficiency and economic rehabilitation is inconsistent with the notions of entitlement and compensation that underlie an investment partnership theory of marriage. Additionally, because alimony is thought to involve the transfer of assets, its availability continues to depend upon both the need of the recipient spouse and the financial ability of the obligor.[73] Each of these can be, and has been, manipulated to the disadvantage of divorcing women. Alimony also is subject to modification, and generally ends with the obligor's death or the recipient's remarriage.[74] By contrast, recognition of a wife's investment interest in her husband's career should not be keyed to financial dependency and should survive the death or remarriage of either party.

B. *Equal Post-Divorce Sharing of Income*

A simpler and more theoretically sound way to implement an investment partnership theory of marriage and divorce is to require divorcing couples to continue their joint financial status for a set period of time after divorce. By this, I mean that each ex-spouse would be entitled to an equal share of the couple's combined income for a set number of years after the formal dissolution of their marriage. The time period for this post-divorce sharing would depend upon the length of the marriage. I would propose, as a starting point, one year of post-divorce income sharing for each two years of marriage.[75] Thus, a couple that

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ongoing medical practice); McGowan v. McGowan, 142 A.D. 355, 535 N.Y.S.2d 990, 991, 992-95 (1988) (master's degree earned during marriage is marital property; teaching certificate conferred during marriage but earned as the result of education completed prior to marriage is not marital property).

71. *See* Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781, 790.

72. Several commentators have recently attempted to reconceptualize alimony as a means of compensating a homemaker-spouse for the reduction in her post-divorce earning capacity attributable to her investment in the marriage. *See, e.g.*, Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 49-50 (1989); Krauskoph, *supra* note 7, at 66-67. This reconceptualization is consistent with the investment partnership theory set forth in this Article. It is inconsistent, however, with the traditional purposes and justifications for alimony. *See* H. CLARK, *supra* note 32, at 420-22 (discussing history of alimony).

73. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347-48 (1987).

74. H. CLARK, *supra* note 32, at 452-53, 457-58, 461-63.

75. This one-to-two sharing ratio is not based on any hard empirical data, but reflects my intuitive sense of the relationship between the length of a marriage and the post-divorce sharing period

divorced after ten years of marriage would continue to divide their combined income equally for the next five years; a divorcing couple with a thirty-year marriage would share income equally for fifteen post-divorce years. This proposal has a number of advantages. First, it recognizes explicitly that marriage is, among many other things, an economic partnership in which spouses make joint investment decisions with the aim of sharing equally the financial rewards of those decisions. The proposal thus provides a compelling justification for insisting on substantial post-divorce sharing of income without invoking the harmful stereotypes that underlie traditional alimony doctrine. In addition, by compensating rather than penalizing spouses who make substantial domestic investments, the proposal affirms the social value of childrearing and other domestic labor.

Second, the proposal recognizes that the majority of today's divorcing couples fit neither the male breadwinner/female homemaker model that underlies traditional alimony doctrine, nor the rosy picture of two equal wage earners that the early divorce reformers painted. Rather, in most families today both spouses work or have worked outside the home, although the husband's career has taken precedence and the wife has assumed primary homemaking and childcare responsibilities. The requirement of post-divorce income sharing is designed to equalize the financial consequences of these gender-linked marital investment decisions. The income-sharing requirement thus compensates both traditional homemakers and the much larger percentage of divorcing women who have held both domestic and market jobs and whose investments in their families and in their husbands' careers have enhanced their husbands' earning power at the expense of their own.

Although the entitlement to post-divorce income sharing would not be limited to traditional homemakers, the proposal would provide the greatest benefits to precisely those women that Weitzman and others have identified as most deserving of financial support—older homemakers and other women who divorce after many years of traditional marriage. These are the women who have made the most substantial and the most costly investments in their husbands' careers—often compromising, if not completely sacrificing their own opportunities for financial security. These also are the women who have both the strongest moral claim and the most legitimate expectation of a long-term post-divorce return on their marital investment. A requirement of equal post-divorce income sharing for a substantial number of years would provide this return. By contrast, in many short-term marriages and in marriages in which spouses have earned approximately equal salaries throughout the marriage, neither spouse is likely to have made a substantial investment in the other's career or to have

necessary to provide a fair return on a supporting spouse's investment in a marriage. Additional empirical research may help provide support for this or some similar post-divorce sharing mechanism. *Cf.* Ellman, *supra* note 72, at 53-71 (proposing elaborate set of rules for using alimony to compensate homemaker spouse for loss of earning capacity attributable to marital investment); Raggio, *Don't Men Have Rights, Too?—Or Lifetime Alimony, an Idea Whose Time Has Come and Gone*, in ALIMONY: NEW STRATEGIES, *supra* note 7, at 33, 39-40 (proposing formula for calculating the value of the marital community's contribution to either spouse's career and earning potential).

sacrificed her own financial security. Application of the proposed income-sharing rule appropriately would produce little post-divorce income sharing in these cases.

Third, the proposal would benefit financially vulnerable divorcing spouses at the time they need assistance most. As Weitzman and others have pointed out, the availability of funds immediately after a divorce can make the difference between a woman being able to seek job training or additional education and having to take the first available job simply to eat and pay the bills.[76] Thus, the premature rupture of a couple's established investment partnership can affect critically a divorcing woman's long-term earning capacity. If she is cut off financially at the time of divorce, she is likely to forego retraining and take a low-paying job that offers few opportunities for advancement, thereby selling herself short in the job market.[77] If instead she is able to retain her financial status, even for a limited period of time, she is far more likely to acquire the job skills and education that will enable her to support herself (and often her children) at an adequate level far into the future.

A requirement of equal post-divorce income sharing also provides a simple and clear-cut formula that limits the exercise of judicial discretion. As the findings of Weitzman and others confirm, divorce doctrines that allow for substantial judicial discretion generally operate to women's disadvantage.[78] This is true in part because the judges who administer the doctrines are still predominantly male, and the judicial system itself is likely to reflect the gender bias of the society as a whole.[79] Even female judges are unlikely to have had any experience with divorce; they are even less likely to have experienced the financial dependency that so many divorcing women experience.[80] The absence of clear-cut legal standards also affects the negotiation process in ways that disadvantage the economically weaker party, generally the woman, in a divorce.[81] Finally, the lack of precise standards associated with many divorce reform proposals may drive up the costs associated with divorce, particularly attorneys' fees, which again penalizes the economically weaker spouse.[82] For all these reasons, reform

76. L. WEITZMAN, *supra* note 6, at 206-07.

77. L. WEITZMAN, *supra* note 6, at 206-07.

78. *See* L. WEITZMAN, *supra* note 6, at 384 (discussing equal versus equitable distribution of property); *id.* at 242-43 (discussing operation of best interest standard for determining child custody); McLindon, *supra* note 6, at 404 (discussing feminization of poverty resulting from unfair alimony and child support awards); Singer & Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 519-20 (1988) (discussing indeterminacy of best interest standard for determining child custody).

79. Recent Task Force and Commission studies in a number of states have found pervasive gender bias against women throughout the court system. *See, e.g., Report of the New York Task Force on Women in the Courts*, 15 FORD. URB. L.J. 11, 15 (1986) ("The New York Task Force on Women in the Courts has concluded that gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences.").

80. *Cf.* Fineman, *supra* note 12, at 845-46 (describing socioeconomic characteristics of women active in Wisconsin divorce law reform).

81. *See* L. WEITZMAN, *supra* note 6, at 234-35; Singer & Reynolds, *supra* note 78, at 520.

82. *See* Castillo, *Divorce Costs Rise Under New Law*, New York Times, Feb. 2, 1981, at 1, col. 1 (discussing increased attorneys' fees resulting from changes in New York divorce law).

proposals that minimize the exercise of judicial discretion are likely to provide the greatest economic benefit to divorcing women and their children.

Finally, a regime of equal post-divorce income sharing is relatively easy to administer. At the time of divorce a couple's most recent federal income tax return can be used to determine the amount of joint income to be divided equally. Subsequent tax returns can provide the basis for future income sharing adjustments.[83] To minimize enforcement problems, states should consider adopting automatic wage withholding and other techniques currently used to enforce child support obligations.[84]

Of course, divorcing couples would be free to agree on financial arrangements other than an equal post-divorce sharing of income. Like other marital support and property rules, the post-divorce income sharing rule would operate only in the absence of an agreement to the contrary. In reaching divorce settlements, however, couples and their attorneys would be negotiating against the legal backdrop of a substantial post-divorce sharing requirement, and this would likely have a significant effect on the outcome of most divorce negotiations. Couples also could alter the financial consequences of divorce through valid prenuptial agreements. In particular, prospective spouses who had made substantial investments in their own careers would be free to protect those investments by entering into pre-marital agreements limiting the financial consequences of divorce, just as prospective spouses with substantial real or personal property do today.[85]

Except in highly unusual cases, the requirement of equal post-divorce income sharing would replace both "permanent" and rehabilitative alimony.[86] However, because it is directed at a divorcing couple's future earnings, rather than their current assets, the sharing requirement would supplement and not replace current property division rules. Moreover, because the post-divorce sharing requirement is designed to adjust equities between the spouses only, it would not eliminate either spouse's responsibility for child support. During the time that the spouses continued to share income equally, each spouse would be expected to make an equal contribution to the support of children.[87] At the end

83. As with current spousal support awards, a court would be required to maintain jurisdiction in order to effectuate these income-sharing adjustments. However, the adjustment process would be much more mechanical, and thus less expensive and time-consuming, than current support modification proceedings. This is because the only factual issue would be the amount of joint income to be shared, and this could be determined from tax returns and similar documentary evidence.

84. For a description of current child support enforcement mechanisms, see Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools For Enforcement*, 10 FAM. L. RPTR. 3051 (1984).

85. Of course, these pre-marital agreements would have to meet applicable standards of voluntariness, disclosure, and conscionability. *See* UNIFORM PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 371, 376 (1983); Oldham, *Premarital Agreements Are Now Enforceable Unless . . .*, 21 HOUS. L. REV. 757 (1984).

86. Permanent alimony might still be available where one spouse became disabled during the marriage or where, at the end of the post-divorce income sharing period, the parties' separate incomes would be unconscionably disparate. *Cf.* MD. FAM. LAW. CODE ANN. § 11-106(c) (1984) (award of alimony for indefinite period).

87. In calculating child support obligations, however, the parent with primary physical custody should receive financial credit for the day-to-day childcare she or he provides. *See* Czapanskiy,

of the income sharing period, child support responsibilities would be adjusted to account for any income disparities between the spouses.

Although the proposal for equal post-divorce income sharing will primarily benefit divorcing women, it has the added virtue of being gender neutral. Thus, in the unusual marriage where a couple has invested more heavily in the wife's career, or where the husband has interrupted his labor-market participation to care for children, the rule will protect the husband's domestic investment. Perhaps such a rule might even encourage husbands to increase their investment in family life, since the financial consequences of such an investment strategy would not be so devastating in the event of a divorce, and the benefits of investing solely in one's own career would not be so complete.

III. CONCLUSION

Recent studies confirm that the economic consequences of divorce are far more devastating for women and children than for men. The no-fault divorce revolution, however, is not primarily to blame for these gender injustices. Divorced women and their children generally fared no better—and may have fared worse—under the fault-based system of divorce. What is needed to achieve economic justice for divorcing women and their children is not a return to traditional marital structures or to a fault-based system of divorce, but rather a new model of marriage and its dissolution that protects both spouses' investment in a marriage and that requires divorcing husbands and wives to share equally in *all* the financial benefits of their union. An investment partnership model of marriage, and the equal post-divorce income-sharing rule that such a partnership model entails, offer one promising avenue for achieving these goals.

Giving Credit Where Credit is Due: The Role of the Noneconomic Contribution of the Physical Custodian in Establishing Child Support, in CRITICAL ISSUES, CRITICAL CHOICES: SPECIAL TOPICS IN CHILD SUPPORT GUIDELINES DEVELOPMENT 141 (Women's Legal Defense Fund 1987).