Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform

Margaret F. Brinig
Notre Dame Law School, mbrinig@nd.edu

June Carbone

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RETHINKING MARRIAGE: FEMINIST IDEOLOGY, ECONOMIC CHANGE, AND DIVORCE REFORM

JUNE CARBONE* AND MARGARET F. BRINIG**

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* Associate Professor of Law, Santa Clara University; A.B., Princeton University, 1975; J.D., Yale Law School, 1978.
** Associate Professor of Law, George Mason University; B.A., Duke University, 1970; J.D., Seton Hall University School of Law, 1973.

The authors would like to thank Carol Sanger, Robert Palmer, Joan Krauskopf, Kandis Scott, Dennis Honabach, and Jack Kirkwood for their comments on earlier drafts of this Article. The authors would also like to thank Karen Hallis and Lois Yoshida for their assistance in preparing the Article for publication.

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I. INTRODUCTION

Making sense of divorce requires making sense of marriage. Yet, while the legal literature abounds with publications about the difficulties with modern divorce, it rarely mentions marriage. What is the role of marriage in the modern era? Does it continue to involve a lifelong commitment? Does it depend on the perpetuation of different roles assigned by gender? Should marriage remain the principal focus of societal provisions for childrearing? What is the role of the state in regulating this most intimate of relationships?

This Article attempts to address these questions by working backwards. With the decline in the importance of religion and of the other societal and economic forces that made lifelong unions central to the social order, there may be no accepted definition of marriage, but there is also no dearth of rules governing divorce. What do those rules and the proposals to reform them say about the nature of marriage?

In an effort to use divorce to examine marriage, this Article draws on several disciplines. The first Part uses modern theories of civil obligation, influenced by the insights of law and economics, to explain the significance of recent divorce reform. Economists approach civil liability as a system of incentives designed to encourage or deter future behavior. While financial incentives may not influence marital behavior to the extent that they influence commercial behavior, divorce awards reinforce

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selected marital ideals at a symbolic level. Viewed in this light, the abolition of fault, not only as a prerequisite for divorce but also as a consideration in determining divorce awards, ushered in a revolution in divorce jurisprudence. Divorce awards under the old system served as a selective form of specific performance dependent on the inviolability of marital obligations. Modern awards, justified by need or lost career opportunities, deny the existence of an obligation to remain married. The wisdom of the resulting awards depends on the marital behavior to be encouraged or deterred.

The second Part of this Article uses an historical approach to explain the forces underlying divorce reform. This section compares revisions in nineteenth- and twentieth-century family law, explaining these revisions in terms of changes in the division of labor. The nineteenth century, which witnessed the transformation of much of the country from an agrarian to an industrial society, involved both greater specialization among men to supply the needs of the emerging industrial economy and an increasingly rigid division between the male world of the market and the female world of the home. The latter part of the twentieth century has involved the transformation from a manufacturing to a service economy—increasing the demand for women workers. Specialization among women, who were once limited to the relatively undifferentiated role of homemaker, is now matching specialization among men as even married middle-class mothers join their husbands in the labor market, hiring other women to satisfy the family's domestic needs.

The third Part of this Article uses the relationships between divorce proposals and the division of labor within marriage to critique the existing theoretical perspectives. This section demonstrates that the traditionalist approach to marriage championed by Chicago School economists like Gary Becker depends on the argument that one spouse, preferably the wife, should bear the primary childrearing role. According to this approach the only way to encourage such a division of responsibilities is to

6. See infra notes 23-25 and accompanying text.
7. See infra notes 41-62 and accompanying text.
8. See infra notes 79-84 and accompanying text.
9. See id.
tie the financial consequences of divorce to the performance of relatively traditional roles. In contrast, liberal feminists, led by Herma Hill Kay, caution against the expansion of divorce awards. They believe that women will achieve substantial equality only when they become financially independent, and that society must withdraw its support for traditional marital roles if this is to occur. In between are two other groups. The first group argues for a divorce award system tied to compensation for lost career opportunities. This system is designed to encourage married women both to remain in the labor market and to bear the primary responsibility for childrearing. Secondly, a newer group of feminists, employing an expanded partnership approach, argues that the childrearing role should be made less perilous without penalizing women’s decisions either to value family more than career or to leave a particular marriage.

The Article concludes that to resolve these issues, to complete a vision of the future of marriage, requires examining not only the relationship between men and women, but also that between marriage and children. Feminists, divided on the degree to which men and women’s roles should differ, should nonetheless be able to agree on the need to separate support for childrearing from the continuation of existing marriages. Should such a separation occur, however, it will mark a new beginning, not an end, for the rethinking of marriage.


12. Martha Fineman, as early as 1983, decried the limitation of the existing debate to what she characterized as two models treating women either as “equal,” and therefore to be presumed economically independent, or as “victim.” Fineman, Implementing Equality: Ideology, Contradiction and Social Change, A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, 1983 WIS. L. REV. 789, 814.


II. WHAT DIVORCE REFORM MEANS: THE APPLICATION OF THEORIES OF CIVIL LIABILITY TO THE FAMILY

The legal aspects of marriage have long been treated as a world of their own, separate from any practical or theoretical connection to theories of liability in other fields. This division occurred partly for historical reasons—the rules governing marital separations developed before modern contract and tort theories, and they developed in a separate system of courts—and partly because, under the influence of formalism, theories of civil obligation focused on the prerequisites for liability. Modern theory, influenced by the insights of law and economics, has shifted its focus from liability's prerequisites to its consequences. Although traditional contract analysis, for example, may have asked whether marital obligations are sufficiently definite or sufficiently voluntary to constitute enforceable agreements, modern scholars examine the incentives supplied by contract remedies. The result is to focus attention on the policies that divorce awards are designed to promote.

In analyzing marriage as a form of civil obligation, and in identifying the policies that are served by modern divorce law, the most striking observation is the identification of the interests that are not protected. Marriage historically involved the lifelong exchange of the husband's support for the wife's services in a union consecrated by God and unalterable by the parties. Fault—the requirement that one party, and only one party, egregiously violate the canons of marriage—served to identify those cases in which one party had so flouted his or her marital obliga-


17. For a recent example of this type of analysis, see Ellman, supra note 2. Cf. Carbone, supra note 13.

18. See sources cited supra note 3; see also Ellman, supra note 2, at 51-52 (claiming that an alimony theory that considers incentives is "noncontractual").

19. For a more complete examination of marriage as a system of civil obligation, see Brinig & Carbone, supra note 5; Carbone, supra note 13.

20. On the religious origins of marriage law, see O'Connell, supra note 2, at 444-51; De Luca, The New Law on Marriage, 30 CATH. LAW. 70 (1985); see also Brinig & Carbone, supra note 5, at 883 & n.115; sources cited supra note 2.
tions that the other party deserved to be released from the obligations of a relationship that had effectively ceased to exist. As a prerequisite for divorce, fault became obsolete once society recognized the right of an unhappy couple to terminate its union. But the recognition of no-fault grounds for ending the marriage did not necessarily mean that either party could choose to leave with impunity. The law could still recognize marriage as a contract whose breach gave rise to liability.

Most states, however, have not done so. In adopting no-fault grounds for divorce, many states have precluded consideration of marital misconduct altogether. Without identification of the party responsible for the end of the marriage, the commitment to remain married becomes unenforceable. In traditional civil terms, neither the expectation interest (the standard of living made possible by the marriage) nor the reliance interest (sacrifices made in the belief the marriage will last) can be protected. Economists would argue that such a result makes sense only to the degree that the costs imposed by a determination that marital obligations have been breached exceed the interests to be protected by an expectation or reliance

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21. J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION § 1452 (1891); see also Setaro, A History of English Ecclesiastical Law, 18 B.U.L. REV. 102, 121-23 (1938); M. RHEINSTEN, supra note 1.

22. Indeed, a number of states continue to permit consideration of the reasons for the divorce in the determination of financial awards. For a fuller examination of the role of marital misconduct in determining divorce awards, see Brinig & Carbone, supra note 5, at 870-82, 884-87, 894-902.

23. Brinig & Carbone, supra note 5, at 887 n.132; Kay, supra note 11, at 72-74 & n.363.

24. The RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) adopts the following definitions:

(a) his “expectation interest,” which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,

(b) his “reliance interest,” which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made.

Neither the expectation interest nor the reliance interest can be protected in the absence of (1) an agreement to remain married and (2) a determination that the paying party is responsible for the other’s loss. For a fuller examination of this issue, see Brinig & Carbone, supra note 5, at 875-76 & n.89.

There has been considerable confusion on this point because the modern trend is to justify spousal support in terms of lost career opportunities, a reliance measure. To the degree, however, that lost career opportunities are compensated only when there is a corresponding gain to the other party such as children or enhanced earning potential, the justification is a restitution and not a reliance measure. See id. at 876 n.89; see also Carbone, supra note 13, at 1476-80.
standard.\textsuperscript{25}

Such an analysis has never been undertaken with any rigor. While the costs of a fault determination are deemed self-evident by anyone familiar with the older system, the costs of a no-fault system have not been weighed against the possible benefits of a more expansive system of divorce awards.\textsuperscript{26} The benefits are those traditionally identified with civil obligation—deterring breach and encouraging reliance over the life of the relationship.\textsuperscript{27} Within marriage, deterring breach translates into lower divorce rates. Encouraging reliance primarily means encouraging the career sacrifices women have traditionally made in the interests of their families.\textsuperscript{28} A decision to preclude consideration of marital misconduct could be justified, therefore, either on the ground that the cost of the determination has increased or because of a conclusion that the interests to be served by such a determination (primarily the interests associated with perpetuating traditional marital roles) are not as important as they once


\textsuperscript{26.} A modern system that considered marital misconduct would not be identical to the older fault system because such a finding would not be a prerequisite for divorce. Courts would accordingly still be free to: (1) find that both parties or neither party was to blame; (2) award support to a blameworthy party on a restitution basis; and (3) develop relatively more gender-neutral definitions of marital misconduct. Nonetheless, such an inquiry would still involve an inquiry into the relationship between the couple, the commission of adultery, and other such factors. For a further discussion of this issue, see Brinig & Carbone, \textit{supra} note 5, at 896-98.

\textsuperscript{27.} Fuller and Perdue argued that the justification for use of expectation damages is to deter breach and encourage reliance over the course of the contract. Fuller & Perdue, \textit{The Reliance Interest in Contract Damages} (pts. 1 & 2), 46 YALE L.J. 52, 60-61, 373 (1936).

Modern economists go beyond Fuller and Perdue, justifying expectation primarily in terms of the need to deter inefficient breach, that is, breach in which the losses exceed the gains. See, e.g., R. Posner, \textit{supra} note 16, at 90. Economists also note that expectation, unlike restitution, encourages not just efficient reliance, but overreliance on performance of the contract. See M. Polinsky, \textit{supra} note 3, at 34-37; Cooter & Eisenberg, \textit{supra} note 25, at 1465. These economists conclude that the choice between expectation and restitution depends on which concern, inefficient breach or inefficient reliance, is greater. M. Polinsky, \textit{supra} note 3, at 38. For a more extended application of these concepts to marriage, see Carbone, \textit{supra} note 13, at 1485-88.

Modern economists also argue that when expectation and reliance differ, expectation measures will deter inefficient breach more effectively, but that reliance measures, like expectation ones, will encourage overreliance over the course of the contract. Cooter & Eisenberg, \textit{supra} note 25, at 1468.

\textsuperscript{28.} See Landes, \textit{supra} note 8, at 35; Ellman, \textit{supra} note 2, at 40-48; Carbone, \textit{supra} note 13, at 1489-90.
Either way, the interests sacrificed must be considered along with the costs. The difficulty of determining fault should not be used to cloak important societal decisions about the nature of marriage.

Once a state has precluded consideration of marital misconduct, the law of civil obligation also helps to define the interests that remain. Again, application of traditional civil terms leads to the conclusion that, while contract and tort remedies depend on a determination of breach of contract or breach of duty, restitution does not. Contract and tort require such a determination in order to justify imposition of one party's loss upon the other. Restitution requires only that one party gain at the other's expense in circumstances in which it would be unjust to allow retention of the gain without payment. Within marriage, restitution is therefore possible whenever the divorce separates gains and losses that would otherwise be shared. Economists observe that the decision to provide compensation—that is, to reach a legal conclusion that retention of the benefit is unjust rather than a conclusion that the benefit has been gratuitously rendered—involves a decision to encourage these forms of exchange.

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29. We argue later in this Article that there are two important justifications for precluding consideration of fault that are independent of the difficulty of making the determination. First, tying the financial consequences of divorce to a determination that marital obligations have been breached serves to reinforce traditional gender roles, encouraging women to think in terms of marriage rather than the market for their financial well-being. See sources cited infra notes 155-64 and accompanying text. Second, a fault system makes it more difficult for the lower earning, rather than the higher earning, spouse to decide to end a marriage. See sources cited infra notes 196-98 and accompanying text; see also Rutherford, Duty in Divorce: Shared Income as a Path to Equality, 58 Fordham L. Rev. 539, 541 (1990).


31. If husband and wife decide, for example, to have the wife quit her job rather than hire a nanny, both parents will share the benefit from the care provided for the children, but only the wife will bear the continuing loss. Similarly, to take an equally stereotyped example, if the wife contributes to the husband's medical education, and the divorce occurs shortly after he graduates, he will have the sole benefit from an investment the couple jointly undertook and paid for. See Krauskopf, supra note 30, at 386. See generally Krauskopf, supra note 13.

32. On the incentives supplied by restitution damages, see generally M. POLINSKY, supra note 3, at 33-38; Katz, supra note 25, at 556-60.

Restitution recoveries are narrower than expectation or reliance recoveries in part because they focus on selected transactions, not on the marriage as a whole. A reliance
Translated into the language of civil obligation, the existing divorce system has largely rejected contract and tort, expectation and reliance, in favor of restitution. Marriage as a lifelong commitment is gone, with expanding protection for particular exchanges made while the marriage lasted. Nothing within existing civil theory, however, provides a basis for considering the wisdom of these developments, for deciding that the costs of determining whether marital obligations have been breached exceeds the benefits gained from deterring divorce, or for deciding to support a mother who quits her existing job to care for her children, but not one who majored in home economics rather than accounting before she married. To critique these developments, indeed, even to explain them fully, requires a broader view of the origins of divorce policy.

III. WHY DIVORCE REFORM OCCURS: AN EXAMINATION OF THE HISTORICAL RELATIONSHIP BETWEEN THE LABOR MARKET AND GENDER ROLES

In the evolution of American divorce and property rules, there are two major reform periods. The first period centers on the nineteenth-century enactment of the Married Women’s Property Acts. The second period is the twentieth-century “no-fault” movement. Both reform periods are explicable largely in terms of a paradigm shift in the relationship between husband and wife. The nineteenth-century reforms involved a change in marriage from what Nancy Cott has described as a form of

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33. In discussing divorce awards in terms of civil obligation, this analysis is limited to a discussion of adjustments made after the initial division of property between the spouses. Such adjustments usually take the form of spousal support. For further discussion of this issue, see infra note 202.

34. See generally M. GLENDON, supra note 1, at 9-96. The degree of protection provided is limited by the theory of liability. To the extent that the husband’s otherwise incalculable benefit from the children is measured by the cost necessary to raise them, that cost involves the wife’s foregone earning potential from the particular decisions the couple made as they raised the children. The wife’s overall potential, however, is the sum of a series of decisions—to complete college, to accept a transfer, to enter a training program, to switch to a job with more flexible hours—all of which may have been made in the anticipation that her marital role would be more important than her career development. An expectation measure (the standard of living made possible by the marriage) or a reliance measure (the position she would have been in had she not married) would allow a larger part of that lost potential to be taken into account. Restitution limits consideration of lost earning potential to that potential lost at the time a particular exchange was made.
indentured servitude\textsuperscript{35} to an ideal of complementarity,\textsuperscript{36} emphasizing the separation of public and private spheres and affection rather than obedience as the basis of the marital order.\textsuperscript{37} The twentieth-century changes, still far from complete, are part of an assault on the ideal of complementarity in the name of equality.\textsuperscript{38} In both cases, the legal reforms were instruments of social change, facilitating a reorganization of gender roles by adjusting the incentives for marital behavior and reinforcing, at a symbolic level, the new marital ideals.\textsuperscript{39}

The nineteenth-century changes, according to the most commonly accepted historical accounts,\textsuperscript{40} accompanied growing industrialization in the United States. The marital and property systems that the American colonists had brought with them from England were feudal in origin.\textsuperscript{41} Professor Donohue

\textsuperscript{35} Nancy Cott describes the relationship between husband and wife as "a contract between unequals with disparate obligations. . . . [M]arriage resembled an indenture between master and servant. . . . The husband's obligation was unequivocal. . . . The wife performed her part in subjection. Like a servant in relation to a master, she contributed continual service and received support." Cott, \textit{Divorce and the Changing Status of Women in Eighteenth Century Massachusetts}, 33 WM. & MARY Q. 586, 611-12 (1976).


\textsuperscript{36} Nancy Cott used the term "complementarity" to refer to the what she terms a preoccupation "with the reciprocal obligations and advantages of the sexes." Cott, \textit{supra} note 35, at 613. She does not appear to use the term in its strict economic sense of two independent factors indispensable in the production of a third item, such as the use of tin and lead to make pewter. \textit{See} H. Varian, \textit{Intermediate Microeconomics} 103 (1986).


\textsuperscript{38} \textit{See} Fineman, \textit{supra} note 12, at 789; \textit{cf.} Kay, \textit{supra} note 11.

\textsuperscript{39} In examining changes in gender roles, we will be concentrating on the ideal, and primarily the middle-class ideal, rather than on an effort to describe actual relationships. In emphasizing the increased importance, for example, of affection over obedience as the basis of the marital order, we do not mean to suggest that affection did not exist between married couples during earlier periods. Rather, we are saying that the fact that affection was accorded relatively greater importance in the popular literature of that period provided symbolic reinforcement of changes that were taking place in marital relationships. On the role of affection generally, see Waldron, \textit{When Justice Replaces Affection: The Need for Rights}, 11 HARV. J.L. & PUB. POL'Y 625 (1988).

\textsuperscript{40} \textit{See generally} Teitelbaum, \textit{Family History and Family Law}, 1985 WIS. L. REV. 1135 (recounting the standard interpretations of nineteenth-century family history).

\textsuperscript{41} The states colonized by the Spanish and French adopted community-law systems. \textit{See generally} Cross, \textit{The Community Property Law in Washington}, 61 WASH. L. REV. 13 (1986); Vaughn, \textit{The Policy of Community Property and Inter-Spousal Transactions}, 19 BAYLOR L. REV. 20 (1967). Professor Donohue notes, however, that "the adoption in the
explains the thirteenth-century origins of that system in terms of the English need to keep landed estates intact and under the authority of a single member of the next generation. English marriage law, as Mary Ann Glendon's work demonstrates, mirrored the property rules and treated husband and wife as "one person in the law," united under the husband's authority. The unavailability of divorce and the reinforcement of the husband's power, like the common-law property system, served to keep estates intact and within the control of a single member of the family.

While hereditary estates were less important in early America than in feudal England, the symbolic union of hus-

nineteenth century of community property by eight of our western states and the retention of separate property by the remainder of the American states may not tell us anything about the societies and institutions of those states. Both ideas were quite well developed at the time they were adopted in America." Donahue, What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century, 78 MICH. L. REV. 59, 60 (1979) (emphasis in original).

42. In Professor Donahue's words, the English system "exhibited a great drive toward unifying control in one person and passing what he had intact to a single member of the next generation." Donahue, supra note 41, at 81; see also Castleberry, Constitutional Limits on the Division of Property upon Divorce, 10 ST. MARY'S L.J. 37, 55 (1989); Vaughn, supra note 41, at 35; Comment, The Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. REV. 1269, 1271-72 (1981).


43. According to Blackstone, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; . . . and her condition during the marriage is called her coverture." 1 W. BLACKSTONE, supra note 42, at *442 (emphasis in original).

44. M. GLENDON, supra note 1, at 17.

45. Upon marriage, husbands acquired the right to manage and control their wives' separate property and any resulting profits. E. WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861, at 9 (1987). If he alienated the lands without her permission, however, she could regain them at his death. See M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 13 (1986).

46. The feudal warranty system, which had largely disappeared in England by the eighteenth century, never took root in the United States. Land was far more plentiful, and often more readily available by acquest than by inheritance. Primogeniture was quickly
band and wife under the husband's authority continued to serve the interests of an agrarian society. At the same time, the courts were able to alleviate pressures for reform by finding ways around the law's inconveniences. So long as property remained the major source of income, with ownership concentrated in husbands and their sons, few financial opportunities existed for women outside of marriage. The husband's dominion extended over both the commercial and the domestic

abolished, underscoring the fact that the colonists had never been as concerned as their English forbears with keeping estates intact. M. SALMON, supra note 45, at 7; E. WARBASSE, supra note 45, at 24-27.

47. The central characteristic of this system was the submersion of the wife's legal identity into her husband's. Upon marriage, the wife lost the ability to enter into contracts, buy or sell land without her husband's consent, sue or be sued, or even make a will. The husband had the right to control and manage his wife's land and to use any profits accruing from the property. Upon the wife's death, if the wife bore the husband a child alive, the husband, by right of curtesy, acquired a life estate in his wife's property, the remainder passing to her heirs. The wife acquired, at her husband's death, a life estate in one third of his property. H. CLARK, LAW OF DOMESTIC RELATIONS 288 (2d ed. 1987); see also E. WARBASSE, supra note 45, at 9.

Although community-property states differed considerably in theory, they varied little in practice, at least while the two spouses were alive. Community property, defined to include most of the property acquired during the marriage, was held by husband and wife jointly, but the husband alone in most states had the right to manage the property during the marriage. Accordingly, while common-law and community-property states differed in their disposition of a spouse's estate at death, they resulted in similar patterns during the life of the marriage. See Vaughn, supra note 41, at 37-38.

48. The major difficulty that the traditional English system presented was the difficulty in selling land, given the wife's lack of power over her own property and her inchoate dower interest in her husband's. American law devised ways around such obstacles without changing the underlying system. See, e.g., N. BASCH, supra note 42, at 23-24.

49. In the United States, land was much more freely available than it had been in England, and primogeniture never became as important here as it had been in England. Nonetheless, farmers often tried to keep the family farm intact, leaving it to a single son on the condition that he support his widowed mother or sisters from the proceeds. See, e.g., N. BASCH, supra note 42, at 105-08. Land ownership and control continued to be vested primarily in men, with many men leaving the reality to their sons and cash bequests to their daughters or placing unfettered control in their sons, while establishing trusts for their daughters. This pattern continued well into the nineteenth century. See Chused, Married Women's Property Laws 1800-1850, 71 GEO. L.J. 1359, 1364, 1382 (1983).

50. See M. GLENDON, supra note 1, at 13-17, 102-08 (discussing the relationship between family law and property). Of course, this varied for different groups at different times. There is some indication that in the colonies and on the frontier, women had greater financial opportunities. See Norton, The Evolution of White Women's Experience in Early America, 89 AM. HIST. REV. 593 (1984); L. ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750, at 13-50 (1982) (indicating that women participated in a separate world of female exchange in which women often generated substantial income as midwives, weavers, cheesemakers, and the like). But see G. RILEY, THE FEMALE FRONTIER 2 (1988) (concluding that frontier women generally performed the same roles that women did in the East).
spheres, as married couples lived and worked side by side.\textsuperscript{51} The husband might have primary responsibility for the shop or the farm, but the wife was available to help with the harvest or to restock the shelves.\textsuperscript{52} The wife might provide the primary care for the younger children, but the husband had a major role in the training and supervision of older children, especially the training of boys expected to follow in their father's footsteps.\textsuperscript{53} While the feudal system of land tenure—and the emphasis on arranged marriages and primogeniture that had accompanied it—had long since disappeared, the law continued to affirm the hierarchical nature of marriage.\textsuperscript{54} This was justified by the inherent inferiority of women\textsuperscript{55} and was economically based on the husband's control of the family's income-producing assets.\textsuperscript{56}

Industrialization, under way in the Eastern United States at the beginning of the nineteenth century, brought with it a sub-

\begin{itemize}
\item \textsuperscript{51} The colonial household was hierarchical, patriarchal, and vested with overlapping and undifferentiated internal and external obligations. The community charged each male governor with the duty of maintaining a well-governed home and sustained his authority by granting him control of its inhabitants as well as of family property and other resources.
\item \textsuperscript{52} As Martha Minow noted, women were more willing to help with the farm or the store than men were to assist with "women's work." Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819, 854-56. Nonetheless, the separation into domestic and commercial "spheres," as opposed to male and female "activities," came later. See infra note 65 and accompanying text.
\item \textsuperscript{53} Indeed, the father, not the mother, had primary authority over the children and he had statutory authority to name a guardian in his will to oversee the care of minor children and their property. 2 J. Kent, Commentaries 184 (1896); see also McCant, The Cultural Contradiction of Fathers as Nonparents, 21 Fam. L.Q. 127 (1987); Zainaldin, The Emergence of a Modern American Family Law, 1796-1851, 73 Nw. U.L. Rev. 1038, 1052-68 (1979).
\item \textsuperscript{54} See, e.g., Teitelbaum, supra note 40, at 1135, 1139-40.
\item \textsuperscript{55} See A. Fraser, The Weaker Vessel I-6 (1984); N. Cott, The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835, at 201-04 (1977); E. Warbasse, supra note 45, at 79; Bloch, Untangling the Roots of Modern Sex Roles: A Survey of Four Centuries of Change, 4 Signs 237, 240-41 (1978). As late as 1911, the Virginia Supreme Court reiterated that "notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband . . . ." Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 661-62, 91 S.E. 632, 634 (1917).
\item \textsuperscript{56} In Norma Basch's words, "Marriage, after all, was also a social arrangement between the sexes in which the distribution of property was inextricably connected to the allocation of power." N. Basch, supra note 42, at 38. It is interesting to note in this respect that, at least in the United States, the community-property states were no different from the common-law states, with both giving the husband the primary power to manage the family and family property. See sources cited supra note 47.
\end{itemize}
stantial reorganization of gender roles, making the older symbolism inappropriate. Farming had made marriage an interdependent economic enterprise. Wives were dependent on the land that their husbands controlled, and husbands were dependent on the labor of their wives and children. Industrialization severed the commercial from the domestic. In an agrarian society fathers could run the farm or the shop and oversee the household, and mothers could care for the children and contribute to the economy. Industrial workers, in contrast, were forced to choose where to concentrate their energies. At the same time, an industrial economy created a demand for different types of workers. Farmers performed relatively undifferentiated roles learned through on-the-job training from their parents. The industrial age required, in addition to large pools of the relatively unskilled, a new class of better educated managers and professionals, and a wider variety of skilled technicians. For the middle class, these changes meant pay scales high enough to reward investment in education and training, greater parental commitment to the care and education of children, and greater

57. As in precapitalist society, throughout most of capitalist history the family has been the basic unit of “economic” production—not the “wage-earning” father, but the household as a whole. While there was an intense division of labor within the family, based upon age, sex, and family position, there was scarcely a division between the family and the world of commodity production, at least not until the nineteenth century. With the rise of industry, capitalism “split” material production between its socialized forms (the sphere of commodity production) and the private labor performed predominately by women within the home. In this form, male supremacy, which long antedated capitalism, became an institutional part of the capitalist system of production.

58. This was true partly because of the physical separation between home and job and partly because of the long and inflexible hours demanded. See E. Zaretsky, supra note 57, at 28-31; United States Dept of Com., Bureau of the Census, Historical Statistics of the United States (pt. 2), at 169 (1975) (indicating that factory workers averaged over 100 hours per week of employment until 1890).

59. Men and women, of course, played different roles, but the role of one farmer to another or one wife to another required relatively little specialization. See E. Zaretsky, supra note 57, at 28-29; Teitelbaum, supra note 40, at 1141. On the importance of role differentiation and specialization in the production of wealth, see A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations bk. 1, ch. 2 (London 1776); L. Von Mises, Human Action 157-59 (1949).

60. Brownlee and Brownlee write that teaching lacked a fundamental counterpart in the pre-industrial world. They observe:

But the late Victorians elaborated on the reality of the nuclear family to increase the specialization of household work and to emphasize the family's patriarchal quality. To an extent, the preferences of the Victorians were appropriate to the
emphasis on the social skills necessary to work within larger institutions.  

The nineteenth-century solution to these new demands was a redefinition of gender roles. The older order, which coupled the husband's property ownership with the wife's duty to obey, was premised on the inherent inferiority of women, their greater susceptibility to temptation, and their immature and childlike qualities. The new ideal, called by some "the cult of true womanhood," celebrated women's nobler virtues. In the forces of economic modernization. The increased Victorian emphasis on education, within as well as without the family, represented an effort to increase society's investment in "human capital." Perpetuating a middle-class life style—the product of skills deemed valuable by the wider society—or raising lower-class children to middle-class status in fact required an increased diversion of society's energies to child rearing.


Mary Ryan details the way in which education fit into what she calls "an elaborate and largely successful strategy for reproducing the middle class." She observes:

As Utica began to industrialize, the native born evaded the clutches of the factories, avoided unskilled day labor, kept skilled trades and small shops afloat, and in significant numbers entered the ranks of professionals and white-collar employees. The sequence of tactics that they employed to this end can be summarized as follows. Prescient native-born couples began in the 1830s to limit their family size, thereby concentrating scarce financial and emotional resources on the care and education of fewer children. Second, as indicated by the popular childbearing literature circulating through Utica beginning in the 1830s, native-born Protestant parents initiated methods of socialization designed to inculcate values and traits of character deemed essential to middle-class achievement and respectability. Next, native-born parents tended to keep their children within the households of their birth for extended periods, often until their sons were well over twenty years of age. By this strategy, mothers and fathers prolonged their moral surveillance and material support of the second generation even as it advanced out of the home into the labor force. At the same time, the parental generation had created the educational institutions and financed the schooling that qualified their children for more skilled and lucrative occupations.

M. Ryan, Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865, at 184-85 (1981). Ryan concludes that much of this effort was undertaken by women. Id. at 185.

61. With industrialization, class differences also became more pronounced. For a discussion of changing class relationships, and the role of women in creating and reproducing the new middle class, see W. Chafe, supra note 37, at 21-24; M. Ryan, supra note 37, at 116-19; M. Ryan, supra note 60, at 145-85. Nonetheless, the interest in promoting education was not limited to the upper and middle classes, although public education did not become widespread until later in the century. See Teitelbaum, supra note 40, at 1149-57.

62. See generally A. Fraser, supra note 55; 1 Women in American Law 27 (M. Wortman ed. 1985).

63. The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors and society could be divided into four cardinal virtues—piety, purity, submissiveness and domesticity. Put them all
increasingly commercialized world of the nineteenth century, women were to preserve the home as a refuge where altruism would prevail over greed, where piety and conscience could flourish.64 The “male” sphere of the market was set in opposition to the “female” sphere of the family. As Frances Olsen concluded, this “dichotomy tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere.”65

The new ideology encouraged married middle-class women to stay home and to assume a different array of responsibilities within the family. Over the course of the nineteenth century, not only were the earlier sources of production—the farm and the shop—being replaced by production outside the home, but many traditional domestic activities—for example, spinning and weaving—were being rendered unnecessary by the expanding market.66 At the same time, women had more opportunities,
albeit dramatically fewer than those available to men, for self-support. 67 If middle-class women were to remain home, their domestic activities needed to be redefined. The new ideology contributed to the redefinition by exalting motherhood. 68 Nancy Cott describes the transformation:

More than ever before in New England history, the care of children appeared to be mothers' sole work and the work of mothers alone. The expansion of nonagricultural occupations drew men and grown children away from the household, abbreviating their presence in the family and their roles in child rearing. Mothers and young children were left in the household together just when educational and religious dicta both newly emphasized the malleability of young minds. Enlightenment psychology drew tighter the connection between early influence on the child and his or her eventual character, just as mothers' influence on young children appeared more salient. 69

In the agricultural communities of early America, childrearing had been simply another of the household activities taking place manufacture; the greater the ramifications of business outside the household and the less within it." Id. at 50. Ryan concludes that "[w]omen's assignments in the traditional household economy were actually among the first productive activities to be transferred to the factory: the spinning of yarn was industrialized long before the planting of corn." M. Ryan, supra note 37, at 119.

67. The early mills and factories hired women as well as men. See M. Ryan, supra note 37, at 119-25. Researchers have found that in cities like Baltimore as many as 40% of the women worked. W. Chafe, supra note 37, at 22. In the textile mill towns, the percentage of women working was higher still. T. Dublin, Women at Work 27 (1979).

The growing interest in education also increased the demand for teachers, and the expansion of the market increased the opportunity to sell the products women traditionally produced at home. See N. Cott, supra note 55, at 30-34.

68. See C. Beecher, Treatise on Domestic Economy, for the Use of Young Ladies at Home and at School 13 (1841) ("It is equally conceded, that the formation of the moral and intellectual character of the young is committed mainly to the female hand. . . . The proper education of a man decides the welfare of an individual; but educate a woman, and the interests of a whole family are secured."); M. Ryan, supra note 65, at 94 (quoting the 1851 Advocate of Moral Reform) ("'We need more and more of the female influence. What can surpass it? What tyranny of evil can stand before it . . . ? We need it in the nursery, where mothers can imbue the minds of children with temperance principles. We need it in childhood and youth when a mother's example, and a mother's warning and kind monition, are like a golden chain. We need it in society, in the social circle and even in the business of life, wherever woman reigns supreme.'").

69. N. Cott, supra note 55, at 46 (footnotes omitted); see also M. Ryan, supra note 60, at 185; Bridges, Family Patterns and Social Values in America, 1825-1875, 17 Am. Q. 3, 9-10 (1965); Teitelbaum, supra note 40, at 1142.

Consistent with the expansion of the domestic role and the emphasis on woman's nobler virtues was an increased emphasis on volunteer activities. See Smith-Rosenberg, Beauty, the Beast and the Militant Woman, in A Heritage of Her Own: Toward a New Social History of American Women 216 (N. Cott & E. Pleck eds. 1979); S. Rothman, Woman's Proper Place 42 (1978).
alongside the harvest, the hunting, the curing, and the weaving. In the new industrial age, childrearing became the middle-class household's reason for being.\(^7\)

The nineteenth-century legal reforms took place within the framework set by the new ideology. Enactment of the Married Women's Property Acts, though perhaps prompted by the utility of protecting married women's property from their husbands' creditors during times of economic uncertainty, embraced the symbolism of complementarity.\(^7\) Married women, mistresses of the idealized domestic realm, could now retain control of their separate property, enter contracts, write wills, sue, and be sued.\(^7\) Upon divorce or their husband's death, they received their share of the property in fee simple.\(^7\)

70. The differences between middle-class women and working-class women were dramatic. Chafe reports:

By the end of the 19th century, therefore, a clear line had been drawn between the appropriate activities of "proper" white middle-class women and the activities associated with black, poor, and immigrant women. For the first time in the nation's history, women from the former group were not centrally involved in what the dominant culture defined as mainstream economic activities. Their less-well-off sisters, by contrast, provided a major source of cheap and marginal labor. The results were dramatically apparent in the 1900 census, which showed that 41 per cent of all non-white women were employed, while only 17 per cent of white women worked, most of them from immigrant stock.

W. Chafe, supra note 37, at 23.

71. Like many reform movements, the movement supporting property law reform operated at several different levels over the course of more than half a century. In some states, passage came during business panics and allowed the states to provide some relief from creditors. For a discussion of the economic conditions underlying passage of the reform statutes, see N. Basch, supra note 42, at 114-15, 123-26; M. Bloomfield, American Lawyers in a Changing Society, 1776-1876, at 112-13 (1976); L. Friedman, A History of American Law 186 (1973); K. Lazarou, Concealed Under Petticoats: Married Women's Property and the Laws of Texas, 1840-1913, at 35-39 (1986); P. Rabkin, Fathers to Daughters: The Legal Foundations of Female Emancipation 154-55 (1980); Chused, supra note 49, at 1400-04.

The contemporaneous debates, however, whether at the time the first statutes were enacted in the 1830s or at the time of the last ones enacted in the 1870s, focused very much on the effect such statutes would have on family stability and order. Opponents of the reform legislation emphasized the continued need to reinforce the husband's authority as head of the household and the instability that would result from giving wives a measure of independence. Proponents often drew on the literature celebrating women's virtues to argue that wives should be afforded a measure of protection from their intemperate or improvident husbands. "Radicals" advocated equality for women in terms that could be taken directly from twentieth-century debates. See N. Basch, supra note 42, 115-16, 121-23, 135, 136-48, 162-83 (chronicling the use of literature by feminists to support property law reform); K. Lazarou, supra note 71, at 35; E. Warbasse, supra note 45, at 307.

72. See N. Basch, supra note 42, at 164; 3 C. Vernier, American Family Laws § 173 (1935); E. Warbasse, supra note 45, at 305-07 passim; Chused, supra note 49, at 1359, 1361; Johnston, Sex and Property, 47 N.Y.U. L. Rev. 1033, 1066 (1972).

73. Under the English common-law provisions for dower, widows received a life
went the commercial for the domestic thus received a greater measure of financial protection.\textsuperscript{74}

With the growing maternal involvement in childrearing, custody presumptions also changed. At the beginning of the nineteenth century, courts favored fathers over mothers in custody disputes in the belief that fathers were in a better position to provide for their children.\textsuperscript{75} As the new ideology celebrated the traits that only mothers could bring to the young, the paternal presumption changed in favor of a maternal one.\textsuperscript{76} The courts protected, and thereby encouraged, the increasing maternal investment in childrearing.\textsuperscript{77}

Finally, and with somewhat less fanfare, the states liberalized the rules governing divorce. Between the turn of the century and the end of the Civil War, virtually all of the states passed legislation replacing cumbersome and expensive legislative divorce with more readily administered judicial divorces.\textsuperscript{78}

\textsuperscript{74} The symbolic changes were greater than the financial effects. Allowing women control of their separate property and a dower or elective share in fee simple followed the decline in the importance of land holdings. Independent control of land would have given a farmer's wife financial independence. In the industrial age, employment was a far more important source of earnings, and the reforms did little to increase middle-class women's workforce participation.


\textsuperscript{76} See Zainaldin, supra note 53, at 1070-73; see also M. Grossberg, supra note 51, at 238-42, 244-53; Teitelbaum, supra note 40, at 1154-55.

\textsuperscript{77} Again, the major effect of the changes is likely to have been symbolic. The legal changes followed the changes in childrearing patterns described above. As Teitelbaum explains,

\begin{quote}
Modification or elimination of the common law doctrine regarding custody to some extent reflects both the enhanced position of women and the perception of separate spheres. The special moral and cultural qualifications of mothers were relied on to explain custodial preferences in their favor, and it was concomitantly assumed that fathers would rely on servants or female relatives to care for children, their own time and energy being occupied by activities in the public arena.
\end{quote}

Teitelbaum, supra note 40, at 1155. While the changes in custody presumptions rewarded mothers' investment in childrearing, they also came at a time when children changed from economic assets to liabilities. See generally K. Hall, The Magic Mirror (1989); S. Presser & J. Zainaldin, Law and American History (2d ed. 1989).

\textsuperscript{78} See L. Friedman, supra note 71, at 182-83; 3 G. Howard, A History of
Although divorce remained rare through the end of the century, it became relatively more accessible\textsuperscript{79} and the fault standards were interpreted more favorably for women than they had been earlier in the century.\textsuperscript{80}

At a time when women were playing a more specialized and more important domestic role, these legal reforms made marriage, particularly traditional marriage, more attractive. The Married Women's Property Acts embraced the symbolism of complementarity, giving some legal autonomy to married women as well as some additional protection to the relatively few upper and middle-class women bringing substantial property of their own into marriage. The changing custody presumption acknowledged women's contributions to their children's upbringing. Divorce reforms gave men married to traditional women an additional incentive to keep their end of the marital bargain,\textsuperscript{81} while opening the door to escape from unhappy marriages.\textsuperscript{82} The new legal order reinforced the new ideology. Both encouraged middle-class women to respond to the removal of

\textit{Matrimonial Institutions} 31-50, 96-101 (1904); Fineman, \textit{supra} note 12, at 799. For a history of divorce, see generally N. Blake, THE ROAD TO RENO (1962).

\textsuperscript{79} On the numbers of divorces, see Davis, \textit{Statistical Perspective on Marriage and Divorce}, 272 ANNALS 9, 18 (1950); Friedman, \textit{Rights of Passage: Divorce Law in Historical Perspective}, 63 Ore. L. Rev. 649, 651-54 (1984).

\textsuperscript{80} See Cott, \textit{supra} note 35, at 592-605. Nancy Cott uses Massachusetts divorce records to document the impact of changing models of marriage on divorce standards. See also R. Griswold, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890, at 78 (1982); M. Salmon, \textit{supra} note 45, at 62-66; Teitelbaum, \textit{supra} note 40, at 1162-63. C. Deglar, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 168 (1980) argues that the growing divorce rate reflected "woman's drive for greater autonomy within marriage and the family." Cf. W. O'Neill, DIVORCE IN THE PROGRESSIVE ERA 6-7 (1967) "([The need for divorce arises when] families become the center of social organization. . . . [At this point,] their intimacy can become suffocating, their demands unbearable, and their expectations too high to be easily realizable. . . . Divorce then becomes the safety valve that makes the system workable.").

Nancy Cott observes that as women's household roles became more specialized, the "marriage choice determined women's life experience to a greater extent than it had earlier." N. Cott, \textit{supra} note 55, at 83 & n.33. She notes, however, that the "marriage trauma" response applies to the early part of the nineteenth century. By the end of the century, more women declined to marry than at any other point in American history. "Toward the later part of the century, more women actually declined to marry; its last decades witnessed the highest proportion of women never-marrying in all of American history. Toward the turn of the twentieth century, when the frequency of divorce rose, the proportion of women marrying returned to more typical levels." Id. at 83 n.33 (footnotes omitted). Marriage rates returned to more normal levels only when divorce rates rose at the turn of the century. Id.

\textsuperscript{81} Divorce law, of course, had long confined woman to traditional marital roles. On the role of divorce in enforcing status roles, see Teitelbaum, \textit{supra} note 40, at 1163.

\textsuperscript{82} See N. Cott, \textit{supra} note 55, at 83.
commercially productive activities from the home by expanding the domestic role of wife and mother, thereby easing the entry of their husbands and sons into the workforce.  

By the later part of the twentieth century, the nineteenth-century solution to the problems of early industrialization stood in the way of continued economic evolution. While nineteenth-century industrialism required more educated workers than did an agrarian society, the greatest demand was for the unskilled and semiskilled. The ideal of complementarity had encouraged middle-class men to make the investment in education and training necessary to fill the relatively few but important managerial positions in early capitalism, while persuading married middle-class women to stay out of the labor market. On the other hand, in the "postindustrial" economy that characterized post-war America, management-intensive light industry and service sector employment replaced heavy manufacturing and agriculture, increasing the demand for educated, literate, English-speaking workers. With middle-class men already fully employed, middle-class women provided the most readily available supply of new labor. At the same time, the traditional demands on

83. As Mary Ryan observed, in her richly detailed study of the family in Oneida County, New York: much of [the] private labor, intelligence, and energy that reproduced and re-created the middle class at midcentury was expended by women, especially the mothers who cared for infants, socialized children, bestowed moral influence upon breadwinners, took in boarders, and even entered the labor force in their own right—all helping to maintain or advance the status of men in their families. M. RYAN, supra note 61, at 185.

84. World War II and its aftermath masked some of the underlying economic changes. Immediately following the War, returning veterans flooded the labor market. The fifties' reaffirmation of married women's domestic role kept women occupied at home until after the economy absorbed the men. One result of that reaffirmation of the domestic role was the baby boom. J. KREPS, SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK 5 (1971); V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 31 (1988); P. ENGLAND & G. FARKAS, HOUSEHOLDS, EMPLOYEMNT AND GENDER 12-13 (1986).

85. M. RYAN, supra note 37, at 305-06. England and Farkas describe the overall changes in the economy in terms of increases in jobs already labelled female, primarily service sector occupations. P. ENGLAND & G. FARKAS, supra note 84, at 148-49. If, however, we examine the changes in rates of participation by women in selected job categories, the biggest increases in female participation occur among professionals, officers and managers, and sales. See Rose, Twenty-Five Years Later, Where Do We Stand on Equal Employment Opportunity Law Enforcement?, 42 VAND. L. REV. 1121, 1181-82 (1989). Accordingly, even if the overall increase in the demand for women workers reflects an expansion in traditionally female jobs, the increase in demand for middle-class women may be more broad based.

86. The other possibilities were lower class men, immigrant men and children. The civil rights movement of the sixties, which gained force shortly before the women's movement of the seventies, removed some of the barriers keeping blacks and other
women as wives and mothers were decreasing. With the decline in infant mortality, women had fewer children, and care of the home had long since ceased to require fresh baked bread, hand sewn clothing, and daily trips to the market. The "problem that has no name" that Betty Friedan described in *The Feminine Mystique*, the book that galvanized the women's movement in the early sixties, was the failure of the roles of wife and mother to continue to provide a satisfying lifetime occupation. With the increasing demand for women's services in the labor force and the decreasing need for women to devote themselves to a lifetime of domestic tasks, a reassignment of responsibilities was in order. Just as nineteenth-century men went from the relatively undifferentiated role of farmer and husband to a highly specialized division of labor, so would twentieth-century women experience an increasingly specialized division of labor.

The first impact that the modern women's movement had on gender roles was to supply an ideology facilitating the large-scale entry of married middle-class women into the labor market. "Liberal" feminists did so by emphasizing sameness.

minorities out of skilled positions. The number of minorities added to the labor force, particularly the number of well-educated minorities, however, remained small in comparison to the demand. Immigration policies during the sixties and seventies favored better educated, more skilled immigrants, but the total numbers were limited by a variety of factors. See generally Kutscher, *Overview and Implications of the Projections to 2000*, MONTHLY LAB. REV., Sept. 1987, at 4; P. ENGLAND & G. FARKAS, supra note 84, at 125-45; V. FUCHS, supra note 84, at 22-31.

87. The need for an expanded domestic role had begun to disappear by the early decades of this century, but first the Depression and then the post-War flood of veterans suppressed any increase in demand for women workers. Similarly, while birth rates declined steadily from the nineteenth to the twentieth century, the "baby boom" involved a temporary increase in fertility rates. See generally P. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 (1989).


89. Chafe observes: the feminism of the 1960's and 1970's differed from previous women's movements precisely because it grew out of and built upon prevailing social trends. For the first time ideological protest and underlying social and economic changes appeared to be moving in a similar direction. . . . [F]emale work patterns were virtually transformed in the years after 1940. Prior to World War II, female employment was limited primarily to young, single women or poor, married women. Few middle-class wives held jobs. By 1975, in contrast, the two-income family had become the norm: 49 per cent of all wives worked. . . . Although the employment changes did not signify progress toward equality, they ensured that social norms about woman's "place" no longer had a basis in reality.

W. CHAFE, supra note 37, at 119-20.

90. We are using the term here as Robin West did. West, *The Jurisprudence of Gender*, 55 U. CHI. L. REV. 1, 22 (1988). According to Joan Williams, they are now derisively referred to as "assimilationists." Williams, supra note 57, at 798.
Drawing on the ideal of equality generated by the civil rights movement, mid-century feminists denied the existence of any significant differences between men and women.\textsuperscript{91} Observable differences were attributed to nurture, not nature.\textsuperscript{92} The new ideal of equality replaced the older ideal of complementarity, tearing down the distinctions between commercial and domestic, between male and female spheres of influence. Separate was now viewed as inherently unequal.\textsuperscript{93} "Liberated" women, freed from an ideology that defined them exclusively in terms of their domestic roles, were encouraged to become lawyers, electricians, and accountants.\textsuperscript{94} At the same time, the traditional domestic role, and those who continued to pursue it, were devalued.\textsuperscript{95}

Divorce reform has both contributed to this transformation, and been shaped by it. As Herma Hill Kay recently reminded us, the movement to eliminate fault as a prerequisite for divorce preceded the modern women's movement.\textsuperscript{96} Fault, typically defined in terms of adultery, desertion, or extreme cruelty, became untenable as the exclusive grounds justifying divorce.

\begin{itemize}
\item \textsuperscript{92} N. Chodorow, Reproduction of Mothering 7 (1986); V. Fuchs, supra note 84, at 140.
\item \textsuperscript{93} For a discussion of the relationship between the civil rights movement and the women's movement, see sources cited supra note 91.
\item \textsuperscript{94} W. Chafe, supra note 37, at 140. Working-class women were less likely than middle-class women to have the option of remaining out of the labor market before the modern women's movement and enjoyed less of an expansion in employment opportunities afterwards. See supra notes 70 & 85. For working-class women, increased opportunities have taken the form not of traditionally male occupations (the increase in the number of women plumbers, for example, has remained relatively small), but of lessened competition from middle-class women for the positions women have traditionally filled. For example, statistics demonstrate that between 1966 and 1987, the largest percentage increase in the proportion of women employed was in the professional category, while the increases in women craft workers and operators was relatively modest. All the areas in which women workers were traditionally concentrated, however, such as office and clerical positions, also experienced substantial increases in the percentage of women workers. See Rose, supra note 85, at 1121 (reprinting EEOC report).
\item \textsuperscript{95} W. Chafe, supra note 37, at 133. One of the reasons feminism has had its primary influence on the middle class is that a central part of this message devalued choices made by working-class women. Such women often worked in relatively low-status jobs (such as factory or waitress positions) because they had to, and they aspired either to the traditional "women's" jobs that middle-class women were now disdaining (such as secretarial or nursing positions) or to the luxury of being able to forego their unsatisfying jobs for the relatively higher status of full-time homemaker.
\item \textsuperscript{96} Kay, An Appraisal of California's No-Fault Divorce Law, 75 CALIF. L. REV. 291, 299-304 (1987) [hereinafter Kay, An Appraisal]; see also Kay, supra note 11.
\end{itemize}
when society no longer dictated that an unhappy couple stay together in order to advance a larger set of societal interests.\(^7\) By the time California enacted the first no-fault act in 1969,\(^8\) fault-based divorce had been obsolete for half a century.\(^9\) Most divorces were uncontested and were granted on the basis of perfunctory testimony of marital fault.\(^9\) The principle that divorce could proceed from the agreement of the parties was so well established that the major argument advanced for divorce reform was not an ideological one, but rather the practical need to "free the administration of justice . . . from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceedings."\(^10\)

The success of the no-fault movement nonetheless had a major impact on women's participation in the labor market because, in both symbolic and practical terms, it remade the marital agreement. Until the mid-twentieth century, the marital bargain exchanged the wife's services for her husband's support.\(^10\) Once the exchange occurred, the wife's position became significantly weaker than her husband's.\(^10\) Her prospects for remarriage declined with age.\(^10\) Whatever employment oppor-

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97. As we explained in our last article, fault-based divorce was a holdover from an earlier period in which marriage was viewed as an indissoluble relationship. Since both parties were bound to the marriage until death, proof of fault served to establish that one party, in a manner unexcused by the actions of the other, had so flouted the marital obligations that the relationship had for all intent and purposes already ended. The divorce then released the innocent party from remaining obligations, permitting remarriage or a formal division of property and other interests. Brinig & Carbone, supra note 5, at 883-84.

98. Kay, supra note 11, at 1 n.1. Kay further notes: "Several states had enacted 'no-fault' grounds for divorce, such as incompatibility of temperament, voluntary separation for a period of time, or incurable insanity, prior to the adoption of the California Family Law Act . . . [S]uch provisions served as 'an opening wedge' for the move to a 'pure' non-fault approach based on factual breakdown of the marriage." Id. (citing M. RHEINSTEIN, supra note 1, at 313-16). For a list of earlier statutes, see Kay, supra note 11, at 6-7 n.22.

99. O'Connell, supra note 2, at 475.

100. See Friedman, supra note 79, at 659-61; Kay, An Appraisal, supra note 96, at 298. In other words, divorce was proceeding from the agreement of the parties, not from unilateral misconduct forcing the courts' hands.

101. Kay, An Appraisal, supra note 96, at 299; see also O'Connell, supra note 2, at 475-82.


103. See generally Krauskopf, supra note 13, at 260-67; Krauskopf, supra note 30, at 397; Peters, Marriage and Divorce: Informational Constraints and Private Contracting, 76 AM. ECON. REV. 437-53 (1986); Landes, supra note 10, at 42.

104. See generally Cohen, supra note 10; Mott & Moore, The Tempo of Remarriage Among Young American Women, 45 J. MARRIAGE & FAM. 427; P. ENGLAND & G.
opportunities she had at the beginning of the marriage were limited by
years as a homemaker.105 Her husband, in contrast, retained the
career and other financial investments that had generated the
family income and, with his sources of income intact, enjoyed
favorable prospects for remarriage.106 Because husbands and
wives’ positions were not symmetrical, enforcement of the hus-
bands’ lifelong promise of support was necessary to encourage
wives to make the career sacrifices that guaranteed their eco-
nomic dependence.107 With expanding economic opportuni-
ties for women, marriage, child-bearing, and the traditional domestic
role would become less attractive without reaffirmation of the
husband’s marital promises.108

The no-fault movement, however, rather than affirming the
traditional marital bargain, rendered it unenforceable.109 The
elimination of fault as a prerequisite for divorce left open the
question of the financial allocations to be made upon divorce.
Fault, redefined in terms of breach of marital obligations, might
be irrelevant to the dissolution of the marriage but still be very
important in the financial settlement; just as breach of a com-
mercial contract, while insufficient to justify specific perform-
ance of a particular obligation, might still be a basis for

Farkas, supra note 84, at 54-59; Becker, Landes & Michael, An Economic Analysis of
105. L. Weitzman, The Divorce Revolution 204-11 (1985); Lauerman, supra
note 102, at 508-09.
106. Cohen, supra note 10, at 278; Krauskopf, supra note 13, at 260-62, 266. Divorce
law entitled women to a significant share of the family property only when employment
replaced real property as the major source of family income. See Brinig & Carbone, supra
note 5, at 863-64.
107. See G. Becker, supra note 10, at 14-15; Becker, Landes & Michael, supra note
104, at 1152-53; Ellman, supra note 28, at 46-50; Landes, supra note 10, at 62-63; Peters,
supra note 103, at 443-44, 451-52. This does not mean, however, that the fault system was
designed and administered for the benefit of women. Marriage did not need to be that
attractive so long as women had relatively few alternatives to marriage and experienced
overwhelming societal pressure to define their roles in terms of marriage. The fault system
made women’s domestic contributions worthwhile primarily by making divorce difficult
and by reinforcing the societal stigma of divorce.
108. Economists are virtually unanimous in predicting these results, and empirical
studies demonstrate drops in marriage and fertility rates, at least for the middle class. See
infra notes 130-31. Efforts to prove a causal relationship between legal changes and the
demographic data are questionable, however, because of the difficulty of holding nonlegal
variables constant. For efforts to establish statistical correlations, see Landes, supra note
10, at 36-49; Peters, supra note 103, at 445-52; Becker, Landes & Michael, supra note 104;
see also W. Chafe, supra note 37, at 155-60; V. Fuchs, supra note 84, at 15-16, 23-27, 60-
73, 96-104; P. England & G. Farkas, supra note 84, at 73-91.
109. Schneider, supra note 2, at 1809.
damages. However, because the no-fault movement had emphasized the difficulties of determining fault rather than its irrelevance as a prerequisite for divorce, and because the courts had trivialized the fault determination rather than acknowledge its obsolescence, determinations of marital misconduct in any form had acquired a bad name. Many states, in enacting no-fault legislation, followed California's lead, abolishing fault as grounds for divorce and precluding any consideration of marital misconduct in the financial allocations to be made.

The effect, probably unintended, of precluding consideration of fault was to change marriage from a lifetime commitment whose obligations were enforced, albeit selectively, through a form of specific performance, to a contract terminable at

110. See Peters, supra note 103, at 442-43, 448-49; Brinig & Carbone, supra note 5, at 884-87.


112. Kay, supra note 11, at 11-12 & n.33; Kay, supra note 96, at 343; Brinig & Carbone, supra note 5, at 887-88 n.132. Fineman notes that in Wisconsin the debate focused on the removal of fault with little attention paid to the extensive economic reforms proposed at the same time. Fineman, supra note 12, at 873-74.

113. Kay emphasizes that divorce reform preceded the modern women's movement, and she notes that greater gender equality was not among the stated goals of the reformers, at least in California. Kay, supra note 96, at 300. In other states, the abolition of fault as a prerequisite for divorce occurred at the same time as property law reforms expressly intended to achieve greater equality. See, e.g., Fineman, supra note 12, at 853-67. In those states, while the reformers did not necessarily address the full implications of a no-fault system, they quite consciously insisted on a divorce system that treated women as equally capable of labor-force participation. Id.

114. Brinig & Carbone, supra note 5, at 884 (observing that the fault system identified which marital obligations to discharge and which to reaffirm and that alimony constituted continuation of the husband's duty of support, not a form of liquidated damages); cf. O'Connell, supra note 2, at 465-71 (describing alimony as part of a system of tort damages). Singer argues that alimony awards were even less common during the fault era than now, and that the fault system never lived up to its promise of lifetime support. Singer, Divorce Reform and Gender Justice, 67 N.C.L. Rev. 1103, 1105-09 (1989). However limited support awards may have been historically, the fault system's primary role in reinforcing the lifetime nature of the marital commitment was to make divorce difficult and to reinforce the societal stigma against divorce. Brinig & Carbone, supra note 5, at 870-82. Alimony awards, indeed divorce awards generally, were financially significant only for the small percentage of divorcing couples with substantial assets, but the disproportionate attention given to those cases served to reinforce, at a symbolic level, the importance of marital responsibilities. On the fault system's effect on bargaining, see M. Glendon, supra note 1, at 52; Fineman, supra note 12, at 802; Peters, supra note 103, at 448-49; see also Fineman, supra note 12, at 790-92 (discussing the role of symbolism in law reform).
will.115 Either party could end the marriage; the other had no ability to prevent termination.116 Most of the states to address the matter have ruled that the reasons why the marriage ended are irrelevant.117 The husband's promise of life-long support became meaningless; the new standard emphasized the parties' self-sufficiency.118 Upon divorce, the property was divided, and dependent spouses were given transitional awards intended to encourage their financial independence.119 Protection of the standard of living enjoyed during the marriage, though discussed in the case law, disappeared from practice.120 The result, as Lenore Weitzman documents, was a divorce system that left men financially better off and women worse off than they had been when they were married.121

115. Indeed, employing traditional contract analysis, the contract is not only terminable at will, but "illusory." For under modern contract law, breach of a contract terminable at will is compensable while breach of marital obligations is not. See, e.g., Lauren v. Marc & Melfa, Inc. 446 So. 2d 1138 (Fla. 1984); Jones v. East Center for Community Mental Health, Inc. v. Nat'l Labs, Inc., 153 So. 2d 752 (Fla. Dist. Ct. App. 1963); Chadd v. Midwest Franchise Corp., 22 Neb. 502, 412 N.W.2d 453 (1987); see also M. GLENDON, supra note 1, at 52-57, 159-70.

116. While state law varies in theory, Homer Clark describes the effect of the changes: "In practice this has come to mean that either spouse can obtain a divorce at will. It is therefore accurate to say that today the concept of permanence has been eliminated from the legal definition of marriage." Clark, The New Marriage, 12 WILLAMETTE L. REV. 441, 444 (1976); see M. GLENDON, supra note 1, at 4; L. WEITZMAN, supra note 105, at 26-28. This change, of course, affects the parties' relative bargaining positions in divorce. See Kay, supra note 11, at 62-63.

117. See sources cited supra note 112.

118. Under traditional family law principles, of course, the duty of support was the husband's alone. Lauer, supra note 102, at 494; Singer, supra note 114, at 1112. See generally L. WEITZMAN, supra note 105, at 41-46; Fineman, supra note 12, at 829, 835; Williams, supra note 57, at 824.


120. For an example of its use in the case law, see Kitson v. Kitson, 17 Or. App. 648, 655-57, 523 P.2d 575, 579 (1974). For studies of the financial impact of divorce on women, see generally T. ARENDELL, MOTHERS AND DIVORCE (1986); Bell, Alimony and the Financially Dependent Spouse in Montgomery County, Maryland, 22 FAM. L.Q 225 (1988); Day & Bahr, Income Changes Following Divorce and Remarriage, 3 J. DIVORCE, Spring 1986; Rowe & Morrow, The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage, 24 WILLAMETTE L. REV. 463 (1988); Weitzman, The Economics of Divorce, supra note 119; Wishik, Economics of Divorce, 20 FAM. L.Q. 79 (1986). Moreover, other studies indicate that precluding consideration of marital misconduct has had an impact on the spouses' respective bargaining power in reaching divorce settlements. See Peters, No-Fault Divorce and Bargaining over the Divorce Settlement, in ALIMONY 18, 30 (Am. Bar Ass'n, Section of Fam. L. 1988).

121. See L. WEITZMAN, supra note 105, at 337-56 (concluding that women experience a 73% decline in their standard of living in the year after divorce while men
This divorce system complemented the message of liberal feminism.\(^2\) The nineteenth-century ideal of complementarity defined the wife's role in terms of domesticity. Marriage law protected her from the resulting financial dependence by making divorce difficult and by promising financial security to wives who upheld their end of the bargain.\(^2\) With dramatically rising divorce rates, modern women had no certainty that their marriages would last nor even the promise of financial protection in the event they did not.\(^4\) Young women in the mid-eighties, whether consciously "feminist" or not, agreed that they could no longer rely on marriage for their economic security.\(^5\) Young couples quickly began to view both spouses' incomes as essential to their economic well-being.\(^6\) The courts reinforced these conclusions by demanding that divorcing women, whatever their experience a concomitant 42% increase). Weitzman's methodology has been criticized. See Abraham, "The Divorce Revolution Revisited" Revisited, 9 N. ILL. U.L. REV. 251 (1989); Hoffman & Duncan, What Are the Economic Consequences of Divorce?, 25 DEMOGRAPHY 641 (1988); Jacobs, Faulting No-Fault, 1986 AM. B. FOUND. RES. J. 767; Kay, supra note 11, at 59-77; Singer, supra note 114, at 1103-12. Weitzman almost certainly overstates the case that men are better off after marriage, in that she considers the wives' loss of their husbands' income without considering the husbands' loss of their wives' services, but, as Joan Krauskopf observes, "Even those who criticize Weitzman's figures differ on amount, not on significant disparity in standard of living between ex-husbands and ex-wives." J. KRAUSKOPF, supra note 13, at 271 n.65.

122. See Fineman, supra note 12, at 821-25.

123. See Singer, supra note 114, at 1112 ("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.'") (quoting Orr v. Orr, 440 U.S. 268, 279 n.9 (1979)). Joan Williams observes: "By the nineteenth century, men's and women's roles were sharply differentiated. Under the new gender system, married women ordinarily experienced utter financial dependence on their husbands, though a divorceless society protected wives from destitution so long as they stayed with their husbands and—perhaps more to the point—their husbands stayed with them." Williams, supra note 57, at 823-24.

124. The greatest impact no-fault divorce has had is not on the extent of the financial protection afforded but on the frequency of divorce. Between 1970 and 1980, the divorce rate more than doubled and researchers with the United States Census Bureau estimate that 49% of all married men and women will divorce. "The continuing high divorce rate may well be the most dramatic change in family life in twentieth-century America." T. ARENDELL, supra note 120, at 1; see also Williams, supra note 57, at 824 ("In 1870, 8 percent of [American] marriages ended in divorce; today 48 percent of all marriages do, and half of all American children will experience family disruption by age eighteen.").


earlier expectations, however young their children, and however long their marriage, had to develop their own sources of income.\textsuperscript{127} By the beginning of the eighties, the separation of the commercial from the domestic and the definition of a wife's role exclusively in terms of domesticity were gone. Feminist theory led—and divorce reform pushed—even the married mothers of young children into the labor market.\textsuperscript{128}

This redefinition of roles, however, did not end with middle-class women joining their husbands in the single-minded pursuit of law firm partnerships.\textsuperscript{129} There was still the small matter of who was to take care of the children. The initial response appeared to be no one. As record numbers of women entered the labor force, middle-class women deferred marriage and child-bearing.\textsuperscript{130} American fertility rates reached a record low in 1976.\textsuperscript{131} Childrearing might no longer be a lifelong occu-
pation, but it still interfered with medical residencies, mortgage payments, and geographic mobility.\textsuperscript{132} The new ideology provided no model for combining parenthood and profession. As Joan Williams recently observed, "[w]estern wage labor is premised on an ideal worker with no child care responsibilities."\textsuperscript{133}

The new feminism, or at least what Robin West calls "cultural feminism,"\textsuperscript{134} tried to provide an answer. In 1982, Carol Gilligan published *In A Different Voice*. The book, a critique of empirical studies purporting to demonstrate that boys' moral development occurred earlier than girls', interpreted the differences in terms of differences between boys and girls' experience of the world. Gilligan concluded:

\begin{quote}
[T]he standard of moral judgment that informs their [women's] assessment of self is a standard of relationship, an ethic of nurture, responsibility, and care . . . . [M]orality is seen by these women as arising from the experience of connection and conceived as a problem of inclusion rather than one of balancing claims.\textsuperscript{135}
\end{quote}

For men on the other hand, "the moral imperative appears rather as an injunction to respect the rights of others and thus to

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\textsuperscript{132} Roles appears to have been decisive. Throughout the 1960's, women married later, delayed the birth of their first child, and bore their last child at an earlier age. Whether as cause or effect, this trend coincided with many women finding occupations and interests away from the home. W. Chafe, *supra* note 37, at 121.

\textsuperscript{133} For working-class women, the expense of child care dramatically reduced the attractiveness of full-time employment, persuading many mothers to switch to part-time employment timed to take advantage of the availability of family babysitters. See M. Ryan, *supra* note 37, at 323.

\textsuperscript{134} Williams, *supra* note 57, at 822 (footnote omitted). The conflicts between work and family have been exacerbated in many middle-class professions by the presence of large numbers of women. The increase in the number of women lawyers, for example, has increased the competition for legal jobs. That increased competition often takes the form of a greater emphasis on billable hours or, for law professors, publications. Accordingly, jobs that twenty years ago might have been structured in a way to make them compatible with childrearing may now, as a direct result of the increased competition occurring because of the presence of women in the workforce, be far more difficult to combine with active parenthood. The advantage enjoyed by workers without family responsibilities has therefore increased. See generally Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 L. & Soc. Inquiry 251, 289 (1989); Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 Harv. C.R.-C.L. L. Rev. 19, 103 & n.82, 126 & n.158 (1989); Margolick, *Wooed, Wined and Overworked Wall St. Lawyers Meet Pink Slips*, N.Y. Times, Aug. 12, 1990, at A1, col. 5; Schwartz, *Management, Women and the New Facts of Life*, 89 Harv. Bus. Rev. 65 (1988).

\textsuperscript{135} West, *supra* note 90, at 17-20.

\textsuperscript{134} C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* 156-60 (1982).
protect from interference the rights to life and self-fulfillment.”

Gilligan’s celebration of difference, her claim that women contribute to a higher morality that cannot be measured by a model created by and for men, has been enormously influential, affecting feminist work in all areas of study.

Unsurprisingly, Gilligan tied her discussion of “difference” to the fact that women rear children and men do not. The “feminine” traits she celebrated are those connected with motherhood: nurturance, responsibility, and care. The literature Gilligan inspired calls for the use of feminist insights to transform virtually all areas of life and thought. It also suggests a re-evaluation of the domestic roles that liberal feminism encouraged women to devalue, if not abandon. Taken to its logical con-

136. Id. at 100.

137. Gilligan was not alone in celebrating women’s separate voice. See generally N. Chodorow, supra note 92; Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986); Smith-Rosenberg, The Female World of Love and Ritual: Relations Between Women in Nineteenth Century America, in A HERITAGE OF HER OWN, supra note 69, at 311. Betty Friedan has also joined the change in emphasis. See B. FRIEDAN, THE SECOND STAGE 38-41, 83-87 (1981).

138. The feminism of “difference” involves a vigorous debate over the source of this difference. The earlier feminists minimized the importance of innate differences, attributing observed differences to nurture rather than nature. The major contribution of Robin West’s influential piece, The Jurisprudence of Gender, is her attempt to define “feminist insights into women’s true nature” in terms of biological differences that determine the different ways men and women experience life. West, supra note 90, passim. Joan Williams disagrees with the conclusion that biology is as deterministic as West suggests. Williams, supra note 57, at 800-01 n.11; see also E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 26 (1980); Rossi, Gender and Parenthood, 49 AM. SOC. REV. 1, 9 (1984); Rossi, A Biosocial Perspective on Parenting, DAEDALUS, Spring 1977, at 1, 4-5.

139. Williams, supra note 57, at 803 n.17. Robin West describes the implications of Gilligan’s conclusions this way:

Cultural feminism does not simply identify women’s differences—patriarchy too insists on women’s differences—it celebrates them. Women’s art, women’s craft, women’s narrative capacity, women’s critical eye, women’s ways of knowing, and women’s heart, are all, for the cultural feminist, redefined as things to celebrate. Quilting, cultural feminism insists, is not just something women do; it is art, and should be recognized as such. Integrative knowledge is not a confused and failed attempt to come to grips with the elementary rules of deductive logic; it is a way of knowledge and should be recognized as such. . . . Women’s distinctive aesthetic sense is as valid as men’s. Most vital, however, for cultural feminism is the claim that intimacy is not just something women do, it is something human beings ought to do. Intimacy is a source of value, not a private hobby. It is morality, not habit.

West, supra note 90, at 18.

140. M. RYAN, supra note 37, at 321 (“[A]lthough the birthrate and marriage rate have fallen precipitously, very few women have forsaken marriage and childbearing entirely. Less than 10 percent of all women in their early thirties were single, and only 13 percent of those married were childless.”) (citations omitted).
clusion, the feminism of difference can be said to imply that women are more nurturing because they rear children; that because women are more nurturing, they value family and children more than their spouses do; because of those values, they are more likely to place the welfare of the family above their individual advancement; and that their subsequent choices to stay home with sick children, to choose more flexible jobs, and to interrupt their careers ought to be respected and protected.

While these conclusions may be controversial,141 Robin West has described Gilligan's book and the type of thinking it represents as "feminism's official story."142 We believe Gilligan's work has been so phenomenally influential because, once married middle-class women permanently entered the labor force, making the earlier ideology of domesticity obsolete, no model existed to reconcile the demands of home and the demands of the market. Women were working more, and middle-class women believed that they should be thinking in terms of careers as well as jobs. Yet, the first generation of middle-class women for whom full labor force participation was a possibility were having children and, as Joan Williams has observed, making choices that placed them at odds with the liberal feminist ideal of equality on male terms.143 The new feminism frees women from the need to succeed exclusively on those terms. It offers the hope of transforming the workplace to accommodate women's values as well as men's,144 and it justifies the choice of

141. For a critique of Gilligan's work in these terms, see Williams, supra note 57, who argues that Gilligan may encourage "women to choose economic marginalization and celebrate the choice as a badge of virtue." Id. at 819. MacKinnon argues that by "establishing that women reason differently from men on moral questions, she [Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use." C. MacKINNON, supra note 42, at 51; cf: West, supra note 90, at 29 (describing "radical" feminists as those who, rather than celebrate women's connections to others, identify them as a source of oppression).

142. West, supra note 90, at 15.

143. See Williams, supra note 57, at 798-99.

144. The modern feminist agenda has focused primarily on the transformation of the workplace, on the need to eliminate discrimination in hiring, to insure adequate provision for childcare, to accommodate the childrearing without marginalizing the caregivers, and to move away from gender-stereotyped definitions of performance. See, e.g., Williams, supra note 57, at 833-36. See generally Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. REV. 55 (1979); Hartmann, Achieving Economic Equity for Women, in WINNING AMERICA: IDEAS AND LEADERSHIP FOR THE 1990s, at 99 (M. Raskin & C. Hartman eds. 1988); Taub, From Parental Leaves to Nurturing Leaves, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-1985). Williams adds, however, that "[s]uch a goal today seems utopian . . ." Williams, supra note 57, at 836.
work and family, career and children, and the accommodations needed to permit both.

The rediscovery of motherhood as a defining component of women's lives and of the economic consequences of mothers' primary responsibility for the care of their children has led to a re-examination of the financial implications of no-fault divorce. In particular, Lenore Weitzman's empirical work has focused attention on the differential impact divorce has on men and women, and the disastrous consequences for the mothers of young children. The primary result has been a reconsideration of the bases for spousal support. The older justifications,

The primary hope for such a transformation may be the predicted labor shortage of skilled workers that may persuade employers to offer additional family benefits as a way of recruiting women employees. See, e.g., Collins, Wooing Workers in the 90's: New Role for Family Benefits, N.Y. Times, July 20, 1988, at A1, col. 4.

145. While many mothers of young children still choose to devote full-time care to their children, dramatically fewer women view the domestic role as a lifetime occupation. For a discussion of sequencing, see generally A. Cardozo, Sequencing (1986); Rimer, Sequencers: Putting Careers on Hold, N.Y. Times, Sept. 23, 1988, at A21, col. 1.

146. With or without a transformation in the workplace, women, while continuing to work outside the home in large numbers, are making choices that Joan Williams concludes lead to their economic marginalization. Williams, supra note 57, at 799 & n.7, 831 & n.146, 833. Williams warns that, in the nineteenth century, "women's rich emotional relationships in their disempowered sphere and the seductive compliments of domesticity—in particular, the notion that women were more moral than men—encouraged women to 'choose' their own repression." Id. at 830. She warns that modern feminist literature such as Gilligan's may similarly encourage women to subordinate their careers to childrearing.

147. L. Weitzman, supra note 105, at 143-83, 262-72, 337-56.

148. While much of the recent discussion has focused on spousal support, property settlements and support have always been linked. Before the wave of divorce reform that accompanied no-fault, divorce awards mirrored the provisions made for widows. The community-property states, influenced by Spanish and French tradition, divided the community property equally as they would have upon the death of one of the spouses and, at least during the nineteenth century, permanent alimony awards were virtually nonexistent. In the common-law states, the awards mirrored dower provisions that granted widows a one-third life estate in their husbands' property. Courts recognizing divorce a mensa et thoro allowed the husbands to retain all of the family property, including their wives' separate estates, while the wives received alimony, often calculated in terms of one-third of their husband's income. See generally Burr v. Burr, 7 Hill 207 (1843). Even after the states allowed divorce a vinculo, the awards continued to follow the earlier practice, with the husband retaining the bulk of the family estate while the wife received alimony. See, e.g., Rice v. Rice, 6 Ind. 100 (1854) (overturning an award of property to the wife in fee simple and granting alimony instead). After passage of the Married Women's Property Acts, many states permitted property awards to the wife, particularly where the wife had brought the property into the marriage in the first place. But, well into the twentieth century the common-law states continued to award the bulk of the property acquired during the marriage to the husband, with alimony used to compensate the wife. See generally M. Glendon, supra note 1, at 52-53; Fineman, supra note 12, at 806-08.

Divorce reformers during the no-fault era emphasized a clean break rather than the
which tied alimony to the husband's duty of support or to the divorce court's finding of fault, were gone.\textsuperscript{149} The new emphasis on transitional support designed to encourage financial independence failed to make adequate provision for women's contributions to childrearing.\textsuperscript{150} The emerging model, which we have elsewhere described as restitution based, justifies spousal support as compensation for the career sacrifices mothers make in the interests of their children or their husband's career.\textsuperscript{151}

The new divorce rules together with the new feminist ideal encourage women to choose both to stay within the labor force and to value childrearing above career pursuits. The new feminist ideal ridicules the very idea of separate spheres without eliminating differences in the assignment of responsibilities.\textsuperscript{152} Men and women are to perform the same jobs (postal worker, parent), but they need not perform them in the same way. In a parallel fashion, the new divorce rules\textsuperscript{153} discourage the traditional exchange of support for domestic services, while reaffirm-

continuing obligations of the marriage and use of the property division rather than maintenance as the primary vehicle for divorce settlements. See Kay, \textit{supra} note 11, at 47. The problem is that for most divorcing couples, the most important asset is the husband's earning power. L. Weitzman, \textit{supra} note 105, at 388.\textsuperscript{149} O'Connell, \textit{supra} note 2, at 492.


Joan Krauskopf has been among the leaders urging consideration of "human capital" in the economic decisions made upon divorce. See Krauskopf, \textit{supra} note 30, at 411; see also Krauskopf, \textit{supra} note 149, at 293. See generally Beninger & Smith, \textit{Career Opportunity Cost: A Factor in Spousal Support Determination}, 16 FAM. L.Q. 201 (1982); O'Connell, \textit{supra} note 2, at 498-506; O'Kelly, \textit{Entitlements to Spousal Support After Divorce}, 61 N.D.L. REV. 225 (1985); Weitzman & Dixon, \textit{The Alimony Myth: Does No-Fault Divorce Make a Difference?}, 14 FAM. L. Q. 141 (1980). For a theory justifying modern spousal support almost exclusively in terms of lost career opportunities or contributions to the other spouse's career or degree, see Ellman, \textit{supra} note 2, at 53-73.

152. See O'Connell, \textit{supra} note 2, at 507-08; Olsen, \textit{supra} note 57. See generally West, \textit{supra} note 90 (on the distinctions between different forms of feminism).

153. Our description of the "new divorce rules" is as overstated as our definition of the "new feminist ideal." Just as there is dissent from Carol Gilligan's celebration of women's "different voice," so is there disagreement among the states as the remaining basis for spousal support, with a number of states retaining consideration of marital misconduct in some form. See Brinig & Carbone, \textit{supra} note 5, at 885 n.125, 886 n.129. The growing trend, however, forbids consideration of fault in the financial allocations made upon divorce. See Kay, \textit{supra} note 11, at 72-74 n.363. In those states that preclude consideration of fault, loss of career opportunities and contributions to the other spouse's career are the most consistently articulated bases for spousal support. See, e.g., Stiff v. Stiff, 395 So. 2d 573, 574 (Fla. Dist. Ct. App. 1981); Jamison v. Churchill Truck Lines, 632 S.W.2d 34, 35-36 (Mo. Ct. App. 1982); Grove, 280 Or. at 351-52, 571 P.2d at 484-85. For a
ing the mother’s primary responsibility for the care of the children and sanctioning career sacrifices, but only if temporary and if made on behalf of the children or the other spouse’s career.154

Translating these developments into the language of legal obligation, the marital contract is dead, not because it is indeterminate, but because society wishes to discourage rather than protect economic reliance on marriage. Restitution, at least on a selective basis, is alive and well because, while married middle-class women are to join their husbands in supplying the labor needs of the postindustrial economy, they are also to remain primarily responsible for the care of their children. Unresolved is the issue whether an as yet unrealized transformation of the workplace together with a symbolic, but financially inadequate, commitment to compensation for middle-class women’s career sacrifices can adequately provide for either the workforce or the domestic needs of the future.

IV. IS DIVORCE REFORM A GOOD IDEA? THEORETICAL PERSPECTIVES ON MARRIAGE AND GENDER

In the first Part of this Article, we explored the role of civil obligation as a framework for analyzing the societal choices implicit in divorce. In the second Part, we explored the broad currents underlying those choices, explaining in more detail the role of divorce rules in facilitating a reallocation of responsibilities between husbands and wives. In this last section, we examine the possibilities for reform, analyzing the alternative agendas in terms of the nature of marriage that the advocates wish to encourage.

summary of the academic writing on this point, see O’Connell, supra note 2, at 500-06; sources cited supra note 151.

154. Existing divorce rules do this by emphasizing transitional awards designed to ease the dependent spouse’s return to the workforce. See sources cited supra note 119. Under support theories that depend on proof of lost career opportunities, the need to establish the career potential sacrificed also will have this effect. See Carbone, supra note 13, at 1497; Ellman, supra note 2, at 78. Partnership proposals that define support obligation in terms of the length of the marriage irrespective of either spouse’s actual gain or loss create an incentive to beat the system, that is, to suffer no more of a career loss than that for which the system provides compensation. See Singer, supra note 114, at 1118.

For more traditional women who fail to develop their earning potential without conferring a direct benefit on their mates, there may be no basis for support in theory at all. For illustrations of this point, see Brinig & Carbone, supra note 5, at 891; Ellman, supra note 2, at 56-58, 74-77. In practice, support is likely to be dependent on need in an amount unrelated to the extent of their actual loss. See Carbone, supra note 13, at 1497-98 (on the importance of retaining need as a residual justification).
In considering the different visions of the family, it is useful to start with what we will call the "traditionalist" view, that is, a defense of the relatively traditional pattern of gender responsibilities that prevailed during the latter part of the nineteenth and first half of the twentieth century. The traditionalists argue that men and women should continue to perform different roles within marriage, that these gender differences make women more economically vulnerable to divorce than men, and that, when divorce is common, women will continue to devote their energies to childrearing and homemaking only if these contributions are protected. The traditionalists favor a contract approach that protects the expectation interest of the non-breaching party in order to encourage specialization within the family and to deter breaches or "shirking" of marital obligations. They therefore decry the elimination of fault from divorce, and favor relatively generous financial settlements for non-breaching wives.

Gary Becker, a University of Chicago economist who pioneered the application of economic analysis to the family, is the traditionalists' leading proponent. He justifies a division of labor between paid employment and domestic work on efficiency grounds. He argues that the theory of comparative advantage demonstrates that specialization will result in greater productivity; that, for biological reasons, women are better suited than men for childrearing; and that women will sacrifice their own earning capacity for household-specific investments, such as childrearing, only if their financial sacrifices are protected by

155. In examining the traditionalist perspective, we have focused primarily on those influenced by Gary Becker and the use of economic analysis because they have received the greatest attention in the legal literature. There are certainly other traditionalist perspectives, however. See, e.g., F. Cancian, Love in America: Gender and Self-Development 122-33 (1987); Gedicks & Hendrix, Democracy, Autonomy and Values: Some Thoughts on Religion and Law in Modern America, 60 S. Cal. L. Rev. 1579 (1987); Hafen, The Family as an Entity, 22 U.C. Davis L. Rev. 865 (1989); Hafen, The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interest, 81 Mich. L. Rev. 463 (1983); see also infra note 169.

156. See G. Becker, supra note 10, at 16; see also Becker, Landes & Michael, supra note 104, at 1143-45; Landes, supra note 10, at 35.

157. For an economic critique of Becker, see P. England & G. Farkas, supra note 84, at 88-89.

158. See, e.g., Landes, supra note 10, at 35; see also Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C.L. Rev. 879 (1988). None of these writers has fully explained what such a divorce system would look like or what definition of breach of marital obligations would apply.
enforceable long-term contracts. On that basis, Becker's associate, Elisabeth Landes, has argued for retention of fault as a basis for divorce awards and for the use of alimony to compensate for the opportunity costs women incur in entering into traditional marriages.

Lloyd Cohen has reached similar conclusions on somewhat different grounds. Citing statistics demonstrating that divorced women enjoy lesser opportunities for remarriage than divorced men, Cohen argues that "women in general are of relatively higher value as wives at younger ages and depreciate much more rapidly than do men." Cohen attributes the differences to different mortality rates, the presence of children, and the nature of sexual attraction. He observes that, because of these factors, gains from the marriage are not distributed symmetrically. Rather, he suggests that

men tend to obtain gains early in the relationship when their own contributions to the marriage are relatively low and that of their wives relatively great. Similarly, later on in the marriage women tend as a general rule to obtain more from the contract than do men. The creation of this long-term imbalance provides the opportunity for strategic behavior whereby one of the parties, generally the man, might find it in his interest to breach the contract unless otherwise constrained.

Cohen concludes that the failure of the legal system to deal with the problem contributes to fewer marriages, fewer middle-class children, and fewer women specializing in homemaking—producing "an inefficient allocation of resources." While Cohen

159. G. BECKER, supra note 10, at 14-37. Indeed, Becker concludes that "one can even say that 'marriage' is defined by a long-term commitment between a man and a woman." Id. at 15.

160. Landes, in particular, argues that an efficient alimony system would penalize the party more at fault in contributing to a divorce. Such a penalty would reduce the incentive of both spouses to cheat within marriage, since the gain from cheating would be reduced by the expected alimony penalty should the marriage dissolve. Hence, penalizing the party more at fault in contributing to a divorce economizes on the costs of enforcing the terms of the marriage and increases the expected gain from investment in the marriage.

Landes, supra note 10, at 48-49; see also Haas, supra note 158, at 889.

161. Cohen, supra note 10, at 278.
162. Id. at 278-87.
163. Id. at 287.
164. Id. at 295-98. Cohen acknowledges that a variety of societal trends have contributed to these changes and that the legal system provides only one, and not necessarily the most effective, of the restraints that have traditionally been used to police marital contracts.
declines to embrace any of the possible solutions he critiques, he acknowledges that the most effective legal response would require a determination of who breached the marriage contract and of the resulting loss to the non-breaching party, in short, the traditional elements of a contract approach.165

Becker and Cohen thus present two different justifications for a contract model of divorce. Becker uses the language of economics to re-invent the separate spheres that were the hallmark of the nineteenth-century ideal of complementarity. He describes gender roles in terms of a choice between either shared responsibilities, or female specialization in the home combined with male specialization in the market. His analysis dictates a contract approach designed to protect expectation because of his depiction of female specialization in terms of a lifetime commitment to homemaking at the expense of career development.166 Frances Olsen has convincingly demonstrated that this dichotomy is a false one.167 The large scale entry of married mothers into the labor force has been marked far more by increasing specialization among women than by any decreasing specialization within the family. Women may devote more of their energies to their careers than to homemaking, while still remaining primarily responsible for the family’s domestic affairs.168 Because

165. Cohen concludes that the “determination of breach is a substantial test but is dwarfed by the difficulties of specifying and quantifying the loss in quasi rents occasioned by a breach of the marriage agreement.” Id. at 303. The problems of quantification are compounded by the fact that Cohen defines the value of marriage not just in terms of lost support, but in terms of the loss of companionship as well. Id. at 268-71.

166. Becker concludes not only that men and women should specialize between home and market, but that “with constant or increasing returns to scale, all members of efficient households must be completely specialized.” G. BECKER, supra note 9, at 20 (emphasis in original).

167. Olsen, supra note 57, at 1563-78.

168. Indeed, if the nineteenth-century shift from farm to factory can be described in terms of increasing specialization among men, the twentieth-century movement of mothers from home to office can be described in terms of increasing specialization among women. Most studies show that as married women have increased their participation in the labor force, they have hired other women to assist them. Their husbands assume only slightly more responsibility for housework than they did when their wives stayed home. See V. FUCHS, supra note 84, at 78, 103; Dowd, supra note 133, at 85 & n.14; Stafford, Backman & Dibona, The Division of Labor Among Cohabitating and Married Couples, 39 J. MARRIAGE & FAM. 43 (1977); Vanek, Time Spent in Housework, 231 Sci. Am. 116, 118 (1974). The large-scale entry of married women into the labor force can better be described not in terms of less specialization within the family, but in terms of greater specialization among women in the provision of domestic activities. Even lower fertility rates among middle-class women, to the extent it means that the workers of tomorrow will be supplied by working-class and immigrant women, can be cited as examples of greater specialization. For a discussion of specialization, see Part III of this Article.
Becker addresses only "the sharp sexual division of labor in all societies between the market and household sectors," he offers no basis for the modern choice between contract—and protection of the standard of living made possible by the other spouse's higher income—and restitution, which compensates only for specific sacrifices made in the interests of the children. Becker's conclusion that specialization within the family is "efficient" begs the question of whether greater specialization among women in the provision of domestic services is not "efficient" as well.

Conversely, Cohen's analysis, at least at the point at which it is farthest from Becker's, provides a justification for a contract approach that is independent of the existence of economic inequality between husbands and wives. In line with Cohen's analysis, even if men and women enjoyed equal career opportunities, and even if they shared child-care responsibilities equally, women would still enjoy fewer opportunities for remarriage than men because of differences in mortality and the nature of sexual attraction. Accordingly, even in an era of economic equality, men would have greater incentives than women to breach their marital obligations, and women would have less of an incentive to enter into marriage if they could not enforce marital


170. For a discussion of restitution, see supra notes 31-32 and infra notes 199-201.

171. For a very different view of the economics underlying the modern division of labor within the family, see P. ENGLAND & G. FARKAS, supra note 84, at 191-94.

To carry the traditionalist approach to its logical extreme requires going beyond Becker's conclusions. The strongest statement of a traditionalist approach would be that: (1) divorce is harmful in itself because of the effect on children; (2) liberalized divorce laws makes divorce more attractive for men while greater economic independence makes divorce more attractive for women and both should be discouraged; (3) a contract approach would facilitate both goals because it would reinforce traditional gender roles and deter breach of marital obligations. For a discussion of the harmful effects of divorce on children, see generally Cochran, The Search for Guidance in Determining the Best Interests of the Child at Divorce, 20 U. RICH. L. REV. 1 (1985); Scott, supra note 2. For the relationship between increased economic independence for women and the divorce rate, see G. BECKER, supra note 10, at 231; P. ENGLAND & G. FARKAS, supra note 84, at 64-65. The conclusion depends, of course, on the benefits to children from intact, although often unhappy, marriages outweighing the benefits from women's increasing economic independence. See also sources cited supra note 155.

172. Cohen agrees with Becker that the failure to enforce marital contracts will discourage investment in children and homemaking. Cohen, supra note 10, at 295-96. However, Cohen does not examine the implications of these developments other than to suggest that they are an "inefficient allocation of resources," and, like Becker, he does not compare the benefits of women's greater workforce participation with the purported loss of efficiency within the family. Id. at 296.

Separating Cohen’s analysis from its economic underpinnings, however, raises other problems with use of the analysis as a justification for a contract approach. First, England and Farkas suggest that “the nature of sexual attraction,” which Cohen describes as eternal and unchanging, may itself be a function of the traditional division of gender roles. They predict that age differences between spouses will decline over time. Second, as Cohen points out, calculating the value of marriage in terms of companionship is problematic at best. So long as marriage was viewed as an economic relationship, the expectation interest in marriage could be valued in terms of the standard of living made possible by the other spouse’s income, that is, in terms of the traditional standard for spousal support. To the extent the marital relationship is characterized as a primarily romantic one, neither specific performance nor damages provide an appropriate remedy. Finally, even if these problems could be overcome, Cohen provides no basis for evaluating the wisdom of such an approach. The “losses” Cohen attributes to the failure to deter male strategic behavior are the losses Becker attributes to decreasing specialization—“underinvestment” in marriage, children, and homemaking. Yet, Cohen, like Becker, makes no attempt to weigh those losses against the benefits from increasing workforce participation by married women. Accordingly, while Cohen’s analysis raises issues of equity between men and women, it is significant in the efficiency terms he addresses only when coupled with Becker’s advocacy of traditional gender roles.

Herma Hill Kay, writing from a “liberal feminist” perspective,

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174. This is another way of saying that the lost opportunity to have married another is more significant for women than for men because men are better able to recoup those lost opportunities through remarriage. Moreover, since the loss in this case is the companionship from the marriage, compensation for lost career opportunities and other restitution style awards would be inadequate. Only a contract measure defined in terms of expectation—as a surrogate for the opportunities lost in the form of other opportunities to marry—would appropriately compensate for this loss. See Brinig & Carbone, supra note 5, at 873-77.

175. England and Farkas argue that the tendency of older men to marry younger women is at least in part a result of the traditional exchange of economic security (better provided by older than younger men) for domestic services (with childbearing and sexual attractiveness more associated with younger than older women). P. ENGLAND & G. FARKAS, supra note 84, at 57.


177. Id. at 271. The traditional response to this dilemma was to deter divorce without any pretext of precisely calculating the value of marriage. See id. at 289-90.
tive,\textsuperscript{178} takes the position most diametrically opposed to that of the Chicago School economists. Concerned about equality rather than efficiency,\textsuperscript{179} Kay argues that women will never be equal with men so long as they continue to "make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce."\textsuperscript{180} Kay further observes that:

since . . . Anglo-American family law has traditionally reflected the social division of function by sex within marriage, it will be necessary to withdraw existing legal supports for that arrangement as a cultural norm. No sweeping new legal reforms of marriage and divorce will be required, however, to achieve this end. It will be enough, I think, to continue the present trend begun in the nineteenth century toward the emancipation of married women, and implemented more recently by gender-neutral family laws, as well as the current emphasis on sharing principles in marital property law.\textsuperscript{181}

Kay concludes that the law, far from encouraging specialization in gender roles, should discourage it. She agrees with Becker and Cohen that the most effective way to encourage women's economic independence is to fail to compensate choices that lead to economic marginalization. She therefore opposes the reintroduction of fault in any form, and by implication, contract-based awards, both because she wishes to discourage women from pursuing the traditional homemaking role and because of concern that even if fault-based awards produced higher settlements for women, that outcome might not be "worth the cost of perpetuating the blackmail and other abuses that accompanied the fault system."\textsuperscript{182} Kay is equivocal on the subject of restitution.

\textsuperscript{178} The terminology, as we explained \textit{supra} note 138, is borrowed from Robin West.
\textsuperscript{179} Kay would almost certainly reject Becker's definition of efficiency as well. While Kay, drawing on the work of Kathleen Gough, observes that the "lengthy period of dependence of the human infant serves as the basis for an efficient division of labor within the family by function, if not by sex, even today," she concludes that a "strategy for childrearing that will bind both fathers and mothers to the nurturance of the child seems better suited to its growth and development under modern conditions in which the child's natal family is less frequently the unit in which it reaches maturity." Kay, \textit{supra} note 11, at 82-84 (footnotes omitted).
\textsuperscript{180} \textit{Id.} at 80.
\textsuperscript{181} \textit{Id.} at 86.
\textsuperscript{182} \textit{Id.} at 76-77. Kay also questions whether fault-based awards would in fact be higher. The data she cites, however, compares awards in the states that continue to list fault as a potential ground for divorce with states that have abolished fault as a consideration in granting divorces. \textit{Id.} at 67. Kay is certainly correct that the adoption of
tion-based awards, favoring compensation for the lost career opportunities of older dependent homemakers while opposing support for women who make “economically disabling” choices in the future.\textsuperscript{183} Identifying child-care responsibilities as the major source of continued sexual inequality, Kay believes that men should be encouraged to share responsibility for the rearing of their children, receiving joint custody upon divorce and remaining emotionally and financially involved thereafter. She believes that if this is accomplished, the “large disparity between men’s and women’s household standard of living that Weitzman discovered . . . should be greatly reduced” and “the trend begun in California toward eliminating fault from all aspects of marital dissolution can continue to work itself out without the risk of financial harm to dependent women and children.”\textsuperscript{184}

Taken to its logical conclusion, Kay’s analysis suggests that the appropriate response to women’s dependence on their husbands’ incomes is less, not more, financial support upon divorce. In order to dismantle the gendered division of labor within the family, Kay argues that the marital bargain, at least the traditional one that exchanges male support for female services, should not be enforceable.\textsuperscript{185} Her analysis further implies that compensation for lost career opportunities, at least for modern women who make choices that are “economically disabling,”

\textsuperscript{183} See Kay, supra note 11, at 79-80; see also Kay, supra note 96, at 315-16.
\textsuperscript{184} Kay, supra note 11, at 86-87.
\textsuperscript{185} To Kay, therefore, fault is irrelevant.
should also be limited.\textsuperscript{186} In states that preclude consideration of fault, lost career opportunities are emerging as the primary basis for spousal support.\textsuperscript{187} Compensation for those lost opportunities, however, sanctions the very choices of which Kay so strongly disapproves: namely, decisions by modern women to forego substantial career opportunities in order to contribute to the care of their children or their husband's careers.\textsuperscript{188} Kay issues no call for a reduction in divorce awards, but such a call is unnecessary. Her endorsement, albeit qualified,\textsuperscript{189} of the present divorce system, which Lenore Weitzman depicts as a system of transitional awards that falls far short of compensating the

\textsuperscript{186} See Kay, supra note 11, at 80.

\textsuperscript{187} See Ellman, supra note 2, at 53-65; Krauskopf, supra note 150, at 265-68; Krauskopf, supra note 13, at 265; O'Kelly, supra note 151, at 228-30; see also Brinig & Carbone, supra note 5, at 877-82, 887-89.

\textsuperscript{188} As we noted above, Kay is equivocal as to the extent to which she supports compensation for lost career opportunities. She specifically embraces such an analysis only for the two groups in which it is least at issue: (1) the older wife, divorced after a lengthy marriage in which she forewent "her own economic self-development in order to devote herself to the role of a full-time homemaker and mother . . . in the context of strong cultural expectations that such choices were proper ones for married women," namely, women who, because of the pervasive sex discrimination of the time, enjoyed limited career prospects in the first place; and, (2) the younger spouse, contributing to the mate's acquisition of a professional degree, where lost career opportunities may be one aspect of a larger contribution. Kay, supra note 96, at 315-16; see also Brinig & Carbone, supra note 5, at 873-74, 881-82 n.107.

Lost career opportunity analysis carries its greatest force, however, when applied to modern women who forego promising career prospects to care for their children. See id. at 877-80. Yet, Kay states that she does "not believe that we should encourage future couples entering marriages to make choices that will be economically disabling for women." Kay, supra note 11, at 80. Presumably, therefore, while Kay believes it is necessary to "alleviate the situation of those women who are trapped in circumstances neither they nor their husbands anticipated," she sees no similar need to relieve those who enjoyed other choices. Id. at 79-80. As a practical matter, the more promising the career prospects foregone, the less Kay is inclined to protect them.

Within this context, there is an important distinction between the permanent subordination of the wife's career to the husband's (for example, a doctor's wife who foregoes paid employment after her husband finishes his residency) and temporary sacrifices made to facilitate the husband's advancement (for example, a doctor's wife who postpones graduate education in order to support the family while the husband is in medical school). While the permanent subordination of the wife's career to the husband's will render her economically dependent, temporary sacrifices, made on behalf of husband or wife, may be quite consistent with economic equality. Divorce awards designed to compensate for accidents of timing, for example when the divorce occurs after she has contributed to his medical degree but before she has reaped any of the anticipated benefits, need not perpetuate a traditional division of gender roles, particularly when the award is to be used to permit the wife to proceed with her interrupted education or career development. For Kay's discussion of these types of awards, see Kay, supra note 96, at 315.

\textsuperscript{189} For Kay's proposals for reform, see Kay, supra note 96, at 310-19.
career sacrifices modern women are continuing to make, has much the same effect.

Kay's central premise is that in order to achieve equality, men and women need to make the same choices. Women need to join men in the pursuit of careers; men need to join women in caring for their children. "Cultural feminists" or "feminists of difference," influenced by the ideology of Carol Gilligan and the sociology of Lenore Weitzman, question whether women should make the same decisions as men and oppose laws that penalize women's different choices. Mary O'Connell, employing the categories developed by Martha Fineman, poses the challenge directly:

[The] issue is this: the vast majority of American women live what can only be fairly described as a feminine lifestyle. They undertake the major—and sometimes sole—responsibility for

190. Kay describes an important objective of the existing divorce system as permitting the couple to rebuild their own lives after divorce. She observes:

Divorce, after all, is a legal declaration that frees both spouses to seek new relationships. The financial consequences of divorce may have a more severe immediate impact on women than on men, but over time women are more likely to experience an improved quality of life following divorce than are men. ... The financial settlement should have as its goal not only security for children, but also opportunity for growth for their parents.

Id. at 318.

191. See Kay, supra note 11, at 85; Kay, supra note 96, at 318. See generally L. Weitzman, supra note 105. Kay acknowledges that "as Weitzman has shown in such dramatic detail, women and children have borne the brunt of the transition that took place in California's legal regulation of the family between 1970 and 1987." Kay, supra note 96, at 319. While Kay describes this as "unfortunate and unnecessary," presumably because she believes traditional homemakers should have been treated more generously under existing law, some transitional impact is inevitable under Kay's analysis. If women are to be persuaded to make different choices by "withdraw[ing] existing legal supports for that arrangement [the social division of function by sex within marriage]," then presumably they will be persuaded by the adverse economic consequences that they suffer or that they see other women suffering. Kay, supra note 11, at 85.

192. Joan Williams observes:

In the 1980's two phenomena have shifted feminists' attention from assimilationists' focus on how individual women are like men to a focus on gender differences, on how women as a group differ from men as a group. The first is the feminization of poverty, which dramatizes the chronic and increasing economic vulnerability of women. Feminists now realize that the assimilationists' traditional focus on gender-neutrality may have rendered women more vulnerable to certain gender-related disabilities that have important economic consequences. The second phenomenon that plays a central role in the current feminist imagination is that of career women "choosing" to abandon or subordinate their careers so they can spend more time with their small children. These phenomena highlight the fact that deep-seated social differences continue to encourage men and women to make different choices with respect to work and family.

Williams, supra note 57, at 798-99 (footnotes omitted).
rearing children, and interrupt or scale down their participation in the paid labor force in order to do so. At divorce, however, this lifestyle choice is either minimized (equality theory) or treated as deviant (victim theory). A woman is either told that she must accept the consequences of her choice and go on, or her husband is ordered to "repair" part of the "damage" his wife has suffered, so that she can be fully self-supporting (that is, function like a man) in the future.193

O'Connell further notes:

If our model for the correct post divorce result is equal lifestyles, and if we begin to recognize that it is not only years absent from the labor force but also the presence of children which compromise one's ability to earn a living at paid work, we may begin to move toward a model which insists that the parent who devotes herself to childrearing must not end up in a worse position than the one who devotes himself to the labor force. . . . We need a new model, a model which does not treat the uncompensated rearing of children as aberrant, a model which sees women as women, but does not rush either to protect or to penalize them on that basis.194

O'Connell reaches the "unpopular conclusion" that women will continue to be more likely than men to compromise labor force participation in order to rear their children and that, rather than dissuade them, the childrearing role must be made "less economically perilous."195 To do so, O'Connell advocates "an augmented role for alimony in the middle-class divorces of the future."196

While O'Connell may disagree with Kay about the desired extent of women's contributions to childrearing, she shares her rejection of a fault standard as a way to secure greater economic security for women. O'Connell, like other feminists of difference, wishes to encourage greater appreciation for "feminine" values without a return to economic dependence on men or marriage. The traditional marital exchange of lifelong support for lifelong services locked women into a relationship in which they were dependent on their husbands' income to maintain their standard of living. Fault served to restrain men from leaving or

193. O'Connell, supra note 2, at 500.
194. Id. at 507-08 (footnotes omitted).
195. Id. at 507.
196. Id. at 506. O'Connell, like most modern writers, is generally critical of what she terms the "make whole" model that treats the wife as "an innocent victim deserving of protection and recompense" without specifically considering the role breach of marital obligations could play as part of a modern justification for expanded alimony. Id. at 489.
flouting their marital obligations too egregiously, but it also left women with little bargaining power within the relationship.\textsuperscript{197} Women dissatisfied with their mates or their mates' behavior could not leave—or effectively threaten to leave—without facing financial ruin.\textsuperscript{198}

To be effective in achieving O'Connell's objectives, any new system must encourage women's economic independence without penalizing their devotion to their children. O'Connell herself sets forth no specific suggestions, but other writers propose two broad categories of reform. The first, which we will call restitution based, would formalize and expand the existing trend toward basing divorce awards on the gains and losses of the marriage. This approach, pioneered by Joan Krauskopf\textsuperscript{199} and recently set forth in a different form by Ira Ellman,\textsuperscript{200} declares that compensation is due any time a marriage ends with one spouse retaining a benefit at the other spouse's expense. If, for example, the wife accepts a lower paying job to be able to spend more time with the children, the couple has, in effect, decided to finance their childrearing efforts through the wife's foregone income. At divorce, both parents will retain the benefit of having had children or of having raised them in a particular way, but only the wife will bear the cost. Similarly, if one spouse finances the other's medical education and the divorce occurs

\textsuperscript{197} See generally P. ENGLAND & G. FARKAS, supra note 84.
\textsuperscript{198} Victor Fuchs observes:

Consider a couple who are bargaining (explicitly or implicitly) over how the household's income will be spent and how household chores will be allocated. Game theory assumes that, other things being held constant, the strength of each participant in the bargaining situation will depend on how well off each would be if they fail to reach agreement—in this case, if they divorce. (Game theory is a theoretical approach to interactive decision making, used in economics to analyze situations where prices and quantities are the outcome of bargaining by individual participants, rather than the automatic result of a competitive market.) The stronger the individual's situation outside marriage, the stronger his or her bargaining position within marriage. . . . When her alternative as a divorced woman is better, her bargaining position—and her well-being—as a married woman is also improved.

V. FUCHS, supra note 84, at 71 (emphasis in original).
\textsuperscript{199} Krauskopf's work was heavily influenced by the economics-of-the-family literature. See Krauskopf, supra note 30, at 386; see also Krauskopf, supra note 150, at 299; Krauskopf, supra note 13, at 260-68.
\textsuperscript{200} This is not to say that Krauskopf would necessarily agree with Ellman's proposals, only that they are both examples of a restitution approach. See Krauskopf, supra note 13, at 273 n.72, 274 n.76. Moreover, Ellman advances a justification for his proposals very similar to Becker's without recognizing either the restitution nature of his proposals or the fact that they cannot advance the interests he identifies. Compare Becker, supra note 104, at 1151-77 with Ellman, supra note 2, at 24-28, 40-53.
shortly after graduation, the doctor will reap the entire benefit of an investment the couple jointly undertook and paid for. In both cases, an adjustment will be due that goes beyond more conventional provisions for property division or spousal support. Krauskopf identifies a strong trend toward the adoption

201. There is a complex relationship between the loss foregone and the resulting gain described in the economic literature on restitution. Basically, we take the position that the loss may be compensated on a restitution rather than a reliance basis so long as it corresponds to a resulting gain. Economists argue that there will be such a correspondence to the extent that we can assume that a rational couple, in choosing to have the mother care for the children, values the benefit from the mother's services at least as much as the foregone income. While the benefit from the children and the mother's particular childrearing practices will always be intangible, the income foregone becomes a surrogate measure of the gain once we assume that the benefit must be at least as great as the loss. Accordingly, the principle at the core of these proposals is compensation for the enrichment even though much of the discussion is cast in terms of the loss. The literature that attempts to link marital roles and divorce reform is discussed in Part III of this Article. See sources cited supra note 1.

202. The distinction between property divisions and spousal support has been blurred by the conflation of what should be two separate questions: (1) whose property is it? and (2) for what purposes shall the property be used? At common law, the courts determined property ownership in accordance with title or with the spouse's respective financial contributions. Alimony served as a continuation of the husband's duty of support and as a liquidated form of property distribution in a system in which the husband was awarded the bulk, indeed often all, of the family property. See Johnston, supra note 72, at 1089 & n.141; see also infra note 211.

Contemporaneously with the enactment of no-fault grounds for divorce, divorce reformers fought for greater recognition of homemakers' contributions. As Herma Hill Kay explains, the reformers argued that the courts should start with a presumption favoring an equal division of the property in recognition of the homemaker's independent economic contribution to the acquisition of the family property (that is, a theory that says the property belongs to both of them because they equally contributed to its acquisition), not as compensation for the services rendered (that is, not a theory that the property is really his because he paid for it, but that he should give some to her in compensation for the services she performed for his benefit during the marriage). Kay, supra note 11, at 50-51. The reformers also argued that property, rather than alimony, should be used whenever possible to address a dependent spouse's financial need. Id. at 47. In theory, such a practice requires the two determinations described above: (1) whose property is it? (presuming a 50/50 division of the property acquired during the marriage), and (2) will the divorce (including the property division) leave one of the spouses in need? If so, the courts should adjust the division of property beyond a 50/50 split to provide for that need or, if there is insufficient property to do so, award maintenance. Few observers believe that the property division has ever been handled in this matter, and most also believe that a need standard, at least one designed to insure only that divorced spouses stay off the welfare rolls, is inadequate. See Krauskopf, supra note 13, at 273-75. Reynolds, in particular, argues that property division has rarely been used to address need, and that it ordinarily reflects contribution alone. Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 FORDHAM L. REV. 827, 840-41 (1988); cf. Krauskopf, supra note 13, at 274 (arguing that courts probably do consider need, but value contributions unequally).

Dissatisfaction with the need standard and with the paucity of property accumulated in most marriages has prompted greater interest in the concept of lost career opportunities
of this rationale as the primary purpose of support awards.\textsuperscript{203} O'Connell, while viewing these proposals as improvements over the earlier reforms, is nonetheless dissatisfied because restitution awards still place a premium on labor market investments rather than domestic investments.\textsuperscript{204} She observes that such pro-

as a justification for divorce awards. \textit{Id.} at 263. Such awards may take the form of either property settlements or support payments, further confusing the distinction between the two. \textit{See, e.g.}, \textit{id.} at 253; H. Clark, \textit{supra} note 47, at 449-52.

Keeping the two determinations identified above separate should help clarify matters. Consider the following hypothetical:

Husband and wife, both engineers, forego outside income during the marriage to operate a high tech start up firm. Both contribute equally to the initial capital needed to start the business and the couple have no other substantial assets. The husband is the CEO and acquires valuable managerial experience. The wife keeps the books, partly because it gives her greater flexibility to care for the couples' children and partly because it is the work most needed at the time. At the divorce, the couple sells the business. The husband finds a managerial job with another company while the wife's prospects are limited to bookkeeping positions less lucrative than either the engineering position she held before the marriage or her husband's job opportunities.

Ellman, \textit{supra} note 2, at 63 n.160. Viewed as a property matter, the spouses' respective interests in the proceeds from the sale should be valued equally because both parties contributed to the venture's success. While, on a market basis, the husband's managerial services would be valued more highly than his wife's bookkeeping efforts, her contributions to the firm should be combined with her domestic contributions (that is, he could combine his managerial contributions with parenthood only because of the greater responsibility she assumed for the children). Given the impossibility of assigning a market value to her domestic responsibilities, the parties' respective contributions should be presumed to be equal unless there is strong evidence to the contrary. After the proceeds of the sale are split, however, further consideration should be given to the fact that the division of labor within the marriage gave the husband both children and enhanced earning capacity while it left the wife with children and a reduced earning potential. The husband should owe the wife restitution for that additional benefit. The restitution award could take the form of a support order or an unequal division of the proceeds from the sale of the business.

Suppose, however, that instead of selling the business, the husband kept it and operated it as his sole source of income. At divorce, the wife, employing the same logic used above, would be entitled to half the value of the business. So long as the business was valued in a way that reflected half of the present value of the earning stream that the business was expected to generate (this is a conventional economic definition of value), the wife would be entitled to no further compensation even though her future income will be substantially less than her husband's. In this second example, any additional compensation for the wife's lost earning capacity would be double counting because the enhanced income the wife's sacrifices made possible is already taken into account in the valuation of the business. For a discussion of the restitution basis of these awards, see Carbone, \textit{supra} note 13, at 1477-80, 1484 n.89.


204. O'Connell also criticizes these proposals because they employ the victim imagery she deplores. O'Connell, \textit{supra} note 2, at 501-03. The victim imagery, the characterization of these proposals as compensation for women's inability to realize the financial benefits of a male lifestyle, however, results at least in part from confusion between reliance and restitution. To the extent such proposals are intended to redress lost career opportunities, with or without a corresponding benefit to the other spouse, the
posals reserve their greatest benefits for women who abandon established careers\textsuperscript{205} and concludes:

The theory seems incapable of capturing the subtler effects of the adoption of a feminine lifestyle. It does not, for example, address the fact that the wife may well have chosen her earlier work with an eye to interrupted or reduced labor force participation during her childrearing years. Flexibility may have outweighed remuneration or potential for advancement as a value to be maximized in choosing a job. No formulation of human capital theory captures the impact of this choice. Yet, by ignoring it, the model is, in effect, applying a masculine template to a feminine lifestyle, the contours of which it does not even begin to discern.\textsuperscript{206}

While O'Connell's feminine lifestyle does not involve the lifelong separation of home and market, it does embrace decisions, with lifelong consequences, to value family above individual advancement. O'Connell insists on protection not just for well-educated women who delay childrearing long enough to establish careers, but for women who marry young and invest less in their education and in the acquisition of marketable skills than in their search for a suitable mate. She objects not to these choices, but to the economic powerlessness that comes with them.\textsuperscript{207}

O'Connell accordingly sees more promise in the recent efforts to use a partnership model to equalize post-divorce standards of living.\textsuperscript{208} Jana Singer, writing after O'Connell, proposes

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\textsuperscript{205} Ellman's proposals are an excellent case in point. He would base alimony awards primarily on a spouse's ability to demonstrate lost earning potential. See Ellman, supra note 2, at 78-80. Other writers who favor basing awards on lost earning capacity would nonetheless allow a more relaxed burden of proof. See Carbone, supra note 13, at 1497-99. To the extent that such awards compensate women for premarital decisions to forego college or to become a school teacher rather than a machinist because of the more flexible hours, however, it is harder to establish a restitution basis for such compensation. See supra notes 29 & 199.

\textsuperscript{206} O'Connell, supra note 2, at 503.

\textsuperscript{207} Id. at 507. Radical feminists are likely to agree with much of O'Connell's critique without necessarily concluding that women, freed from a patriarchal structure, would continue to make the choices in the same way. See, e.g., C. MacKINNON, supra note 42, at 220-22.

\textsuperscript{208} O'Connell, supra note 2, at 507-08.
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.209 Singer's justification for these proposals, like the earlier use of property division to address need,210 conflates two separate determinations.211 First, whose income is it? In invoking the concept of economic partnership, Singer suggests that the post-divorce disparity in earning power is a reflection of the couple's investment decisions and that the higher earning spouse's income is at least to some degree theirs, not just his or hers.212 Second, for what purposes will income adjustments be made? Singer emphasizes the ability of her proposal to provide compensation for lost career opportunities, to advance the purposes of rehabilitative alimony, and to address need without explaining the relationship between these purposes and the determination of whose income it is in the first place.213 The partnership

209. Singer, supra note 114, at 1117-18 (footnote omitted); see also Rutherford, supra note 29, at 577-84; Sugarman, Dividing Financial Interests Upon Divorce, in DIVORCE REFORM AT THE CROSSROADS 130-65 (S. Sugarman & H. Kay eds. 1990). Although Singer suggests this standard as "a starting point," she strongly argues for limiting judicial discretion. Singer, supra note 114, at 1119.


211. Joan Krauskopf, in her thoughtful examination of the distinctions between property divisions and spousal support, describes two separate adjustments to be made: "1) sharing the asset accumulation to which both contributed and 2) sharing at least the loss resulting from the transfer of earning capacity." Krauskopf, supra note 13, at 273.

212. Singer, supra note 114, at 1117-18. Indeed, some commentators have argued for expanded definitions of property to include career assets, but, with the exception of New York, such efforts have largely failed. For a review of these developments, see Krauskopf, supra note 13, at 260-61. In discussing proposals similar to Singer's, Sugarman discusses the comingling of the parties' income-producing interests rather than the need to adjust for lost career opportunities as the basis for the proposals. Sugarman, supra note 209. Rutherford, in proposing what she terms "income sharing," rejects the idea of adjustment for prior contributions, stating instead

Income sharing is not based on need, pre-divorce standard of living, prior contributions or fault. Instead, it represents a conscious effort to achieve equality between spouses who have divided their labors during marriage. If spouses have not divided the labor, either because they were not married long enough, or because they did not have children, then income sharing should not apply.

Rutherford, supra note 29, at 578.

213. Singer, supra note 114, at 1118-19. If a partnership proposal were to address these issues directly, it would resemble the restitution model described above in the most stereotypical cases. Consider the following example:

Two M.B.A.'s marry shortly after graduation from business schools and have
model, in short, embraces the existing justifications for expanded property divisions and spousal support, while eschewing any effort to achieve precise calculations.214

While the justifications advanced for the partnership model are conventional ones, the symbolic consequences are quite different from those of the other models. Partnership proponents will not satisfy the traditionalists because they refuse to embrace what Becker calls "the sharp sexual division of labor in all societies between the market and the household sectors" or the lifetime commitment necessary, in Becker's view, to make that division possible.215 At the same time, the partnership approach

comparable jobs during the early years of their marriage. He is soon working 60 hour weeks in positions that take him up the corporate ladder. She scales back her hours after the children are born, taking less demanding, parttime positions that offer little promise of advancement. They divorce after 15 years of marriage. He is making $200,000 a year. She is making $60,000 and has custody of the children.

In this case, it is reasonable to assume that most of the income disparity is explained by her childrearing responsibilities. Accordingly, the result is the same whether the case is analyzed in terms of her lost earning potential (she would be making $200,000 a year but for the children); his gain (he could have his 60-hour-a-week executive position and well-cared for children only because of her efforts); or a sharing of post-divorce income. For an examination of the results in less stereotypical cases, see infra note 214.

214. Precisely for this reason, the most troubling consequences of a partnership approach are for those couples who do not conform to either the traditional breadwinner/homemaker stereotype or the more modern model of the full-time worker/part-time parent married to the part-time worker/full-time parent. Consider the partnership model's division of income in the following cases:

1. Construction worker marries beautician and they have two children. He, the construction worker, drinks heavily, works sporadically, and verbally abuses his wife and children. She supports the family and assumes full responsibility for the house and the children. After ten years of marriage, she makes $25,000 a year and he makes $12,000.

2. Two college students marry upon graduation. She defers her plans to attend medical school so that she can support his medical education. They divorce four years later. At the time of the divorce, he has just begun a three year residency paying $20,000 a year. She is making $25,000 per year. His income following the residency will exceed $100,000 per year.

3. Two skilled machinists earning comparable incomes marry. She is bored by the work and becomes an art instructor. He helps finance her education and the acquisition of the materials she needs to set up her business. They have no children and they equally share cooking and cleaning responsibilities. They divorce after eight years of marriage. At that time, he is making $40,000 a year and she is making $20,000 per year.

4. Movie director making several million dollars a year marries aspiring actress with income in six figures. They are married for twelve years and have no children. Her career has been enhanced by her relationship to him and at the time of the divorce she averages a million a year. His career is at its height. He made $20 million in the year preceding the divorce and expects to make comparable amounts over the next few years. Their community property exceeds $80 million with most of it attributable to his directing success.

215. See G. BECKER, supra note 10, at 21. These proposals, however, would
eschews the liberals' insistence that women be encouraged to look to their own careers rather than to their husbands as the primary source of financial security. Rather, because these models reserve their greatest benefits for the marriages with the greatest income disparity and do so independently of any actual contribution made, the proposals validate not just decisions to value children over individual advancement, but marriage over career, and the search for a financially attractive mate over investment in one's own earning capacity. Partnership models, in their effort to make women's choices less disabling, also make the traditional role more comfortable.

constitute a greater deterrent to divorce than current law. Higher earning spouses could not extinguish their marital obligations as readily as under existing law. Lower earning spouses, while granted greater financial security than they enjoy now, would still be foregoing, if they decided to seek a divorce, the greater access to their spouse's income that a longer marriage would insure.

216. Reconsider the M.B.A. example given supra note 213. Suppose that instead of marrying another M.B.A., the husband marries a 20-year-old high school graduate who has been working as a secretary and who becomes a full-time homemaker after the children are born. After 15 years of marriage, he is making $200,000 a year, and she can get another secretarial job at $18,000 per year. Under the partnership analysis, the court would divide their combined incomes, and they would receive $109,000 a year each for the next seven and a half years.

Under a narrow restitution approach, the court would measure the benefit conferred on the husband (the ability to have children and a career dependent on being able to work 60 hours a week) by the cost of acquiring it (her foregone earning potential). That cost would be determined in accordance with whatever opportunities she had at the time the decision was made, namely, her earning potential as a secretary, unless she can demonstrate that she was about to start college or otherwise switch jobs.

Under a broader lost-career-opportunities approach, the court would consider not only the job she held at the time she became pregnant, but the career choices she might have made had she not looked to marriage rather than to her own earnings for her financial well-being. Since there is no way to determine what she might have done in those circumstances, some courts assume that, but for her reliance on marriage, her financial position would have been comparable to her husband's. See, e.g., In re Marriage of Yantis, 52 Or. App. 825, 629 P.2d 883 (1981). Using this approach, the partnership model and a lost-career-opportunities model would produce similar results.

These results, however, raise two questions applicable to either model. First, to what extent should the husband be responsible for decisions his wife made before they ever met? The wife's decision not to attend college may have had a greater impact on her earning potential than her decision to leave her secretarial position. Second, to the extent these models will encourage women to continue to think in terms of marriage rather than career, is there a societal interest in encouraging them to do so?

217. Ironically, Singer justifies this model on the ground that it insists "on substantial post-divorce sharing of income without invoking the harmful stereotypes that underlie traditional alimony doctrine." She then argues that the proposal is appropriate because it "affirms the social value of childrearing and other domestic labor" and "equalize[s] the financial consequences of these gender-linked marital investment decisions." Singer, supra note 114, at 1118.
V. CONCLUSION

A. Breaking the Impasse: The Role of Children

Both Herma Hill Kay and Mary O'Connell discuss legal proposals that, at most, involve incremental changes in the family order. Underlying their respective visions, however, are potentially dramatic implications for the nature of human relationships.

The central premise of the liberal feminist critique of the relationships between men and women is that women’s childrearing role stands in the way of full equality.\textsuperscript{218} Victor Fuchs argues, however, that it is not the fact that women raise children, but the fact “that, on average, women have a stronger demand for children than men do, and have more concern for children after they are born,” that creates the disadvantage.\textsuperscript{219} Fuchs observes:

Suppose women were better than men at producing and caring for children but had no particular desire to do so, while it was the men who wanted the children and cared more about their welfare. We would probably still see the same division of labor we see now, but men would have to pay dearly for women’s services. The present hierarchy of power would be reversed.\textsuperscript{220}

Instead, women, on average, are more willing than men to sacrifice their own well-being to have children and to protect the interests of their children.\textsuperscript{221} The result is that men individually and society generally are able to have children at a lower price than the price they would have to pay if women’s preferences were the same as men’s.

The liberal feminist strategy of withdrawing support for the maternal childrearing role is aimed at changing these preferences.\textsuperscript{222} While the liberal ideal may be shared parenting,\textsuperscript{223} the immediate effect of higher divorce rates and low divorce awards is to convince women that they make sacrifices for their children at their own peril. Later marriages and fewer middle-class chil-

\textsuperscript{218} See, e.g., Kay, supra note 11, at 80-81.

\textsuperscript{219} V. Fuchs, supra note 84, at 68. Women also assume greater responsibility for the care of other relatives. See, e.g., Trading Places: The Daughter Track, NEWSWEEK, July 16, 1990, at 48.

\textsuperscript{220} V. Fuchs, supra note 84, at 68.

\textsuperscript{221} Id. at 68-73; Weiss & Willis, Children As Collective Goods in Divorce Settlements, 3 J. LAB. ECON. 268, 276 (1985).

\textsuperscript{222} Kay, supra note 11, at 85.

\textsuperscript{223} Id. at 80-85.
dren are predictable consequences of that strategy.\(^ {224}\) When combined with the Reagan-era cutbacks in the resources available for poorer families, the result is a dramatically increasing percentage of American children raised in poverty, with a concomitant effect on their performance and well-being.\(^ {225}\) Yet all of the demographic data indicate that the demand for relatively well-educated workers will be increasing in the future.\(^ {226}\)

If the result of this strategy is to persuade women to value children less, then men who want children of their own may have to give up more to have them. Or there may simply be fewer children. At that point, society generally should have a greater interest in encouraging investment in children, mandating more generous parental leave, subsidizing child care, providing tax breaks, increasing educational resources, and otherwise assisting childcare providers.\(^ {227}\) Or the United States could meet its labor force demands by selectively increasing immigration.

Whichver result occurs, the price for children will be higher. But women will no longer pay such a disproportionate share of the price. In the interim, however, women and their children will bear the major burden of the transition.\(^ {228}\) For the liberal strategy to succeed, the disparity between men and women's preferences for children must change. They are more likely to change if society withdraws its support for the traditional maternal role. The economic consequences Lenore Weitzman chronicles are therefore a prerequisite for liberal success.\(^ {229}\)

\(^{224}\) See discussion supra notes 130-31.

\(^{225}\) Fuchs observes: "The proportion of children living in poverty is almost double that of adults: 20 percent versus 11 percent in 1986. This is an extraordinary situation; in 1960 and 1970 the poverty rate for children was only one-third above that of adults." V. Fuchs, supra note 84, at 107. Fuchs also cites studies demonstrating that performance on scholastic aptitude tests declined markedly in the 1960s and 1970s, childhood obesity rose, and the suicide rate for teenagers was two and one-half times as high as it was twenty years earlier. Id. at 104.


\(^{227}\) As Victor Fuchs points out, such policies would benefit women more than men so long as women cared more about children than men did. V. Fuchs, supra note 84, at 71-72.

\(^{228}\) Herma Hill Kay recognizes the problems and voices her greatest support for older wives who chose to devote themselves "to the role of full-time homemaker and mother... in the context of strong cultural expectations that such choices were proper ones for married women." Kay, supra note 96, at 316. Kay would not, however, provide such support for modern women who make the same choices.

\(^{229}\) See L. Weitzman, supra note 119, at 164; Weitzman, supra note 119, at 1221-31. This is not to say that Herma Hill Kay or other liberal feminists embrace the
Cultural feminists, however much they may agree that the greater value women place on children is the source of women’s lack of power, applaud such values. They are unwilling to encourage women to value children less or to pay a penalty for refusing to do so. For cultural feminists, therefore, greater protection for the childrearing role is essential. The challenge for these feminists is to persuade society to do so without perpetuating women’s dependence, economic or psychological, on men.

These divisions in feminist theory, an updated version of the dichotomy Martha Fineman identified between woman as equal and woman as victim, are unnecessarily accentuated by the exclusive focus on divorcing husbands and wives. The historical source of protection for childrearing has been marriages that lock women into unequal relationships with their husbands. To the extent that modern proposals continue to tie support for the childrearing role to the husband’s income and the length of the marriage, they risk perpetuating women’s dependence. A more radical strategy may be a child-centered approach that separates support for childrearing from marital roles and insists on greater recognition of both the societal and the individual responsibility for children. Such a strategy would

conclusions in this analysis. We mean to say only that such conclusions are implicit in this line of analysis. Individual writers may disagree with all or part of these proposals.

230. See, e.g., O’Connell, supra note 2, at 507-08.
231. See B. FRIEDAN, supra note 137, at 98.
232. Radical feminists are likely to agree with liberal feminists in identifying differences, including differences in the childrearing role, as a source of disparities in power, and they are likely to agree with the cultural feminists in seeking to change those power relationships without necessarily making women more like men. Radical feminists are likely, however, to attribute less importance to motherhood and to give higher priority to redressing the power relationship than are the cultural feminists. For a discussion of the differences in perspective, see West, supra note 90, at 13-15.
233. This is a sin of which we too are guilty. See Brinig & Carbone, supra note 5, at 857 n.4.
234. See G. BECKER, supra note 10, at 14-15; V. FUCHS, supra note 84, at 71. Under a fault-based system, a traditional homemaker’s principal source of support was her husband’s income, and if she chose to leave an unhappy marriage without sufficiently egregious conduct on the part of her mate, she could be deprived of all support. See Brinig & Carbone, supra note 5, at 886-87 (discussing the change in West Virginia law on this point).
235. They do so partly because, as we noted above, they continue to validate the choice of marital partner as a source of financial security and partly because of the potential effect on bargaining power within the marriage. Under Singer’s partnership model, for example, the higher earning spouse would have an incentive to terminate the marriage earlier rather than later, while the lower earning spouse would have a financial incentive to stay in the marriage as long as possible.
emphasize: (1) increased societal support for day care, parental leave, education, nutrition, medical care, and other subsidies that directly benefit children and their primary caretakers;\textsuperscript{236} (2) allocation of property and post-divorce income for the children's benefit before the spouse's individual claims are considered;\textsuperscript{237} and (3) recognition of the parents' continuing responsibility for, and benefit from, children as a primary basis for divorce adjustments.\textsuperscript{238} While these principles can be combined with other approaches,\textsuperscript{239} and while they cannot and should not provide the exclusive basis for the financial allocations made upon divorce,\textsuperscript{240} we believe that emphasis on children and childrearing

\textsuperscript{236} See V. Fuchs, supra note 84, at 72.

\textsuperscript{237} See Glendon, Family Law Reform in the 1980's, 44 LA. L. REV. 1553, 1555-65 (1984). See also Rutherford's proposals which advocate income sharing on a per capita basis in order to take children's interests into account. Rutherford, supra note 29, at 578. Better enforcement of such obligations is also essential.

\textsuperscript{238} In describing what we call the restitution approach, and what others have described in terms of lost career opportunities, human capital, enhanced earning power, rehabilitative alimony, and other terms, we believe the emphasis should be on the fact that, in many divorces, one parent is able to retain the benefit involved from having had children or having had them raised in a particular way without bearing a full share of the cost. That the cost may be measured in terms of lost career opportunities should not obscure the fact that the basis for compensation is retention of the benefit, not existence of the loss. We would similarly insist on recognition that when the gain is the husband's ability to combine parenthood with the professional success that comes with being able to devote 60 hours a week to the job, the primary benefit is the children, not the enhanced income. \textit{Cf.} Ellman, supra note 2, at 47-48; Carbone, supra note 13, at 1479, 1484; see also Murray, \textit{Improving Parent-Child Relationships Within the Divorced Family: A Call for Legal Reform}, 19 U. Mich. J.L. REF. 563 (1986).

To the extent that partnership proposals are similarly based on either contributions to the higher earning spouse's career or the lower earning spouse's lost career opportunities, we believe that the rationales should be recast in terms of parental benefits and obligations arising from children.

\textsuperscript{239} The first two parts of this proposal are compatible with a liberal strategy because they do not necessarily provide support for women who curtail their labor force involvement because of parenthood. The insistence that the benefits from children be a basis for adjustment at divorce does encourage career sacrifices made for the benefit of the children.

Incorporation of these principles in a partnership approach would probably require limiting the equal division of post-divorce income to marriage in which there were children and in which the lower earning spouse bore more than half of the responsibility for childrearing. Glendon observes that "childless and child-rearing marriages involve different social, political and moral issues and should therefore be analyzed separately." Glendon, supra note 237, at 1560.

\textsuperscript{240} The other two major considerations in divorce adjustments will be the determination of what part of marital property and post-divorce income is joint as opposed to separate property and the identification of benefits, such as professional degrees and other forms of enhanced income or lifestyles, that will trigger compensation independently of the presence of children. \textit{See} discussion supra notes 201, 212.
RETHINKING MARRIAGE

will do more to advance a feminist perspective than any examination limited to the relationship between husband and wife.

B. Marriage in the Future

Both the liberal feminist and the cultural feminist agendas ultimately call for uncoupling marriage and childrearing. For the traditionalists, children were what marriage was about, and the marital exchange of lifelong support for lifelong services served to encourage women to undertake childrearing and to lock both parents into traditional gender roles once the choice was made. The liberal feminists now wish to release women from the primary childrearing role altogether, and the cultural feminists seek to separate protection for childrearing from the continuation of the marriage. The success of either agenda may accelerate the existing trend away from the traditional family, with more couples choosing not to have children, more children being raised by single parents, and both men and women experiencing a greater variety of parenting roles.

If support for childrearing were no longer dependent on marriage, the question would remain open as to the role marriage will play in the future. Joseph and Clorinda Margolis observe:

Marriage increasingly tends to focus on the satisfaction of certain private interests, while family tends to focus on at least some public concerns regarding the well-being of dependents, the control of property, and the like. Why not, therefore, consider what would be involved in construing marriage as essentially concerned with such private interests, and families as essentially concerned with public interests?...

Consider, then, the extreme possibility. If marriage were a purely personal matter, the effective union of two (or even several) persons (of either sex), the permanence of the relationship would depend entirely on the feelings and volitions of the parties affected. On that assumption, there would be absolutely no point in linking property rights, inheritance, social position, the "begetting and educating of children," and even the monitoring of sex or obligations of child support or the support of spouses, with the institution of marriage.

241. The Catholic Church, which continues to embrace the traditionalist position, stated in Humanae Vitae, "'Marriage and conjugal love are by their nature ordained toward the begetting and educating of children.'" Joseph & Clorinda Margolis, The Separation of Marriage and Family, in FEMINISM AND PHILOSOPHY 293 (M. Vetterling-Bragg, F. Elliston & J. English eds. 1978) (quoting Humanae Vitae).
Two types of marriage would fit this extreme condition. First of all, there could be an informal marriage, a personal agreement to cohabit, not legally binding but socially (possibly even religiously or sacramentally) recognized. Second, there could be a term marriage, a legal agreement to cohabit for a certain period; this would be for purposes of a private nature, and renewable by mutual consent.\textsuperscript{242}

The Margolises, like Mary Ann Glendon\textsuperscript{243} and various other writers, conclude that to the extent marriage no longer plays a major societal role in childrearing, the control of property, and the like, marriage becomes a matter of contract—contracts in whose terms and in whose enforcement the state will have very little interest. The result will be an increased variety of personal relationships, all legally terminable at will unless the parties specify otherwise, with the enforceability of marital agreements that so specify very much an open question.\textsuperscript{244}

For both liberal and cultural feminists, the unenforceability of the traditional marital bargain may spur the new era of equality. But once childrearing is separated from marriage, feminists will have to address again the nature of human relationships. Are there lasting differences in the preferences of men and women? Are women more likely than men to value commitment above the freedom to leave, promises to form a lifelong union above an agreement terminable at will, their husbands' commitment to the children above their own economic independence? If so, greater protection for children and childrearing will only begin the process of rethinking marriage.

\textsuperscript{242} Id. at 292-94 (emphasis in original).
\textsuperscript{243} See generally M. GLENDON, supra note 1.
\textsuperscript{244} See generally Haas, supra note 158.