Putting Asunder in the 1990s


Reviewed by J. Thomas Oldham*

[Modern private divorce law techniques, and the partnership ideologies advanced to support them, have served the comforting function of appearing to be in control of a constantly deteriorating situation.]

I

INTRODUCTION

American private divorce law has undergone significant changes during the past twenty years. When Ronald Reagan became Governor of California, marriage was, at least in theory, a lifetime bond that could

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be dissolved while both parties were alive only if one spouse was guilty of bad behavior such as adultery, cruelty, or abandonment. Two decades later, all states have adopted some type of no-fault divorce\(^3\) and some form of the “equitable distribution” system of property division.\(^4\)

Many commentators, including Professor Glendon (whose criticism is set forth in the epigraph at the beginning of this book review), have wondered recently whether these “law reforms” have been fair or in society’s best interest.\(^5\) Even after the divorce law reform of the last twenty years, people—particularly women—often experience serious economic disadvantages as a result of divorce.\(^6\)

Dean Herma Hill Kay and Professor Stephen Sugarman invited a number of highly regarded family-law professors\(^7\) to comment upon the current state of American divorce law in the collection \(Divorce Reform at the Crossroads\) [hereinafter \(Crossroads\)]. Professor Sugarman’s introduction outlines the two themes of the book: “what has happened so far since the no-fault divorce revolution began in the 1960s, and how future reforms should be shaped” (p. 1). Five of the seven chapters focus on the economic consequences of the “new divorce.”\(^8\) The contributors propose


\(^4\) See J. Thomas Oldham, \(Divorce, Separation and the Distribution of Property\) § 3.03[1] (1991). Some states permit courts to divide all property owned by either or both spouses at divorce. I have referred to such systems as “kitchen sink” systems. Id. § 3.03[2]. This is sometimes referred to as a “hotchpot” system. Most states permit the divorce court to divide only certain types of property owned by spouses at divorce; property accumulated before marriage, or that acquired by one spouse during marriage by gift or inheritance, is not divisible. Id. § 3.03[3]. These “marital property” states permit a divorce court to divide such property equitably, not equally. Id. Although some states provide that equal division of marital property is presumptively equitable, no state requires an equal division. Id. A number of states created a system of equitable distribution before the acceptance of no-fault divorce. Grace G. Blumberg, \(Reworking the Past, Imagining the Future: On Jacob’s Silent Revolution\), 16 \(Law & Soc. Inquiry\) 115, 136 n.53 (1991).

\(^5\) See, e.g., Glendon, supra note 1; Lenore J. Weitzman, \(The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America\) (1985) (stating that unexpected consequences of no-fault divorce have hurt women and children economically).

\(^6\) See Saul D. Hoffman, \(Divorce and Economic Well-Being: The Effects on Men, Women, and Children\), \(Del. Law.\), Spring 1987, at 18 (finding 30% drop in standard of living in year after divorce); Lenore J. Weitzman, \(The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards\), 28 \(UCLA L. Rev.\) 1181, 1249-50 (1981) (study of 5000 American families over seven years revealed loss in real income of 19% by divorced men and 29% by divorced women, compared to 22% rise in real income by married men and women).

\(^7\) The authors include David Chambers, Marsha Garrison, Herma Hill Kay, Harry D. Krause, Martha Minow, Robert H. Mnookin, Deborah Rhode, and Stephen D. Sugarman.

\(^8\) In addition to the chapters regarding the economic consequences of divorce, Robert Mnookin, Eleanor Maccoby, Catherine Albiston, and Charlene Depner wrote a chapter about their ongoing study of custody arrangements, and David Chambers contributed a chapter pertaining to the rights and obligations of stepparents.

The term “new divorce” refers to the significant changes in divorce legislation that have occurred in the United States since the 1960s. For other commentaries on the “new divorce,” see Mary Ann Glendon, \(The Transformation of Family Law\) (1989); Weitzman, supra note
further reform but by no means reach a consensus on either the goals or the structure such reform should take. The three major proposals for altering the economic consequences of divorce, by Sugarman, Kay, and Professors Rhode and Minow, reveal fundamentally different perspectives on what harms divorce law should try to remedy, particularly to what extent the law should compensate women for social inequities that are not specific to the marriage itself. Crossroads thus reflects the diversity of opinion now evident among commentators regarding appropriate private-law standards for the financial consequences of divorce.9

II
CURRENT RULES REGARDING ECONOMIC CONSEQUENCES OF DIVORCE

A. Equitable Division of Property, Alimony, and No-Fault Divorce

There is consensus that spouses should, at a minimum, share the tangible property accumulated during marriage due to either spouse's efforts.10 Nearly all states permit some form of equitable division of

5; Blumberg, supra note 4; Martha Fineman, Implementing Equality: Ideology, Contradiction and Social Change, 1983 Wis. L. Rev. 789.

9. The federal government, as well as most state legislatures, continues to view divorce reform problems as private matters. As Professor Krause notes in Crossroads, we have "privatized" the responsibility for children (p. 178). We quickly and vocally disparage those irresponsible parents who inadequately support their children. However, unlike many other Western countries, we are much less inclined to allocate public resources to the support of such children. See Glendon, supra note 8, at 237 (comparing American system to system in Nordic countries, France, and Germany); David Bradley, Financial Support for Children: The Swedish Example, Fam. L., Sept. 1990, at 349, 349 (examining the Swedish system of public and private child support).

Parents frequently divorce with minor children. Since the cost of raising children in America is growing, it is a vital policy concern that the custodial parent have access to resources. It seems unlikely that the current "privatized" support system will accomplish this. For example, there were hopes that the promulgation of child support guidelines would greatly improve the amount of child support received. See Jessica Pearson et al., Legislating Adequacy: The Impact of Child Support Guidelines, 23 Law & Soc'y Rev. 569, 570-71 (1989). Recent studies suggest that the effect of guidelines has in reality been very modest. Id. It is unclear why this has occurred. It does suggest, however, that it might be very difficult to transfer substantially more assets to the divorcing mother via private law changes. See Herbert Jacob, Faulting No-Fault, 1986 Am. B. Found. Res. J. 773, 780 (reviewing Weitzman, supra note 5). In any event, child support guidelines can do little to change the economic circumstances of the divorcing poor. See Cynthia N. Fletcher, A Comparison of Incomes and Expenditures of Male-Headed Households Paying Child Support and Female-Headed Households Receiving Child Support, 38 Fam. Rel. 412, 416 (1989).

Several of the contributors to Crossroads discuss how government could attempt to aid single-parent families after divorce. Sugarman, Krause, and Rhode and Minow all urge the allocation of more public resources to family support (pp. 164, 183-86, 191, 210). Sugarman and Krause propose variations on the social security system to support divided families (pp. 164, 183-86).

However, the discussions of "public law" solutions to the problems associated with divorce are a relatively minor part of the dialogue contained in Crossroads. For that reason, this Review Essay will limit its discussion to "private law" reform.

10. See John D. Gregory, THE LAW OF EQUITABLE DISTRIBUTION ¶ 1.03 (1989) ("[E]ven the most cursory review of cases in various jurisdictions reveals general agreement among the courts
property on divorce.11 Underlying the system of equitable division is a conception of marriage as "partnership."12 Because each "partner" in the marriage is seen as having facilitated the other's achievements, fairness requires the partners to share all accumulated wealth if the marriage ends in divorce.13 A corollary to the "partnership" theory of marriage is the theory that premarital assets should not be divided at divorce.14 Because the nonacquiring spouse typically did not facilitate acquisition of premarital assets, the marital estate has no claim to such property. Therefore, most states generally limit the divisible estate to property acquired during marriage.15

Carrying the partnership analogy to its logical end, one might argue that equitable division could be a sufficient divorce regime in itself. If marriage is a partnership terminable at will, arguably the economic ramifications of dissolution of the marital partnership should be the same as the dissolution of a commercial partnership: unless otherwise agreed, the "partners" should merely divide the profits equally.16 Most writers now agree that such a system would be unfair. Many marriages do not accumulate a significant amount of property.17 Spouses

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11. See Homer H. Clark, Jr., The Law of Domestic Relations in the United States 590 (2d ed., student ed. 1988); Oldham, supra note 4, § 3.03[1]. Although alimony awards are still possible under equitable-distribution systems, they are rare. See id. For a case in which a substantial lump-sum alimony award was upheld as a substitute for equitable property division, see Jones v. Jones, 532 So. 2d 574 (Miss. 1988).


13. Almost all common law states and all community property states accept the concept that spouses should share divorce property accumulated during marriage due to the efforts of either. See Oldham, supra note 4, § 3.03[3]. In all such common law states, and in many community property states, divorce courts are instructed to divide the marital estate equitably. Although the statutory guidelines are almost identical, the results in common law states and community property states appear to differ. In common law courts, it appears that a housewife rarely receives more than half of the marital estate. In contrast, anecdotal evidence suggests that community property courts seem more inclined to award over fifty percent of the marital estate to a spouse whose earning capacity has been impaired by a role assumed during marriage. Cf. McNabney v. McNabney, 782 P.2d 1291, 1296 (Nev. 1989) (stating in dicta that when a wife and mother in a long-term marriage has given up career opportunities to devote herself to her family, "very frequently justice and equity will require a divorce court to adjust community property in an unequal manner").

14. See Gregory, supra note 10, ¶ 2.03; Oldham, supra note 4, § 3.03[3]. In some states, the courts include property acquired in contemplation of marriage as "marital property" that can be divided at divorce. Gregory, supra note 10, ¶ 2.03. If the parties were cohabiting, the non-acquiring spouse could have some quasi-partnership claim. However, this claim would be based upon unmarried-cohabitation principles, not marital property rights.

15. See Oldham, supra note 4, § 3.03[3].


17. See Weitzman, supra note 6, at 1188.
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can have very different economic prospects at the time of divorce, and the differences often stem at least in part from roles assumed during marriage. To adjust for this disparity, all states except Texas have accepted alimony as a potential supplement to the equitable distribution system.  

American jurisdictions adopted the concept of alimony from English law. Under English law, absolute divorce was not possible; spouses could obtain only a separation from bed and board. Because the marital bond was not dissolved, the husband was still obligated to support the wife. After the American Revolution, most states quickly accepted the idea of absolute divorce but retained the concept of alimony. However, in many states, the recipient was entitled to support only if she was not at fault in causing the divorce.  

In recent times the emphasis on fault has faded. For example, the Uniform Marriage and Divorce Act states that a spouse is entitled to post-divorce maintenance if the petitioning spouse:

(1) lacks sufficient property to provide for his [or her] reasonable needs; and

(2) is unable to support himself [or herself] through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

This standard has recently come under some criticism. First, it limits spousal support to those spouses who need it. Second, the provision does not provide much guidance. When does a spouse “need” post-divorce support? What is “appropriate” employment? In what circumstances is it “appropriate” for a custodian not to work and for how long? In Crossroads, Kay, Sugarman, and Rhode and Minow grapple with these questions and offer their visions of the standards and rationales for spousal support; these proposals will be discussed below.

18. See Tex. Fam. Code Ann. § 21.02 (West 1991) (duty of support does not include alimony); Clark, supra note 11, at 620 n.14. Of course, the right of child support also exists if the parties had a child.


20. After 1670, parliamentary divorce was available to a small number of aristocrats. Roderick Phillips, Untying the Knot 37 (1991). Before that time annulments were possible, but apparently were not frequently obtained. Id. at 4. In 1857, England passed its first general divorce law. Id. at 124.


23. See Clark, supra note 11, at 652-53.

B. Assessing No-Fault Divorce: Professor Garrison’s Study

The editors of Crossroads make the realistic assumption that the right to unilateral no-fault divorce has been accepted by American society and will not be restricted in the near future. Few commentators are clamoring for a return to fault divorce; no other realistic alternative has been suggested. Even if some new initiative were to limit divorces, this would not necessarily be an improvement. Children still could be

25. For example, when a sample of young mothers was asked in 1962 whether married parents with minor children should remain married if they could not get along, half said they should. When this same question was asked in 1985, fewer than one in five said the couple should remain married.

26. For example, when a sample of young mothers was asked in 1962 whether married parents with minor children should remain married if they could not get along, half said they should. When this same question was asked in 1985, fewer than one in five said the couple should remain married. See id. at 105. Some contend that American conservatives are “gearing up” to restrict the right to divorce. See Barbara Ehrenreich, Life in Splitsville, N.Y. TIMES REV. BOOKS, July 21, 1991, at 15; see also Brigitte M. Bodenheimer, Reflections on the Future of Grounds for Divorce, 8 J. FAM. L. 179, 193 (1968) (criticizing unilateral divorce; however, in 1968, when the article was published, entirely unilateral divorce was seldom advocated).


28. Cf. ALLEN PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? (forthcoming 1992) (arguing that divorce by mutual consent would be preferable to unilateral divorce); Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 VA. L. REV. 9 (1990) (arguing that a regime of enforceable precommitment to marriage will discourage quick divorces by raising costs); Judith T. Younger, Marital Regimes: A Story of Compromise and Democratization, Together with Criticism and Suggestions for Reform, 67 CORNELL L. REV. 45, 90 (1981) (proposing that it should be much more difficult for spouses with minor children to obtain a divorce). Some other Western countries have not fully accepted unilateral divorce. See e.g., MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 74 (1987) (noting that although divorce laws in England, France, and West Germany permit unilateral divorce, they “keep open the possibility that the court may dismiss the petition . . . if the divorce would cause exceptional hardship”); Brown & Lydon, supra note 26, at 465 (referring to the consideration of hardship by English courts); Wolfram Müller-Freienfels, The New Family and the New Property, 33 AM. J. COMP. L. 733, 740-45 (1985) (describing forms of divorce in France and West Germany). In addition, many countries and several American states require a waiting period of more than one year for a no-fault divorce if one party contests the divorce. See GLENDON, supra, at 68.

Professor Glendon points out that barriers to unilateral divorce can have unexpected effects as well. For example, the “hardship” provision in European divorce laws—though infrequently invoked—could affect bargaining between divorcing spouses. See GLENDON, supra note 8, at 192.
harm. Informal separation would certainly remain an option. Adultery and spousal abuse could also increase.

However, some commentators, such as Professor Weitzman, have argued that the adoption of no-fault divorce has caused substantially worse post-divorce economic results for women. Professor Garrison's contribution to Crossroads (ch. 3) evaluates this thesis using her own empirical research on New York divorces and other empirical data on divorce outcomes. Garrison concludes that no-fault divorce alone has not had a significant effect on the consequences of divorce.

New York adopted equitable distribution in 1980 but has not accepted unilateral no-fault divorce. Garrison studied divorce outcomes in three New York counties in 1978, before the adoption of equitable distribution, and in 1984, after its adoption (p. 82). She collected data regarding the disposition of the family home, the amount of child support, and the amount and duration of any alimony award. By comparing her results to other studies, she attempted to determine whether negotiating leverage was different under New York's equitable distribu-

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29. See generally Rheinstein, supra note 2; Glenda Riley, Divorce: An American Tradition 18 passim (1991) ("[E]vidence suggests that many more people may have thought about divorce, but ended their marriages through desertion and separation instead."); Friedman, supra note 2.

30. Spousal abuse is not uncommon even with the current system. See Furstenberg & Cherlin, supra note 25, at 21. For a discussion of the relationship between strict divorce laws and bigamy, see Hendrik Hartog, Marital Exit and Marital Expectations in Nineteenth Century America, 80Geo. L.J. 95, 122-23 (1991).

31. Weitzman, supra note 6, at 1251 (study of divorced couples in California after adoption of no-fault divorce shows 42% rise in men's standard of living and 73% drop in women's within one year of divorce).


34. New York has accepted no-fault divorce only by mutual consent. See N.Y. Dom. Rel. Law § 170 (McKinney 1988); see also Garrison, supra note 33, at 79.
tion system without unilateral no-fault divorce than in jurisdictions allowing such divorce.

Garrison found that fewer alimony awards were made in 1984 than in 1978 and that fewer awards were "permanent" (p. 83). The decline in alimony frequency affected all types of wives, including long-term housewives and mothers who had the custody of minor children after divorce (pp. 84-86).

Since the decline in the frequency of alimony in New York was unaccompanied by the acceptance of no-fault divorce, Garrison doubts that no-fault divorce can explain any worsening of the economic condition of divorced women (p. 90). Rather, Garrison argues that the New York equitable distribution system is responsible for the lower frequency of the alimony awards (p. 92). This seems quite likely. From the information Garrison provides, however, it is unclear whether women fared better in 1978 or 1984 divorces. Wives in 1984 received alimony less frequently, but Garrison does not address whether this may have been offset by the amount of equitable distribution awards. Garrison does not mention the frequency or magnitude of any marital property award; she focuses only upon alimony and the marital home. It may be that most spouses possess no substantial property other than the house. Still, in order to reach a conclusion about the comparative economic well-being of wives in 1978 and 1984, one must have information about the equitable distribution awards.

Garrison found further evidence that no-fault divorce does not affect bargaining when she compared New York child support awards with data from other studies. She found that, as a percentage of the obligor's income, New York child support awards were no higher (and sometimes

35. Alimony awards were more frequently received in contested cases. See Garrison, supra note 33, at 242 n.73. In 1984, 73% of the wives in contested cases worked, compared to 64% in 1978. Garrison states that this factor should have resulted in a 3% decrease in alimony awards in 1984, but the frequency of alimony awards in contested cases dropped from 45% in 1978 to 30% in 1984. Id. at 85. The average income of wives in 1984, adjusted for inflation, was only marginally higher than the 1978 figure. Id. at 86.

36. The New York statute in effect in 1978 had been interpreted as requiring alimony to be "permanent" absent an agreement to the contrary. Id. at 93.

37. At least one past study found this to be true. See Weitzman, supra note 6, at 1188. I wonder whether this continues to be true, in light of expanding definitions of divisible property and the increasing prevalence of pensions. For example, a recent study found that two thirds of all workers have pension rights. See Kathleen Short & Charles Nelson, U.S. Dep't of Commerce, Pensions: Worker Coverage and Retirement Benefits, 1987, at 1 (1991) (stating that in 1987, 66.4% of all American workers were covered by pension plans). In 1989 approximately 80% of all full-time employees of medium or large firms had some type of pension coverage. See Bureau of Labor Statistics, U.S. Dep't of Labor, Bulletin No. 2363, Employee Benefits in Medium and Large Firms 4 (1990) (tbl. I). Most states now consider potential retirement benefits to be divisible property at divorce, regardless of whether they are vested or non-vested. See Oldham, supra note 4, § 7.10. If the employee was not married throughout his or her career, only a portion of the pension is treated as divisible, based upon the fraction of the career during which the employee was married. Id.
were lower) than awards in states with unilateral divorce (p. 95). In addition, Garrison discusses other studies of divorce outcomes (pp. 90-100), which she argues provide further proof of her thesis that the adoption of no-fault divorce has not been a substantial cause of the post-divorce economic problems of women.

Garrison's conclusions support the editors' decision to assume that a return to fault divorce is not a desirable policy option (pp. 1-3). Sugarman makes a related point. He questions whether the acceptance of fault divorce alone would significantly improve the economic circumstances of divorcing women. He demonstrates that, even using Professor Weitzman's data, the difference between results under fault and under no-fault divorce is not substantial. Thus, a return to fault divorce would not significantly change the post-divorce outcome for most divorcing women.

III
RECTIFYING SOCIAL AND MARITAL INEQUITIES:
PROPOSALS FOR DIVORCE REFORM

Many writers have documented the economic problems borne by women after divorce. When one looks at the data regarding the economic circumstances of divorced women, the picture certainly more closely resembles the work of George Grosz than that of Claude Monet. Still, is this the fault of the current system of divorce? How can the fairness of the current system be judged?

In analyzing the fairness of both the current rules governing distribution of property on divorce and the proposals contained in Crossroads, one encounters differing views regarding the nature of the obligations that should stem from a decision to marry. For example, if marriage is regarded as a lifetime commitment, then one might require the spouses to share their earnings even after divorce. However, it is clear that this view of marriage is unrealistic, and most commentators agree that lifetime post-divorce economic sharing cannot be justified solely upon the marriage commitment.

Family law policy needs to be formulated in light of the circumstances of contemporary families, not the circumstances of families

38. Sugarman, supra note 26, at 131-35.
39. See, e.g., Homer H. Clark, Jr., The New Marriage, 12 WILLAMETTE L.J. 441 (1976) (discussing new lack of permanence of marriage). Professor Clark commented that contemporary marriage seems to be merely "some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, that may be formed by consent of both parties and dissolved at the will of either." Id. at 450-51.
40. Some have argued, however, that "joint inception of parenthood" could justify some kind of lifetime economic sharing. See JOHN EEKELAAR & MAVIS MACLEAN, MAINTENANCE AFTER DIVORCE 104-07, 141-49 (1986).
decades ago. A few facts about divorce are particularly noteworthy. The divorce rate has more than doubled since 1960.41 Indeed, a recent article predicts that approximately 66% of newly formed marriages will end in divorce.42 Many divorcing spouses have not been married a long time. Because marriages are often of short duration, many divorcing spouses are quite young. Sixty-three percent of all women whose first marriage ended in divorce in 1980 were younger than thirty at divorce.43 Furthermore, many divorcing spouses do not have children.44 In other words, although some divorces involve older people who have been married for a long time and have raised a family, many involve young adults who have been married a relatively short time. These divorcing couples frequently remarry others—many soon after divorce.45 Only 55% of all marriages now taking place are first marriages for both parties.46


42. See Teresa C. Martin & Larry L. Bumpass, Recent Trends in Marital Disruption, 26 Demography 37, 49 (1989).

43. See Glick & Lin, supra note 41, at 740.

44. According to data provided to the author by the Natality, Marriage and Divorce Statistics Branch Division of Vital Statistics (National Center for Health Statistics, U.S. Department of Health and Human Services), approximately 42% of divorcing couples had not had children together.

45. For example, Glick and Lin found that, for women who divorced before age 30 and eventually remarried, the median number of years between divorce and remarriage was 2.8 years. See Glick & Lin, supra note 41, at 742. One writer has estimated that 83% of divorcing males and 78% of divorcing females eventually remarry. See Robert Schoen et al., Marriage and Divorce in Twentieth Century American Cohorts, 22 Demography 101, 103, 105 (1985); see also Andrew J. Cherlin, Marriage, Divorce, Remarriage 29 (1981) (reporting similar findings); Glick & Lin, supra note 41, at 739 (same); cf. Espenshade, supra note 41, at 208 (citing similar statistics regarding remarriage of white women, but somewhat lower percentages for black women).

A recent study attempted to specify variables that affect remarriage rates. See Larry Bumpass et al., Changing Patterns of Remarriage, 52 J. Marriage & Fam. 747 (1990). The authors noted that “age at separation is the most important individual characteristic with respect to remarriage rates.” Id. at 751. Eighty-nine percent of the women in the survey who were younger than 25 at the time of separation remarried, as did 79% of the women aged 25 to 29 at the time of separation. In contrast, only 59% of women aged 30 to 39 at the time of separation remarried, and this percentage dropped to 31% for women aged 40 or over at the time of separation. Id. Childless women have a higher rate of remarriage than mothers. Id. at 754. Remarriage rates also vary regionally. Id. at 753. In the South and West, 77-78% of divorced women will remarry, compared to 60% in the Northeast. Id. at 754. The authors note that this remarriage information might be misleadingly low because it includes the 6% of separated wives who never actually divorce (and cannot remarry). Id. at 753.

Of course, some women who remarry divorce a second time. The divorce rate in remarriages is higher than that for first marriages. See Furstenberg & Cherlin, supra note 25, at 14. In addition, a significant number of women who do not remarry establish informal relationships. See infra note 158.

46. See Paul C. Glick, American Families: As They Are and Were, 74 Soc. Sci. Rev. 139, 141 (1990). Of the 49.5 million married couples in 1980, 17% of the husbands had been previously married, compared to 16% of the wives. In 10% of all married couples, both the husband and the wife had been previously married. See James A. Sweet & Larry L. Bumpass, American Families and Households 143 (1987).
Divorce law must respond to this trend toward "serial monogamy." Family law must be sensitive to the economic consequences of divorce, both for couples cast in the traditional mold and for those who exemplify the modern picture of young, dual-career spouses. The role of married women in American society has changed drastically during the last thirty years. Married women are now much more likely to work outside the home, although working women, on average, earn less than men. It is not clear what conclusions, if any, family-law policymakers should derive from this information. Women earn less than men, on average, for many reasons, such as socialization, occupational choice, lower educational levels, and sex discrimination. These factors affect women who are not married as well as those who are. It should not be surprising that women fare worse economically than men do after divorce. Because men earn more than women earn, it could be said that "women gain financially from marriage by partial access to the income of better-paid men, and they lose financially when their marriages are dissolved." Family-law policymakers need to determine what portion of the economic disparity between men and women should be ameliorated by the private-law divorce system.

A. The Social Engineering Function of Marital Property Rules

One approach to marital property law is to attempt to affect the behavior of people before they divorce. Some family-law writers believe that marital property and alimony rules affect choices spouses make dur-
ing marriage, although the magnitude of this effect is unclear. If family law does affect behavior of spouses during marriage, what should it try to do? Some suggest that the law should encourage “sharing” behavior, whereby one spouse, normally the wife, does not work outside the home. One justification for such a policy is that role division in marriage is efficient. Also, some might argue that homemakers are better mothers. Dean Prager has noted that sharing behavior can encourage stability and cooperation in marriage.

Dean Prager’s concerns are serious, to be sure. However, like Dean Kay (p. 10), I do not believe that family law should create incentives within families that encourage women to leave the work force. Even in marriages that endure, “role division” can significantly affect women’s feelings of self-worth, as well as the balance of power in the relationship. Given the fact that many marriages end in divorce, it does not seem advisable to encourage women not to work outside the home. Even if a consensus evolves that some form of post-divorce income sharing is appropriate, this may not greatly affect a woman’s post-divorce lifestyle. Where there is little to share, the right to share is of little consequence. Although a post-divorce income sharing system could affect some upper-middle-class divorcing spouses, it seems unlikely that such a system would solve the economic problems of most divorcing women. The law

53. See Ira M. Ellman, The Theory of Alimony, 77 Calif. L. Rev. 1, 50 (1989) (asserting that wives “who might otherwise adopt suboptimal marital patterns in order to reduce the magnitude of their potential loss in earning capacity, might not do so if they know the law will reallocate some of their loss in the event of divorce”).

54. Sugarman notes that many women have fulfilled domestic roles despite a system that has not provided great protection for those whose marriages end in divorce. See Sugarman, supra note 26, at 144-45.

55. See Gary S. Becker, A Treatise on the Family 21-29 (1981) (arguing from biological differences between men and women that allocative efficiency demands specialization in household roles and postulating that marital institutions have evolved to further such efficiency).

56. Id.; see also Ellman, supra note 53, at 48.

57. See, e.g., Robin Abcarian, U.S. Role in Day Care: New Funds, New Hope, L.A. Times, May 13, 1991, at E2 (quoting Phyllis Schlafly of the Eagle Forum who points out that “research shows it is very risky for children under age 3 [to be left by their working mothers]”); see also Selma Fraiberg, Every Child’s Birthright 132 (1977) (arguing that federal welfare policies that provide “incentives and encouragement to mothers to seek employment” have contributed to “emotional starvation” of a generation of poor children); Marilyn H. Mitchell, Note, Child Custody: Mother’s Career May Determine Custody Award to Father, 24 Wayne L. Rev. 1159, 1165-67, 1171 (1978) (commenting that the “best interest of the child” standard may favor the father in custody disputes involving working mothers).

58. See Susan W. Prager, Sharing Principles and the Future of Marital Property Law, 25 UCLA L. Rev. 1, 7-11 (1977) (discussing how both spouses may make individual decisions so as to maximize opportunities for both).

59. Dean Prager’s arguments were made in the context of justifying sharing accumulated property at divorce; she did not argue that the law should encourage a spouse to leave the work force. Id.

60. See Philip Blumstein & Pepper Schwartz, American Couples 53 (1983) (finding that “the amount of money a person earns—in comparison with a partner’s income—establishes relative power”); see also Jan Pahl, Money and Marriage 168-79 (1989).
should not encourage sharing behavior if it cannot address the dependency that will result.

Spouses who remove themselves from the work force for a significant period do so at their own peril. Instead of encouraging women to choose a path that leads to economic dependence, the law should encourage precisely the opposite. A more helpful state policy would attack the obstacles that impede women's involvement in the work force, such as the lack of affordable child care and reasonable maternity leave policies.61

The old fault divorce was in some ways a method of social engineering, creating obstacles to divorce.62 Importing similar notions of fault into the law regarding property division would provide a different mechanism for discouraging divorce. However, this would require the application of some form of moral judgment to the couple's decision to divorce: to create a disincentive, there must be some notion of "punishable" behavior.

Two decades after the acceptance of no-fault divorce, there is no consensus regarding the extent to which morality should affect the divorce outcome. Some decry our continuing punitive notion of divorce. Dean Kay, for example, urges the acceptance of divorce as a "normal social occurrence," not as a societal wrong "where blame is determined and damages assessed" (p. 28). Others, such as Professor Schneider, advocate some retention of moral concerns in divorce decisionmaking.63 States certainly have been reluctant to completely jettison moral concerns connected to divorce. Although all states have generally accepted no-fault divorce, a number still allow "fault" to affect the property div-

61. For a helpful discussion of policies that encourage (and discourage) women in the workforce, see Ruth Sidel, Women and Children Last 178-79 (1986) (discussing Swedish policies that have narrowed the wage gap in Sweden to 90%); Jacob A. Klerman & Arleen Leibowitz, Child Care and Women's Return to Work After Childbirth, 80 Am. Econ. Rev. 284, 284-87 (1990) (analyzing the effect of tax credits and labor market conditions on women's return to work); Tamar Lewin, For Some Two-Paycheck Families, the Economics Don't Add Up, N.Y. Times, Apr. 21, 1991, at E18 (addressing the "prime postfeminist question: should women with young children work?"). The European Community now requires member states to offer women a minimum of 14 weeks maternity leave, paid at the rate workers receive as sick pay. New Maternity Leave Policy, N.Y. Times, Nov. 8, 1991, at D13.

62. However, most studies have concluded that no-fault divorce did not have a significant effect upon the divorce rate. See Gerald C. Wright & Dorothy M. Stetson, The Impact of No-Fault Divorce Law Reform on Divorce in American States, 40 J. Marriage & Fam. 575, 580 (1978) (finding no clear rise in divorce rates in states with liberal no-fault provisions); see also Homer H. Clark, Jr., Divorce Policy and Divorce Reform, 42 U. Colo. L. Rev. 403, 404 (1971) (arguing that couples do not shape their behavior according to legal regimes). But see Thomas B. Marvell, Divorce Rates and the Fault Requirement, 23 Law & Soc'y Rev. 543, 563 (1989) (noting that "[n]o-fault laws operationalized as a single variable, had a significant impact on divorce rates").

sion or alimony award.\textsuperscript{64}

There is a seductive appeal to the notion that divorce law should deter divorce by disadvantaging those responsible. This might be done by factoring bad behavior or consideration of which party chose to divorce into the property division. Further examination of these possibilities, however, reveals why we must try to remove the economic consequences of divorce from the reach of moral judgments about the parties involved.

Allowing ideas about bad behavior during marriage to affect the economic outcome of divorce raises many of the evidentiary problems that led to the demise of the fault divorce system.\textsuperscript{65} Furthermore, an increasing number of courts and commentators wonder how often it is possible to consider one spouse at fault and the other innocent.\textsuperscript{66} It is difficult to assess whose behavior is truly the more reprehensible. For example, is adultery acceptable if your spouse is cruel, violent, a workaholic, or an alcoholic? The cost of making such a determination seems much greater than any social benefit.\textsuperscript{67} In any event, I question the wisdom of asking judges to scrutinize the private lives of divorcing couples in order to evaluate the relative propriety of their behavior. Newspapers could no doubt add a new section for such material, and supermarket tabloids would have a field day, but I doubt that such a

\textsuperscript{64} See Freed & Walker, supra note 3, at 343-44 (tbl. V) (indicating state approaches to fault in property distribution). Also, many states have not repealed the fault grounds for divorce. In these states, fault continues to be available as alternate grounds. Id. at 326 (citing examples of recent cases in which courts considered fault as grounds for divorce). Fault can affect the economic outcome of divorce in a number of Western countries. See GLENDON, supra note 8, at 198-238. For example, France allows compensatory payments to the plaintiff, but not, in most cases, to the defendant, in a fault-based divorce. Id. at 210.

\textsuperscript{65} Allowing fault to affect economic consequences would not be the same as requiring fault to obtain a divorce. The former system would not encourage perjured testimony in efforts to obtain a divorce. Yet, like the old fault system, the evidence could inflame the divorce process. Spouses certainly would have an incentive to present evidence of past misbehavior by the other spouse. For a general discussion of whether fault should affect the economic outcome of divorce, see Ellman, supra note 53.


\textsuperscript{67} The costs include both the emotional cost of encouraging the spouses to participate in exercises to determine each party's respective blameworthiness regarding the failure of the marriage and the financial cost of permitting additional discovery regarding the "behavioral sludge at the bottom of failed marriages." Jane M. Cohen, Comparison-Shopping in the Marketplace of Rights, 98 YALE L.J. 1235, 1260 (1989) (reviewing MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987)).
system would be beneficial to either the divorcing parties or society. While it might be useful to retain a rule that truly egregious behavior could affect the economic outcome of divorce proceedings, if such behavior also could be grounds for an independent tort action, it would be unnecessary to consider it in the divorce process.

Punishing the spouse who chooses to divorce raises equivalent problems. Such a system would provide incentives for one spouse to pretend to resist a mutually desired divorce or to behave in such a way as to encourage the other spouse to seek a divorce and consequently suffer the economic penalty. Furthermore, even those who bemoan the current ease of divorce must accept that some divorces, such as those involving spousal abuse, are justified. No economic penalty should be imposed in such cases.

During the past two decades, American society has generally accepted the notion that one engaged in an unsatisfying marriage should have the opportunity to divorce and fashion a more satisfying relationship. From this perspective, any system that attempts to deter divorce can be criticized as potentially encouraging people to stay in bad marriages. Establishing more obstacles to divorce might also cause more spouses to simply desert their marriages. Using sanctions to encourage unhappy spouses to stay “together” can be detrimental to the parties or their children. Obviously, marriage often creates post-divorce financial obligations, so current divorce rules in some sense already create financial disincentives. I do not believe additional penalties are appropriate.

I also have a more fundamental concern about incorporating moral notions into the divorce process. We now live in an increasingly trou-

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68. But cf. Schneider, supra note 63, at 203, 233-54 (arguing that, in alimony suits, courts need to be able to consider spouses’ moral relations).


70. This generally would depend upon whether interspousal tort immunity still exists in the state. See, e.g., Hakkila v. Hakkila, 812 P.2d 1320, 1323 (N.M. Ct. App. 1991) (permitting one spouse to assert a claim of intentional infliction of emotional distress against the other spouse).

71. This change in American morals and attitudes toward marriage is reflected in the passage, over the past twenty years, of no-fault divorce laws in every state. Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803, 1809 (1985); see also Scott, supra note 27, at 10 (“[C]ontemporary marriage has been aptly described as a ‘non-binding commitment’ . . . that survives only as long as each spouse's needs are met.”). For a discussion of similar changes in attitudes toward marriage in other countries, see GLENDON, supra note 8, at 143-47 (arguing that the “most dramatic shift that has taken place in the past twenty years . . . is . . . in the meanings that people attribute to marriage, to family relations, and to life itself”).

72. I do not include Professor Scott's proposals (such as waiting periods and counseling) in this discussion. See Scott, supra note 27, at 76-78 (arguing that while mandatory delay and counseling may impose unnecessary costs on spouses in some cases, they will generally improve spousal decisionmaking about divorce with minimal adverse effects).
bling time when Americans seem eager to prescribe more and more lim-
its upon the behavior of other Americans and to punish those who do not
meet some real or imagined norm.73 I share Professor Levy's concern
that divorce policymakers (as well as legislators and Phyllis Schlafly)
would be inclined to impose their values on others, "solely for their own
good, of course."74 Incorporating moral notions would also present
room for substantial hypocrisy.75

B. Crossroads: Proposals for Economic Reform

The authors represented in Crossroads explicitly or implicitly accept
the notion that rules governing disposition of property on divorce should
not attempt to deter divorce. They accept no-fault divorce as a given and
appear to support it on principle. The proposed reforms instead
approach divorce from a purely economic point of view and are aimed at
achieving a more "just" post-divorce result.

At the heart of most of the proposed reforms is the concept of career
damage, where one spouse, usually the woman, compromises her career
objectives to further joint marital goals, particularly childrearing.
Divorce leaves this spouse in a disadvantaged economic position. Some
writers note that married women are joining the work force in increasing
numbers and wonder whether this factor will eventually solve the post-
divorce problems of women.76 Although such a painless solution to the
divorce policy puzzle would be quite welcome, available evidence unfor-
tunately suggests a different future.

An increasing number of married women with children work
outside the home. In 1957, 80% of single women but only 33% of mar-
ried women aged 25 to 54 worked.77 By 1987, 68% of married women
were in the labor force; the participation rate for single women had not
changed.78 Of course, many married women still do not work. For a

73. See John Elson, Busybodies: New Puritans, TIME, Aug. 12, 1991, at 20 (commenting that
the "U.S. may still be the land of the free, but increasingly it is also the home of dedicated neo-
Puritans, humorlessly imposing on others arbitrary . . . standards of behavior, health and thought").
74. Levy, supra note 24, at 59. For recent examples of this trend, see Phillip J. Hilt, Panel
Assails Canceling of Teen-Ager Study, N.Y. TIMES, Sept. 25, 1991, at A21 (discussing cancellation of
National Institute of Health study into teen behavior in light of strong political opposition to the so-
called "sex survey"); Anna Quindlen, Parental Rites, N.Y. TIMES, Sept. 25, 1991, at A23
(condemning opposition to school programs which make condoms available to students).
teleevangelist's resignation amidst charges of solicitation of prostitutes).
76. See Levy, supra note 24, at 71.
77. Susan E. Shank, Women and the Labor Market: The Link Grows Stronger, MONTHLY LAB.
78. Id. This increase in the labor force participation of married women obviously was aided by
the gradual disappearance of explicitly discriminatory policies toward married women. See
CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP 171-75 (1990) (discussing "marriage
bars," which prohibited employment of married women, and their decline).
number of reasons, almost one-third of married mothers with minor children and almost one-half of married mothers with children younger than three do not work outside the home. While many of these women do return to work when their children reach school age, the disruption can have a significant and continuing impact upon the mother’s career. Her skills erode and she loses potential training, experience, and seniority rights. Even when the mother returns to work, her continuing child care responsibilities make it quite difficult to be an “ideal” worker.

79. These reasons include maternity leave policies, inflexible work schedules, and child care costs. For a discussion of the effect of these factors on women’s decisions to work, see sources cited supra note 61.

80. See Bureau of Labor Statistics, U.S. Dep’t of Labor, Bull. No. 2340, Handbook of Labor Statistics 242, 244 (1989) [hereinafter Handbook of Labor Statistics]. This “snapshot” data might be somewhat misleading because it represents whether a woman was in the work force at a particular moment in time. Of married women surveyed in 1989, 33% of those with children under 6 had not worked at any point in the last year; of those who had worked, 36% did so part-time. Of married women with children under 18, 27% had not worked in the last year, with 34% of those who worked doing so part-time. Of married women whose youngest child was between 6 and 17, 22% did not work at all during 1989, and 32% of those who worked did so part-time. Bureau of Labor Statistics, U.S. Dep’t of Labor, Current Population Survey (Mar. 1990) (unpublished data on file with author) [hereinafter Current Population Survey].

81. During 1989, 43% of married women with children under 6 worked full-time and 24% worked part-time, while for those with children between 6 and 17, 53% worked full-time and 25% worked part-time. Current Population Survey, supra note 80; see also Handbook of Labor Statistics, supra note 80, at 243 (noting that in 1988, 57% of married women with children under 6 worked, compared to over 72% of those with children between 6 and 17).


Professor Polachek estimated that an individual who stays out of the workforce for one year loses approximately 2% in raises due to seniority losses and about 0.5% in wages due to human-capital depreciation. As a result, when the employee returns to work, the employee’s wages are lower than they would have been with no interruption by, on average, an amount equal to 2.5% per year absent from the workforce. Telephone Interview with Professor Solomon W. Polachek (Sept. 12, 1991).

83. See Mary J. Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. Rev. 55, 61 (1979) (concluding that biases against working parents necessitate a dramatic restructuring of the labor market); Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 823-34 (1989) (arguing that mothers are forced to “choose” between child care and earning potential).
Also, many working mothers work part-time or less than year-round, both career paths affect training and promotion possibilities.

Furthermore, women who do work find that the earnings of full-time female workers are much lower than the comparable figure for men. Although approximately 18% of wives earn more than their husbands and another 8% earn about as much, the average wage of female workers amounts to approximately 65% to 70% of what the average male earns.

To be sure, trends suggest that the wage gap between men and women will continue to narrow. More married women are joining the work force. Explicit discrimination against married women has largely disappeared. An increasing number of women are graduating from college and pursuing lucrative careers, and more young women are working full-time and year-round. Women are also moving into high-status, traditionally male occupations. These factors certainly suggest that the

84. See supra notes 80-81.
85. See Shank, supra note 77, at 6 (stating that in 1986, 57% of all employed women aged 25-54 worked year-round, full-time, and 78% of employed men in the same age group worked year-round, full-time). In 1987, 51% of working wives worked year-round, full-time. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORT, SERIES P-60, NO. 165, EARNINGS OF MARRIED COUPLE FAMILIES: 1987, at 1 (1989); see also June O’Neill, Women and Wages, AM. ENTERPRISE, Nov.-Dec. 1990, at 25, 33 (emphasizing that women’s wages will be less than men’s wages for the foreseeable future due to women’s family responsibilities, among other factors).
86. See BUREAU OF THE CENSUS, supra note 85, at 6. Nearly 40% of married women who had five or more years of college education currently earn as much or more than their husbands. Paul C. Glick, Fifty Years of Family Demography: A Record of Social Change, 50 J. MARRIAGE & FAM. 861, 865 (1988).
87. GOLDIN, supra note 78, at 61; Michael W. Horrigan & James P. Markey, Recent Gains in Women’s Earnings: Better Pay or Longer Hours?, MONTHLY LAB. REV., July 1990, at 11; June O’Neill, The Trend in the Male-Female Wage Gap in the United States, 3 J. LAB. ECON. S91, S93-S95 (Supp. 1985). The exact percentage depends upon the year selected, whether one is referring to hourly wage or annual wage (men work more hours per week), and whether the percentage reflects a mean or a median. In 1990, the mean annual earning for a man who worked full time was $34,886; the comparable figure for women was $22,768, a wage gap of 65%. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, NO. 174, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE U.S.: 1990, at 128, 142 (1991). The ratio of the median earnings of full-time, year-round female workers to that of male workers in 1990 was 69%. Id. at 5. Wives who worked year-round, full-time in 1987 earned 57% of husbands who worked year-round and full-time. See BUREAU OF THE CENSUS, supra note 85, at 2-3. James Smith and Michael Ward recently predicted that the wage gap will narrow to about 74% by the year 2000. See James P. Smith & Michael Ward, Women in the Labor Market and in the Family, 3 J. ECON. PERSP. 9, 17 (1989).
88. BUREAU OF THE CENSUS, supra note 85, at 1 (noting that in 1967, 37% of married women were in the labor force; this figure rose to 56% by 1988); Shank, supra note 77, at 5. Shank estimates that, by the year 2000, 81% of all women aged 25-54 will work, compared to 93% of men in that age group. Id. at 7.
89. For a discussion of this discrimination, see GOLDIN, supra note 78, at 159-79.
90. Id. at 215.
91. Thirty-nine percent of women aged 25-34 worked full-time, year-round in 1966, compared to 55% of such women in 1986. Id. at 216.
92. See generally Andrea H. Beller, Trends in Occupational Segregation by Sex and Race,
difference between men's and women's wages in the future will not be as great as in the past. However, given current American family policy and employer practices, it still seems likely that the careers of many mothers will continue to be negatively affected by child care responsibilities.

Thus, employment disruptions during marriage cause many women to suffer career damage. There is an issue, however, as to the extent of the damage and as to what portion of the "wage gap" is attributable to these disruptions. The career damage that results depends upon the length of the disruption and the level of skill the job requires. Recent studies suggest that those mothers whose jobs require greater skill, and who could incur significant career damage due to a disruption, are less likely to leave the work force. However, it is important to note that the wage gap cannot be explained solely by career disruptions.

One study concluded that women who had no career disruption earned only 69% of what men earned. Since this is not substantially different from the normal wage gap, factors other than career disruptions must be involved.
I. The Goal of Post-Divorce Equal Living Standards: Professors Rhode and Minow

Men and women have different earning capacities for many reasons. Although some of these reasons, such as discrimination, education levels, and career choice, are not directly related to roles assumed during marriage, a general argument could be made that all of these factors indirectly stem from society's assumption that women will bear primary child care responsibilities. Discrimination based on this assumption can place women at a considerable economic disadvantage. Employers might be concerned about pregnancy or other leave time, parents might provide less encouragement or education for daughters, and women themselves might choose less "desirable" careers that can more easily accommodate child care responsibilities.

Few contend that the divorce courts should or could compensate for all differences in post-divorce opportunities between women and men. Of the contributors to Crossroads, only Rhode and Minow suggest such a goal. Although the precise contours of their proposal are vague, the authors suggest that divorce law should "seek[] equality between men and women . . . in actual status, power, and economic security" (p. 198). The courts are advised to consider both the length of the marriage and the spouse's independent resources in evaluating the strength of the wife's claim (p. 203). Rhode and Minow endorse the idea that a divorcing spouse should have a post-divorce standard of living equal to that during marriage and that if the marriage was of "long" duration, the spouses should have equivalent standards of living, apparently for the rest of their lives (p. 203). The post-divorce standards of living of the two households should also be the same if the couple has a minor child (pp. 204-07). Rhode and Minow do not spend a great deal of time justifying their views. They argue that spouses should be compensated for "contributions" and sacrifices made during marriage, and that the yardsticks set forth above would furnish appropriate estimates of value (p. 203).

Rhode and Minow, like a growing number of other writers, highlight the career damage incurred by many women during marriage due to child care responsibilities and argue that it is unfair to force women at divorce to bear all such career damage (p. 131). Nevertheless, it is


99. Presumably this would be true only if the other spouse could "afford" to fund such a guarantee.

100. See, e.g., Ellman, supra note 53, at 53-54; Williams, supra note 83, at 822-25 (noting that the "gender structure of wage labor" and the failure of men to keep "their side of the gender bargain" lead to "impoverishment of previously married women").
unclear how their proposal relates to this career damage. For example, they do not distinguish between childless marriages and marriages with children or between marriages where both spouses worked full-time and marriages where one spouse did not work. If career damage is the justification for their proposal, such distinctions seem fundamental. Rhode and Minow also emphasize that, in addition to career damage, each spouse’s “contributions” should be compensated at divorce (p. 203). It is not clear, however, to what the authors are referring. Moreover, as they acknowledge, valuing the contributions would be extremely difficult (p. 203).

Even if one accepts the view that almost all of the wage gap stems from actual or potential child care responsibilities, it does not follow that the full cost of these employment disabilities should be borne by the divorcing husband. I believe it is fair only to ask the divorcing husband to share the costs of decisions in which he participated and that some mechanism should be found that isolates the effects of decisions made during marriage. It is not fair to ask the husband to compensate the wife for all career damage she incurred on the expectation that one day she would assume child care responsibilities. Even if the husband should be responsible for such damage, a goal of post-divorce equal living standards is not justified by compensation for career damage. Individual spouses have different levels of intelligence and education and have different career interests at the time of marriage; these all would cause income inequalities for reasons largely unrelated to sex. Thus, even a very broad concept of career damage due to child care responsibilities does not justify a goal of post-divorce equal living standards. If the appropriate focus is compensation for career damage, some other standard for measuring the magnitude of the post-divorce transfer is needed.

2. Career Damage: Dean Kay

Although few writers go as far as Rhode and Minow, an increasing number urge divorce courts to consider whether either spouse

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101. Equitable distribution statutes frequently refer to each spouse’s “contributions” as a factor to be considered by the court when fashioning an equitable division of the marital estate. See OLDHAM, supra note 4, § 3.03. It does not appear that Rhode and Minow are using “contribution” in this sense.

102. See Ruth Deech, Financial Relief: The Retreat from Precedent and Principle, 98 LAW Q. REV. 621, 641 (1982) (“The disadvantages suffered by working women . . . are not actually attributable to the particular husband expected to pay maintenance, and it is unfair to expect the individual to shoulder an expense that should be spread out evenly amongst all men . . . .”); cf. Blumberg, supra note 4.

103. Income sharing could, in theory, be justified on other grounds, such as implied promise from the marital commitment, investment theory, or child support.

104. See Rutherford, supra note 98. Other writers have advocated post-divorce income sharing for a certain period after some divorces. See Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C. L. REV. 1103 (1989); Sugarman, supra note 26, at 154-55; cf. John Eekelaar, Equality and the
incurred career damage during the marriage due to family responsibilities and to incorporate the post-divorce costs of this damage into the equitable distribution balance.\textsuperscript{105} Advocates of this approach disagree over the exact nature of such a system. Professor Ellman has concluded that only “financially rational” career damage should be compensated at divorce,\textsuperscript{106} while Dean Kay would compensate a spouse for career damage regardless of whether the other spouse benefitted (pp. 33-34).

There is force to the Kay/Ellman argument that the existence and amount of any post-divorce award (after equitable distribution of the marital assets) should be based upon career damage incurred during marriage. Although this general approach seems fair, I doubt the ability of divorce courts to compute career damage in a consistent manner. Certainly the attempts of divorce courts to value increased earning capacity arising from a professional degree do not give great comfort.\textsuperscript{107} The randomness of the awards that could result from Kay’s proposal would make the economic outcome of divorce much less predictable, thereby discouraging settlement and increasing transaction costs.\textsuperscript{108}

The Kay/Ellman career-damage award suffers from many of the same uncertainties as Rhode and Minow’s broader approach. There are problems with identifying and quantifying career damage, as well as the difficulty of distinguishing between damage resulting from marital decisions and damage caused by general social conditions. Calculating the amount of career damage can itself pose questions of daunting complex-
ity. If a spouse previously had an established career, the court could attempt to estimate the difference between the spouse's salary at divorce and the salary that could have been attained at the time of divorce but for the career disruption. Even in this simplest case, however, the hypothetical earning calculation would not be easy. What assumptions should be made about promotions that would have occurred and about whether the spouse would have continued in the same career path?

If the spouse had not embarked upon a career at the time of the wedding, the Kay/Ellman calculation becomes even more troubling. If no career existed, is there no "damage"? Here the spouse has not suffered skill depreciation but has simply foregone the opportunity of developing a skill. How should a court determine what the spouse would have done? I imagine the spouses could provide evidence of the spouse's career interests at the time of the wedding. Although courts are forced to make estimates of what would have happened in other areas of the law, the level of speculation that would be required by the Kay/Ellman proposal is a substantial drawback. It is hard to evaluate the reasonableness of the Kay/Ellman award without having some idea of the magnitude of recoveries that would result. Because the career damage could only be estimated at the time of divorce, the actual post-divorce career damage suffered by the spouse could significantly differ from the court's estimation. In such a case, should either party ever be able to petition for the award to be increased or diminished?

The calculation would be complicated further if both premarital decisions and post-divorce effects would also be considered. Victor Fuchs has argued that a significant number of women choose less profitable careers because they are easier to combine with family responsibilities. These decisions are often made before the spouses meet. Is this

109. This obviously would involve some assumptions about promotions that would have been received in the interim. This estimate would not be simple. For example, consider what should occur if a law student graduates from law school, marries, and does not work outside the home. Should career damage be based upon the difference between the spouse's wage at divorce and the average wage of all lawyers, the average wage of lawyers the same age as the spouse, the average wage of lawyers the same age in private firms, the average wage of graduates of the spouse's law school, or something else?

110. For an example of testimony that might be given, see Stiff v. Stiff, 395 So. 2d 573, 574 (Fla. Dist. Ct. App. 1981).

111. See Victor Fuchs, Women's Quest for Economic Equality 61 (1988); Victor R. Fuchs, Women's Quest for Economic Equality, 3 J. Econ. Persp. 25 (1989). Also, women might choose less "desirable" career paths within one field. For example, women law graduates are more likely than men to work in government or corporate legal departments (as opposed to private practice); this is a major cause of the wage gap between men and women attorneys. See Ann J. Gellis, Great Expectations: Women in the Legal Profession: A Commentary on Case Studies, 66 Ind. L.J. 941, 961-66 (1991) (discussing various state studies on the role of women in the legal profession); Paul W. Mattessich & Cheryl W. Heilman, The Career Path of Minnesota Law School Graduates: Does Gender Make a Difference?, 9 Law & Ineq. J. 59, 59-71, 79-91 (1990) (reviewing major findings of a study on the careers of University of Minnesota Law School graduates).
“career damage” that should be compensated at divorce? For divorcing spouses with young children, child care demands will frequently continue to affect the custodial spouse's career prospects after divorce. Presumably this post-divorce career damage should be considered as well.

Career damage focuses upon the post-divorce costs of roles borne during marriage. Should divorce courts consider anything else about these roles? For example, the leisure created by not working outside the home can be enjoyable if the spouse does not have substantial household responsibilities. Should the career-damage computation be adjusted for the leisure the spouse enjoyed? If the couple has children, should a court try to determine whether it was more or less enjoyable for one spouse to assume household responsibilities during marriage than it was for the other to work outside the home?

The particular financial circumstances of the parties lead to other questions. One major question would be the interrelationship between need, the size of the marital estate, and the availability of the Kay/Ellman award. Should a Kay/Ellman award always be available, regardless of whether the spouse needs it? If the spouse does not need it, should it matter whether this results from the spouse’s current earning capacity, the size of the marital estate, or an inheritance? In order to fashion an answer, it will be necessary to consider whether allowing a Kay/Ellman award and a marital estate permits some kind of “double counting.” Some spouses accumulate a significant amount of marital property during their marriage. If this results from the wages of the spouse who did not incur career damage, perhaps the career-damage claim should be offset by the marital property award.

Changes in the parties’ circumstances after divorce also must be considered. I assume that a Kay/Ellman award could either come out of the marital estate or be satisfied in periodic post-divorce payments. If the award is paid in the form of periodic payments, would it be affected by the death of the payor or the recipient, the remarriage of the recipient, or any other significant change in the economic circumstances of either spouse? If ability to pay is considered relevant, as it inevitably must be, proponents of the award must address whether such post-divorce events should be grounds for modifying the award. Although remarriage

112. Calhoun and Espenshade have estimated that, on average, the opportunity cost of having one, two, or three children is $22,000, $43,000 and $64,000, respectively. See Charles A. Calhoun & Thomas J. Espenshade, Childbearing and Wives' Foregone Earnings, 42 POPULATION STUD. 5, 24 (1988) (providing a table of estimated foregone market earnings associated with childbearing).

113. For example, Kay has suggested that the remedy is necessary primarily when the spouses are divorcing after a long marriage, there is a small marital estate, and one spouse is economically dependent and cannot learn a new career. Herma Hill Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CALIF. L. REV. 291, 316 (1987).

114. Currently, such events do affect awards of spousal support. See CLARK, supra note 11, at 660-71 (discussing modification of alimony decrees).
may significantly improve the economic circumstances of the divorced woman, an argument can be made that the recipient's remarriage should not affect the award: if it is accepted that the wife "earned" the career-damage recovery, her continuing need is irrelevant and remarriage would not affect the damage. It seems that underlying the Kay/Ellman proposal, however, is a desire to discover a conceptually acceptable rationale for awarding more money at divorce to women who need it. If this is true, remarriage of the recipient could be relevant. I also would note that if remarriage cuts off such an award, a wife who divorces in order to marry another would receive no award. Although this result might be consistent with many people's intuitive feelings about divorce and morality, such a policy could also be seen as a counterproductive focus upon previously discarded fault notions.

Apart from the myriad difficulties of calculating a career-damage award, one might also ask whether a Kay/Ellman system would create inappropriate incentives for mothers. Would knowledge of such awards encourage more married mothers to leave the work force? I suggested above that I doubted whether this is a wise policy. Still, it seems unlikely that marital property rules significantly affect marital behavior. Even if the award did create incentives for the woman to leave her job, the effect would presumably be countered by the husband discouraging such an action, both to increase the spouses' standard of living during marriage and to minimize the amount of any post-divorce career-damage payment.

The Kay/Ellman system could have other undesirable effects. If the awards were quite large, this could effectively bar many men from remarrying. In my view, this would be an inappropriate result. Such a system might also induce men to establish less-committed, informal relationships instead of ceremonial marriages.

Equitable distribution theory generally enables a court to avoid any detailed analysis of the relative contributions of the spouses to the marriage. Men normally provide more income; women assume more household responsibilities and can incur career damage. Under equitable distribution, courts increasingly assume that the spouses made equal contributions, and in many divorces the marital estate is divided approximately equally. This allows divorce courts to avoid the politically charged process of comparing the value of male and female contributions during marriage.

Although the marital property remedy at divorce is generally perceived as a division of "partnership" accumulations, it may also be perceived as a rough measure of compensation to housewives for services provided and career damage incurred. Under current practice, when the

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115. Cherlin, supra note 45, at 84; Eekelaar & MacLean, supra note 40, at 99-103.
116. See supra text accompanying notes 59-60.
career damage exceeds the marital property award, rehabilitative alimony should be received if training is desired and the payor can afford it. The addition of a career-damage recovery to the current marital property system could be seen to allow double recovery. Of course, many couples do not accumulate much property. For those couples who do, however, courts would have to determine whether to offset a fraction of the property settlement against any career-damage award.

The career-damage recovery could have another unforeseen effect. An advantage of the current system is that the judge is not required to compare the value of the respective contributions by the spouses. The court is asked merely to divide the accumulations of the parties, and this increasingly results in an approximately equal division of the estate. Advocates of the career-damage remedy encourage the court to focus upon the different earning capacities of the spouses at divorce and the extent to which these earning capacities have been harmed due to roles assumed during marriage. Urging courts to focus on the manner in which roles assumed during marriage harmed post-divorce prospects might cause the courts also to consider the value of, and possibly the satisfaction derived from, the disadvantaged spouse's role and contributions during marriage.

Could anything be done to retain the essence of the Kay/Ellman system, while reducing its negative effects? One approach would be to attempt to isolate those divorces where career damage due to family responsibilities seems likely and guarantee Kay/Ellman awards only in those divorces.

I would suggest barring a Kay/Ellman award in divorces involving childless couples. It seems much more likely and unavoidable that career damage will result in marriages with children, because of the familial responsibilities associated with raising children. Therefore, the career-damage claim is more compelling on fairness grounds when a couple has conceived and raised children together. Furthermore, Kay/Ellman awards assume that spouses make joint decisions about whether one should stop working outside the home. There is not a lot of information available to support this proposition, and it might not be true in a number of cases. For example, while it might be reasonable to assume that decisions concerning workforce disruptions due to child care needs are made jointly, it is less clear that these decisions are made jointly in

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117. In contrast, if the marital property system serves only as compensation for services—not career damage—then no double recovery problem would exist.
118. Of course, an alimony remedy is also possible as a supplement to, or a substitute for, the property division.
119. See Levy, supra note 24, at 70.
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marriages not involving children. To be sure, spouses can incur career damage in childless marriages. Still, it seems more likely that the spouse would be quitting to avoid an unpleasant job or to enjoy more leisure time, not to assume family responsibilities. Thus, in marriages without children, fairness concerns may not demand compensation for such damage at divorce. Division of the marital estate in such instances should provide an adequate remedy. Divorce courts should not provide divorce career-damage insurance for every spouse who quits a job during marriage.

Even if Kay/Ellman awards were limited to marriages involving children, most divorces would involve such claims. Still, it is possible that neither parent will incur career damage, even if the spouses raise children. Since employment disruptions are a significant cause of career damage, marriages in which both spouses work full-time and year-round will be unlikely to result in substantial career damage. Kay/Ellman awards presumably would not be needed. By excluding Kay/Ellman awards in these marriages, and in childless marriages, the awards would become less common, but would still be available in most instances where they are appropriate.

Limiting the types of divorce in which career-damage awards would be available would reduce some of the burdens the Kay/Ellman system would impose upon the divorce process, but the problems in calculation would remain. Because the system does not provide simple, predictable rules to guide marital settlements, it would involve significant speculation and require a good deal of expert testimony. Also, I fear it could create a black hole of attorneys’ fees that would devour the parties’ assets. One of the more disheartening events in family law practice occurs when one party depletes the spouses’ funds on a custody fight. If the Kay/Ellman system created yet another mechanism by which spouses could deplete their assets in the divorce process, it obviously would be cause for concern.

A rule requiring post-separation income sharing for some specified period or for a fraction of the duration of the marriage would avoid some of the calculational problems posed by career-damage awards. This system would be more predictable than a Kay/Ellman award, and the obligor’s ability to “pay” is a given. Of course, income sharing has its drawbacks compared to the Kay/Ellman system. It is overinclusive in the sense that spouses could be entitled to income sharing without establishing career damage, unless proof of career damage is established as a prerequisite for income sharing. Also, the amount received would bear

121. In 1984, approximately 54% of divorcing spouses had children under 18 together. NATIONAL CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVS., SERIES 21, NO. 46, CHILDREN OF DIVORCE 8 (1989). According to a recent study, 58% of all divorcing couples had children together. See supra note 44.
no relation to the career damage. The duration of the income sharing might not coincide with the period needed for training or adjustment unless the judge is given some discretion. Income sharing might not be needed if there is a substantial marital estate. In addition, it is unclear how income sharing would function if one or both spouses remarry during the sharing period. One version of income sharing, proposed by Sugarman, is discussed below.

3. Income Sharing: Professor Sugarman

Professor Sugarman describes three different models for post-divorce transfer payments (pp. 154-65). His first model requires payment when necessary to avoid grave financial hardship (p. 154). Need has long been a traditional basis for alimony, but some commentators have recently questioned whether all spouses who “need” post-divorce support should receive it, even if the other can afford the support. Sugarman believes that a need-based award is justified by the couple’s prior intimate relationship. Although the plight of a financially pressed former spouse is troubling, I don’t agree that the financial obligation should be imposed upon the former spouse, as opposed to some other family member or the public, unless the hardship is the result of career damage during marriage. Sugarman makes an analogy to other situations where one person is dependent upon another and the dependent person is given a legally enforceable claim for assistance. He further provides that a need-based award would be only of a magnitude necessary to avoid grave financial hardship and would not be a lifetime award, even if the hardship persisted (pp. 154-55).

Sugarman questions whether it is possible to justify a goal of equal living standards for divorced spouses, but his second model does suggest a form of post-divorce income sharing. Some justify post-divorce income sharing because spouses “invest” in each other’s careers or are “partners.” Like Sugarman (pp. 139-41), I am not persuaded by this argument. While someone might choose a spouse based upon, among other qualities, the person’s future economic prospects, one who makes such a choice should not thereby acquire an interest in the other’s lifetime earnings, regardless of the length of the marriage or whether they have children.

122. E.g., Ellman, supra note 53, at 52.
123. Professor Ellman also has criticized need as a test. Id. But see June Carbone, Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman, 43 VAND. L. REV. 1463, 1498 (1990) (arguing that married couples have a societal obligation to ensure that both spouses are provided for prior to the granting of divorce).
124. See Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony, 27 J. FAM. L. 351, 353-55 (1989) (“To avoid penalizing women for participating in this transfer of human capital, rules for setting the duration of alimony should serve the goal of equalizing the standards of living of the former spouses . . . .”).
The decision to marry in contemporary America cannot, without more, constitute a reason to grant a lifetime claim in the other’s earnings. It has been argued that a spouse provides services, such as advice and business entertaining, that might justify such a lifetime claim.125 These services, while admittedly sometimes valuable, do not justify granting the nonprofessional spouse a portion of the professional’s post-divorce earnings. At least for most professional spouses, the support provided during marriage and the marital property settlement would compensate amply for these services.

Of course, spouses frequently provide other important services, such as homemaking and child care. As Sugarman points out, however, these services do not enable the other spouse to have a career; they enable the spouse to have children (p. 157). It is unclear why post-divorce income sharing should be the appropriate compensation. Child care responsibilities can cause career damage, but that concept is much different from income sharing.

Sugarman offers other justifications for more limited versions of post-divorce income sharing. One theory conceptualizes human capital as a resource constantly being depleted and renewed (pp. 159-60). Under this theory, it is not perceived to be unfair to allow the marital estate to accrue an increasing interest in each spouse’s human capital over time because the capital is replenished during marriage due to effort. This makes some sense conceptually, although it raises a number of questions. Would it be a fair and workable system, and would it be consistent with the expectations of the parties? I am not an enthusiastic supporter of such a system, particularly if it were to be applied to all types of marriages.

Sugarman’s model seeks to include “human capital” in the property to be divided at divorce. Commentators agree that tangible personalty or realty is “property” for purposes of divorce property division.126 During the past fifteen years, courts have accepted that other less tangible rights, such as an employee’s pension,127 business goodwill,128 and certain contingent rights,129 can be included in the marital estate as well. Some observers argue that current notions of divisible property should be expanded even further to include human capital acquisitions made dur-

125. See, e.g., Rutherford, supra note 98, at 577-92.
126. See, e.g., GREGORY, supra note 10, ¶ 2.06[1][c].
127. Id. ¶ 5.04[1]; OLDHAM, supra note 4, § 7.10. But see Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in CROSSROADS, supra note 26, at 191, 200-01 (stating that unvested pensions are not considered divisible in most states).
128. See OLDHAM, supra note 4, ¶ 10.03.
129. See In re Marriage of Kilbourne, 284 Cal. Rptr. 201, 204 n.5 (Ct. App. 1991) (noting that a husband’s right to receive fees is contingent and such fees are divisible community property).
Sugarman's model envisions the gradual merger of the spouses' human capital (p. 159) whereby each spouse accrues an interest in the other's human capital. Sugarman suggests that this should occur at a rate of approximately 2% per year; regardless of the duration of the marriage, the interest should not exceed 40% (p. 160). There would be a vesting period of three to five years to exclude marriages of short duration (p. 160).

Sugarman does not specify what it would mean for one spouse to own 40% of the other's human capital after divorce. Presumably this means that one spouse would transfer annually to the other 40% of the difference in their annual net or gross earnings. I assume this shared human capital interest would continue at least as long as both spouses are alive.

There is superficial appeal to the argument that human capital accumulated during the marriage should be shared between the spouses. Some forms of human capital, such as medical, law, or M.B.A. degrees, intuitively feel valuable. Indeed, certain of these rights are treated as "property" for other purposes, such as whether a state action affecting civil service employment or government benefits can constitute a deprivation of property without due process. In my view, this reflects an incomplete analysis of the issue. Something can be designated "property" for some purposes but not for others.

Under equitable distribution systems, wages are characterized as "marital" (divisible at divorce) or "separate" (not divisible at divorce) based only upon the spouse's marital status when the services were performed and the wages received. Notice that this system treats wages as earned solely during the pay period. Thus, if an executive was married during January, his or her January pay is 100% marital property. Is this really "correct"? In many cases, the employer is willing to pay the executive a high wage only because the executive had the proper education and many years of training and experience. Still, under equitable distribution systems the executive's salary is 100% marital property even if the executive was unmarried until the month before the check was received. This demonstrates the inaccuracy of the assumption of equitable distribution systems that a wage is earned solely due to efforts
expended during the applicable pay period. Unfortunately, I cannot conceive of any other system for characterizing the earnings that would not be prohibitively complex. For example, to determine with greater precision what portion of the executive’s January salary actually should be marital property, one would have to determine what portion of the salary was due to prior training and experience and what portion of that was accumulated prior to marriage. Such a complicated computation does not seem to be a workable solution.\footnote{134}

Could we keep the current system and add a new dimension for human capital accumulations during marriage? This is what New York state appears to be doing.\footnote{135} Note, however, that this “double counts” wages earned by an employee, if (as is quite likely) the employee remarries. For example, in New York, one spouse may earn a medical degree during marriage. Upon divorce, the degree is included in the marital estate and its value is determined by the increased lifetime earning capacity that will be generated by that degree.\footnote{136} If the educated spouse then remarries, the wages generated by the degree during the second marriage will be included in the second marital estate: no deduction is received for the amount included in the first marital estate. Under normal marital-partnership theory, property is deemed earned only once. As an illustration, assume that an employee works for forty years, during which time he has two twenty-year marriages. Half of the accumulated pension rights will be deemed part of the marital estate of the first marriage, and half will be part of the second marital estate.\footnote{137} Similarly, if a lawyer-spouse works on a contingent fee case during the first marriage and settles the case during the second marriage, most courts would apportion the fee between both marriages in some manner, such as the relative amount of time spent on the case during the two marriages.\footnote{138} By treating professional degrees and licenses earned during marriage as marital property, and by valuing the degree in terms of the lifetime earning capacity of the spouse, the New York system counts a professional’s accumulations twice.\footnote{139}

\footnote{134}{But see Blumberg, supra note 4, at 144-45 (suggesting solution could be workable).}


\footnote{136}{See O'Brien, 489 N.E.2d at 718.}

\footnote{137}{In some states, this computation oversimplifies the calculation of the first marriage's marital share of the pension. See, e.g., Berry v. Berry, 647 S.W.2d 945 (Tex. 1983) (reversing lower court's decision that relied on more complex formula); see also Oldham, supra note 4, § 7.10. See generally Gregory, supra note 10, § 5.05.}

\footnote{138}{See In re Marriage of Kilbourne, 284 Cal. Rptr. 201, 202-06 (Ct. App. 1991).}

\footnote{139}{Recent cases suggest that New York courts are moving beyond professional degrees and licenses to include in the marital estate the value of all increases in earning capacity accruing during
I am not in favor of the New York system. First, I doubt that the career-asset idea is consistent with the expectations of most people, particularly if, as seems inevitable, it is extended beyond professional-degree situations. More fundamentally, the career-asset theory is not a good response to the inadequate awards given to some women under the present system. The award centers on a finding that one spouse's career has improved. I believe that the appropriate focus for reform should be on improving remedies for spouses who have incurred career damage due to child care responsibilities. From this perspective, the career-asset approach is both under- and over-inclusive. Childless divorcing spouses could receive huge awards, and mothers could receive nothing. The career-asset theory also requires a speculative computation of the spouse's increased earning capacity during marriage. The career-asset theory is a high-transaction-cost approach that gives a remedy to the wrong spouses for the wrong reasons.

The discussion above summarizes why I believe that human capital assets acquired during marriage should not be considered marital property. At the very least, the value of the property should not be determined based upon the increased earning capacity of the spouse due to the human capital. The most compelling of the “human capital” cases are the situations where one spouse supports the other through professional school and the educated spouse dissolves the marriage soon after graduation. The optimal approach in these cases is some form of reimbursement award to the supporting spouse, an approach now accepted by many states.

Sugarman's third model stems from the idea that marriage is not an impersonal, quick, market transaction. Accordingly, a spouse should provide adequate notice before ending the relationship, at least where one has become dependent upon the support of the other (pp. 160-61). During the notice period, the parties' financial affairs would remain largely intertwined. In his view, because the difficulty of unraveling a spouse's dependency frequently varies with the marriage's duration, the notice

marriage. See Elkus, 572 N.Y.S.2d at 904-05 (increase due to celebrity status); Madori, 573 N.Y.S.2d 553 (increase due to post-licensing speciality training).

140. See supra note 139.

141. See also Kay, supra note 105, at 31 (arguing that the reform agenda should not include expanding definitions of property); Allen M. Parkman, The Recognition of Human Capital as Property in Divorce Settlements, 40 ARK. L. REV. 439, 448-49 (1987) (concluding that most human capital should be treated as separate property).

Sugarman questions whether in the professional degree cases the “supporting spouse” normally enables the “educated spouse” to attend graduate school. The supporting spouse's earnings might permit the educated spouse to avoid incurring a great deal of debt, but in Sugarman's view, the educated spouse would have attended school regardless of the other spouse's contributions. See Sugarman, supra note 26, at 157. This argument, if accepted, leads to the conclusion reached by many states that the supporting spouse is a lender, not an owner. See generally Oldham, supra note 4, ch. 9.

142. See Oldham, supra note 4, § 9.02(4)(c).
period would be based on the length of the marriage (p. 161). Under such a system, this notice period could be anything from 25% to 100% of the duration of the marriage. Sugarman’s “notice” concept resembles rehabilitative alimony in some respects, but there are also striking differences. Currently, rehabilitative alimony is awarded in a specific—often small—amount; in contrast, “fair notice” alimony would require spouses to “share” income during the period, and the amount would vary with the spouses’ combined post-divorce income.

Sugarman does not explain what function the transitional support period would serve. He probably considers it a time when necessary career training might be obtained. It is unclear what might be contemplated if the dependent spouse does not desire training; the transition period could also serve as a time to find a new partner or merely to adjust to living without the spouse.

A number of important details are missing from Sugarman’s description of the notice model. Sugarman only sketches an outline of how spouses’ finances would be intertwined during the notice period. He states that they will, “generally speaking, continue to fully share their income” (p. 161), but does not specify whether the spouses should share equal living standards or merely divide the income equally. This distinction would be significant if there were disparities in the spouses’ health care needs, prior child support obligations, or child custody responsibilities. It is also unclear whether the parties could remarry during this period and what effect this would have.

Sugarman also does not specify whether he would give the divorce judge any discretion, although he implies that the transition period is intended to be a fixed rule. Such a rule might produce predictable results, but it would provide only an estimate of what would be appropriate for most spouses. Furthermore, Sugarman does not discuss whether the sharing could ever stop before the designated period ends. If the period is intended as a training period or to provide for a spouse while the spouse seeks a new mate, could the sharing end earlier if the training has ended or the spouse remarries? On one hand, the award apparently cannot be extended, so it could be argued that it should not be shortened. In contrast, the award could be considered a maximum award, which could be reduced if the need did not exist.

Sugarman’s notice theory assumes that levels of economic dependency usually increase with the duration of the marriage. This would

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143. For example, rehabilitative alimony and fair-notice alimony are intended to support a dependent spouse while he or she is obtaining education or training.

144. Also, it could be argued that the possibility of termination could create undesirable incentives for the recipient to prolong the appearance of dependency.

145. It is unclear whether Sugarman is referring here to an inability to be self-supporting at all or to an inability to support oneself at the standard of living enjoyed during marriage. Whether “dependence” increases during marriage depends upon which standard is used.
presumably be true for those spouses who, at divorce, have not been in
the work force for a long time. An increasing number of women, how-
ever, are joining the work force. Also, many of those who experience a
workforce disruption due to child care responsibilities rejoin the work
force once the youngest child reaches school age.\textsuperscript{146} Thus, Sugarman's
assumption may be only partially true. Alternatively, by "dependency"
Sugarman might simply mean being accustomed to a certain standard of
living. In this sense all spouses are dependent. Still, it is unclear why the
post-divorce adjustment period for this type of "dependency" should
vary with the length of the marriage.

The rationale of the fair notice model suggests that it need only
apply if the spouse with the higher earning capacity wanted a divorce.
Sugarman disagrees, arguing that such a rule would give the higher
earner too much bargaining power (p. 162). This argument is weak. For
example, Sugarman might argue that unless a lower earner could file for
divorce and get "fair notice," the higher earner would have little incent-
tive to please the other spouse because the lower earner would have no
realistic recourse.\textsuperscript{147} Such a scenario, however, essentially describes the
current system.\textsuperscript{148} An alternative argument in support of the Sugarman
view is that even if the lower earner (or non-earner) decides that he/she
wants a divorce, that person might still need support for an adjustment
period.

A rule requiring post-separation income sharing for some specified
period or for a fraction of the duration of the marriage would be more
predictable than a Kay/Ellman award, and the obligor's ability to "pay"
is a given. Of course, income sharing also has drawbacks. It is overin-
clusive in the sense that spouses could be entitled to income sharing with-
out establishing career damage, unless proof of career damage is
established as a prerequisite. In addition, the amount received would
bear no relation to the career damage, nor would the duration of the
income sharing coincide with the period actually needed for training or
adjustment, unless the judge is given some discretion. Finally, income
sharing might not be needed if there is a substantial marital estate.

\footnotesize{146. See supra note 81 and accompanying text.}

\footnotesize{147. Victor Fuchs has noted that the spouses' bargaining power during marriage is affected by
their alternatives (that is, the economic ramifications of the divorce outcome). See FUCHS, supra
note 111, at 71.}

\footnotesize{148. Some might argue that the current system substantially undermines the bargaining power
of women during marriage, particularly those who remove themselves from the work force.}
IV
A RESPONSE TO CROSSROADS

A. A Proposed System of Post-Divorce Income Sharing

Divorce reform is still struggling to respond to the increasing practice of serial marriage in American society. Most divorcing spouses eventually remarry.\textsuperscript{149} Indeed, one argument advanced in support of no-fault divorce was that people should be able to establish a happy domestic life; if a first marriage appeared to be a mistake, the spouses should be free to dissolve the first union and initiate another.\textsuperscript{150}

Obviously, such a policy is not unrelated to the post-divorce economic problems of women and children. Many divorcing families already are in a difficult economic situation.\textsuperscript{151} Once the divorced father remarries, particularly if he establishes a new family, his connections with the first family will probably diminish. Divorce courts frequently take these new responsibilities into consideration when evaluating whether to reduce the father's support obligations to the first family.\textsuperscript{152} Some commentators, such as Rhode and Minow, have criticized this policy (p. 207).

What posture should divorce law take toward the divorced father? Should he be encouraged to remarry, should substantial barriers to remarriage be created, or should the law be neutral? If the father remarries, this may affect his inclination and ability to provide resources to his former spouse and his children.\textsuperscript{153} Many, myself included, would find it unfair to burden unduly the noncustodial parent's ability to remarry. Thus, the challenge for the no-fault divorce system is whether it can adequately provide for the custodial parent and the children without placing unreasonable burdens upon the ex-husband's remarriage options. Satisfying both of these goals may require the talents of the magicians Penn and Teller. Many divorcing families already are pressed financially before they divorce.\textsuperscript{154} Maintaining two households frequently is quite difficult, even before a divorcing spouse contemplates establishing a new

\textsuperscript{149} One study found that 78% of divorced women and 83% of divorced men eventually remarry. See Schoen, supra note 45, at 103, 105.

\textsuperscript{150} See Rheinstein, supra note 2, at 266-70.

\textsuperscript{151} See Bureau of the Census, supra note 85, at 2.

\textsuperscript{152} See Wright v. Wright, 623 P.2d 97, 99 (Haw. Ct. App. 1981) ("[T]he family court may properly consider the husband's current obligation to his second family as part of the totality of circumstances bearing upon his ability to pay a fixed amount of child support . . . ."); Clark, supra note 11, at 662, 729-30 (describing courts' consideration of the payer's remarriage in modifying alimony and child support).

\textsuperscript{153} See Furstenberg & Cherlin, supra note 25, at 37-38; cf. Jay D. Teachman, Who Pays? Receipt of Child Support in the U.S., 53 J. MARRIAGE & FAM. 759, 767 (1991) ("[C]ontrary to expectations, fathers who have remarried are more likely to pay child support than are other fathers.").

\textsuperscript{154} See Glendon, supra note 1, at 71 (noting that divorce laws in all places have become concerned with the new problem of people with limited means divorcing and then remarrying).
relationship.\textsuperscript{155}

It must be recognized that divorce normally will be a financial hardship for both spouses as well as for the children. Marital roles will change and probably become more onerous for most custodial parents, at least until they remarry; this is unfortunate, but given current American family policy it seems inevitable. About 60\% of married women living with their spouse work outside the home. In contrast, about 75\% of divorced women are in the work force.\textsuperscript{156} It is unrealistic to suggest that a divorcing housewife should not be "forced . . . to play multiple roles against her will after the marriage ends."\textsuperscript{157} One must strike a fair balance between a desire to use private law to compensate women for roles assumed during marriage and the concern about unduly burdening men's remarriage prospects.

A compromise solution may be possible. Most divorced women experience their most substantial economic problems between the time of divorce and remarriage. Of course, not all divorced women remarry but for those who do, their primary need is transitional support.\textsuperscript{158} During at least a part of this period, support might be provided by accepting the notion that post-separation income sharing is appropriate if the spouses had at least one child, one spouse suffered a workforce disruption of substantial duration to care for that child, and the other spouse's income at divorce is higher than the spouse who was responsible for child care. I suggest that, unless the marriage is of "long" duration, the income-sharing benchmark should be three years after separation or one-half the duration of the marriage, whichever is shorter.\textsuperscript{159} Equal income sharing

\textsuperscript{155} See id.

\textsuperscript{156} Dowd, supra note 94, at 442.


\textsuperscript{158} A 1980 study found that younger divorced women who remarried had a mean of 2.8 years between divorce and remarriage. See Glick & Lin, supra note 41, at 742.

Remarriage frequently solves the economic problems of divorcing women, at least as long as that marriage lasts. See generally Greg T. Duncan & Saul D. Hoffman, A Reconsideration of the Economic Consequences of Marital Dissolution, 22 DEMOGRAPHY 485 (1985). For a general discussion of remarriage rates, see Bumpass et al., supra note 45.

Sweet and Bumpass estimated that about one-half of all divorced women remarry within five years after separation. See SWEET & BUMPASS, supra note 46, at 195. About two-thirds remarry within 10 years after separation. Id. The probability of remarriage and the duration between separation and remarriage are affected by, among other things, the woman's age at separation. Id. at 196. For example, only 27\% of those older than 35 at the time of separation had remarried within five years. Id. The remarriage rate for Whites is higher than that for Hispanics and Blacks. Id. at 198.

In addition to those divorced women who remarry, some cohabit. See Pamela J. Smock, Remarriage and Cohabitation Among Previously Married Women: Race Differentials and the Role of Educational Attainment, at 11 (National Survey of Families and Households Working Paper No. 31, Ctr. of Demography and Ecology, Univ. of Wis.—Madison) (finding that 17\% of divorced white women were cohabiting, compared to 30\% of divorced black women).

\textsuperscript{159} If spouses are divorcing after a "childful" marriage of long duration, the remarriage
during the sharing period would be the goal. This system resembles, with a few changes, the "notice" system advocated by Sugarman. Some career-damage compensation would be provided, yet the remarriage options of the non-custodial parent would not be unduly burdened. The system would be simple and predictable. The amount of the award presumably would be substantially higher than current rehabilitative awards. Even if this proposal would not cover marriages of a "long" duration, most marriages would be covered. Seventy-eight percent of all divorcing couples have been married fewer than fifteen years. Eighty-seven percent of all couples who divorce dissolve their marriages within twenty years of the wedding date.

This policy would present a number of crucial questions: should income sharing occur regardless of need or size of the marital estate, and should it continue regardless of whether the recipient has remarried? The answers depend upon whether the system is seen more as career-damage compensation or as a system to alleviate need. If the income-sharing recipient works after separation, some means would have to be found to incorporate the wages earned by the payee into the sharing system. Also, if the payee has sole physical custody of children, the system would have to determine how income sharing meshes with child support. I would suggest that the non-custodial parent should never be asked to pay more than 50% of net income for all purposes during the sharing period.

B. Another Proposal: Different Rules for Different Types of Marriages

American divorce law has traditionally contained one rule that governed all marriages, an approach that is to some degree continued by the proposals contained in Crossroads. The justification for this procedurally Procrustean policy is unclear.

Because one standard now governs all divorces, the "rules" governing the exercise of discretion are necessarily vague and in many instances contradictory. Courts are admonished to divide the marital estate "equitably" after considering all relevant factors, such as the spouses' respective contributions, needs, earning capacities, health, and homemaking activities. In a number of states, fault can be included in the equitable distribution calculus. Alimony rules are also often

prospects of the wife will be much lower, and career damage potentially much greater. A model of transitional support seems inadequate for a divorcing spouse in this situation.

161. Id. Note that this includes marriages with children and marriages without children.
162. For example, 50% of the payee's net income might be deducted from the payer's sharing obligation.
163. See OLDHAM, supra note 4, §§ 3.01-03.
164. Id.
While this system might sometimes provide the litigants with a sense of individualized justice, some have wondered whether it more often produces arbitrary results with high transaction costs. A number of writers, including Rhode and Minow (p. 196), are critical of the substantial discretion granted divorce courts to determine economic outcomes. It is quite unlikely that definite rules could be promulgated regarding all aspects of the divorce outcome as long as all marriages are governed by one divorce law.

The proposals made by Sugarman and by Rhode and Minow do not distinguish between different types of marriages. The sole benchmark offered is duration of marriage. Thus, parties would be treated the same, regardless of their age, whether they had children, or whether they suffered career damage. Two thirty-year-olds with two children divorcing after five years of marriage would be treated the same as two sixty-year-olds without children ending a marriage of the same duration. This is a significant defect of each proposal. In my view, the argument for some type of post-divorce payment is much more compelling when one spouse has suffered career damage due to family responsibilities during marriage and the size of the marital estate is small. The justification for post-divorce transfer payments in other situations is less clear.

For these reasons, I believe different types of marriages justify different outcomes. Divorcing spouses might have different earning capacities for many reasons. The difference could have existed at the time of marriage. The spouses could have different talents, experience, or education. Alternatively, the spouses might have chosen careers with very different earning prospects. I do not believe the divorce system could or should attempt to equalize post-divorce earning disparities that result from these causes. When determining whether the divorce court should attempt to compensate one spouse for earning capacity differences at divorce, the cause of the earning disparity is crucial. Why should one spouse, normally the husband, be responsible for compensating the other for earning-capacity differences resulting from the different socialization of men and women or from choices made by the wife that have no connection with the marriage or the husband? Some argue that one spouse helps the other develop his or her career, so it is fair to allow the spouse to share their post-divorce earning prospects. I am not persuaded by this argu-

165. See id. § 13.04.

166. See Glendon, supra note 108, at 1184 (referring to this system as a "discretionary distribution" system).


168. It is conceivable that all marriages could be governed by one definite law regarding property division. See Cal. Civ. Code § 4000 (West 1991). Differences among marriages could then be addressed via alimony or some other adjustment award created to replace alimony.

169. Different careers obviously have different prospects. Even different choices within similar careers (lawyer or law professor; medical research or orthopedics) can be significant.
ment. As Sugarman notes, wives frequently facilitate having children, not establishing a career (p. 157). In my view, the appropriate focus at divorce is upon any career damage suffered by either spouse during marriage due to family responsibilities.

It might be difficult to reach a consensus on how to distinguish among various marriage types. However, it would be sensible at least to distinguish between childless marriages and marriages in which the spouses have conceived and raised children.\textsuperscript{170} For the former type, I would suggest a presumptive result that the marital estate should be divided equally and that there should be no additional adjustment.\textsuperscript{171} I have noted that childless marriages frequently have far fewer characteristics of an economic partnership.\textsuperscript{172} Presumptive rules for marriages with children would be much harder to agree upon. To begin this dialogue, I would suggest formulating different rules, depending upon whether the marriage was of short, medium, or long duration. A crucial criterion should be whether the wife worked full-time during marriage without a substantial career disruption.

B. A Comment Regarding the Scope of Crossroads

Crossroads provides a useful survey of views on how the rules governing the economic consequences of divorce should be changed. It does not address all the effects of no-fault divorce on American society or discuss all the areas where reform could be useful. The book focuses on the economic consequences of divorce and in particular on the economic consequences for women, ignoring the male experience of divorce.\textsuperscript{173} I

\textsuperscript{170} A number of writers have noted the differences between these types of marriage. See John Eekalaar, \textit{Family Law and Social Policy} 86-87 (2d ed. 1984); Mary Ann Glendon, \textit{Family Law Reform in the 1980's}, 44 La. L. Rev. 1553, 1558 (1984); J. Thomas Oldham, \textit{Is the Concept of Marital Property Outdated?}, 22 J. Fam. L. 263, 266-67 (1984).

While a significant element of a claim for equitable adjustment at divorce stems from the child care responsibilities borne by the wife, such a concern normally would not be present in a childless marriage. Of course, child care (or other caretaking activities) can exist in some childless marriages if one or both parties have children from prior marriages or an elderly parent.

\textsuperscript{171} The answer would not be as clear if the wife devoted a substantial amount of time to caring for the husband's children from a prior marriage, and thereby suffered career damage.

An alternate model for a short-term childless marriage would be to try to put the parties in the position that would have resulted had the marriage not taken place. See Rose v. Rose, 755 P.2d 1121 (Alaska 1988). Also, in childless marriages I would continue the equitable remedies that have been developed to address the problem created when a spouse graduates from a professional school and then quickly divorces. See Oldham, supra note 4, § 9.

\textsuperscript{172} See Oldham, supra note 170, at 266, 268, 305.

\textsuperscript{173} For example, the book mentions in passing that many divorcing men do not request their preferred custody arrangement. See Robert H. Mnookin et al., \textit{Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?}, in Crossroads, supra note 26, at 71. Mnookin et al. conclude that in most instances fathers concede primary custody to the wife, even though the fathers would like a more active role. The potential of joint physical custody is not explored. Admittedly this issue is not a simple one. See \textit{Child Custody and the Politics of Gender} (Carol Smart & Selma Sevenhuijsen eds., 1989); Fineman, supra note 52, at 34; Martha L. Fineman,
do not mean to minimize the gravity of the economic problems encountered by many women after divorce.\textsuperscript{174} This serious social issue certainly warrants the attention of the able scholars who have contributed to Crossroads. Still, it seems of some interest that, in a book that purports to be a survey of important contemporary divorce issues, the concerns of men are largely ignored.

This perspective leads to an incomplete view of the post-divorce circumstances of the parties. It gives the impression that men are "deadbeat dads" who need to be whipped into shape via better enforcement mechanisms for family-law orders. Although I am sure that this description is valid in some instances, it is not the whole picture. The lack of concern for the consequences of divorce upon men is unfortunate. It suggests that only women suffer after divorce and that men's problems after divorce are less deserving of attention.\textsuperscript{175} Is it not of some interest that nearly half of all divorced fathers have not seen their minor children


Research during the next decade should allow us to better understand the dynamics of the divorced father's relationship with his children when the mother has sole physical custody. For example, Furstenberg and Cherlin suggest that visitation by divorced fathers might be unsatisfactory to many merely because they never assumed primary responsibility for child care during the marriage, and they may find it difficult to adjust to after divorce. See \textit{Furstenberg & Cherlin}, supra note 25, at 119.

\textsuperscript{174} See generally Bureau of the Census, \textit{U.S. Dep't of Commerce, Current Population Reports, Series P-70, No. 23, Family Disruption and Economic Hardship: The Short-Run Picture for Children 8-13} (1991); Weitzman, supra note 5, at 340-41 (stating that with child support often being inadequate, the standard of living often falls off sharply for many women).

\textsuperscript{175} Gauging degrees of suffering obviously is tricky business. However, a 1985 poll of divorced
in the past year.\textsuperscript{176} If more attention were paid to the effect of divorce upon men, it might be possible to create new mechanisms to minimize the sense of estrangement men feel after divorce. If paternal estrangement leads to non-compliance with child support orders, these new mechanisms could make fathers more willing to contribute financially to their children after divorce. It seems quite unlikely, given recent federal legislation requiring states to enforce child support orders via garnishment,\textsuperscript{177} that much more can be done to improve compliance with family-law orders without trying to induce men to want to comply.\textsuperscript{178} Encouraging fathers to maintain contact with their children would also benefit the children.\textsuperscript{179}

V

CONCLUSION

A number of factors are relevant to a choice of post-divorce economic rules. Significant concerns include the perceived fairness of the system, the predictability of result obtained, and the required transaction costs.\textsuperscript{180} For example, Minow and Rhode's equal-living-standards proposal would yield predictable results and have low transaction costs, but would raise fairness concerns. Conversely, the Kay/Ellman career-damage approach would be more fair, in my opinion, but raises the specter of unpredictable and arbitrary results, as well as high transaction costs.

Only one generation after the general acceptance of no-fault divorce, it is not surprising that there is no agreement regarding how to address


Father-bashing might be gaining a new foothold in this area. Some courts and commentators support financial and other penalties against a noncustodial parent who does not exercise visitation rights. See, e.g., SYLVIA A. HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN 258 (1991); Mark Hansen, A Court-Ordered Better Dad: Chicago Woman Asks Judge to Force Spouse to Visit Son More Often, A.B.A. J., Oct. 1991, at 24. This would be an appropriate response if divorced noncustodial fathers are perceived to be lazy and irresponsible. In contrast, if it is perceived that many men do not exercise their visitation rights due to the emotional pain of their marginal status, the remedy seems much more cruel.

\textsuperscript{177} 42 U.S.C.A. $654$ (West 1991).


\textsuperscript{179} Cf. ROBERT E. EMERY, MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT 89-90 (1988) (noting a lack of research); FURSTENBERG & CHERLIN, \textit{supra} note 25, at 72-73 (acknowledging inconsistencies in research findings, but positing that children still benefit from continuing contact with noncustodial fathers).

\textsuperscript{180} Professor Schneider would include the morality of the rules. See Schneider, \textit{supra} note 63, at 198.
all the questions resulting from no-fault divorce and the increasing practice of serial marriage. While I doubt that any group of mortals could have definitively resolved these questions, *Crossroads* does the next best thing by at least raising many of them. It reflects a growing consensus that American women are treated unfairly at divorce and reveals the diversity of views on fashioning an appropriate response. I suggest that the effects of divorce on men, as well as on women, must not be forgotten in developing new approaches to the dissolution of marriages, and that in these times of changing marital patterns it might be appropriate to approach different marriage patterns with different presumptive rules.