

UNIVERSITY OF
CINCINNATI LAW REVIEW

PUBLISHED QUARTERLY BY THE BOARD OF EDITORS

VOLUME 56

1987

No. 1

**EQUALITY AND DIFFERENCE: A PERSPECTIVE ON
NO-FAULT DIVORCE AND ITS AFTERMATH***

*Herma Hill Kay***

INTRODUCTION

Nearly twenty years ago, in 1969, California adopted the first no-fault divorce law in the United States.¹ In the briefer span of ten years within that period, beginning in 1972, the nation participated in an intense debate over the proper roles of women and men as Congress proposed and the state legislatures debated whether to ratify an Equal Rights Amendment (ERA) to the United States Con-

* A shorter version of this paper was delivered on April 3 and 4, 1986, as the Robert S. Marx Lectures at the College of Law, University of Cincinnati.

** Professor of Law, University of California at Berkeley. B.A. 1956, Southern Methodist University; J.D. 1959, University of Chicago. The author was a member of the California Governor's Commission on the Family; Co-Reporter of the Uniform Marriage and Divorce Act; and a Co-Investigator on the California Divorce Law Research Project (Dr. Lenore Weitzman, Principal Investigator). I am grateful to my research assistant, Barbara Flagg, for her help.

Editor's Note: In Ohio, the syllabus of an opinion of the Ohio Supreme Court states the controlling points of law. See Rule 1(B) of the Ohio Supreme Court Rules for the Reporting of Decisions. Because the text of opinions merely discusses these controlling points of law, the University of Cincinnati Law Review cites to the syllabi wherever possible.

1. Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312. Several states had enacted "no-fault" grounds for divorce, such as incompatibility of temperament, voluntary separation for a period of time, or incurable insanity, prior to the adoption of the California Family Law Act. See *infra* note 22 (listing statutes including those preceding California Act). As Rheinstein has noted, such provisions served as "an opening wedge" for the move to a "pure" no-fault approach based on factual breakdown of the marriage. M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 313-16 (1972).

stitution.² In 1987, no-fault divorce is available in all fifty states,³ but proponents of the ERA, having failed to achieve its ratification, are preparing to renew the debate over its adoption concurrently with the national celebration of the Constitution's 200th anniversary.⁴

Proponents of the ERA in the 1970s shared a common vision of equality between women and men that was premised on their equal treatment before the law. Except where sex-specific traits were involved, they wished to prohibit the use of sex as a basis for classification. The vision of equality held by feminists in the 1980s is no longer a unified one, nor is it limited to the achievement of formal equality of treatment. The focus has shifted from a recounting of the similarities between women and men to an examination of what differences between them should be taken into account under what circumstances in order to achieve a more substantive equality.

The laws governing marriage and divorce received close examination during the first debate over the ERA, for they focus exclusively on the relationships between women and men. Moreover, the proposals for no-fault divorce were considered in many states at roughly the same time as the national debate over ratification of the ERA.⁵ The no-fault laws may have seemed consistent with the ideal of equality embodied in the ERA, for, as a general matter, those proposals drew no distinctions based on sex. Despite their contemporaneous presence on the agendas of the state legislatures, however, the proposals to remove fault from divorce and to place a guarantee of equality between the sexes into the federal Constitution had different origins and purposes. The achievement of equality between divorcing marital partners was not among the goals of the divorce reform movement, at least in its early stages.⁶

2. J. MANSBRIDGE, *WHY WE LOST THE ERA* 1-7, 12-14 (1986).

3. For categorization of the types of no-fault divorce laws and citation to the state statutes, see *infra* notes 19-22 and accompanying text.

4. 19 NAT'L NOW TIMES, Winter 1987, at 1, col. 1 (featuring NOW President Ellie Smeal's discussion of reintroduction of ERA in 100th Congress on January 6, 1987, and quoting her as saying that "[W]e can raise the nation's awareness of the need for the Equal Rights Amendment in an unprecedented way during the Bicentennial celebration."). See H.R.J. Res. 1, 100th Cong., 1st Sess., 133 CONG. REC. H104 (daily ed. Jan. 6, 1987); S.J. Res. 1, 100th Cong., 1st Sess., 133 CONG. REC. S155 (daily ed. Jan. 6, 1987).

5. Many state no-fault statutes were adopted or modified in the 1970s. See *infra* note 22 (listing pre-1969 no-fault provisions and post-1969 modifications), text accompanying notes 249-79 (discussing divorce laws adopted in 1970s and comparing states' consideration of ERA).

6. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 300 (1987).

Dr. Lenore Weitzman, in her study of the aftermath of the no-fault divorce movement, however, has provided an historical picture of that movement suggesting that the proponents of no-fault divorce set out to treat men and women equally upon divorce, but instead unintentionally devised a system that has operated to the disadvantage of women and children.⁷ Weitzman's historical account needs correction, at least so far as it is based on the goals of the various participants in the no-fault divorce reform movement in California.⁸ Her conclusion that divorce disadvantages women more than men may be accurate, but if so, that phenomenon is only partly explained by the shift from a fault to a no-fault system of divorce.

In the debate over equality between women and men, the question of difference must be confronted. It is now clear that biological reproductive sex differences, such as pregnancy, may be taken into account under certain circumstances in affording women equality in the workplace.⁹ I wish to explore in this Article the question whether social differences, such as the traditional and virtually universal assignment of the role of primary nurturing parent to mothers, should be taken into account in affording women equality upon divorce.

In what follows, I provide in Part I a short overview of the divorce reform movement in the United States. In Part II, I survey the contours of the feminist debate over equality and difference and show how that controversy affects our understanding of the position of women after divorce. In Part III, I recount in more detail the history of the no-fault divorce reform movement, with particular emphasis on its California origins, and show that achievement of equality between women and men in divorce was not its purpose. In Part IV, I examine the claim that the elimination of fault from divorce has in fact disadvantaged women. In Part V, I consider, in light of a critique I have developed elsewhere to analyze sex differences, and which I term "episodic analysis,"¹⁰ a possible justifica-

7. L. WEITZMAN, *THE DIVORCE REVOLUTION* 16-41 (1985).

8. For commentary on the participants' goals, see *infra* text accompanying notes 103-14.

9. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 693-94 (1987) (Title VII of federal Civil Rights Act, 42 U.S.C. §§ 2000e to e-17 (1983), did not preempt California statute requiring employers to provide female employees with unpaid pregnancy disability leave and to reinstate an employee returning from such leave, unless job was no longer available due to business necessity).

10. Kay, *Equality and Difference: The Case of Pregnancy*, 1 *BERKELEY WOMEN'S L.J.* 1, 22-27 (1985).

tion for treating women and men in traditional marriages differently at divorce.

The thesis of this Article, that women in traditional marriages are encouraged to become dependent upon their husbands for their identity and support, and that their dependency often produces an inequality of situation upon divorce, is in a sense independent of the shift from fault to no-fault divorce for it will apply to marriages characterized by a conventional division of labor by sex under either regime. It takes on special significance, however, in the context of the reexamination of family forms that has accompanied the no-fault divorce movement. If the social and cultural norms that once supported the traditional model of marriage are giving way to a new consensus that supports more egalitarian partnerships, the no-fault reform, although not itself the result of a search for equality between women and men, may yet serve to stimulate a more substantive approach to that goal.

I. OVERVIEW OF THE NO-FAULT DIVORCE MOVEMENT

The most recent wave of American divorce reform began in California in 1963.¹¹ Paradoxically enough, the reform effort was touched off by a bachelor serving in the state legislature, who, as an attorney, had noticed that judges deciding his clients' divorce cases exhibited a lack of uniformity in determining questions of alimony, child support, and child custody. Today, nearly twenty-five years later, some feminists believe that judges applying the no-fault divorce laws he helped to initiate are treating women and children unfairly, particularly with respect to spousal and child support and the identification and distribution of property.¹² Other observers wonder whether the no-fault divorce reform movement has produced merely a shift from earlier laws that favored women to an existing system that favors men.¹³

Yet the California Governor's Commission on the Family, the group usually credited with exerting the greatest influence on the development of the California law, did not design its no-fault divorce proposal to favor either women or men. Nor was its primary goal that of achieving equality between the sexes. Rather, the Commission's aim was to abolish California's existing substantive di-

11. Krom, *California's Divorce Law Reform*, 1 PAC. L.J.156, 157-58 (1970).

12. See, e.g., L. WEITZMAN, *supra* note 7, at xi-xiv; Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 880-85.

13. See, e.g., Murray, *Family Law, Twelfth Survey of Florida Law, Part One*, 30 U. MIAMI L. REV. 107, 108 (1976).

orce law based on fault, together with its accompanying adversary divorce procedures and to replace those provisions with a concept of marital dissolution administered within a Family Court equipped with a specialist judge and a staff trained to assist divorcing couples to resolve their disputes with a minimum of hostility.¹⁴ In order to facilitate the Family Court's inquiry into the real causes of marital breakdown, the Commission proposed to remove fault from other aspects of marital dissolution: from the award of spousal support, from the division of property, and from the child custody determination.¹⁵ As we will see, however, the California Family Law Act of 1969, which became the model for a national shift from fault to no-fault divorce, was not the law that the Governor's Commission on the Family had recommended. The legislature abandoned the Commission's proposal for a Family Court,¹⁶ and the no-fault approach was left to the interpretation and implementation of judges unfamiliar with its philosophy.

The concept of no-fault divorce as a recognition of factual marriage breakdown spread east from California, strengthened by its endorsement in the Uniform Marriage and Divorce Act (UMDA), originally promulgated in 1970 by the National Conference of Commissioners on Uniform State Laws.¹⁷ As it moved eastward, however, the no-fault idea was modified in several important respects that marred its conceptual clarity. Not all states were willing to follow the California Governor's Commission and the 1970 Uniform Act in abolishing all fault-based grounds for divorce and installing in their stead a pure no-fault law based on marriage breakdown.¹⁸ Only fifteen states have "pure no-fault" divorce laws in that strict sense.¹⁹ In twenty-one states, a no-fault provision based either on

14. CALIFORNIA GOVERNOR'S COMM'N ON THE FAMILY, REPORT 1-2 (1966) [hereinafter GOVERNOR'S COMM'N REPORT].

15. *Id.* at 26.

16. CAL. ASSEMBLY COMM. ON JUDICIARY, REPORT ON A.B. NO. 530 AND S.B. NO. 252 (THE FAMILY LAW ACT), 4 ASSEMBLY JOURNAL 8053 (Aug. 8, 1969) [hereinafter ASSEMBLY COMM. REPORT].

17. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 91 (1979) [hereinafter UMDA]. The final version of the UMDA was promulgated in 1973, and received the endorsement of the American Bar Association in 1974. See *infra* text and accompanying notes 236-37.

18. Neither the California Family Law Act nor the 1973 version of the UMDA embodied the "pure" no-fault concept proposed by the Governor's Commission. See *infra* text and accompanying notes 201-03 (discussing Family Law Act), 237-38 (discussing UMDA).

19. The states are Arizona, California, Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming. ARIZ. REV. STAT. ANN. §§ 25-312, 25-316 (1976 & Supp. 1986); CAL. CIV. CODE § 4506 (West 1983); COLO. REV. STAT. § 14-10-106 (Supp. 1985); FLA. STAT. § 61.052 (1985); HAW. REV. STAT. § 580-41 (1976); IOWA CODE ANN. § 598.17 (West

the California or Uniform Act version of the breakdown model supplements, but does not replace, fault grounds.²⁰ Ohio, counted as one of these twenty-one states, is unique in having both a divorce law based on fault and a procedure for dissolution of marriage based on an agreement of the spouses without any statutory specification of a breakdown standard.²¹ Fourteen states and the District of Columbia use a separation or an incompatibility standard as their no-fault ground; most of these laws predated the California Family Law Act.²²

1981); KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984); MICH. COMP. LAWS ANN. § 552.6 (West Supp. 1986); MINN. STAT. ANN. § 518.06 (West Supp. 1987); MONT. CODE ANN. § 40-4-104 (1985); NEB. REV. STAT. § 42-347 (Supp. 1986); OR. REV. STAT. § 107.025 (1984); WASH. REV. CODE ANN. § 26.09.030 (West 1986); WIS. STAT. ANN. § 767.07 (West 1981); WYO. STAT. ANN. § 20-2-104 (1986).

20. The states are Alabama, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, and West Virginia. ALA. CODE § 30-2-1 (1983); CONN. GEN. STAT. ANN. § 46b-40 (West 1986); DEL. CODE ANN. tit. 13, §§ 1503-05 (1984); GA. CODE ANN. § 19-5-3 (1982); IDAHO CODE § 32-603 (1983); ILL. REV. STAT. ch. 40, para. 401 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-1-11.5-3 (Burns Supp. 1986); LA. CIV. CODE ANN. art. 138 (West Supp. 1986); LA. REV. STAT. ANN. § 9.302 (West Supp. 1986); ME. REV. STAT. ANN. tit. 19, § 691 (1981); MASS. ANN. LAWS ch. 208, § 1 (Law. Co-op. 1981); MISS. CODE ANN. §§ 93-5-1 (1973), 93-5-2 (Supp. 1986) (divorce for irreconcilable differences requires consent of both parties and a separation agreement); MO. ANN. STAT. §§ 452.305, 452.320 (Vernon 1986); N.H. REV. STAT. ANN. §§ 458:7, 458:7a (1983); N.D. CENT. CODE § 14-05-03 (1981); OHIO REV. CODE ANN. §§ 3105.01, 3105.63 (Anderson 1980 & Supp. 1985) (dissolution of marriage requires consent of both parties and separation agreement); PENN. STAT. ANN. tit. 23, § 201 (Purdon Supp. 1986); R.I. GEN. LAWS §§ 15-5-2, 15-5-3, 15-5-3.1 (1981 & Supp. 1986); S.D. CODIFIED LAWS ANN. § 25-4-2 (Supp. 1986); TENN. CODE ANN. § 36-4-101 (Supp. 1986); UTAH CODE ANN. § 30-3-1(3) (1984) (amended by H.B. 139, 1987 Utah Laws, effective Apr. 29, 1987); W. VA. CODE § 48-2-4 (1986).

21. OHIO REV. CODE ANN. § 3105.01 (Anderson Supp. 1985) (listing grounds for divorce; includes fault-based grounds and one no-fault ground, based on separation for one year); OHIO REV. CODE ANN. §§ 3105.61-.65 (Anderson 1980) (authorizing court to grant dissolution of marriage when petition requesting dissolution is signed by both spouses and separation agreement is attached providing for property division, alimony, child custody, support, and visitation). *See generally* Norris, *Divorce Reform, Ohio Style*, 47 OHIO B. 1031 (1974) (analyzing provisions of 1974 Reform Act and arguing Ohio legislature acted wisely in passing divorce reform without adopting no-fault system); Note, *The Ohio Divorce Reform of 1974*, 25 CASE W. RES. L. REV. 844 (1975) (discussing advantages of combined fault-no-fault system over pure no-fault system).

22. These jurisdictions are Alaska, Arkansas, the District of Columbia, Kansas, Maryland, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Texas, Utah, Vermont, and Virginia. ALASKA STAT. § 25.24.050 (1983) ("incompatibility of temperament" ground added 1935, ch. 54, 1935 Alaska Sess. Laws 120); ALASKA STAT. § 25.24.200 (1983) (permits petition for "dissolution of marriage" upon showing that "incompatibility of temperament has caused the irremediable breakdown of the marriage" added 1976, ch. 260, 1976 Alaska Sess. Laws); ARK. STAT. ANN. § 34-1202 (Supp. 1985) (provision allowing divorce based on three consecutive years of voluntary separation enacted 1937, no. 167, 1937 Ark. Acts 630); D.C. CODE ANN. § 16-904 (1981) (separation without cohabitation for one year immediately

States adopting the no-fault factual breakdown of marriage approach varied, as well, about the extent to which they were willing to modify their existing provisions governing the financial aspects of divorce. The states follow one of two methods of property holding between married couples. Eight states, including California, follow a community property regime in determining the property rights of

preceding commencement of action added 1935, Pub. L. No. 74-453, § 1, 49 Stat. 539 (1935); mutual voluntary separation without cohabitation for six months added 1977, 23 D.C. Reg. 5869-70 and 8737); KAN. STAT. ANN. § 60-1601 (1983) (incompatibility ground added 1969, ch. 286, 1969 Kan. Sess. Laws 738, 739); MD. FAM. LAW CODE ANN. § 7-103 (1984) (voluntary separation for twelve continuous months without reasonable expectation of reconciliation or uninterrupted separation for two years required) (voluntary separation provision added with longer period of separation in 1937, ch. 396, 1937 Md. Laws 791); NEV. REV. STAT. § 125.010 (1985) (incompatibility ground added 1967, ch. 278, 1967 Nev. Stat. 805) (provision allowing divorce after five years' separation, added 1931, is discretionary with court, ch. 111, 1931 Nev. Stat. 180); N.J. STAT. ANN. § 2A:34-2 (West Supp. 1986) (18 months' separation with no reasonable prospect of reconciliation provision added 1971, ch. 212, 1971 N.J. Laws 1022, 1023); N.M. STAT. ANN. § 40-4-1 (1986) (incompatibility added 1973, ch. 319, 1973 N.M. Laws 1354); N.Y. DOM. REL. LAW § 170 (McKinney 1977) (provisions enacted 1966 allowing divorce based on one year of separation following decree or judgment of separation or pursuant to written separation agreement); N.C. GEN. STAT. § 50-6 (1984) (one party can apply for divorce after separation for one year) (originally enacted, with longer period of separation, 1931, ch. 72, 1931 N.C. Sess. Laws 98); OKLA. STAT. ANN. tit. 12, § 1271 (West 1961) (incompatibility added 1953); S.C. CODE ANN. § 20-3-10 (Law. Cop. 1976) (separation for one year) (originally enacted, with longer period of separation, 1969, no. 170, 1969 S.C. Acts 172); TEX. FAM. CODE ANN. § 3.01 (Vernon 1975) ("insupportability" of marriage, due to discord or personal conflict, ground added 1969, ch. 888, 1969 Tex. Gen. Laws 2707, 2721), TEX. FAM. CODE ANN. § 3.06 (Vernon 1975) (living apart for three years without cohabitation) (originally enacted 1925 with ten-year period of separation); VT. STAT. ANN. tit. 15, § 551 (1974 & Supp. 1986) (separation for six consecutive months and the resumption of marital relations not reasonably probable) (originally enacted 1941 with three-year period of separation); VA. CODE ANN. § 20-91 (Supp. 1986) (continuous separation for one year; period reduced to six months if there are no minor children and if parties have entered into separation agreement) (originally enacted, with longer period of separation, 1960, ch. 108, 1960 Va. Acts 121).

Several states with no-fault grounds based on separation reduced the period of required separation after the California Family Law Act was adopted in 1970. Thus, Maryland reduced its voluntary separation period from eighteen months to twelve months in 1973, ch. 699, 1973 Md. Laws 1472, 1473, and its separation period from three years to two years in 1983, ch. 491, 1983 Md. Laws 1496, 1497. New Jersey added its 18 months' separation provision in 1971. Ch. 212, 1971 N.J. Laws 1022, 1023. South Carolina reduced its period from three years to one year in 1979. No. 10, 1979 S.C. Acts 10, 11. Vermont reduced its period in 1971 from three years to two years, no. 39, 1971 Vt. Laws 62, and then to six months, no. 238, 1971 Vt. Laws (Adj. Sess.) 449. Virginia reduced its period from two years to one year in 1975, ch. 644, 1975 Va. Acts 1336, 1342, and in 1982 added a six-month period for separated couples without minor children, ch. 308, 1982 Va. Acts 514. The District of Columbia added its provision for mutual and voluntary separation for six months in 1977. 23 D.C. Reg. 5869-70 and 8737.

married persons.²³ The other forty-two states trace their laws governing property to the common law of England.²⁴ When work began on the UMDA, in the mid-1960s, slightly more than one-third of these common law states did not authorize property awards on divorce or restricted such awards to specific types of property or forms of title.²⁵ It may have been unreasonable to expect those states to follow California in mandating an equal division of marital property.²⁶ Still, it might have been reasonable to anticipate that a no-fault approach to divorce would produce different property awards in community property and common law states. The 1970 version of the UMDA sought to deal with this problem by creating a deferred community property system to take effect upon dissolution.²⁷ The final 1973 version of the Act, however, deleted the de-

23. The eight states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 20 (1967); see also Lowey, *The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California*, 1 CALIF. L. REV. 32 (1913).

24. Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 59 (1979).

25. An analysis of Professor Robert J. Levy's Appendix of state laws concerning property division on divorce, prepared for the Commissioners on Uniform State Laws, shows seventeen common law states and the District of Columbia as not authorizing, prohibiting, or restricting property distribution on divorce, and twenty-five common law states as allowing such distribution under some circumstances. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS app. B, B-1 to B-18 (1969) (internal document prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws) (copy on file in Professor Kay's office). See also Krauskopf, *A Theory For "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 167-71 (1976) (criticizing common law approach).

26. Professor Levy, the first Reporter appointed for the UMDA, noted in his background monograph prepared for the Commissioners' Special Committee on Divorce that "[i]t seems clear that the time is not yet ripe to insist upon a '50-50 formula.' It would be much more difficult to convince those states which have not recognized any power to distribute property to adopt such a radical innovation rather than a more modest power of judicial distribution." R. LEVY, *supra* note 25, at 167.

27. UMDA § 307 (1970) provided:

[Disposition of Property.]

(a) In a proceeding for dissolution of the marriage or for legal separation, or a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:

- (1) the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (2) the value of the property set apart to each spouse; and
- (3) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of

ferred community provision and substituted an equitable

awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(b) For purposes of this Act only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

- (1) property acquired by gift, bequest, devise, or descent;
- (2) property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) property acquired by a spouse after a decree of legal separation;
- (4) property excluded by valid agreement of the parties; and
- (5) the increase in value of property acquired prior to the marriage.

(c) All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (b).

Id.

Section 307 was amended in 1971 to make several minor changes in wording and to add a new factor, the duration of the marriage, to the list of relevant factors to be considered when dividing the property. Section 307, as amended in 1971, reads as follows:

[Disposition of Property]

In a proceeding for dissolution of the marriage, or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (2) value of the property set apart to each spouse;
- (3) duration of the marriage; and
- (4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(b) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage except:

- (1) property acquired by gift, bequest, devise, or descent;
- (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) property acquired by a spouse after a decree of legal separation;
- (4) property excluded by valid agreement of the parties; and
- (5) the increase in value of property acquired before the marriage.

(c) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is

distribution of all property.²⁸ Given this conflict between the stan-

overcome by a showing that the property was acquired by a method listed in subsection (b).

Id.

28. UMDA § 307 (1973) deleted the definition of "marital property" previously contained in § 307(b), quoted *supra* note 27, and set out two alternative versions. The first is recommended for general adoption while the second is tailored to community property states. Section 307 (1973) provides:

Alternative A

[Disposition of Property.]

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however or whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, any prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and as the contribution of a spouse as a homemaker or to the family unit.

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Alternative B

[Disposition of Property.]

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal dissolution by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

- (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (2) value of the property set apart to each spouse;
- (3) duration of the marriage; and
- (4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.

UMDA § 307 (1973).

The 1973 version of § 307 also revised the comment to that section so that it states, in the final paragraph:

dards for property division under the California Family Law Act and the 1973 Uniform Act, it is not surprising that a debate ensued in many states over the relative wisdom of an equal or an equitable distribution of assets.²⁹

Both in California and in the 1970 and 1973 versions of the Uniform Act, the legal standards governing alimony (renamed "spousal support" in California³⁰ and "maintenance" by the Uniform Act³¹) were altered to eliminate marital fault as a bar to the award. Specific factors listed in the statutes directed the court's attention, instead, to economic considerations and the factual circumstances of the parties as the basis for support.³² Again, however, states varied in

Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone, in accordance with an enumeration of principles, resemblant, so far as applicable, to those set forth in Alternative A.

Id. § 307 comment.

29. For citations to discussions of the debate over equal or equitable distribution of assets, see *infra* note 288.

30. CAL. CIV. CODE § 4801 (West Supp. 1986).

31. UMDA § 308(b) (1973).

32. The California Family Law Act, as adopted in 1969, authorized the court to order support for either party in

any amount, and for such period of time, as the court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children of the parties in the custody of such spouse.

Family Law Act, § 8, 1969 Cal. Stat. at 3333. The most recent version of this provision contains a longer list of factors. See CAL. CIV. CODE § 4801(a) (West Supp. 1986).

Section 308(b) of the 1973 UMDA, unchanged in substance from the 1970 version, provides:

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UMDA § 308(b) (1973).

their willingness to eliminate fault from the financial package as well as from the grounds for divorce.³³

The no-fault divorce laws did not change the legal standards governing the custody of children in any significant way. Both the California Family Law Act and the 1970 and 1973 versions of the Uniform Act adopted the "best interests" of the child standard.³⁴

33. Levy lists the "extent of the husband's guilt" as a common factor taken into account in setting the alimony award. R. LEVY, *supra* note 25, app. B at B-20. At the time he wrote, twenty-six states and the District of Columbia authorized alimony awards to wives only. *Id.* app. B at B-19. The United States Supreme Court invalidated such provisions as a violation of the equal protection clause in *Orr v. Orr*, 440 U.S. 268 (1979). Levy also noted that, under some circumstances, twenty states by statute barred alimony to a wife who had committed adultery or another act of marital misconduct. R. LEVY, *supra* note 25, app. B at B-21.

34. The Family Law Act provided in part that:

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child

Family Law Act, § 8, 1969 Cal. Stat. at 3330 (current version at CAL. CIV. CODE § 4600 (West Supp. 1986)).

The 1973 version of the UMDA, unchanged from the 1970 version, provides in § 402: [Best Interest of Child]

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

The comment to § 402 notes that "[t]his section, excepting the last sentence, is designed to codify existing law in most jurisdictions."

The California legislature ultimately rejected the proposals of the Governor's Commission to remove considerations of marital misconduct³⁵ as well as sex-based priorities³⁶ from the child custody determination. The Uniform Act, however, ruled out both fault and explicit sex preferences for the custodian.³⁷ The recent movement to permit joint custody of children³⁸ was not part of the original no-fault divorce package, although proponents of joint custody have claimed that a preference for shared parenting is a logical extension of the no-fault concept.³⁹

35. The Governor's Commission recommended abolition of the maternal preference and the need to prove a parent "unfit" in order to award custody to a non-parent. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 38-40. The Family Law Act provided, however, that

[i]n any pleadings or proceedings for legal separation or dissolution of marriage . . . evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences.

Family Law Act, § 8, 1969 Cal. Stat. at 3325 (amended by Act effective Jan. 1, 1970, ch. 1609, § 14, 1969 Cal. Stat. 3355). The use of specific acts of misconduct as proof of irreconcilable differences was deleted in 1975, Act of Apr. 18, 1975, ch. 35, § 1, 1975 Cal. Stat. 59, but its use in child custody determinations remains in the section. *See* CAL. CIV. CODE § 4509 (West 1983).

36. The Family Law Act embodied a maternal presumption. Family Law Act, § 8, 1969 Cal. Stat. at 3330 (current version at CAL. CIV. CODE § 4600 (West Supp. 1987)). This provision is quoted *supra* note 34.

37. UMDA § 402 (1973), *quoted supra* note 34. The comment to § 402 points out:

Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children—and this section enjoins judges to decide custody cases according to that general standard.

UMDA § 402 comment (1973).

One court has relied on this statement in the comment to § 402 to uphold a maternal presumption and to reverse an award of custody of a two-year-old child to a father. *Casale v. Casale*, 549 S.W.2d 805, 806 (Ky. 1977).

38. California enacted its comprehensive joint custody statute in 1979. Act of July 3, 1979, ch. 204, § 1, 1979 Cal. Stat. 447 (current version at CAL. CIV. CODE § 4600 (West Supp. 1987)); Act of Sept. 21, 1979, ch. 915, § 2, 1979 Cal. Stat. 3150 (current version at CAL. CIV. CODE § 4600.5 (West Supp. 1987)). *See generally* JOINT CUSTODY AND SHARED PARENTING (J. Folberg ed. 1984) (collection of articles on various aspects of joint custody and shared parenting). Thirty states have enacted joint custody laws. Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331, 401 (1986).

39. *See* Cook, *Joint Custody, Sole Custody: A New Statute Reflects a New Perspective*, 18 CONCILIATION CTS. REV. 31 (1980), *reprinted in* JOINT CUSTODY AND SHARED PARENTING, *supra* note 38, at 168.

In summary, then, the no-fault divorce movement, as it took shape in California, had as its major goal a reform in the grounds for divorce, supplemented by accompanying changes in the financial awards thought necessary to prevent considerations of marital misconduct from reappearing in another guise. Today, all fifty states and the District of Columbia have accepted, in one form or another, the no-fault philosophy that once appeared so radical.⁴⁰ Ironically, the present criticism of no-fault divorce has nothing to do with the grounds for divorce.⁴¹ Rather, the controversy is focused on the financial aspects of marital dissolution, and its centerpiece is the assertion that women and children have been the unintentional victims of the new divorce laws.⁴² That controversy, in turn, is part of the larger debate over the legal meaning of equality between women and men. In the next section, I describe briefly the contours of that debate.

II. EQUALITY AND DIFFERENCE

Legal and philosophical discussions of equality between men and women often founder on the question of difference. The formal concept of equality, especially when used in a mathematical sense, requires that the values being compared be the same.⁴³ In a less rigorous sense, however, when used by judges in constitutional interpretations of the equal protection clause, the concept of equality has come to mean only that the law must treat alike persons who are

40. See *supra* notes 19, 20, 22 (listing state grounds for divorce); see also Freed & Walker, *supra* note 38, at 335 (with South Dakota's enactment of no-fault divorce law in 1985, "[n]ow all fifty states have adopted some form of no-fault divorce, fifteen years after California led the way with its Divorce Reform Act of 1970").

41. But see A REPORT OF THE WORKING GROUP ON THE FAMILY, THE FAMILY: PRESERVING AMERICA'S FUTURE 19-21 (Nov. 1986). The Reagan Administration's Working Group on the Family concludes that "[c]learly, we all have an interest—whether ethical or economic—in reversing the recent trend toward automatic divorce." It goes on to point out that "we have the power, as residents of the separate States, to demand the rectification of those laws which have allowed, and even encouraged, the dissolution of the family." *Id.* at 21.

42. See L. WEITZMAN, *supra* note 7. Weitzman's analysis is discussed *infra* in Section IV of this Article.

43. Westen has argued provocatively that, as applied to legal rights, equality is itself an empty concept, one that must draw its substantive meaning from other values. Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). His thesis has been attacked. See, e.g., Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983) (arguing that idea of equality includes substantive principles); Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) (arguing that equal citizenship principle set out in fourteenth amendment has substantive content). Westen has responded to his critics. Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983); Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply*, 81 MICH. L. REV. 604 (1983); Westen, *On "Confusing Ideas": A Reply*, 91 YALE L.J. 1153 (1982).

similarly situated.⁴⁴ This is a less rigorous sense because “similarly situated” does not necessarily mean “the same.” It thus becomes possible to analyze legislative classifications drawn on the basis of differences such as race or sex, wealth or intelligence, and birth or marital status by looking beyond those differences to ask whether, despite the differences, the individuals challenging the classification are similarly situated for purposes of the matter at issue. The basic thrust of such an argument is comparative: it seeks to show, for example, that women are like men in the particular trait relevant to the discriminatory law, and that women should therefore be treated the same as men. The claim asserted is the underlying similarity of the groups being compared.

Feminists have used this mode of argument to powerful advantage, and Wendy Williams defends its continued use.⁴⁵ Others believe that this comparative analysis produces a formal equality of treatment that ignores the concrete circumstances of many women’s lives.⁴⁶ My own contribution to this debate has occupied a more intermediate position. I have suggested elsewhere⁴⁷ that the legal history of publicly sanctioned race segregation in the United States, from its installation in the federal Constitution through the doctrine of “separate but equal” public facilities for blacks and whites in *Plessy v. Ferguson*⁴⁸ in 1896 to its overthrow in the context of segregated schools in *Brown v. Board of Education*⁴⁹ in 1954, can be seen as the slowly developing perception that racial differences, when used to stigmatize a racial group, can never be the basis of legislative classification. On questions of access to the voting booth, to the jury room, to public facilities (including schools, public housing, and municipal golf courses), and to public employment, the concept of equality inherent in the equal protection clause decrees that persons of different races are similarly situated and must be treated the same.⁵⁰ I have also suggested that sex differences, up to a point,

44. See, e.g., Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) (“[T]he [Supreme] Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.”).

45. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329-32 (1984-85).

46. See, e.g., Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1148-63 (1986); Littleton, *Restructuring Sexual Equality*, 75 CALIF. L. REV. —, — (in press 1987).

47. Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 56 (1985).

48. 163 U.S. 537 (1896).

49. 347 U.S. 483 (1954).

50. Kay, *supra* note 47, at 48-57.

cannot support a different public treatment of women and men.⁵¹ The history of constitutional interpretation of laws drawn on the basis of sex is less consistent than that of laws based on race, but it does document a growing abandonment of the complacent attitude reflected in Justice Bradley's concurring opinion in *Bradwell v. Illinois* in 1873 that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."⁵² That position has been replaced by Justice O'Connor's view, expressed in her opinion for the Court in *Mississippi University for Women v. Hogan* in 1982 that the constitutional test for determining the validity of classifications based on sex "must be applied free of fixed notions concerning the roles and abilities of males and females," adding that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."⁵³ On questions of voluntary access to the voting booth, the jury room, the office of estate administrator, and to public employment (including positions of police officer and firefighter), the concept of equality embodied in the suffrage amendment as well as the equal protection clause decrees that persons of different sexes are similarly situated and must be treated the same.⁵⁴ The legal development of sex equality is less consistent than that of race equality, however, for unlike blacks and whites, women and men have been held not to be similarly situated in their responsibility for civic obligations such as compulsory military service⁵⁵ or jury duty.⁵⁶ These cases are troublesome reminders that legal doctrine in the area of sex discrimination is still evolving.⁵⁷

I have concluded, however, that the concept of equality that permits us to disregard race differences is applicable to sex differences only up to a point.⁵⁸ That point occurs when the biological reproductive differences that define women and men become relevant to

51. *Id.* at 77-78.

52. 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in judgment).

53. 458 U.S. 718, 724-25 (1982).

54. Kay, *supra* note 47, at 63-72.

55. *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding compulsory registration for military service for males only).

56. Cases striking down statutes that made jury service voluntary, rather than mandatory, for women have been decided on sixth amendment, rather than equal protection, grounds. See *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). An earlier case that upheld a "volunteers only" provision for women jurors against an equal protection challenge, *Hoyt v. Florida*, 368 U.S. 57 (1961), was distinguished in *Taylor*, 419 U.S. at 533-34.

57. See Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (providing critique of Supreme Court's sex discrimination cases).

58. Kay, *supra* note 47, at 78, 83-84.

the matter under discussion. I have proposed elsewhere that biological reproductive sex differences should be relevant for legal purposes only during the discrete episodes when they are being exercised.⁵⁹ During those episodes, measured roughly from the sexual union of sperm and egg that initiates conception through the changes that are characteristic of pregnancy and culminating in the termination of pregnancy through childbirth, miscarriage, or abortion, women and men function differently. Before and after these reproductive episodes, however, men and women are capable of functioning alike. I have argued that, when this episodic analysis is applied to the employment setting, it supports the validity of laws designed to prevent pregnant women from being disadvantaged at work because of their pregnancy.⁶⁰ Once the reproductive episode has been completed, however, working parents of both sexes must be treated alike on the job. Thus, childbearing leave can be restricted to women, but childrearing leave must be available to fathers as well as mothers.⁶¹

The analysis of the accommodation of biological reproductive sex differences in employment as a means of realizing the societal goal of ending sex discrimination at work,⁶² difficult as it may be, seems relatively uncomplicated when compared to the application of an episodic analysis to the family setting. For one thing, despite the existence of widespread and persistent sex segregation in the job market,⁶³ federal and state laws against employment discrimination have made clear that, with rare exceptions, access to jobs cannot be

59. Kay, *supra* note 10, at 22-26.

60. *Id.* at 26-27. The Supreme Court has recently held that states may enact such laws. The Court decided in *California Federal Savings & Loan Association v. Guerra* that Title VII of the federal Civil Rights Act, 42 U.S.C. §§ 2000e to e-17 (1983), did not preempt a California statute that required employers to provide female employees an unpaid pregnancy disability leave of up to four months and to reinstate an employee returning from such a leave to her previous job, unless it was no longer available due to business necessity. 107 S. Ct. 683, 693-94 (1987). Writing for the Court, Justice Marshall pointed out that "[b]y 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 694.

61. Kay, *supra* note 10, at 33-35.

62. This goal is expressed at the national level in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1983) (as amended 1972, 1978), and at the state level by various state fair employment laws. See generally Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983).

63. See generally COMM. ON WOMEN'S EMPLOYMENT AND RELATED SOCIAL ISSUES, COMM'N ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, NAT'L RESEARCH COUNCIL, *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* 5-9 (B. Reskin & H. Hartmann eds. 1986) ("The segregation of the sexes is a basic feature of the [U.S.] world of work"; describing sex segregation in various occupations in U.S.).

determined by sex. Men and women alike must be allowed to prove their ability to perform the job, absent the existence of a bona fide occupational qualification that justifies the exclusion of all members of one sex.⁶⁴ Men and women workers may be treated differently, however, when their reproductive differences are manifested in the episode of conception, pregnancy, and termination of pregnancy.⁶⁵ Still, measured against the working life of the individual, these episodes are relatively brief.⁶⁶ The norm for most persons consists of periods during which their distinguishing biological reproductive differences are not being exercised. In that sense, reproductive conduct is marginal in the work setting, and, except for on-site childcare facilities, childrearing takes place entirely outside that environment.

In the family setting, by contrast, reproductive conduct is generally viewed as central to the enterprise. Although the matter is not free from dispute, the family unit seems to have been formed initially to provide food and nurturance for infants.⁶⁷ Marriage devel-

64. Section 703(e) of Title VII permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §§ 2000(e)-2(e) (1982). The BFOQ exception, however, has been interpreted narrowly. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (holding gender criterion for assigning prison guards to maximum security institutions in Alabama falls within "the narrow ambit of the BFOQ exception"); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.) (being female not BFOQ for job of flight cabin attendant; refusal to hire men violates Title VII), *cert. denied*, 404 U.S. 950 (1971).

65. The Supreme Court held in *California Federal Savings & Loan Association v. Guerra* that the federal Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1983), was not inconsistent with a California statute mandating pregnancy leave. 107 S. Ct. 683 (1987). For a summary of the holding in this case, see *supra* note 60.

66. Eighty-five percent of working women are likely to become pregnant during their working lives. S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 5 (1983). In March 1985, 49.4% of married women with children less than one year old worked outside the home, up from 39% in 1980, and more than double the figure for 1970. N.Y. Times, Mar. 16, 1986, at L25, col. 1 (citing study released by U.S. Department of Labor, Bureau of Labor Statistics).

67. Thus, Margaret Mead asserts that "[w]hen we survey all known human societies, we find everywhere some form of the family, some set of permanent arrangements by which males assist females in caring for children while they are young." M. MEAD, MALE AND FEMALE 188 (1949). Such arrangements are not limited to human societies. Ninety percent of birds and nearly four percent of mammals are thought to be monogamous, defined as "[t]wo animals that breed and remain together to rear offspring." S. HRDY, THE WOMAN THAT NEVER EVOLVED 34-35 (1981). Hrdy's examination of the 37 species of primates who are monogamous under her definition suggests that "[a]most all of them are forest-dwelling and live in small ranges or territories which both partners defend. Males invest in individual offspring either directly, by carrying or providing food for them, or indirectly, by defending them or by yielding food to the mother-offspring pair." *Id.* at 39. Mead speculates that "[s]omewhere at the dawn of human history, some social invention was made under which males started nurturing females and their young. We have no reason to believe that the nurturing males had any

oped later as an institution that facilitated sexual intimacy between identified heterosexual cohabiting adults, designed to and in fact leading to the birth and rearing of children.⁶⁸ Consistent with that traditional view, our society limits access to the legal status of marriage to two partners of the opposite sex⁶⁹ and recognizes the fundamental right of those partners to be custodians of children born as a result of their sexual interaction.⁷⁰ Married couples may, of course, be childless, either by choice or necessity. Conversely, unmarried couples of either sex can and do in fact form family units, as do single parents living with their children. Whatever the legal status of the family unit, however, the presence of children within it

knowledge of physical paternity, although it is quite possible that being fed was a reward meted out to the female who was not too fickle with her sexual favours." M. MEAD, *supra*, at 189. More recent research, based on the behavior of contemporary gatherer-hunter peoples such as the !Kung San of the Kalahari in Southern Africa, as well as detailed accounts of primate behavior (especially that of chimpanzees) suggests that the "social invention" of which Mead spoke may have been mate selection by females, who chose as sexual partners "those males who were friendly, nurturing, tool-using, and willing to share food." Zihlman, *Women as Shapers of the Human Adaptation*, in *WOMAN THE GATHERER* 75, 96 (F. Dahlberg ed. 1981); see also McGrew, *The Female Chimpanzee as a Human Evolutionary Prototype*, in *WOMAN THE GATHERER*, *supra*, at 54. But see Collier, Rosaldo & Yanagisako, *Is There A Family? New Anthropological Views*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 25-33 (B. Thorne & M. Yalom eds. 1982). These writers attack Bronislaw Malinowski's view of the family as a universal human institution, consisting of a mother, father, and their children, living together in definite physical space, feeling affection for one another, and whose primary function was nurturance of young children. *Id.* at 26-28 (citing B. MALINOWSKI, *THE FAMILY AMONG THE AUSTRALIAN ABORIGINES* (1913)). They argue instead that the family "is a moral and ideological unit that appears, not universally, but in particular social orders." *Id.* at 33.

68. A recent analysis of household composition drawing on microeconomics and sociological exchange theory suggests that "[m]arriages can be viewed as partnerships for the production of 'goods and services'—for example, affection and children—that are not easily acquired in other ways." P. ENGLAND & G. FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC AND DEMOGRAPHIC VIEW* 8 (1986).

69. No state presently permits persons of the same sex to marry each other, and several courts have rejected arguments that the failure to authorize same-sex marriage violates the constitutional rights of the prospective spouses. See, e.g., *Singer v. Hara*, 11 Wash. App. 247, 264, 522 P.2d 1187, 1197 (1974) (Washington State Equal Rights Amendment does not invalidate state's statutory prohibition against same-sex marriage); *Baker v. Nelson*, 291 Minn. 310, 315, 191 N.W.2d 185, 187 (1971) (rejecting claims based on ninth amendment, due process clause, and equal protection clause), *appeal dismissed*, 409 U.S. 810 (1972). But see Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-89 (1973) (arguing proposed Equal Rights Amendment to U.S. Constitution would prohibit uniform denial of marriage licenses to same-sex couples).

70. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," and holding that due process requires that state seeking to terminate parents' custody and control must meet "clear and convincing evidence" standard).

requires that decisions be made concerning their care during a lengthy period of dependence.⁷¹

A second complication for the application of episodic analysis to family units as compared to employment sites results from the expectations appropriate to each setting about the respective roles that men and women will play in nurturing their children after the reproductive episode has come to an end. A bright line separates childbearing from childrearing at work. In theory, at least, employers are not permitted to assume that mothers, as compared to fathers, will bear the primary burden of caring for children and therefore may be less desirable workers.⁷² Instead, Title VII requires employers to treat working parents of both sexes alike, absent the existence of a bona fide occupational qualification.⁷³ Members of a family unit, however, may choose for themselves how the responsibility of child care will be allocated. The functional distinction between childbearing and childrearing exists at home as well as at work, but family members are free, as employers are not, to allocate childrearing responsibilities along sex-based lines.⁷⁴

71. This problem confronts families in all human societies. Kluckhohn identified this basic fact of human existence as one of the invariant points of reference from which cross-cultural comparison in anthropology begins. He noted that "[a]ll cultures constitute so many somewhat distinct answers to essentially the same questions posed by human biology and by the generalities of the human situation. . . . Every society's patterns for living must provide approved and sanctioned ways for dealing with such universal circumstances as the existence of two sexes; the helplessness of infants; the need for satisfaction of the elementary biological requirements such as food, warmth, and sex; the presence of individuals of different ages and of differing physical and other capacities." Kluckhohn, *Universal Categories of Culture*, in *ANTHROPOLOGY TODAY: AN ENCYCLOPEDIA INVENTORY* 507, 520-21 (A.L. Kroeber ed. 1953).

72. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (court of appeals erred in interpreting § 703 of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, as permitting one hiring policy for women and one for men, where each has pre-school-age children).

73. 42 U.S.C. §§ 2000e to e-17 (1983). The majority in *Phillips* suggested that "[t]he existence of such conflicting family obligations [caused by having pre-school-age children], if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act," the BFOQ exception. *Phillips*, 400 U.S. at 544. Justice Marshall rejected the majority's assumption that the challenged statute permits "ancient canards about the proper role of women to be a basis for discrimination." *Id.* at 545 (Marshall, J., concurring).

74. Blumstein and Schwartz report that these choices are frequently sex-linked. Thus, married couples are reported to have varied opinions about whether wives should work. Among those couples who disagree on this issue, more wives want to work than husbands want them to do so. Moreover, in marriages where the wife works, the couple experiences more conflict about how the children are being raised than appears among couples where the wife does not work. P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES* 118-25, 135-38 (1983). The authors state that, among married couples, the man's job is treated as of primary importance, while women, even those who are employed outside the home, continue to value their roles as companion and caretaker.

The cultural division of labor by sex within the family is reflected in the traditional legal framework surrounding family life. Anglo-American family law historically took as a given a sexual division of responsibility within the family, and followed traditional social patterns by placing the duty of family support upon the husband, that of care of home and children upon the wife.⁷⁵ Beginning roughly at the end of World War II,⁷⁶ a variety of social forces have combined to challenge that traditional model. These include the growing entry of married women, including women with young children, into the labor market;⁷⁷ the sexual revolution that permitted women to manage their own fertility through effective means of birth control;⁷⁸ the emergence of new reproductive technologies, such as ar-

Id. at 325-26. See also Goode, *Why Men Resist*, in *RETHINKING THE FAMILY*, *supra* note 67, at 131, 143 (noting that in U.S., despite rise in men's approval of more equality for women, as shown in opinion research data, husbands still expect their working wives to take care of housework and children).

75. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 181-82 (1968).

76. A few women sought to escape the traditional model at an earlier period. Thus, in the 19th century, a minority of women had challenged the family as their primary source of identity and emotional and financial support. See generally C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 144-77 (1980) (surveying women's strategies for challenging traditional family by refusing to marry or have children, by developing close relationships with other women, or by seeking divorce).

77. See generally *id.* at 418-23 (summarizing changes in women's work since 1940). See also W. CHAFE, *WOMEN AND EQUALITY* 92-95 (1977) (discussing influx of women into labor force with advent of World War II and women's desire to continue working, despite societal pressures to contrary, past war's end).

78. After World War II, the fertility rate increased during the "baby boom" years, "peaking in 1957 with a birth rate of 27.2 children per thousand people." W. CHAFE, *supra* note 77, at 120. There followed a prolonged decline in the birth rate, which reached an all-time low in the mid-1970s. *Id.* at 120-21. Effective modern methods of female contraception include the birth control pill, which was approved for use by the FDA in 1960. See generally J. ROCK, *THE TIME HAS COME* (1963) (arguing world population crisis can best be approached by means of public policy regarding birth control which is based upon respect for individual conscience and which eschews deference to views of any one religious group; advocating governmental support for wide array of birth control methods). In 1970, Senator Gaylord Nelson held a series of hearings on the birth control pill which resulted in an FDA warning placed in each packet that read in part, "The oral contraceptives are powerful and effective drugs which can cause side effects in some users and should not be used at all by some women." 21 C.F.R. § 130.45 (1972) (current version at 21 C.F.R. § 310.501 (1986)). For a description of the hearings from the point of view of an outraged feminist, see Coburn, *Off the Pill?*, *RAMPARTS MAGAZINE*, June 1970, at 46. Even before the development of modern methods of birth control, women had sought to control their fertility. See generally C. DEGLER, *supra* note 76, at 178-209 (discussing dramatic decline in fertility among white women in United States in 19th century—fertility rate fell from average of 7.04 children in completed families in 1800 to 3.56 in 1900, a drop of 50%—and suggesting, *id.* at 189, that major reason for decline was that "as women became more conscious of themselves as individuals, they also sought to control their fertility").

tificial insemination and *in vitro* fertilization,⁷⁹ and the availability of abortion;⁸⁰ the pressure of the modern women's movement for equality before the law;⁸¹ more specific attempts to redefine marriage by two quite different groups: same-sex couples who wish to be allowed to marry,⁸² and heterosexual couples who live in nonmarital cohabitation, but who may wish to share some of the attributes of marriage, particularly its financial benefits;⁸³ the trend toward private ordering that supports public recognition of individual contracts between married couples;⁸⁴ and the children's rights movement.⁸⁵

Counter-trends to these social forces have appeared roughly in the last fifteen years and have taken as their rallying cry a return to traditional family values. These include the opposition to legalized abortion by self-proclaimed pro-life groups;⁸⁶ the resurgence of religious fundamentalism;⁸⁷ the defeat of the Equal Rights Amend-

79. See O'Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY WOMEN'S L.J. 140 (1985); Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986).

80. See C. DEGLER, *supra* note 76, at 227-48 (tracing availability of abortion, characterized as a "peculiarly female" form of birth control, in 19th and 20th centuries, and concluding, *id.* at 248, that laws permitting woman to have abortion even if her husband does not agree make it possible for married women "to determine whether they will have a family at all").

81. See generally Kay, *supra* note 47, at 63-78 (summarizing U.S. Supreme Court litigation resulting from women's equality movement).

82. See Note, *supra* note 69, at 578-80 (presenting interests of same-sex couples in being allowed to marry). Advocates of same-sex marriage may give their cause even higher priority in the wake of the Supreme Court's decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (holding Georgia statute prohibiting sodomy between consenting adults is constitutional as applied to gay men). In the course of its opinion in *Hardwick*, the majority observed that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated by the Court of Appeals or by respondent." *Id.* at 2844.

83. See generally J. EEKELAAR & S. KATZ, *MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL AND ETHICAL CHANGE* (1980).

84. See Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 207-11 (1982) (arguing contractual tools and processes are uniquely appropriate to reforming and revitalizing state's policy of marriage governance).

85. See, e.g., P. ADAMS, L. BERG, N. BERGER, M. DUANE, A.S. NEILL & R. OLLENDORFF, *CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD* (1971) (essays advocating child-centered education that treats children as autonomous persons capable of governing themselves, growing intellectually, and developing toward adulthood where education takes place in "deschooled" society); see also Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986) (providing reconceptualization of children's rights that stresses their double dependency on parents and state).

86. See K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 126-57 (1984) (discussing emergence of right-to-life movement in U.S. from 1960s to 1980s).

87. See Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1871-74 (1985) (mentioning, as potential counter-force to his

ment;⁸⁸ and open discrimination against the homosexual community,⁸⁹ made more virulent by the public fear over the AIDS epidemic.⁹⁰ The family, the primary social unit for sexual interaction and childrearing, is positioned at the center of these controversies.⁹¹ Thus it is not surprising that feminists have recognized that a reexamination of laws affecting the family and the individuals who constitute it is essential to a coherent view of equality between women and men.⁹²

hypothesized "trend toward diminished moral discourse in family law," "reinvigorated conservatism, politicized fundamentalism, and traditional Roman Catholicism").

88. The extended ratification deadline for the Equal Rights Amendment expired on June 30, 1982. J. MANSBRIDGE, *supra* note 2, at 1.

89. See generally Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons In The United States*, 30 HASTINGS L.J. 799 (1979) (compiling legal sources pertaining to homosexuals, revealing pervasive and systematic discrimination in courts).

90. In response to an inquiry from the U.S. Department of Health and Human Services, the U.S. Department of Justice expressed the opinion that federal laws forbidding discrimination against handicapped persons have only limited application to AIDS victims. N.Y. Times, June 23, 1986, at A13, col. 1. The Supreme Court has recently held, however, that a person suffering from a contagious disease with some accompanying physical impairment may be considered handicapped under § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (1982)). *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, 1132 (1987). The Court then remanded the case for "an individualized inquiry" to determine whether the handicapped individual—in this case, an elementary school teacher with tuberculosis—was "otherwise qualified" for the job in question. Pertinent factors, the Court stated, include the risk of contagion and whether the employer could reasonably accommodate the employee. *Id.* at 1131. It did not reach the question whether a carrier of a disease like AIDS has a physical impairment or can be defined as handicapped. *Id.* at 1128 n.7. Nevertheless, the decision "was hailed as a major victory, if less than a total one," by those who believe the nondiscrimination provision should apply to AIDS victims. N.Y. Times, March 4, 1987, at 1, col. 5.

An initiative hostile to victims of AIDS appeared on the California State Ballot in the November 1986 election. The ballot measure would have added AIDS to a state roster of highly contagious diseases. As a result, anyone infected with the AIDS virus would have been barred from working as a food handler or from working at or attending any school or college in the state. San Francisco Chron., Nov. 6, 1986, at 2, col. 5. It was defeated by a margin of 71 percent to 29 percent of the votes cast. San Francisco Chron., Nov. 6, 1986, at 10, col. 5.

91. Compare, e.g., B. BERGER & P. BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* (1983) (surveying attitudes toward family of both political left and conservative "pro-family" movement; defending centrist position that views "bourgeois family" as most viable model for childrearing, preserving individual autonomy, and serving needs of democracy) with L. POGREBIN, *FAMILY POLITICS: LOVE AND POWER ON AN INTIMATE FRONTIER* (1983) (arguing that there is no single "best" model of family life and that families need freedom to define themselves; and urging that fundamental core of family life is loving intimate contact between all family members). See also REPORT OF THE WORKING GROUP ON THE FAMILY, *supra* note 41, at 2-10.

92. See, e.g., Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819 (critical analysis of traditional family law history, rejecting thesis of progressive individualism for one that suggests importance of family values); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L.

The goal I have set for my own research over time is to explore, through concrete case studies, the legal meaning of equality between women and men. As I noted earlier, I began working on that agenda by concentrating on the biological reproductive differences between the sexes, and asking to what extent the existence of those undeniable sex differences required a conceptual model of sex equality that went beyond the established assimilationist model of race equality.⁹³ I concluded that a different model was required, and that one could be offered that would support a difference in legal treatment of men and women in employment during the periods when those reproductive differences were being utilized. In this Article, I want to move to the opposite end of the spectrum of sex differences, and concentrate on the legal implications we might draw from the existence of socially-defined role differences between women and men in the family unit. I will put aside, for the moment, the question of whether those role differences are biologically determined.⁹⁴ Nor will I examine in this Article whether the laws governing the formation of family units facilitate the assumption of sex-specific roles within the family.⁹⁵ Instead, I want to concentrate here on whether, in order to achieve equality between the sexes in family law, legal significance should be accorded at the dissolution of the family unit to the consequences of choices made concerning the allocation of functions by sex during the existence of the family relationship. I propose, in short, to begin my examination of the family by an analysis of divorce.

This strategy may appear paradoxical, but I believe that several factors combine to make my approach both timely and appropriate. First, it is often possible to gain important insights about the composition, structure, and function of social institutions, like that of physical objects, through analysis of their breakdown.⁹⁶ Second,

REV. 1497 (1983) (equality between sexes will be reached only when reformers transcend society's dichotomy between market and family). See generally RETHINKING THE FAMILY, *supra* note 67 (essays providing feminist analysis of family in light of "family crisis" debate between New Right and feminist ideology).

93. See *supra* text accompanying notes 59-61.

94. For the argument that many of these differences are biological in origin, see Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617 (1984). Compare J. SAYERS, BIOLOGICAL POLITICS 7-104 (1982) (criticizing use of biology in arguments against feminism).

95. For a feminist critique that compares marriage to slavery, see Cronan, *Marriage*, in NOTES FROM THE THIRD YEAR: WOMEN'S LIBERATION 62-65 (1971), reprinted in H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 222-29 (2d ed. 1981).

96. Generalizations about social change based on analogies between the methodologies of the natural, physical, and social sciences must, of course, be drawn with caution. See generally C. TILLY, BIG STRUCTURES, LARGE PROCESSES, HUGE COMPARISONS 17-59 (1984) (exposing eight "Pernicious Postulates" of twentieth-

our society has experienced a significant change in the laws governing family dissolution that began roughly twenty-five years ago,⁹⁷ and that was characterized by a shift from divorce based on marital fault to no-fault divorce based on marital breakdown.⁹⁸ This legal change in the grounds for divorce has now largely been accomplished in all states,⁹⁹ although the consequences of that change for other aspects of family breakdown, particularly for questions concerning financial matters and the custody of children, remain controversial.¹⁰⁰ Third, the impact of these legal changes on the lives of men, women, and children has been examined by social scientists, and a body of data is available to serve as the basis for evaluating the wisdom of the legal reforms.¹⁰¹ Finally, although the initial proponents of no-fault divorce did not conceptualize their effort as one designed to achieve equality between women and men, some critics have asserted that the results of that effort have produced greater substantive inequality for women.¹⁰² I propose, then, to ask what the legal framework for family dissolution should be in a society resolved to permit a variety of family lifestyles, but at the same time committed to achieve equality between men and women.

century social thought drawn from mistaken nineteenth-century observations of social change).

97. I date the beginning of the no-fault divorce movement from 1963, when the California Assembly first began examining that state's divorce laws. See Krom, *supra* note 11, at 157-58. The California Family Law Act was adopted in 1969, and became effective on January 1, 1970. Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312.

98. See Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664-65 (1984).

99. For a summary of the types of no-fault divorce laws presently in effect, see *supra* text accompanying notes 19-22. South Dakota, the last state to enact a no-fault ground for divorce, did so in 1985. Act of Mar. 12, 1985, ch. 207, §§ 1, 3, 1985 S.D. Sess. Laws 392 (codified at S.D. CODIFIED LAWS ANN. §§ 25-4-2(7), 25-4-17.1 (Supp. 1985)). See Freed & Walker, *supra* note 38, at 335.

100. For a summary of the debate over financial matters, see *infra* notes 287-88 and accompanying text. Regarding custody of children, see *supra* text accompanying notes 34-39.

101. See, e.g., L. WEITZMAN, *supra* note 7, app. A (study based on random samples of 2,500 court dockets between 1968 and 1977; interviews with forty-four judges; sample of British legal experts; interviews with 228 divorced men and women); J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) (study of sixty families going through divorce, including follow-up data on parent-child relationships at one and one-half years, and five years, after divorce).

102. See, e.g., Fineman, *supra* note 12, at 791-92.

III. THE NO-FAULT DIVORCE MOVEMENT IN THE UNITED STATES

A. *The California Background*

In her account of the no-fault divorce movement in California,¹⁰³ Dr. Lenore Weitzman has presented the California law as the product of a cohesive group of reformers who had a consistent, if idealistic, set of goals that can be empirically tested to determine the success or failure of the reform effort.¹⁰⁴ High among the reformers' goals, she suggests, was the achievement of equality between the divorcing spouses.¹⁰⁵ The latter claim is inaccurate, for none of the various groups that participated in the shaping of the California law had identified equality between women and men as a goal of the reform effort. As I have pointed out elsewhere, it was not until after the effective date of the Family Law Act that individuals and groups seeking reform of the community property laws introduced the theme of legal equality to support their proposals.¹⁰⁶ Moreover, as a model of the legislative process, Weitzman's view is overly simplistic. When used to describe the legislative history of the California Family Law Act, it is particularly misleading. In order to assess adequately the impact of the California law, we must take a fresh and fuller look at the often contradictory goals of its proponents and framers.

The California Family Law Act took shape over a seven-year period between 1963 and 1969, which began when the California As-

103. As she notes, Weitzman bases her summary of the development of the California Family Law Act on an unpublished manuscript that I prepared for her use as part of my collaboration with her in the California Divorce Law Research Project. See L. WEITZMAN, *supra* note 7, at 16 n.2 (printed in Notes, at 441 n.2). The fuller account I present here also draws on my unpublished manuscript, as well as on the contemporary description provided by Krom in 1970. See Krom, *supra* note 11. Another version of these events, written from the perspective of a political scientist, is presently in preparation under the direction of Professor Herbert Jacob of Northwestern University.

104. In her historical section, Weitzman accurately quotes my statement that "to speak of the 'goals' of the drafters of the California law is deceptive: the no-fault divorce law was the product of many different persons whose ideas were as often contradictory as they were complementary." L. WEITZMAN, *supra* note 7, at 17 (quoting Kay, *The California Background*, written for California Divorce Law Research Project, Center for the Study of Law and Society, University of California, Berkeley, September 1977) (unpublished)). Yet her ensuing critique of the consequences of no-fault divorce fails to distinguish between the Family Court Act that was proposed by the Governor's Commission on the Family in 1966 and the California Family Law Act that was enacted in 1969, an oversight that unfortunately causes her mistakenly to equate some of the decisions of the legislature to the proposals of the Governor's Commission. See *id.* at 357-66. The significance of this point is developed more fully *infra* in text and accompanying notes 194-213.

105. L. WEITZMAN, *supra* note 7, at 365-66.

106. Kay, *supra* note 6, at 299-304.

sembly conducted legislative hearings and authorized a study by a Citizens' Advisory Committee on the subject of divorce.¹⁰⁷ During that time, the leadership of the reform effort shifted three times: first, from the California Assembly to the Governor's office with the appointment of a Governor's Commission on the Family in 1966;¹⁰⁸ second, from the Governor's Commission to the California State Bar Association's Committee on Family Law in 1967;¹⁰⁹ and, finally, from the State Bar Committee to the California legislature for final action in 1969.¹¹⁰ The Governor's Commission on the Family in its 1966 Report first proposed the elimination of fault grounds for divorce and the substitution of a no-fault provision as the only basis for marriage dissolution.¹¹¹ Although the Commission originated the no-fault concept, however, the legislature ultimately rejected both the statutory language the Commission drafted to embody the no-fault ground¹¹² as well as its proposal for a Family Court.¹¹³ The latter decision was particularly unfortunate, for the Family Court would have provided a specialist family law judge to interpret the new law as well as a staff of court counselors to assist divorcing couples to adjust their differences in light of the no-fault approach.¹¹⁴ Thus, the California no-fault divorce law as it exists today was shaped by many different persons whose ideas were contradictory as often as they were complementary. What follows is a brief account of the distinctive contribution to the legislative process made by each of the groups who held the reform initiative at various times.

1. *The California Assembly Begins: 1963-1965.* The Assembly's inquiry into California's divorce law was not motivated by any grand design for sweeping change. In 1963 California, like most states, recognized a mixed bag of statutory grounds that would justify an innocent spouse in seeking a divorce from a guilty spouse. The state's first civil code, enacted in 1872, contained six of these grounds, all based on marital fault: adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, and the conviction of a fel-

107. See Krom, *supra* note 11, at 157-58.

108. *Id.* at 163.

109. *Id.* at 172.

110. *Id.* at 174.

111. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 26-31; see also Krom, *supra* note 11, at 167-68.

112. Krom, *supra* note 11, at 174-75. For the language used by the legislature in the Family Law Act and a critique, see *infra* text accompanying notes 195-97.

113. Krom, *supra* note 11, at 175, 177. For a critique of the differences between the Family Law Act and the Commission's original proposal, including the deletion of the Family Court, see *infra* text and accompanying notes 201-05.

114. See GOVERNOR'S COMM'N REPORT, *supra* note 14, at 10-13.

ony.¹¹⁵ Other provisions of the 1872 code established as defenses to divorce acts of connivance, collusion, condonation, or delay in bringing suit.¹¹⁶ In addition, a defense to divorce known as "recrimination" was generally understood to prevent divorce if each spouse had been guilty of marital wrongdoing sufficient to give the other a cause of action for divorce.¹¹⁷ In such cases, neither spouse was "innocent" of marital wrongdoing, and neither could obtain a divorce. Taken together, these provisions meant that if the parties had entered into a valid marriage, the resulting contract was binding on both until such time as one of them, himself or herself innocent of marital wrongdoing, perfected against the other a cause for divorce based on marital fault. Once the cause had been proven and the defendant had failed to establish an adequate defense, the plaintiff was not only released from his or her own marital obligations to the defendant, but also was entitled to a dissolution of the marriage as partial legal relief for his or her suffering. Under these six grounds, the law permitted only unilateral divorce, granted at the instance of an innocent party against a guilty party. If the innocent party declined to seek a divorce, the guilty party was unable to end the marriage in law, even though he or she might do so in fact by leaving the family home.¹¹⁸

In 1941, the legislature added a seventh ground for divorce, incurable insanity,¹¹⁹ which was inconsistent with the concept that fault alone could serve to terminate a valid marriage. Instead, the theory of this new ground was that the spouse of an insane person might wish to end the marriage, not because the insane spouse was guilty of deliberate misconduct, but because his or her confinement in a mental institution for a required period of three years preceding

115. CAL. CIV. CODE § 92 (1872), *repealed by* Family Law Act, § 3, 1969 Cal. Stat. at 3313. See Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1213-14 (1968).

116. CAL. CIV. CODE §§ 111-21, 124-27 (1872), *repealed by* Family Law Act, § 3, 1969 Cal. Stat. at 3313.

117. See H. CLARK, *supra* note 75, at 373-77.

118. This feature of fault-based divorce laws facilitated negotiations between the "guilty" and "innocent" spouses, in which the guilty spouse who wanted a divorce, presumably to permit the contracting of a new marriage, was forced to make it worth the while of the innocent spouse to "give" the divorce by refraining from raising appropriate defenses. See, e.g., M. RHEINSTEIN, *supra* note 1, at 51-105 (contrasting strict "law of the books" with more lenient "law in action" based on mutual consent).

119. Ch. 951, § 2, 1941 Cal. Stat. 2547, *repealed by* Family Law Act, § 3, 1969 Cal. Stat. at 3313. The Governor's Commission proposal eliminated incurable insanity as a ground for divorce, even though its Report recognized that such a ground did not involve a matrimonial offense. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 26. The California legislature, however, chose to preserve this ground in the Family Law Act, and it is presently embodied in CAL. CIV. CODE §§ 4506, 4510 (West 1983).

the divorce made a functioning relationship factually impossible. Unlike many other states, California never recognized either of the two no-fault grounds that preceded the modern reform effort: separation for a period of time or incompatibility.¹²⁰

The Assembly in 1963 had little thought of completely restructuring California's approach to divorce, nor was its inquiry into divorce prompted by feminists seeking equality. Instead, the Assembly charged its Committee on Judiciary to hold interim hearings on various aspects of the ways the divorce laws functioned as judges applied them to specific cases. The agenda included the feasibility of enacting standards to guide judges in setting alimony and support awards, and in determining child custody, as well as the content of such standards.¹²¹ Broader concerns included seeking ways to reduce the divorce rate and insure the permanence of marriage as well as a general examination of all the divorce laws.¹²²

The Assembly Committee held four hearings under this mandate. At its first hearing,¹²³ the Committee received conflicting advice as to the approach it should follow. Some witnesses suggested specific changes to deal with existing problems they saw in the laws.¹²⁴ Others had programs to save marriages, aid divorcing couples to reconcile, and teach the elements of successful married life through documentary films.¹²⁵ Still other witnesses were less concerned about patching up existing flaws than with achieving structural change in the divorce law itself. Two of these witnesses were law professors who later became members of the Governor's Commission on the Family. They sounded several themes before the Assembly Committee that the Commission later proposed, including the elimination of fault as the basis for divorce¹²⁶ and the establish-

120. For a discussion of these earlier divorce grounds, see H. CLARK, *supra* note 75, at 349-54.

121. Krom, *supra* note 11, at 158.

122. *Id.*

123. *Id.* at 160.

124. Thus, Mr. Harold E. Simmons, representing the Director of the Department of Social Welfare, urged that the state should fund the cost of divorces through legal services programs for a group of approximately 700 welfare families in which the father would like to divorce a former wife in order to marry the woman with whom he was living and legitimate their children. Cal. Assembly Interim Comm. on Judiciary, Transcript of Proceedings 82-91 (Los Angeles, Jan. 8-9, 1964) (copy on file in Professor Kay's office) [hereinafter Transcript]. Mr. Lester E. Olson, a member of the Family Law Committee of the Los Angeles County Bar Association, urged legislation to clarify the availability of civil contempt as an enforcement remedy for support orders. *Id.* at 199-202.

125. Testimony of Judge Roger Pfaff, *id.* at 33-35.

126. Testimony of Professor Herma Hill Kay, of the University of California, Berkeley, School of Law, *id.* at 179-81.

ment of a Family Court designed to modify the adversary setting of divorce and reduce the hostility attributable to the legal procedures themselves.¹²⁷ Their proposals were relatively modest, however, compared to those advanced by an organization representing divorced men who wanted to remove divorce from the judicial system entirely and place it within a "Family Center" that would reduce the control of judges.¹²⁸ Several divorced men made the only claim of sex-based inequality that was presented to the Assembly Committee: they asserted that the existing laws were unfair to husbands.¹²⁹

At the conclusion of its first round of hearings, the Assembly Committee had learned enough to realize that it needed help in dealing with the rather large and diverse topics it had uncovered.¹³⁰ It decided to appoint a Special Legislative Advisory Committee on Family Life and Law to assist its investigation.¹³¹ The Committee, however, had little time to offer any meaningful advice. The Speaker of the Assembly formally appointed the Advisory Committee on August 6, 1964, with a charge to report its findings and recommendations to the Assembly no later than January 11, 1965.¹³² Even this brief period was not used: Judge Roger Pfaff, the Presid-

127. Testimony of Professor Aidan Gough, of the University of Santa Clara School of Law, *id.* at 159-64. For a fuller expression of Gough's views, see Gough, *A Suggested Family Court System for California*, 4 SANTA CLARA LAW. 212 (1964).

128. Testimony of Dr. Peter Hoffman, Chairman of the Legislative Committee of United States Divorce Reform, Inc., Transcript, *supra* note 124, at 207-12.

129. Following Dr. Hoffman's testimony, *see supra* note 128, the hearings were opened to testimony from members of the public. Fourteen witnesses appeared. Six identified themselves as divorced men, while six others may have been members of that category. Some of these witnesses accused judges of splitting fees with divorce lawyers, *e.g.*, Testimony of Mr. Francis L. Harmon, Transcript, *supra* note 124, at 225-26; charged that husbands were victimized and subjected to financial ruin by wives in divorce proceedings, *e.g.*, Testimony of Mr. Wallace R. Kennedy, *id.* at 229; or characterized divorce lawyers as "money-sucking private attorneys," Testimony of Dr. Frank Walz, *id.* at 230. Several committee members admonished these witnesses for testimony perceived as irresponsible. Yet their charges were public witness to the bitterness of these divorced men. Their sense of injustice led them to organize and seek to influence the course of divorce reform in California and other states. *See generally* M. WHEELER, NO-FAULT DIVORCE 50-51 (1974) (discussing Alimony, Ltd.), 136-38 (discussing Fathers United for Equal Rights).

130. Transcript, *supra* note 124, at 215. The Assembly Committee voted unanimously to recommend that the Governor appoint a Special Citizens' Advisory Committee to assist the Committee in its work. *Id.* Governor Brown responded on March 4, 1964, with an encouraging letter to each member of the Assembly, commenting on the January hearing and supporting further study. *See* CAL. ASSEMBLY INTERIM COMM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS, FINAL REPORT, 2 APPENDIX TO ASSEMBLY JOURNAL Vol. 23 No. 6, at 176-77 (1965) [hereinafter FINAL REPORT].

131. *See* Krom, *supra* note 11, at 159; FINAL REPORT, *supra* note 130, at 178-79. The Legislative Advisory Committee was heavily dominated by lawyers: of its seventeen members, eleven were members of the legal profession. Only three were women.

132. *See* Krom, *supra* note 11, at 159 & n.21.

ing Judge of the Los Angeles Conciliation Court, who was named as Chair, did not convene the Committee until after its deadline had passed. The Advisory Committee held its first and only meeting on March 13, 1965,¹³³ when it was invited to approve a list of fifteen specific proposals presented by Judge Pfaff.¹³⁴ He characterized this as a modest legislative program that would attempt to effect changes in existing law while arousing the least controversy and at the same time representing a substantial record of achievement in family law reform.¹³⁵ The Assembly Judiciary Committee, thus deprived of the benefit of any wisdom its Advisory Committee might have offered, proceeded to hold three more public hearings, prepare a written report, and introduce several bills into the 1965 Legislative Session.¹³⁶

The Report of the Assembly Interim Committee on Judiciary was filed on January 11, 1965.¹³⁷ It discussed fifteen topics reflecting the diverse testimony presented at the four hearings: both technical

133. *See id.*

134. Letter from Judge Roger A. Pfaff to Members of the Special Legislative Advisory Committee (December 29, 1964) (copy on file in Professor Kay's office).

135. Judge Pfaff had presented his legislative proposals at the fourth public hearing held by the Assembly Committee. Cal. Assembly Interim Comm. on Judiciary, Transcript of Proceedings on Domestic Relations 2 (Los Angeles, Oct. 8-9, 1964) (copy on file in Professor Kay's office) [hereinafter Transcript (Oct. 1964)] (characterizing his proposals as "a comprehensive but modest initial legislative program of reform for 1965").

136. *See* FINAL REPORT, *supra* note 130, at 62 n.*, 96 n.*. Krom is incorrect in his statement that the Committee held only three public hearings. *See* Krom, *supra* note 11, at 159, 159-63.

During the final months of 1964, several members of the Advisory Committee conferred informally with the Committee's Consultant, Professor Robert E. Furlong of Willamette University Law School, to structure the three remaining hearings and to testify as witnesses. *See* Krom, *supra* note 11, at 159. The second hearing dealt with a variety of topics, including the inadequacy of sociological data concerning California divorces; title to property; marriage counseling; pre-marital education; and the family. Cal. Assembly Interim Comm. on Judiciary, Synopsis of Testimony (Sacramento, Aug. 13-14, 1964) (copy on file in Professor Kay's office). The third hearing, held concurrently with the annual meeting of the State Bar of California, was devoted to technical problems of property settlement agreements. Cal. Assembly Interim Comm. on Judiciary, Synopsis of Testimony (Santa Monica, Sept. 30, 1964) (copy on file in Professor Kay's office). The fourth and final hearing, held in Los Angeles, was dominated by Judge Pfaff, who presented the list of detailed proposals that he later submitted to the Citizens' Advisory Committee in March 1965, for its endorsement. Transcript (Oct. 1964), *supra* note 135.

Thus, despite the Advisory Committee's general inactivity, and its formal concentration on limited change, some of its members as individuals were able to advocate more general reforms, including the establishment of a Family Court, the shift from fault to no-fault as the basis of marriage dissolution, and the consequent elimination of fault from other related issues, including property division, spousal support, and child custody.

137. FINAL REPORT, *supra* note 130.

changes and broad reforms were included. The Committee recommended action, however, on only six topics.¹³⁸ It reserved the no-fault divorce proposal and the establishment of a Family Court for further study.¹³⁹ Its bill that would have continued the study, however, was defeated.¹⁴⁰ The Assembly's initial investigation of the problems of marriage and divorce thus ended abruptly during the closing days of the 1965 Legislative Session. Its only concrete legislative results were the enactment of a Divorce Registry Act¹⁴¹ and a Memorial to Congress calling for a constitutional amendment that would establish minimum uniform residence periods for marriage and divorce in all states.¹⁴² But these bills were not the Assembly's most significant achievement. It had created an impetus for a serious effort at basic reform. The leadership of that endeavor shifted from the Assembly to the Governor's Office in 1966.

2. *The Governor's Commission on the Family Continues: 1966.* After the Assembly's attempt to continue its study of marriage and divorce collapsed, a small group of interested family law practitioners, academics, judges, and mental health specialists met to discuss ways in which the reform effort might be continued.¹⁴³ At roughly the same

138. The six action items were: (1) the creation of a Registry Certificate for divorce, annulment, and separate maintenance proceedings, *id.* at 10; (2) an increase in the cost of marriage licenses from \$2.00 to \$5.00, and an increase of \$5.00 in the filing fee for divorces to finance a voluntary program of family life education in the public schools and to establish courts of conciliation throughout the state, *id.* at 44-45; (3) enactment of a legislative proposal submitted by the State Bar of California to restore civil contempt as an enforcement remedy for the support provisions contained in integrated property settlement agreements, *id.* at 114-15; (4) the presentation of a Memorial to Congress, seeking an amendment to the U.S. Constitution that would establish uniform minimum residence requirements for filing marriage and divorce suits, *id.* at 139-40; (5) legislation authorizing the introduction into evidence of child custody investigative reports regardless of whether the parties had stipulated to such introduction, and requiring the investigator to be available, on request, for cross-examination, *id.* at 143-44; and (6) legislation setting a single time for the establishment of sister-state divorce decrees, *id.* at 163.

139. *Id.* at 95. The Committee also reserved the matter of child custody for further study. *Id.* at 161.

140. Cal. Assemb. Con. Res. 16, 1st Ext. Sess. 1964.

141. The Divorce Registry Act was the only legislative proposal put forward by the Assembly Committee that was enacted during the 1965 Legislative Session and signed into law by the Governor. It grew out of the second hearing, and was designed to provide statistical data concerning divorce, annulment, and separation decrees. Act effective Jan. 1, 1966, ch. 1893, § 9, 1965 Cal. Stat. 4362, 4364, *repealed by* Act of Sept. 8, 1977, ch. 676, § 6, 1977 Cal. Stat. 2197, 2198. *See generally* CAL. BUREAU OF VITAL STATISTICS, DIVORCE IN CALIFORNIA: INITIAL COMPLAINTS FOR DIVORCE, ANNULMENT, AND SEPARATE MAINTENANCE 1966, at 1-5 (Oct. 1967); Furlong, *Youthful Marriage and Parenthood: A Threat to Family Stability*, 19 HASTINGS L.J. 105, 137-39 (1967).

142. Cal. Assemb. Jt. Res. 17, res. ch. 118, 1965 Cal. Stat. 5274 (passed June 10, 1965).

143. *See* Krom, *supra* note 11, at 163 n.45 (identifying three members of this group).

time, the association of divorced men known as United States Divorce Reform, Inc. decided to take matters into their own hands. They attempted to qualify a proposed Initiative, known as the Sitton-Winterfeld Initiative, for the 1966 California ballot. The Initiative would have removed divorces and related family law issues from the courts, and placed these matters before an administrative Department of Family Relations.¹⁴⁴ Although the proponents of this Initiative failed to gather the nearly 500,000 signatures then necessary to place it on the ballot,¹⁴⁵ their efforts attracted the attention of the State Bar of California. The Board of Governors denounced the initiative as the work of "non-lawyer groups, antagonistic to the legal profession and the judiciary," and called upon the State Bar Family Law Committee to "acquaint all local Bar Associations of the serious dangers to the fundamental legal rights of the public which are involved in any system which deprives the people of proper court hearings and representation in domestic relations matters."¹⁴⁶ Fears that the reform effort would be taken out of the hands of the legal profession may have added weight to the proposal that it be carried on under the auspices of the Governor.

On May 11, 1966, Governor Edmund G. Brown appointed his Commission on the Family,¹⁴⁷ a body heavily weighted with lawyers. Fourteen of the twenty-two persons named to serve as co-chairs or members had legal training; of the remaining eight, five were physicians, of whom three were psychiatrists.¹⁴⁸ Governor Brown charged the Commission to formulate specific proposals that could become the basis for legislation introduced during the 1967 Session, and he identified four topics of concern. These were broadly conceived, and included substantive revision of the laws relating to the family, including marriage and divorce, alimony, division of property, and custody of children; the possibility of developing family life education courses to be given in the public schools; the desirability of establishing a national standard for residence for marriage and divorce; and finally, and in the Governor's words, "perhaps most important," the establishment of a Family Court.¹⁴⁹ The Governor did not mention the achievement of equality between women and men in his charge. Perhaps recognizing that his agenda would

144. Letter from Mr. Hazen L. Matthews, Legislative Representative of the State Bar of California, to the members of the Board of Governors (with copies to Members of the Committee on Family Law) (Nov. 2, 1965) (copy on file in Professor Kay's office).

145. San Francisco Chron., Apr. 18, 1966, at 14, col. 3.

146. Wailes, *Work of the Board*, 41 CAL. ST. B.J. 438-39 (1966).

147. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 1.

148. *Id.* app. C at 145-47 (Roster of Members).

149. *Id.* at 1.

require a great deal of effort if it were taken seriously, the Governor requested only that the Commission produce tentative recommendations before the end of the year. But 1966 was an electoral year; and in November, it was clear to the Commission that its report must be in final form by the end of December, since a new Governor, Ronald Reagan, was elected and would be installed in January 1967. Accordingly, the Commission decided to give priority to the substantive reform of California divorce law and the establishment of a Family Court, leaving the remainder of its charge for future development.¹⁵⁰

In the twenty years since its 1966 Report appeared, the recommendations proposed by the Governor's Commission on the Family have been widely discussed.¹⁵¹ I do not propose to repeat or to evaluate that discussion in this Article. For my present purposes, it is necessary only to contrast what the Governor's Commission actually proposed with the law that the California Legislature finally enacted in 1969, in order to show that, although the Commission did not have among its goals the achievement of equality between the divorcing parties, its proposals nevertheless took account of a potential differential impact on women and sought to avoid that impact. Unfortunately, the legislature ignored many of the safeguards proposed by the Commission.

150. *Id.* at 2-3. The Commission was not the first gubernatorial study group to recommend that a family court be established in California. The Elkus Committee, appointed in 1947 by Governor Earl Warren to study the juvenile justice system, had recommended the creation of a "family and children's court" that would be staffed by qualified judges and could provide a "uniformity of philosophy, procedure and administration in those departments handling family and children's cases." Final Report of the Special Crime Study Commission on Juvenile Justice 13-15 (June 30, 1949) (copy on file in Professor Kay's office). Judge Alexander, an early proponent of the family court, published one of his earliest articles on the topic during the tenure of the Elkus Committee. Alexander, *Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce*, 32 J. AM. JUD. SOC'Y 38 (1948).

151. See, e.g., M. RHEINSTEIN, *supra* note 1, at 375-78 (discussing GOVERNOR'S COMM'N REPORT, *supra* note 14); M. WHEELER, *supra* note 129, at 19-31 (discussing both Governor's Commission proposal and California Family Law Act); Dinkelspiel & Gough, *The Case For A Family Court—A Summary of the Report of the California Governor's Commission on the Family*, 1 FAM. L.Q., Sept. 1967, at 70; Dinkelspiel & Gough, *A Family Court Act for Contemporary California—A Summary of the Report of the Governor's Commission on the Family*, 42 CAL. ST. B.J. 363 (1967); Goddard, *The Proposal for Divorce Upon Petition and Without Fault*, 43 CAL. ST. B.J. 90 (1968) (arguing fault standard should not be eliminated without further study and consideration); Hammer, *Divorce Reform in California: The Governor's Commission on the Family and Beyond*, 9 SANTA CLARA LAW. 32 (1968) (discussing need for reform in California divorce system and assessing Family Court Act); Kay, *supra* note 115 (discussing California plan for no-fault divorce administered through family court); Krom, *supra* note 11 (detailed historical analysis of development and enactment of California Family Law Act of 1969).

The Governor's Commission firmly linked its suggestion to eliminate fault from all aspects of marriage dissolution to its proposal for a Family Court.¹⁵² It viewed the existing fault-based divorce system as inextricably rooted in an adversary procedure.¹⁵³ Families on the verge of marital breakdown were forced to appear in court as adversaries before judges who were limited to taking testimony on the existence of matrimonial misconduct that might have little to do with the personal dynamics of the relationship. Spouses in marriages that had broken down in fact might not qualify for legal termination if the "right" acts of misconduct had not occurred, while marriages that might still be viable could be ended at the suit of an "innocent" party determined to claim vindication. The role of the court was limited to an artificial inquiry into fault. The Commission believed that meaningful reform could not be attained unless both parts of the existing system were changed.¹⁵⁴

The proposed Family Court would be staffed by experienced family law judges who would receive special training and who would sit on the Court for a minimum period of two years.¹⁵⁵ The judges would be assisted by trained professional staff¹⁵⁶ capable of helping divorcing couples clarify the conflicts in their marriages by inquiring into the day-to-day problems they were experiencing, rather than into the existence of marital fault. The staff would provide an initial evaluation for all divorcing couples, followed either by reconciliation counseling for those couples who desired to try to save their marriages, or dissolution counseling for those couples who felt no reconciliation was likely.¹⁵⁷ Dissolution counseling covered all aspects of separation and divorce, including financial issues and questions of child custody and support.¹⁵⁸ The counselor would prepare a report, after consultation with the attorneys for each party, informing the court of the parties' circumstances, the matters on which they were in agreement, those issues remaining to be resolved, and a recommendation as to the viability of the marriage.¹⁵⁹ A clear line separated the responsibilities of the counselor and those of the attorneys and the judge. The counselor's function was to investigate the circumstances of the marriage and to ascertain the extent of continued disagreement between the parties. The lawyers

152. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 26.

153. *Id.* at 28-29.

154. *Id.* at 31.

155. *Id.* at 10-11.

156. *Id.* at 11-13.

157. *Id.* at 18-20.

158. *Id.* at 20.

159. *Id.*

remained responsible for negotiating disputed issues and for litigating those that could not be resolved. The judge was responsible for the final adjudication and order.¹⁶⁰

The Commission gave the Family Court its highest priority. It viewed the elimination of fault from the substantive law as a change needed to further the work of the Family Court, not the other way around. The Family Court's searching inquiry into the real causes of marital breakdown would be hampered by the need to assign fault and to declare one party "innocent" and the other "guilty" of specific misconduct as the basis for dissolution. Instead of identifying marital fault, the Commission proposed that the Family Court dissolve only those marriages that had broken down in fact. Its suggested standard tied the judicial finding of a no-fault ground firmly to the factual inquiry conducted by the counselor: "[A]n order shall be made by the court dissolving the marriage if the court, after having read and considered the counselor's report and any other evidence presented by the parties, makes a finding that the legitimate objects of matrimony have been destroyed and that there is no reasonable likelihood that the marriage can be saved."¹⁶¹

The Commission realized that elimination of fault from the grounds of divorce would be ineffectual unless fault was also removed from other aspects of divorce, primarily from the financial awards,¹⁶² the division of property,¹⁶³ and the custody determination.¹⁶⁴ Since California is a community property state, and since both spouses hold equal interests in the community property during the marriage, it might have appeared logical to recommend that the community property be divided equally upon divorce as a means of implementing the no-fault philosophy. But the Commission did not recommend an equal division of community property. It recognized that "an absolutely equal division is impracticable, if not impossible, in many cases."¹⁶⁵ It pointed to the difficulties of an equal division where the chief asset is a business or a partnership. It noted that

160. *Id.* at 20-21.

161. *Id.* at 91 (§ 028 of Commission's proposed Family Court Act). The accompanying comment to § 028 indicated that the proposed statutory language was based on Chief Justice Traynor's opinion in *De Burgh v. De Burgh*, 39 Cal. 2d 858, 250 P.2d 598 (1952) (interpreting defense of recrimination to permit divorces to be granted to both parties if trial court determined that legitimate objects of matrimony had been destroyed after considering relevant factors, including prospect of reconciliation between parties; effect of marital conflict upon parties, their children, and any other concerned third parties; and comparative guilt of parties).

162. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 47-48.

163. *Id.* at 44-45.

164. *Id.* at 39-40.

165. *Id.* at 45.

“an equal division may fail to give sufficient protection to the wife and children, even though their needs would normally be provided for through alimony and support awards.”¹⁶⁶ Accordingly, it recommended that the “Family Court shall . . . divide the community property . . . of the parties equally between them, except that if the Court finds that the economic circumstances of the parties require it, the Court may order an unequal division.”¹⁶⁷ The Commission recommended changing the existing requirement that alimony be awarded only to an “innocent” party,¹⁶⁸ thus shifting the basis for spousal support from fault to an assessment of “the circumstances of the respective parties including the duration of the marriage” and calling upon the Family Court to set the award “in such amount and for such period of time, as the court may deem just and reasonable.”¹⁶⁹ The standards for awarding child support were not changed, although both parents could be ordered to contribute.¹⁷⁰ The Commission was keenly aware of the difficulties of enforcing both spousal and child support, and it included several recommendations for ensuring that the support payments ordered by the Family Court would be collected.¹⁷¹ Finally, the Commission proposed that the standard for child custody determinations be the best interests of the child, and recommended eliminating the existing sex-based statutory preference for mothers as custodians of young children and for fathers as custodians of children ready to be prepared for business or a profession.¹⁷² California’s more recent experiment with joint custody was neither considered nor proposed by the Governor’s Commission on the Family.¹⁷³

The Governor’s Commission presented its recommendations in its final Report in December 1966.¹⁷⁴ Not all members agreed with its proposals.¹⁷⁵ Two legislative members, however, introduced

166. *Id.*

167. *Id.* at 111 (§ 051 of proposed Family Court Act).

168. *Id.* at 47.

169. *Id.* at 112 (§ 052 of proposed Family Court Act).

170. *Id.* at 104-05 (§ 045 of proposed Family Court Act).

171. *Id.* at 51-54.

172. *Id.* at 38-40. *See* former CAL. CIV. CODE § 138(2) (West 1968) (“As between parents adversely claiming custody, neither parent is entitled to it as of right; but, other things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father.”).

173. *See supra* text and accompanying notes 38-39. *See generally* JOINT CUSTODY AND SHARED PARENTING, *supra* note 38.

174. *See* GOVERNOR’S COMM’N REPORT, *supra* note 14, at i.

175. Judge Roger A. Pfaff, who had chaired the Special Citizens’ Advisory Committee to the Assembly Interim Committee on Judiciary, was subsequently a member of the Governor’s Commission on the Family. Prevented by ill health from attending the

bills containing the Commission's draft of the Family Court Act into the 1967 Session.¹⁷⁶ Action on these bills was deferred to await scrutiny and refinement by the California State Bar Association.

3. *The State Bar Family Law Committee Refines the Commission's Proposal: 1967-1969.* Because of overlapping membership between the State Bar Family Law Committee and the members of the Governor's Commission on the Family, the Board of Governors created a Special Committee to study the Commission's Report.¹⁷⁷ The Special Committee submitted its evaluation to the Board on February 12, 1968.¹⁷⁸ The Committee disapproved of the Family Court Act as drafted, but agreed in principle with its major provisions, including the creation of a Family Court and the adoption of a no-fault divorce law.¹⁷⁹ It totally rejected the expansive role contemplated for the professional staff of the Family Court.¹⁸⁰ Moreover, it was not ready to remove fault from the award of alimony, noting that "[u]nder the Act an adulterous or drinking wife would be as entitled to alimony as one who conducted herself as one would normally expect a wife to act and who was then wilfully abandoned by the husband in favor of a younger woman."¹⁸¹

Upon receipt of the Special Committee's report, the Board of Governors formally disapproved the legislative bills embodying the proposals of the Governor's Commission.¹⁸² Senator Grunsky, a member of the Commission, withdrew his bill and undertook to work with a group composed of former members of the Commission and representatives of the State Bar to produce a final draft of a bill that could be introduced into the legislature in 1969.¹⁸³ The Board of Governors thereupon referred the proposed Family Court Act,

Commission's meetings, he followed the proceedings by reading copies of the Commission's Minutes. He wrote to Chair Richard Dinkelspiel that "I want to be perfectly frank in stating that I could never join in giving blanket approval to this report because I feel many of the recommendations therein are unrealistic and some are based on erroneous assumptions." Letter from Judge Roger A. Pfaff to Mr. Richard Dinkelspiel (Dec. 14, 1966) (copy on file in Professor Kay's office).

176. A.B. 1420 (Shoemaker) and S.B. 826 (Grunsky) placed the Family Court Act before the 1967 Regular Session of the California legislature. A.B. 1420, Reg. Sess., Cal. Assembly Bills 1967; S.B. 826, Reg. Sess., Cal. Senate Bills 1967.

177. Wailes, *Work of the Board*, 42 CAL. ST. B.J. 328, 328 (1967).

178. Wailes, *Work of the Board*, 43 CAL. ST. B.J. 298, 301 (1968).

179. Report to Board of Governors of the State Bar on Behalf of the Committee to Study Report of the Governor's Commission on the Family 1-2, 4-5 (Feb. 12, 1968) (copy on file in Professor Kay's office).

180. *Id.* at 4.

181. *Id.* at 8. The Committee also recommended that courts be allowed to take account of the parties' conduct during the marriage when dividing the community property, thus reintroducing fault into that determination as well. *Id.* at 7.

182. Wailes, *supra* note 178, at 301.

183. See Krom, *supra* note 11, at 172-73.

along with the Report of the Governor's Commission and that of its Special Committee, to its Committee on Family Law for further study and report.¹⁸⁴

The State Bar Family Law Committee produced sixty-four revisions in the proposed Family Court Act.¹⁸⁵ It retained, however, the major recommendations of the Governor's Commission, including the Family Court (with the modification that its professional staff would provide an initial diagnostic interview only for divorcing couples with children under the age of eighteen, a decision motivated by fiscal concerns), the no-fault approach as the sole basis for marriage dissolution, and the removal of fault from the financial matters and from the custody determination.¹⁸⁶ The Board of Governors approved the report of its Committee on Family Law in January 1969, and instructed its Legislative Representative, Mr. Hazen Matthews, to support the Family Court Act if it were amended to conform to the Committee's draft.¹⁸⁷ Senator Grunsky accepted the changes, and amended his bill accordingly. The Family Court Act was ready for serious consideration by the California Legislature.

4. *The California Legislature Acts: 1969.* Senator Grunsky introduced S.B. 252, embodying the Family Law Committee's revisions of the Governor's Commission proposal, into the Senate in late January 1969.¹⁸⁸ Shortly thereafter, Assemblyman James A. Hayes introduced a rival bill, A.B. 530, into the Assembly.¹⁸⁹ The Hayes bill reflected the opposition that had materialized in the Los Angeles Conciliation Court to the basic approach to divorce reform taken by the Governor's Commission on the Family. The Hayes bill proposed the enactment of no-fault divorce shorn of its protective setting in a specialized court.¹⁹⁰ Other significant differences between

184. Wailes, *supra* note 178, at 309-10.

185. Report of Committee on Family Law on the Family Court Act (Dec. 30, 1968) (copy on file in Professor Kay's office). For a summary of the most important changes proposed by the State Bar Family Law Committee, see Krom, *supra* note 11, at 173-74.

186. Report of Committee on Family Law, *supra* note 185. Krom notes:

While the present legislation [the Family Law Act] contains substantial modifications of the Family Court Act, the Commission's proposal has served as the main working model on which the subsequent bills were based. Moreover, its main concept of removing matrimonial offenses as the grounds for divorce, property division, and alimony, substituting a factual inquiry into the breakdown of the marriage and recognizing the possibility that it can be saved, has remained intact throughout the two and one-half years of legislative development which have ensued.

Krom, *supra* note 11, at 170 (footnotes omitted).

187. Wailes, *Work of the Board*, 44 CAL. ST. B.J. 294, 300-01 (1969).

188. S.B. 252 (Grunsky), Reg. Sess., Cal. Senate Bills 1969.

189. A.B. 530 (Hayes), Reg. Sess., Cal. Assembly Bills 1969.

190. See Krom, *supra* note 11, at 175, 177.

the two bills existed as well. The Hayes bill included an express reference to the existing fault grounds for divorce as part of its definition of the proposed standard for dissolution, "irreconcilable differences,"¹⁹¹ and it retained incurable insanity as a separate ground.¹⁹² Further, it allowed the court to receive evidence of circumstances other than purely economic ones in dividing the marital property.¹⁹³

In the legislative debate that ensued, members of the Governor's Commission attempted to defend the Family Court against the objections raised by the Los Angeles Conciliation Court staff and its new presiding judge, Judge William E. MacFaden.¹⁹⁴ They were unsuccessful. The compromise measure that emerged from the California legislature in 1969 resulted in the enactment of a far more radical law than the Governor's Commission had proposed. Its chief features were a provision permitting the dissolution of marriage on either of two grounds: "irreconcilable differences which have caused the irremediable breakdown of the marriage"; or "incurable insanity."¹⁹⁵ The Family Law Act further defined "irreconcilable differences" as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."¹⁹⁶ The no-fault approach was badly flawed by a provision making evidence of "specific acts of misconduct" admissible on two issues: first, "where child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child," and, second, where the judge determines that such evidence is "necessary to establish the existence of irreconcilable differ-

191. *Id.* at 174. A.B. 530 provided in part that the court "shall be guided by, but not limited to, the statutory grounds and corresponding judicial decisions in effect prior to the effective date of this act" in determining the existence of "irreconcilable differences." A.B. 530, *supra* note 189, § 4506.

192. A.B. 530, *supra* note 189, § 4507.

193. A.B. 530 allowed the court to take account of "all the evidence and the economic circumstances of the parties" in ordering an unequal division of the community property. *Id.* § 4800 (emphasis supplied).

194. See Krom, *supra* note 11, at 177.

195. Family Law Act, § 8, 1969 Cal. Stat. at 3324 (codified at CAL. CIV. CODE § 4506 (West 1983)).

196. Family Law Act, § 8, 1969 Cal. Stat. at 3324 (codified at CAL. CIV. CODE § 4507 (West 1983)). The reference to prior fault grounds contained in A.B. 530 § 4506, quoted *supra* note 191, was deleted prior to enactment of the Family Law Act. Rheinstein characterized §§ 4506-08 as "a compromise that was worked out obviously in a hurry," and as "poorly drafted," noting that their "literal application is impossible." M. RHEINSTEIN, *supra* note 1, at 368. See also Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1318-23 (1970) (attempting to clarify legislative intent underlying "irreconcilable differences" standard, and concluding that standard was intended to be fundamentally subjective).

ences.”¹⁹⁷ The Family Law Act called for equal division of the marital property as the general rule, providing for two exceptions: first, where economic circumstances warrant the award of an asset to one party on conditions proper to effect a “substantially equal division” of the property; and second, to restore to one party sums deliberately misappropriated by the other.¹⁹⁸ The Act eliminated fault from the spousal support award, but the legislature added a significant consideration to those proposed by the Governor’s Commission. In addition to taking account of the circumstances of the parties and the duration of the marriage, as the Commission had proposed, the legislature instructed the court to consider “the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children in the custody of such spouse.”¹⁹⁹ The legislature accepted the Commission’s proposal that the best interests standard be the basis for the custody determination, but it retained the preference for mothers as custodians of children of “tender years.”²⁰⁰

The California Family Law Act of 1969 was quite a different document from the Family Court Act proposed in 1966 by the Governor’s Commission on the Family. The Family Law Act’s statement of the no-fault ground, “irreconcilable differences, which have caused the irremediable breakdown of the marriage,”²⁰¹ focuses on the conflict between the parties, and its further reference to a court determination of “grounds . . . which make it appear that the marriage should be dissolved,”²⁰² harks back to the fault approach. The

197. Family Law Act, § 8, 1969 Cal. Stat. at 3325, amended by Act of Sept. 4, 1969, ch. 1609, § 14, 1969 Cal. Stat. 3352, 3355 (operative Jan. 1, 1970) (current version at CAL. CIV. CODE § 4509 (West 1983 & Supp. 1987)). The provision authorizing the use of “specific acts of misconduct” to establish the existence of irreconcilable differences was deleted in 1975. Act of Apr. 18, 1975, ch. 35, § 1, 1975 Cal. Stat. 59. For the original text of § 4509 and subsequent amendments, see *supra* note 35.

198. Family Law Act, § 8, 1969 Cal. Stat. at 3333 (current version at CAL. CIV. CODE § 4800(b)(1), (2) (West Supp. 1987)).

199. *Id.* § 8, 1969 Cal. Stat. at 3333 (current version at CAL. CIV. CODE § 4801(a)(5) (West Supp. 1987)).

200. *Id.* § 8, 1969 Cal. Stat. at 3330 (current version at CAL. CIV. CODE § 4600(a) (West Supp. 1987)). The maternal preference was eliminated in 1972. Act of Aug. 17, 1972, ch. 1007, § 1, 1972 Cal. Stat. 1854, 1855.

201. Family Law Act, § 8, 1969 Cal. Stat. at 3324 (codified at CAL. CIV. CODE § 4506 (West 1983)). For criticisms of the Family Law Act’s no-fault ground, see *supra* note 196. Assemblyman Hayes, as Chair of the Assembly Committee on Judiciary, prepared a report on the Family Law Act in which he explained that the term “irreconcilable differences” “was chosen simply because it is in fact descriptive of the frame of mind of the spouses in a marriage which is no longer viable.” ASSEMBLY COMM. REPORT, *supra* note 16, at 8057.

202. Family Law Act, § 8, 1969 Cal. Stat. at 3324 (codified at CAL. CIV. CODE § 4507 (West 1983)).

Commission's proposed factual inquiry into the question whether "the legitimate objects of matrimony have been destroyed and that there is no reasonable likelihood that the marriage can be saved"²⁰³ was more neutral, and carried the connotation that both parties had contributed to the breakdown of their marriage. The deletion of the Family Court from the Family Law Act made difficult, if not impossible, any attempt to secure a consistent application of the no-fault provisions throughout the state. Without the training in the no-fault philosophy that the Commission envisaged for the specialist judges, and deprived of the assistance of trained staff, the California trial court judges were left to puzzle out the statutory language for themselves, aided only by an accompanying Legislative Report²⁰⁴ drafted by Assemblyman Hayes after the Act had been adopted. As we shall see, this Legislative Report first suggested a connection between the Act's financial provisions and the achievement of equality between women and men.²⁰⁵ In this and other respects, the Report proved to be a false guide.

The Family Law Act made two significant changes in the Governor's Commission proposal concerning the financial aspects of marital dissolution that subtly altered the way judges would interpret the statute. The first was a change in the statutory language concerning the division of community property. The Commission, as I have noted, proposed an equal division of community property as the general rule, but made clear that an unequal division could be ordered if the economic circumstances of the parties required it.²⁰⁶ The Family Law Act did not mention the possibility of an "unequal" division of the community property. Instead, it permitted an exception to the equal division rule where economic circumstances warranted the award of a particular asset to one party on conditions appropriate to effect a "substantially equal" division of the property.²⁰⁷ Thus, the Act authorized a much narrower exception from

203. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 91 (§ 028 of Commission's proposed Family Court Act). For a summary of the basis for this standard, see *supra* note 161.

204. ASSEMBLY COMM. REPORT, *supra* note 16. At least one contemporary observer appreciated the significance of the California legislature's defeat of the Family Court proposal. See Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution*, 16 N.Y.L.F. 119, 153 (1970) ("The failure to adopt the proposed family court system is actually a total rejection of the procedure the Commission envisioned. In the new Family Law Act the legislature has adopted a non-fault system, but has left it to function within the existing judicial machinery.").

205. See *infra* text accompanying notes 211-13.

206. For a summary of the Commission's property division proposal, see *supra* text and accompanying notes 165-67.

207. Family Law Act, § 8, 1969 Cal. Stat. at 3333.

the equal division approach than the Commission would have done.²⁰⁸ Second, the Family Law Act specifically directed the judge to consider the supported spouse's ability to engage in gainful employment when setting the spousal support award.²⁰⁹ Although this direction was softened somewhat by the accompanying admonition not to interfere with the interests of children in the custody of the supported spouse,²¹⁰ the statute could be read as urging judges to encourage ex-wives to go to work. That interpretation was reinforced by the 1969 Legislative Report drafted by Assemblyman Hayes, in which he specifically cited the increasing numbers of working married women and called attention to their "approaching equality" with men.²¹¹ The Governor's Commission had made no similar statement in its 1966 Report. Instead, as I have noted, the

208. Professor Aidan Gough, the Executive Director of the Governor's Commission, was especially critical of this section of the Family Law Act, noting that its rejection of the Commission's proposal "has been retrograde rather than progressive." Gough, *Community Property and Family Law: The Family Law Act of 1969*, 1970 CAL LAW 273, 293. Gough's prediction that the Family Law Act's equal division mandate would require "forced sale of the residence" in "the great majority of cases," and his further warning that "this problem of the family home is one of the most pressing difficulties presented by the new enactment," *id.* at 294, have been confirmed by Weitzman's data on the disposition of the family home by judges interpreting the Family Law Act. See L. WEITZMAN, *supra* note 7, at 78-96. For further discussion of disposition of the family home, see *infra* note 292.

209. Family Law Act, § 8, 1969 Cal. Stat. at 3333 (current version at CAL. CIV. CODE § 4801(a)(5) (West Supp. 1987)). For the exact language of this provision, see *supra* text accompanying note 199.

210. Family Law Act, § 8, 1969 Cal. Stat. at 3333 (current version at CAL. CIV. CODE § 4801(a)(5) (West Supp. 1987)).

211. ASSEMBLY COMM. REPORT, *supra* note 16, at 8062. The full passage, offered in support of the Family Law Act's equal division mandate, reads as follows:

When our divorce law was originally drawn, woman's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decisions of courts with respect to matters incident to dissolution.

Id.

Weitzman quotes this passage, attributing it to "the reformers," in a paragraph immediately following one in which she notes that only four members of the Governor's Commission were women, and speculates about why the Commissioners, including the present author who is identified by name, failed to "foresee how *de jure* equality might not result in equity in a society lacking *de facto* equality." L. WEITZMAN, *supra* note 7, at 364-65. Although Weitzman's footnote correctly identifies the Assembly Committee Report as the source of the quoted passage, *id.* at 487 n.33, a reader who failed to turn from the text on page 365 to consult the footnote printed on page 487 could easily, but mistakenly, conclude that the passage had been part of the Report of the Governor's Commission on the Family.

It may be of historical interest to note that California's first legislature also provided for an equal division of the community property upon dissolution, despite the vastly

Commission recognized that a mandatory equal division of the community property might be unfair to women and children.²¹² The theme of equality between men and women was thus introduced into the legislative history of the California Family Law Act for the first time after the Act had been adopted. Not only was that theme not part of the earlier studies and deliberations that had produced the Act, there is some reason to believe that Assemblyman Hayes introduced it for later use as a weapon in his own divorce proceeding.²¹³ As we shall see, Weitzman's research has made clear that the trial court judges who interpreted the Family Law Act applied Assemblyman Hayes's concept of equality in inappropriate ways.

B. A National View: The Uniform Marriage and Divorce Act

The National Conference of Commissioners on Uniform State Laws commenced its work on the Uniform Marriage and Divorce Act in 1965,²¹⁴ a year before the appointment of the California Governor's Commission on the Family. Drafting did not begin in earnest, however, until 1968.²¹⁵ By that time, the Governor's Commission Report had appeared. When the Commissioners promulgated the first version of the Uniform Act in August 1970, the California Family Law Act had been in effect for seven months. Several observers, including some who participated in the preparation of the Uniform Act, as well as others who followed the proceed-

unequal "*de jure*" and "*de facto*" situations of women and men at that time. See Act of Apr. 17, 1850, ch. 103, § 12, 1849-50 Cal. Stat. 254. This Act provided in part:

In case of the dissolution of the marriage, by the decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require.

Id. The provision requiring an unequal division of the community property when the divorce was granted on the grounds of adultery or cruelty was introduced by the Field Code of 1872. CAL. CIV. CODE §§ 147-48 (1872).

212. For a summary of the Commission's community property division proposal, see *supra* text and accompanying notes 165-67. See also Gough, *supra* note 208, at 292-97.

213. Assemblyman Hayes's divorce proceeding was filed in 1966; the decree was entered in 1969. He subsequently quoted the 1969 Legislative Report's passage identifying the "approaching equality" of women with men as an appropriate factor to be considered by judges in a brief filed in support of his motion, made on December 13, 1972, to terminate a court order requiring him to support his former wife. Respondent's Opening Points and Authorities, Order to Show Cause, Hayes v. Hayes (filed Dec. 13, 1972) (No. D700 518), quoted in R. EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 28 (1977). For the history of Hayes's divorce proceedings, see R. EISLER, *supra*, at 24-31.

214. UMDA prefatory note.

215. Merrill, *Section 305: Genesis and Effect*, 18 S.D.L. REV. 538, 540 (1973).

ings closely, pointed out that the broad outlines of the 1970 version of the Uniform Act were heavily influenced by decisions taken in California. Thus, Professor Maurice Merrill, who chaired the Commissioners' Special Committee charged with producing the Act, noted that the decision to use the concept of marital breakdown, rather than separation for a period of time or incompatibility, as the basis for no-fault divorce, "was prompted by the fact that there was already considerable literature employing the term, that there had been European experience with the concept, and that it had been used in California."²¹⁶ Professors Max Rheinstein²¹⁷ and Henry Foster²¹⁸ also noted the similarities between the approach taken by the drafters of the Uniform Act and that adopted in California. Unlike the dissolution provision finally enacted in California,²¹⁹ however, the 1970 Uniform Act did not rely on a showing of "irreconcilable differences" to establish marital breakdown. Instead, the 1970 Uniform Act did not define marital breakdown at all, choosing instead to rely on a series of procedural steps to guide the court to a judgment that the marriage had broken down in fact, and accordingly, should be dissolved in law as well.²²⁰ The 1970 Uniform Act also followed California's lead in removing fault from the

216. *Id.* at 541. The comment to § 305 cites the California Family Law Act, among others, as having adopted the proposed no-fault approach, and it refers to Justice Traynor's opinion in the *De Burgh* case, previously identified in the GOVERNOR'S COMM'N REPORT, *supra* note 14, at 91, as the source of the breakdown concept. For a summary of *De Burgh*, see *supra* note 161.

217. M. RHEINSTEIN, *supra* note 1, at 382-91.

218. Foster, *Divorce Reform and the Uniform Act*, 18 S.D.L. REV. 572, 576, 588-89 (1973).

219. For a summary of the California provision, see *supra* text and accompanying notes 195-96.

220. Section 305 of the 1970 version of the UMDA provided:

[Irretrievable Breakdown.]

(a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall

(1) make a finding whether the marriage is irretrievably broken, or

(2) continue the matter for further hearing not less than 30 or more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar and may suggest to the parties that they seek counseling. At the adjourned hearing, the court shall make a finding whether the marriage is irretrievably broken.

Id.

disposition of property,²²¹ the award of alimony (termed “maintenance” rather than “spousal support”),²²² and the custody determination.²²³ The Commissioners did not, however, propose that a Family Court be created to administer its no-fault law. The members of the Special Committee thought that the organization of a state’s judiciary was a local matter to be considered by each state, rather than an appropriate subject for uniform legislation.²²⁴

As originally drafted and promulgated, the 1970 Uniform Act, like the proposal of the California Governor’s Commission, had as its basic aim the elimination of fault—not merely from the standard for marital dissolution, but also from the division of property, the award of maintenance, and the placement of children—and the substitution of a non-judgmental, factual assessment of whether a marriage had broken down irretrievably. Reporter Levy clearly foresaw that this approach would require safeguards for wives who might otherwise be penalized by abandoning the financial bargaining stance they had held under the fault system. He added this topic to the Special Committee’s agenda: “[H]ow to provide adequate, long-term financial protection for the ‘innocent’ wife who can be divorced against her will by virtue of new, non-fault grounds for divorce. . . . [S]atisfactory resolution of this problem will require path-breaking and imaginative divorce-property doctrines.”²²⁵

The 1970 Uniform Act’s proposed solution to this problem was to enact a deferred marital property scheme modeled on community property regimes and effective on dissolution.²²⁶ Section 307 provided in part that a court dividing marital property was to take into account, among other factors, “the contribution of each spouse to

221. UMDA § 307 (1970), *quoted supra* note 27.

222. UMDA § 308 (1970). The 1973 version of § 308, unchanged in substance from the 1970 version, is *quoted supra* note 32.

223. UMDA § 402 (1970). Section 402, unchanged from the 1970 version, is *quoted supra* note 34.

224. The comment to UMDA § 305 notes that “[t]he Act does not forbid the creation of a family court, or the use of a family court division within a court having jurisdiction over divorce and related subjects.” UMDA § 305 comment. Reporter Levy, in his background manuscript prepared for the Commissioners, recommended that they should avoid the complex problems of creating a family court to accompany the Uniform Act. R. LEVY, *supra* note 25, at 133-34.

225. R. LEVY, *supra* note 25, at 138 (footnote omitted). Levy noted that this problem had already been considered in two British studies: PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY, The Report of a Group Appointed by the Archbishop of Canterbury in January 1964 (1966); and LAW COMM’N, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE (Cmnd. 3123, Nov. 1966). These reports influenced the thinking of both the California Governor’s Commission and the drafters of the Uniform Act.

226. UMDA § 307(b) (1970), *quoted supra* note 27.

the acquisition of the marital property, including the contribution of a spouse as homemaker.”²²⁷ The comment to section 307 added that “[t]he court may divide the marital property equally or unequally between the parties, having regard for the contributions of each spouse in the acquisition thereof, the value of each spouse’s non-marital property, and the relative economic position of each spouse following the division.”²²⁸ The court was instructed by section 307(a)(3) to consider, as part of the economic circumstances of the parties, “the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.”²²⁹

Reporter Levy had made a strong plea that property division, rather than maintenance, be the primary vehicle for financial settlement between husband and wife.²³⁰ He preferred to conceptualize child support awards as including a sum for the custodian’s maintenance,²³¹ rather than to use alimony for this purpose. Thus, he proposed that the Special Committee

consider abolishing alimony *except* in divorces which fulfill *all* the following conditions: (1) the spouses have no unemancipated children, *and* (2) the wife’s age, or physical or emotional condition make it unlikely that she will remarry or be able to support herself, *and* (3) the property of the spouses which is available for distribution to the wife by the divorce decree does not fairly reflect her economic and/or other contributions to the marriage.²³²

Although the Commissioners did not recommend that alimony be abolished, section 308 of the 1970 Uniform Act did give priority to property division over maintenance, by authorizing a court to grant maintenance only if two conditions were met: the court must find that the spouse seeking maintenance “(1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be re-

227. UMDA § 307(a)(1) (1970), *quoted supra* note 27.

228. UMDA § 307 comment (1970).

229. UMDA § 307(a)(3) (1970), *quoted supra* note 27.

230. R. Levy, *supra* note 25, at 140-47.

231. *Id.* at 145.

232. *Id.* at 144 (emphasis in original). Levy wrote at a time when alimony was routinely awarded only to wives, and before the Supreme Court declared unconstitutional statutes that limited alimony to wives only. *See supra* note 33. He recommended that this distinction between husbands and wives be abolished. R. LEVY, *supra* note 25, at 147.

quired to seek employment outside the home."²³³ Levy's concept was also recognized in section 309(2), which requires the court in setting the child support award to consider among the relevant factors "the financial resources of the custodial parent."²³⁴

The 1970 version of the Uniform Marriage and Divorce Act, like the California Family Law Act, was a result of internal debate among the participants. Reporter Levy has recalled that the Uniform Act was not "a sort of monolith which enjoyed in its conception and during its gestation unanimous internal approval."²³⁵ The Family Law Section of the American Bar Association disagreed sharply with the proposed standard for marital dissolution contained in the 1970 Uniform Act; their sponsorship of a rival Act led to a bitter debate that dragged on from August 7, 1970, when the 1970 Act was promulgated, to February 5, 1974, when the American Bar Association finally approved the 1973 version of the Uniform Act.²³⁶ The outcome of this debate resulted in the requirement that marital breakdown be proved either by a period of separation for more than 180 days or the existence of "serious marital discord adversely affecting the attitude of one or both parties toward the marriage."²³⁷

The compromise standard draws more heavily on traditional phrasings of no-fault grounds already in place in some states, such as separation for a period of years and incompatibility,²³⁸ than it does on the pure no-fault approach based on a factual showing of

233. UMDA § 308(a)(1), (2) (1970). The 1973 version of the UMDA retains this language. See UMDA § 308(a)(1), (2) (1973). Some courts have correctly recognized that this language is jurisdictional. See, e.g., *Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974); *In re Marriage of Johnsrud*, 181 Mont. 544, 548-49, 572 P.2d 902, 904-05 (1977).

234. UMDA § 309(2) (1970). The 1973 version of the UMDA retains this language. See UMDA § 309(2) (1973).

235. Levy, *Introduction*, 18 S.D.L. REV. 531, 533 (1973). He added, "Each policy—indeed, each clause of each section—was the subject of intense, often cantankerous, debate (among Commissioners on the Committee, between Advisors and Commissioners, often between Commissioners and Reporters); indeed, I cannot recall any provision which was not the product either of a compromise among competing policy choices or a vote to which there was significant dissent." *Id.*

236. Compare Merrill, *supra* note 215 (response to ABA's criticism of proposed UMDA) with Foster, *supra* note 218 (account of ABA's rejection of proposed UMDA and prediction of revisions by ABA). See also Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 601 (1973) (criticism of UMDA and discussion of ABA's proposed revisions). A blow-by-blow account of the infighting appears in Zuckman, *Commentary: The ABA Family Law Section v. The NCCUSL: Alienation, Separation and Forced Reconciliation Over the Uniform Marriage and Divorce Act*, 24 CATH. U.L. REV. 61 (1974). See also Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403 (1971) (comparing California Family Law Act, 1970 UMDA, and proposals of Archbishop's Group).

237. UMDA § 302 (1973).

238. For a list of state statutes with grounds for divorce based on separation and/or incompatibility, see *supra* note 22.

marital breakdown originally proposed by the California Governor's Commission and endorsed by the 1970 Uniform Act. Even the 1969 California Family Law Act standard of "irreconcilable differences," once its inconsistent reference to "specific acts of misconduct" as evidence of those differences had been deleted in 1975,²³⁹ was a cleaner no-fault standard. The compromise between the Commissioners and the American Bar Association embodied in the 1973 Uniform Act averted the perceived danger that advocates of no-fault divorce would have to contend with two rival model statutes before state legislatures, each backed by one of "two giants of the legal profession."²⁴⁰ But the three-and-a-half-year delay in achieving a final Uniform Marriage and Divorce Act that the Commissioners wished to promulgate and the American Bar Association was willing to endorse nevertheless resulted in the existence of three different, although similar, models: the California Family Law Act and the 1970 and 1971²⁴¹ versions of the Uniform Act. As we shall see, the influence of all three models can be clearly identified in the statutory choices made by state legislatures.

The intense debate over the no-fault standard may have obscured the changes in the 1970 Uniform Act property provisions contained in the 1973 Uniform Act. Chief among those revisions was the shift in section 307 from a concept of a deferred marital community of property that would be divided between the parties upon dissolution to an equitable distribution of all assets.²⁴² In the process, the Commissioners eliminated from Alternative A of section 307 the direction contained in the 1970 version to courts to consider awarding the family home, or its possession, to the custodian of the children,²⁴³ but inexplicably left that provision intact in Alternative B, meant for adoption in community property states. The new version retained the reference to "the contribution of a spouse as a homemaker," adding the phrase "or to the family unit," as a factor rele-

239. Family Law Act, § 8, 1969 Cal. Stat. at 3325, amended by Act of Sept. 4, 1969, ch. 1609, § 14, 1969 Cal. Stat. 3352, 3355 (current version at CAL. CIV. CODE § 4509 (West 1983 & Supp. 1987)).

240. Zuckman, *supra* note 236, at 73.

241. The Commissioners amended the 1970 UMDA in 1971 to emphasize efforts to reconcile divorcing couples. Thus, 1970 UMDA § 305(b)(2) was amended to authorize the court, at the request of either party or on its own motion, to order a conciliation conference. See UMDA § 305(b)(2) (1971). A new subsection (c) was added to § 305, which provided that "[a] finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation." UMDA § 305(c) (1973).

242. Compare UMDA § 307 (1970), quoted *supra* note 27, with UMDA § 307 (1973), quoted *supra* note 28.

243. See UMDA § 307(a) Alternative A (1973), quoted *supra* note 28.

vant to the apportionment of the property.²⁴⁴ The redrafted comment accompanying the 1973 version of section 307 displays its misunderstanding of the significance accorded in community property systems to a homemaker's contributions to the acquisition of marital property²⁴⁵ by referring to this factor as "the 'homemaker's services to the family unit,'" and by noting that "[t]his last is a new concept in Anglo-American law."²⁴⁶ This way of characterizing the matter suggests that the homemaker is being compensated for services rendered, rather than being credited with an independent economic contribution to the acquisition of the family property that

244. *Id.*

245. The homemaker's contribution to the acquisition of community property is not measured in monetary terms. *See, e.g.,* *Coats v. Coats*, 160 Cal. 671, 678, 118 P. 441, 444 (1911) (determining wife's share of community property upon annulment of marriage).

[I]t is entirely immaterial that . . . plaintiff's services in its accumulation were 'of no monetary value.' She is not suing to recover for services rendered under a contract for labor, nor to establish the value of her interest in a business partnership. What she did, she did as a wife, and her share of the joint accumulations must be measured by what a wife would receive out of community property on the termination of the marriage.

Id. Contrast the concept expressed in the following passage from *La Rue v. La Rue*, 304 S.E.2d 312, 322-23 (W. Va. 1983), a case authorizing trial courts to consider a homemaker's services in the equitable distribution of marital assets in a common law state:

[T]he concept of homemaker services is not to be measured by some mechanical formula, but instead rests on a showing that the homemaker has contributed to the economic well-being of the family unit through the performance of the myriad of household and child-rearing tasks which make up the term "homemaker services."

In valuing this service, the length of the marriage is an important factor and consideration should be given to the quality of the services. For example, a homemaker who, over the course of the marriage, has been frugal in the handling of homemaker expenditures and has thereby enhanced the family assets is entitled to a more equitable return than one who has been extravagant. Some consideration should also be given to the age, health, and skills of the homemaker as well as the amount of independent assets possessed.

Finally, we believe that fault is a factor to consider when valuing homemaker services even though it is not a factor to consider where economic contributions have been made. The reason for considering fault is that, historically, homemaker services were the wife's marital contribution upon which rested the husband's countervailing support obligation and his duty to pay alimony if the marriage was dissolved without fault on the wife's part.

Id. The West Virginia court is not defining a property right, but a factor to be considered in making an equitable property award. It goes on to note that an award for equitable distribution based on homemaker services does not "give rise to the right to have transfer made of the legal title to real estate," as would be the case in an award based on the homemaker's "tangible economic contributions." *Id.* at 323. *See generally* Note, *The Need to Value Homemaker Services Upon Divorce*, 87 W. VA. L. REV. 115 (1984) (analysis of various methods used in placing monetary value on homemaker's services).

246. UMDA § 307 comment (1973).

should be recognized in its division. Instead of "path-breaking and imaginative divorce-property doctrines"²⁴⁷ designed to prevent financial hardships to homemakers, the 1973 Uniform Act chose to rely on the time-honored discretionary power of judges to fashion an equitable distribution of property on a case-by-case basis.

C. *The State Legislatures Choose*

The delay in producing a Uniform Marriage and Divorce Act that could be presented to state legislatures with the endorsement of the American Bar Association²⁴⁸ meant that states that were eager to climb aboard the politically popular bandwagon of divorce reform turned their attention to the California law or to the 1970 or 1971 versions of the Uniform Act. Many of the states among the first group to act simply chose to change their grounds for divorce, rather than to attempt a thorough revision of the statutory framework for marriage and its dissolution. Thus, the 1970 version of the Uniform Act was reflected in the Colorado law covering marriage dissolution and child custody enacted in 1971,²⁴⁹ and in the divorce provisions adopted in 1972 in Hawaii and Nebraska.²⁵⁰ The 1971 version of section 305, with its emphasis on reconciliation,²⁵¹ was adopted in Arizona in 1973,²⁵² and, with the addition of a requirement that the parties must have lived apart for sixty days, in Kentucky in 1972.²⁵³ Washington's comprehensive 1973 Marriage Dissolution Act²⁵⁴ was loosely modeled on the 1973 Uniform Act, but its dissolution provision contains mandatory language that the

247. R. LEVY, *supra* note 25, at 138. Levy's passage is quoted in full *supra* at text accompanying note 225.

248. For a summary of the delay and resulting compromise, see *supra* text and accompanying notes 236-40.

249. Act of June 2, 1971, ch. 130, § 1, 1971 Colo. Sess. Laws 520, 523 (effective Jan. 1, 1972) (current version at COLO. REV. STAT. §§ 14-10-101 to -133 (1974 & Supp. 1985)). Section 14-10-110(1) provides in part that "[i]f both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken or one of the parties has so stated and the other has not denied it, *there is a presumption of such fact, and unless controverted by evidence*, the court shall, after hearing, make a finding that the marriage is irretrievably broken" (emphasis supplied, indicating variation from UMDA § 305).

250. Act of Apr. 11, 1972, ch. 11, § 3, 1972 Haw. Sess. Laws 165, 166 (current version at HAW. REV. STAT. § 580-42 (1976)); Act of Apr. 8, 1972, L.B. 820, § 15, 1972 Neb. Laws 246, 249-50 (current version at NEB. REV. STAT. § 42-361 (1984 & Supp. 1985)).

251. For a summary of § 305, see *supra* note 241.

252. Act of May 14, 1973, ch. 139, § 2, 1973 Ariz. Sess. Laws 973, 978 (codified at ARIZ. REV. STAT. ANN. § 25-316 (1976)).

253. Act of Mar. 25, 1972, ch. 182, § 7, 1972 Ky. Acts 740, 744-45 (current version at KY. REV. STAT. § 403.170 (Michie/Bobbs-Merrill 1984)).

254. Act of Apr. 24, 1973, ch. 157, § 3, 1973 Wash. Laws 1215, 1217-18 (current version at WASH. REV. CODE ANN. § 26.09.030 (1986)).

Commissioners were unwilling to accept.²⁵⁵ Montana was the first state to adopt most of the 1973 version of the Uniform Act.²⁵⁶ Both Florida and Missouri appear to have been influenced by the "irretrievable breakdown" language of the Uniform Act; however, both imposed other conditions in cases where one party denies that the marriage has broken down,²⁵⁷ and Florida also extended the additional conditions to cases where minor children are present in the divorcing family.²⁵⁸

The influence of the proposal of the California Governor's Commission on the Family, with its reference to the destruction of the legitimate objects of matrimony,²⁵⁹ can be traced in the 1970 Iowa law,²⁶⁰ and in the 1972 Michigan statute.²⁶¹ The California Family Law Act's formulation of the dissolution standard, "irreconcilable differences, which have caused the irremediable breakdown of the marriage,"²⁶² appears in slightly modified form in the Oregon law of

255. WASH. REV. CODE ANN. § 26.09.030(1) (1986) provides that "[i]f the other party joins in the petition or does not deny that the marriage is irretrievably broken, the court *shall* enter a decree of dissolution" (emphasis supplied). UMDA § 305 (1973) provides, by contrast, that a court under those circumstances "shall make a finding *whether* the marriage is irretrievably broken" (emphasis supplied). For the UMDA's definition of what is necessary to prove breakdown, see *supra* text accompanying note 237 (quoting UMDA § 302 (1973)).

256. Act of May 6, 1975, ch. 536, § 19, 1975 Mont. Laws 1514, 1521 (current version at MONT. CODE ANN. § 40-4-107 (1985)).

257. Where one party denies that the marriage is irretrievably broken, Missouri requires the petitioner to prove breakdown by a showing of fault or by a period of separation. Act of Aug. 6, 1973, H.B. No. 315, § 5, 1973 Mo. Laws 470, 471-72 (current version at MO. ANN. STAT. § 452.320 (Vernon 1986)). In such cases, Florida permits the court to order marriage counseling, to continue the proceedings up to three months, or to take other discretionary action. Act of June 22, 1971, ch. 71-241, § 7, 1971 Fla. Laws 1319, 1320-22 (current version at FLA. STAT. § 61.052 (1985)).

258. Act of June 22, 1971, ch. 71-241, § 7, 1971 Fla. Laws 1319, 1321-22 (current version at FLA. STAT. § 61.052(2)(b) (1985)).

259. GOVERNOR'S COMM'N REPORT, *supra* note 14, at 91 (§ 028 of Commission's proposed Family Court Act). For the language proposed by the Governor's Commission, see *supra* text accompanying note 161.

260. Act of Mar. 20, 1970, ch. 1266, § 18, 1970 Iowa Acts 380, 383 (current version at IOWA CODE ANN. § 598.17 (West 1981)) ("A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.").

261. Act of July 29, 1971, no. 75, § 1, 1971 Mich. Pub. Acts 127, 127-28 (current version at MICH. COMP. LAWS ANN. § 552.6 (West Supp. 1986)) ("A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.").

262. CAL. CIV. CODE § 4506 (West 1983). For the language of the California provisions, see *supra* text accompanying notes 201-03.

1971 as the sole ground for divorce.²⁶³ A number of other states have simply tacked "irreconcilable differences" on to their existing list of fault-based grounds for divorce,²⁶⁴ while still others have chosen to accomplish the same result by the addition of "irretrievable breakdown."²⁶⁵ Maine combined the forms by adding to its list of fault-based grounds the possibility of a showing that the "marital differences are irreconcilable and the marriage has broken down."²⁶⁶ Ohio's 1974 law created a separate cause of action for dissolution of marriage available only by mutual consent²⁶⁷ alongside its traditional fault-based grounds for divorce.²⁶⁸ The Ohio law is unique in that it provides no standard, other than the consent of both spouses, as the basis for marital dissolution.²⁶⁹ Two other states, Massachusetts and Mississippi, decided in 1976 to permit no-

263. Act of June 4, 1971, ch. 280, § 9, 1971 Or. Laws 387, 389 (current version at OR. REV. STAT. § 107.025 (1984)) ("The dissolution of a marriage . . . may be decreed when irreconcilable differences between the parties have caused the irremediable breakdown of the marriage.").

264. Act of Feb. 13, 1971, ch. 20, §§ 1-2, 1971 Idaho Sess. Laws 33, 34 (defining "irreconcilable differences," using language of California Family Law Act, as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved") (current version at IDAHO CODE § 32-603 (1983) ("irreconcilable differences" is ground for divorce), § 32-616 (1983) (defining "irreconcilable differences")); Act of June 30, 1971, ch. 445, § 458:7-a, 1971 N.H. Laws 527, 527-28 (current version at N.H. REV. STAT. ANN. § 458:7-a (1983)); Act of Mar. 18, 1971, ch. 149, §§ 1, 2, 1971 N.D. Sess. Laws 234, 235 (current version at N.D. CENT. CODE §§ 14-05-03, 14-05-09.1 (1981) (using language of California Family Law Act in defining "irreconcilable differences")); Act of May 22, 1975, ch. 287, § 1, 1975 R.I. Pub. Laws 780, 780-81 (current version at R.I. GEN. LAWS § 15-5-3.1 (1981)); Act effective Apr. 29, 1987, H.B. 139, 1987 Utah Laws (amending UTAH CODE ANN. § 30-3-1 (1984)) (adding "irreconcilable differences of the marriage" as new ground for divorce).

265. Act of Oct. 1, 1971, No. 2272, § 2, 1971 Ala. Acts 3662, 3662-63 (current version at ALA. CODE § 30-2-1 (1983)) (divorce may be granted "[u]pon application of either party, when the court finds there has been an irretrievable breakdown of the marriage and that further attempts at reconciliation are impractical or futile and not in the best interests of the parties or family"); Act of May 29, 1973, No. 73-373, § 1(c), 1973 Conn. Acts 677 (current version at CONN. GEN. STAT. ANN. § 46b-40 (West 1986)); Act of Apr. 13, 1973, No. 276, § 1, 1973 Ga. Laws 557, 557-59 (current version at GA. CODE ANN. § 19-5-3(13) (1982)); Act of Apr. 12, 1973, Pub. L. No. 297, § 1, 1973 Ind. Acts 1585, 1585-86 (current version at IND. CODE ANN. § 31-1-11.5-3 (Burns Supp. 1986)).

266. Act of Oct. 3, 1973, ch. 532, 1973 Me. Laws 932, 932-33. This innovative language was simplified in 1977 to become "irreconcilable marital differences." Act of Oct. 24, 1977, ch. 226, § 1, 1977 Me. Laws 273, 273-75 (current version at ME. REV. STAT. ANN. tit. 19, § 691 (1981)).

267. Act of June 24, 1974, Am. Sub. H.B. No. 233, 1974 Ohio Laws 603, 615-16, amended by Act of Aug. 1, 1975, Am. H.B. No. 370, 1975-76 Ohio Laws 2451, 2452-54, and amended by Act of June 13, 1975, Am. H.B. No. 1, 1975-76 Ohio Laws 1194, 1275 (current version at OHIO REV. CODE ANN. §§ 3105.61-.65 (Anderson 1980)).

268. OHIO REV. CODE ANN. § 3105.01 (Anderson Supp. 1985).

269. OHIO REV. CODE ANN. §§ 3105.61-.65. For a summary of the Ohio provisions, see *supra* note 21.

fault divorce in cases where the parties were able to agree to end their marriage and to negotiate a property settlement agreement to be presented to the court for its approval.²⁷⁰ In case of disagreement, Massachusetts initially required a twenty-four-month waiting period prior to scheduling a court hearing on the "irretrievable breakdown" ground,²⁷¹ while Mississippi relegates the parties to the fault-based grounds for divorce.²⁷²

The period of statutory revision of the grounds for divorce had largely been completed by the end of the 1970s. No state has enacted a pure no-fault law since Minnesota did so in 1978.²⁷³ The two states that amended their fault-based grounds more recently—Pennsylvania in 1980²⁷⁴ and South Dakota, the last hold-out, in 1985²⁷⁵—both added the modern approach to their fault-based grounds. The debate over ratification of the ERA began on March 22, 1972, when the proposed amendment passed the Senate and was sent to the states for consideration, and ended on June 30, 1982, when the extended period for ratification ended. Thirty of the thirty-five states that eventually voted to ratify the ERA had done so by 1973; no state ratified the proposed amendment after 1977.²⁷⁶ In several states, reform of the divorce grounds preceded changes in the financial aspects of divorce.²⁷⁷ The ERA debate in the unratified states focused on the financial aspects of marriage and

270. Act of Nov. 19, 1975, ch. 698, § 2, 1975 Mass. Acts 866, 867-68 (current version at MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West 1986)); Act of May 20, 1976, ch. 451, § 1, 1976 Miss. Laws 704, 704-05 (current version at MISS. CODE ANN. § 93-5-2 (Supp. 1986)).

271. Act of Nov. 19, 1975, ch. 698, § 2, 1975 Mass. Acts 866, 868. The waiting period was reduced to twelve months in 1977. Act of Sept. 20, 1977, ch. 531, § 2, 1977 Mass. Acts 679.

272. MISS. CODE ANN. § 93-5-2 (Supp. 1985).

273. Act of Apr. 5, 1978, ch. 772, § 63, 1978 Minn. Laws 1062, 1088 (effective March 1, 1979) (current version at MINN. STAT. ANN. § 518.06 (West Supp. 1987)) ("A dissolution of marriage shall be granted . . . when the court finds that there has been an irretrievable breakdown of the marriage relationship.").

274. Act of Apr. 2, 1980, No. 1980-26, § 201, 1980 Pa. Laws 63, 66-67 (current version at PA. STAT. ANN. tit. 23, §§ 201(c), (d) (Purdon Supp. 1986)).

275. Act of Mar. 12, 1985, ch. 207, §§ 1, 3, 1985 S.D. Sess. Laws 392 (current version at S.D. CODIFIED LAWS ANN. §§ 25-4-2(7)) ("irreconcilable differences" is ground for divorce), 25-4-17.1 (defining "irreconcilable differences" using language of California Family Law Act) (Supp. 1985).

276. See J. MANSBRIDGE, *supra* note 2, at 12-14.

277. See CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, RECOGNITION OF ECONOMIC CONTRIBUTION OF HOMEMAKERS AND PROTECTION OF CHILDREN IN DIVORCE LAW AND PRACTICE 2 (Jan. 1974) [hereinafter CITIZENS' ADVISORY COUNCIL REPORT] (noting that only five of nineteen states that had adopted UMDA's "irretrievable breakdown" standard for divorce had also adopted most or all of its economic provisions relating to division of property, maintenance, child support, child custody, and enforcement of support and property orders).

divorce, in particular on the husband's duty of support during marriage, alimony awards following divorce, and property rights.²⁷⁸ The proponents' arguments that the ERA would mandate equal treatment in the financial aspects of divorce²⁷⁹ may have influenced divorce court judges in both ratified and unratified states in their interpretations of the no-fault laws. As we shall see, the later reforms in the financial provisions not infrequently were made to correct erroneous interpretations of the no-fault philosophy by trial court judges.

IV. THE SOCIAL AND ECONOMIC AFTERMATH OF NO-FAULT DIVORCE

Even though the proponents of no-fault divorce did not visualize it as a change designed to ensure equality between the divorcing spouses, many of them saw the reform effort as a progressive and enlightened move away from outmoded and unnecessary legal restrictions.²⁸⁰ In California there was a surprising lack of public opposition to the varying proposals that emerged over the period between 1963 and 1969. While Catholic religious opposition existed in New York in 1965 to the plan to add a no-fault ground based on separation to the existing fault-based grounds,²⁸¹ in California representatives of the same religious group supported

278. J. MANSBRIDGE, *supra* note 2, at 91-98. As the author notes, other family law issues figured in the debate, including child custody, domicile of married women, married women's names, and the age of marriage.

279. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *THE EQUAL RIGHTS AMENDMENT: GUARANTEERING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION* 12-14 (Clearinghouse Pub. No. 68, June 1981); Weitzman, *Legal Equality in Marriage and Divorce: The ERA's Mandate*, in *IMPACT ERA: LIMITATIONS AND POSSIBILITIES* 184, 201 (Equal Rights Amendment Project, Calif. Comm'n on the Status of Women ed. 1976) ("[T]he Equal Rights Amendment would nullify the existing marriage contract and would require that marital rights and duties be based on individual functions and needs. In both marriage and divorce this would mean that spouses would be treated equally or on the basis of their individual capacities. Today's network of legal disability for married women would have to disappear."); see also Rhode, *Equal Rights in Retrospect*, 1 *LAW & INEQUALITY* 1, 18-26 (1983) (discussing debate between opponents and proponents in Illinois).

280. See, e.g., R. LEVY, *supra* note 25, at 41-47; Kay, *supra* note 115, at 1212-25; see also M. RHEINSTEIN, *supra* note 1, at 406 (noting that aim of liberalization of divorce was "to eliminate the measure of pain unnecessarily added by traditional law to the suffering which is inevitable in every case of marriage breakup"); Wadlington, *Divorce Without Fault Without Perjury*, 52 *VA. L. REV.* 32 (1966) (arguing for adoption of "breakdown approach" to divorce permitting dissolution when parties cannot be reconciled).

281. See M. RHEINSTEIN, *supra* note 1, at 358 (discussing New York Catholic Bishops' opposition to "divorce by consent," and their proposal that compulsory conciliation be made part of statutory reform); Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 *FAM. L.Q.* 105, 106 (1979).

the Governor's Commission in its recommendation for a Family Court.²⁸² The only organized interest group involved in the California reform effort was an association of divorced men who felt they had been treated unfairly and who thought divorce should be removed from the courts.²⁸³ No feminist groups were available to participate: the modern women's movement was just emerging in 1963, when the California Assembly began its inquiry into divorce.²⁸⁴ Once women's groups became aware of the proposed change from fault to no-fault divorce, many supported the concept.²⁸⁵

As no-fault divorce spread across the country, however, and as social scientists began to investigate the impact of the new laws, the attitude of some feminists began to change.²⁸⁶ Particularly in the

282. M. WHEELER, *supra* note 129, at 131-32. The Family Court, with its emphasis on counseling, perhaps won favor with Catholic spokesmen in California. In New York, the establishment of a mandatory conciliation service was a key feature of the compromise with Church groups that finally permitted the reform statute to be enacted. M. RHEINSTEIN, *supra* note 1, at 359. An early evaluation of the New York conciliation service indicated that it was unsuccessful in practice. Comment, *New York's New Divorce Law: Beyond the Sixth Commandment*, 5 COLUM. J.L. & SOC. PROBS., Aug. 1969, at 2, 5-11.

283. For discussion of the activities of United States Divorce Reform, Inc., see *supra* text accompanying notes 128-29, 144-45.

284. Betty Friedan's book, *THE FEMININE MYSTIQUE*, was published in 1963. It contained "by far the most popular presentation of the non-traditional view" of women's role in society, M. CARDEN, *THE NEW FEMINIST MOVEMENT* 154 (1974), and is considered to have been a major influence in the rebirth of the American women's movement. Friedan was a founding member of the National Organization for Women, and served as its first president. *Id.* at 103-04.

285. See, e.g., Marriage and Family Comm. of the National Organization for Women, *Suggested Guidelines in Studying and Comments on the Uniform Marriage and Divorce Act 3* (Apr. 11, 1971) (copy on file in Professor Kay's office) [hereinafter *NOW Marriage & Family Comm. Report*] ("Section 305 [of the UMDA] deals with irretrievable breakdown. In principle we agree to this as we are not for hopeless marriage—neither are we for hopeless divorce. [Subsection] (b) which permits one of the parties to deny the marriage is irretrievably broken is important because it permits the court to examine the situation and might reveal the conditions under which the divorce is being obtained."); see also CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 34-38* (1968) [hereinafter *TASK FORCE REPORT*] (including, as one of three "principles which should guide revision of State divorce laws," statement that "[t]he concept that there must be a guilty party to any divorce is unrealistic and unnecessarily creates hostility between the parties, which is often detrimental to their children"). The California Advisory Commission on the Status of Women supported the proposed Family Law Act, not because the Act promised equality between women and men, but rather because it offered a desirable elimination of hypocrisy in the legal system, put a new emphasis on counseling, and promised an analysis of the real cause of family problems. Cal. Advisory Comm'n on the Status of Women, *California Women 79-80* (1969).

286. See R. EISLER, *supra* note 213, at 20-54 (1977) (arguing that no-fault provisions be supplemented with legal and financial safeguards for women); B. FRIEDAN, *IT CHANGED MY LIFE 325-26* (1976) ("It is a trap for thousands, . . . if not millions of women, when they face a no-fault divorce law . . . [W]e must insist on immediate legislation . . . that

common law states, observers began to insist that new financial provisions were needed to accompany the no-fault laws in order to protect women and children.²⁸⁷ A debate emerged over whether property should be divided equally or distributed in equitable shares following divorce.²⁸⁸

enforces economic provisions for a dependent spouse and children."); *see also* Levin, *Virtue Does Not Have Its Reward for Women in California*, 61 *WOMEN LAW. J.* 55, 57 (1975) ("Unfortunately, however noble its aims, the no-fault equal division of community property provision of our state law is, sadly, some 20 to 30 years ahead of its time. . . . However unpalatable, allowing reverse discrimination in this area in favor of the women may be the only way ultimately and finally to achieve justice and true equality."); Prager, *Shifting Perspectives on Marital Property Law*, in *RETHINKING THE FAMILY*, *supra* note 67, at 111, 123 ("[N]one of us who heralded California's 1970 no-fault divorce reform foresaw its ramifications, particularly for many homemakers."). Friedan has recently urged women to "confront the illusion of equality in divorce" in light of Weitzman's book. Friedan, *How To Get The Women's Movement Moving Again*, *N.Y. Times*, Nov. 3, 1985, § 6 (Magazine), at 98.

287. *See* CITIZENS' ADVISORY COUNCIL REPORT, *supra* note 277. The history of divorce reform in Wisconsin provides an apt illustration. In 1975, the Wisconsin Senate defeated a bill passed by the Assembly that would have added a no-fault ground, based on "irretrievable breakdown," to the existing grounds, in part because the bill did not provide sufficient economic protection for divorced spouses and their children. Fineman, *supra* note 12, at 848-50. In 1977, Wisconsin enacted a no-fault bill that contained provisions requiring courts to give "appropriate economic value to each party's contribution in homemaking and child care services" and that took as its starting point a presumption that property analogous to community property would be distributed equally. *See* Act of Feb. 1, 1977, ch. 105, § 41, 1977 *Wis. Laws* 560, 571 (current version at *WIS. STAT. ANN.* § 767.255(3) (1981)). In 1984, Wisconsin became the first common law state to adopt a community property regime effective during the marriage, rather than one deferred until divorce. Act of Apr. 4, 1984, ch. 186, § 47, 1983 *Wis. Laws* 1153, 1163-75 (codified at *WIS. STAT. ANN.* §§ 766.001-.97 (West Supp. 1986)) (effective Jan. 1, 1986). *See* Weisberger, *The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model for Comprehensive Common Law Property Reform*, 1 *WIS. WOMEN'S L.J.* 5 (1985). The Wisconsin Marital Property Act is based on the UNIF. MARITAL PROPERTY ACT, 9A U.L.A. 21 (Supp. 1985) [hereinafter UMPA]. The drafters of the UMPA selected a sharing principle as the essential characteristic of spouses' relationship to their property, in part because "[t]hat principle appeared to the committee to be well established, given the development of equitable distribution patterns developed in the last decade and a half in the divorce area." Cantwell, *The Uniform Marital Property Act: Origin and Intent*, 68 *MARQ. L. REV.* 383, 383 (1985). Unlike the "deferred community" regime proposed in § 307 of the 1970 UMDA, however, the UMPA begins its sharing principles at the inception of the marriage. *Id.* at 385.

See also Ferrell, *No-Fault Divorce*, 62 *WOMEN LAW. J.* 27, 28 (1976) (discussing Delaware law; notes that "[a] no-fault divorce law should certainly not be enacted without the economic provisions of the Uniform Marriage and Divorce Act"); Tennery, *No-Fault Divorce: A Craze or Cure*, 62 *WOMEN LAW. J.* 30, 30 (1976) ("The argument against the Maryland style proposed no-fault divorce bill is that it makes inadequate provisions with respect to the property of the parties.").

288. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 *Fam. L. Rep.* (BNA) 4043, 4043 (reporting that, while women's groups in Pennsylvania fought for equitable, not equal, distribution as part of the divorce reform effort, the National Organization for Women in New York demanded equal, not equitable, division); *see also* Foster & Freed, *Marital Property Reform in New York: Partnership of Co-*

Meanwhile, legal commentators monitoring the emerging case law in California noted a disturbing tendency of trial court judges to cut back on already meager alimony awards and to limit even those awards to brief periods of time.²⁸⁹ California appellate courts found themselves reversing spousal support awards as inadequate, and accompanying their orders remanding the judgments for reconsideration with a stern message to trial court judges denying that the no-fault laws had been intended as a mechanism for the impoverishment of former wives.²⁹⁰ Proposals began to be advanced for broadening the definition of what constituted "property" subject to division.²⁹¹ The California Assembly Committee on Judiciary issued a supplemental report clarifying its original intent regarding the equal division requirement in order to eliminate unanticipated confusion among lawyers and judges about its application.²⁹²

Equals?, 8 FAM. L.Q. 169 (1974) (arguing New York's laws controlling property division are obsolete and unfair because they do not allow for equitable division of property); Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555-57 (1984) (contending equitable distribution of property is unwieldy, unpredictable, and often perceived as unfair); Krauskopf, *supra* note 25, at 176-77 (advocating equal property division as starting point that may be tempered by actual contributions, economic need, and conduct of parties).

289. Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAM. L.Q. 405, 416-17 (1972); Mass, Jr., Cantwell, III, & Hervey, *Divorce Without Fault: Good, Bad or What?*, 10 CONCILIATION CTS. REV., Dec. 1972, at 1, 3-4, 8.

290. See, e.g., *In re Marriage of Morrison*, 20 Cal. 3d 437, 451-54, 573 P.2d 41, 50-52, 143 Cal. Rptr. 139, 148-50 (1978) (citing with approval *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 420, 136 Cal. Rptr. 635, 637 (1977); *In re Marriage of Rosan*, 24 Cal. App. 3d 885, 895-98, 101 Cal. Rptr. 295, 302-04 (1972)).

291. See, e.g., Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974) (arguing professional education is capable of classification and valuation as community property for purposes of dissolution or legal separation).

292. Nearly two months after the California Family Law Act became effective, the Assembly Judiciary Committee issued a supplemental report designed to correct a "misconception" concerning the disposition of the family home. CAL. ASSEMBLY COMM. ON JUDICIARY, REPORT ON A.B. NO. 530 AND S.B. NO. 252 (THE FAMILY LAW ACT), 1 ASSEMBLY JOURNAL 785, 787 (Feb. 26, 1970) [hereinafter SUPPLEMENTAL ASSEMBLY COMM. REPORT]. The Supplemental Report noted that some lawyers representing wives had begun a practice of filing a homestead declaration on the family home prior to filing an action for dissolution in the belief that the homestead provisions would permit the court to allow the wife and children to continue to live in the family home despite the equal division requirement. *Id.* at 786; see CAL. CIV. CODE § 4808(a) (West 1983) (authorizing the court in a dissolution proceeding to assign the homestead "either absolutely or for a limited period to either party"). The Report stated that this practice was unnecessary, since the equal division law itself authorized the court "[w]here economic circumstances warrant" to award "any asset to one party on such conditions as the court deems proper to effect a substantially equal division of the property." SUPPLEMENTAL ASSEMBLY COMM. REPORT, *supra*, at 787 (citing CAL. CIV. CODE § 4800 (West 1970)). Although the Committee's initial report had not mentioned the family home in connection with its discussion of this provision, see ASSEMBLY COMM. REPORT, *supra* note 16, at 8061-62 (discussing division of "going business"), the Supplemental Report declared the disposition of the family home an "obvious situation" that the

A vague sense that something had gone wrong was crystallized for many observers in Fall 1985 by the publication of Dr. Lenore Weitzman's study of the impact of the California Family Law Act.²⁹³ Her message was a mixed one: on the one hand, she found that the no-fault philosophy had been accepted as an improvement over the fault system by California judges and lawyers, and that it was seen as "fair" by most divorcing couples.²⁹⁴ On the other hand, she found that the equal division requirement had lowered property awards to women below the higher unequal awards some women had received under the earlier law,²⁹⁵ and, where there was insufficient offsetting property, had been interpreted by judges to require sale of the family home in order to effectuate an equal division.²⁹⁶

language was intended to cover. SUPPLEMENTAL ASSEMBLY COMM. REPORT, *supra*, at 787. The Supplemental Report explains: "Where an interest in a residence which serves as the home of the family is the major community asset, an order for the immediate sale of the residence in order to comply with the equal division mandate of the law would, certainly, be unnecessarily destructive of the economic and social circumstances of the parties and their children." *Id.* An appellate court subsequently relied on this passage as evidence of legislative intent in affirming an order authorizing the wife to live with the children in the family home, which was the sole community asset, until the youngest child attained majority. *In re Marriage of Boseman*, 31 Cal. App. 3d 372, 375 n.1, 107 Cal. Rptr. 232, 234 n.1 (1973). This treatment of the family home was codified in 1984. See CAL. CIV. CODE § 4800.7 (West Supp. 1986) (authorizing "family home award," defined as "an order that awards temporary use of the family home to the party having custody of minor children for whom support is authorized under Section 206 in order to minimize the adverse impact of dissolution or legal separation on the welfare of the children") (enacted by ch. 463, § 1, 1984 Cal. Stat. 1927, amended by ch. 419, § 4, 1985 Cal. Stat. —, —). For further discussion of disposition of the family home, see *infra* note 325.

293. L. WEITZMAN, *supra* note 7. Dr. Weitzman's California research had four components. First, she and her collaborators examined a sample of court records in 500 cases decided in San Francisco and 500 decided in Los Angeles in 1968, two years before the Family Law Act became effective, as well as an equal number of cases from the same counties in 1972, two years after the effective date of the new law. Second, she conducted interviews with 44 judges and commissioners who were assigned to the domestic relations calendar in 1974 and 1975 in both counties. Third, she interviewed 169 matrimonial lawyers during the same years in both counties. Finally, she examined court records in 500 cases decided in Los Angeles in 1977 and held in-depth structured interviews in 1978 with 228 recently divorced men and women in Los Angeles county. *Id.* at 403-11.

Weitzman's research has been criticized for her use of quantitative data, her generalization of her findings from California to the nation, and her conclusion that the ill effects of divorce she identifies were the result of the no-fault reforms. Jacobs, *Faulting No-Fault: A Review of Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, 1986 AM. BAR FOUND. RES. J. 767.

294. L. WEITZMAN, *supra* note 7, at 25-26.

295. *Id.* at 74-75.

296. *Id.* at 78-84. In criticizing the California legislature's rejection of the Governor's Commission proposal on this point, Professor Aidan Gough had predicted that sale of the family home would be necessary in many cases to satisfy the equal division

Weitzman's strongest criticism of the equal division provision, however, is directed at the limited pool of marital assets upon which it operates. Charging that "[t]he omission of the career assets from the pool of marital property makes a mockery of the equal division rule,"²⁹⁷ Weitzman makes a strong case for defining as property subject to distribution such assets as pensions and other retirement benefits; the goodwill of a business or professional practice; and a professional degree and license to practice, together with the enhanced capability those assets afford of producing a higher stream of future income.²⁹⁸ Despite this criticism, Weitzman does prefer a law requiring an equal division of property rather than an equitable division, and cites studies in New Jersey and New York indicating that wives are likely to be awarded less than half the tangible property in equitable distribution states.²⁹⁹ Thus, she supports the concept of equal division, with appropriate additions to include career assets and to provide special treatment for the family home.³⁰⁰

Weitzman also found that judges had not implemented the California spousal support laws in the manner intended by the drafters. She states that the reformers identified three groups of women who needed special treatment under the support laws: "[T]hose who

requirement. Gough, *supra* note 208, at 294. For a summary of his argument, see *supra* text and accompanying note 208. For discussion of the disposition of the family home, see *supra* note 292 and *infra* note 325.

297. L. WEITZMAN, *supra* note 7, at 388 (emphasis in original).

298. *Id.* at 110-29. The California Governor's Commission, given its limited existence, had decided to focus on reform of the grounds for divorce and the establishment of a Family Court to the exclusion of other matters, among them "a number of points concerning community property." GOVERNOR'S COMM'N REPORT, *supra* note 14, at 3. For a summary of this decision by the Commission, see *supra* text accompanying note 150. Nevertheless, all the assets mentioned in the text, with the exception of a professional degree and license, together with the enhanced income produced after their attainment, are considered property subject to division in California. See *In re Marriage of Brown*, 15 Cal. 3d 838, 847-52, 544 P.2d 561, 566-70, 126 Cal. Rptr. 633, 638-42 (1976) (pension rights acquired during marriage and which survive discharge or voluntary termination are property subject to division on dissolution of marriage); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974) (professional goodwill). The California courts have refused to characterize a professional education as "property" subject to division on dissolution. See, e.g., *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969) (education is at best "an intangible property right, the value of which . . . cannot have a monetary value placed upon it for division between spouses"). The marital community has a statutory right of reimbursement for contributions to the education or training of a spouse that "substantially enhances" his or her earning capacity. CAL. CIV. CODE § 4800.3 (West 1983 & Supp. 1986). See *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (case that had denied relief to supporting spouse remanded for reconsideration in light of statute).

299. L. WEITZMAN, *supra* note 7, at 104-09.

300. *Id.* at 108.

were housewives and mothers in lengthy marriages, those with full-time responsibility for young children, and those needing transitional support to become self-supporting.”³⁰¹ Her data show, however, that judges making support awards did not give special consideration to those groups. Instead, they seemed more concerned with encouraging women to work, including mothers with custody of young children.³⁰² She found that awards to homemakers divorced after lengthy marriages are more closely related to the former husband’s income than to the length of the marriage.³⁰³ Finally, Weitzman found that child support awards are inadequate to cover the actual cost of raising children;³⁰⁴ that they end when the child reaches majority, usually before the child has become self-sufficient, particularly if he or she is attending college;³⁰⁵ that these inadequate awards become eroded by inflation;³⁰⁶ and that they frequently are not enforced.³⁰⁷ Weitzman concludes that these data, taken together, show that “[d]ivorce has radically different economic consequences for men and women.”³⁰⁸ Citing in-depth structured interviews with a sample of 228 recently divorced men and women in Los Angeles in 1978³⁰⁹ and using an index of economic well-being developed to compare income in relation to family needs based on the U.S. Department of Agriculture’s low standard budget for urban families,³¹⁰ Weitzman concludes that “[j]ust one year after legal divorce, [m]en experience a 42 percent improvement in their postdivorce standard of living, while women experience a 73 percent decline.”³¹¹ She reasons that these strikingly different sex-based economic consequences may be explained, first, by the inadequate court awards for spousal and child support; second, by the ex-

301. *Id.* at 164.

302. *Id.* at 186-87.

303. *Id.* at 189-90.

304. *Id.* at 270-72.

305. *Id.* at 278-81.

306. *Id.* at 281-83.

307. *Id.* at 283-309.

308. *Id.* at 323.

309. *Id.* at 326-28 (Tables 26-27), 338 (Fig. 3), 407.

310. *Id.* at 338.

311. *Id.* at 339 (emphasis in original). This finding has been highlighted in discussions of Weitzman’s book. See, e.g., S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN’S LIBERATION IN AMERICA* 14 (1986); Kammeyer, Book Review, 48 *J. MARRIAGE & FAM.* 455 (1986); Scarf, *Cruel Contracts* (Book Review), 194 *THE NEW REPUBLIC*, Apr. 21, 1986, at 35, 37; Takas, *Who Gets the Blame in “No-Fault,”* 14 *MS. MAGAZINE*, Feb. 1986, at 48, 50; Schrag, *Going For Broke* (Book Review), 241 *THE NATION*, Dec. 7, 1985, at 620; Williamson, *Victims of Reform* (Book Review), *N.Y. Times*, Oct. 13, 1985, § 7 (Book Review) at 39, cols. 1-2. The significance of this finding for theories of equality between women and men is discussed in Part V of this Article.

panded demands on the wife's resources after divorce, when she must make up any difference in cost of living between the court's support order and her household needs; and, finally, by the husband's greater earning capacity and ability to supplement his income after divorce.³¹²

Weitzman shares common ground with Martha Fineman and others in her observation that the removal of fault from the divorce system altered the framework for bargaining between divorcing spouses.³¹³ Under the fault system, the bargaining advantage lay with the "innocent" spouse. If that person were the wife, and if she wished to preserve the marriage, she could simply refuse to press her cause of action against the guilty husband. Of course, in cases where the parties had separated, her refusal served to prevent the husband's "[r]estoration to the freedom of the marriage market," as Professor Max Rheinstein put it.³¹⁴ In a no-fault system, even one based on a period of separation, the "guilty" spouse could simply wait out the period and the "innocent" spouse could not prevent a divorce.³¹⁵ Thus, as Weitzman notes, in a no-fault divorce system, the advantage lies with the spouse who wants to end the relationship, not the one who wants to continue it.³¹⁶

Many proponents of no-fault divorce would not disagree with this analysis. Taking the "blackmail" out of divorce was not an unintended consequence of the reform movement. The California Governor's Commission on the Family, as well as the Commissioners on Uniform State Laws, rejected the idea that marriage should be used as a device for extortion.³¹⁷ What was not intended was that the

312. L. WEITZMAN, *supra* note 7, at 340-43.

313. *Id.* at 26-28; Fineman, *supra* note 12, at 901-02 (reporting arguments made by critics of unsuccessful 1975 Wisconsin no-fault bill); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952-54 (1979); CITIZENS' ADVISORY COUNCIL REPORT, *supra* note 277, at 1; *see also supra* note 286.

314. M. RHEINSTEIN, *supra* note 1, at 267.

315. *See* Frank, Berman & Mazur-Hart, *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 65-71 (1978) (reporting survey of Nebraska judges covering "nearly 10,000 dissolution cases failed to reveal a single instance in which it could be said with certainty that a divorce which was desired by even one of the spouses was ultimately refused," *id.* at 66).

316. L. WEITZMAN, *supra* note 7, at 27.

317. *See* GOVERNOR'S COMM'N REPORT, *supra* note 14, at 28 ("[T]he removal of the specific fault grounds and the adoption of a 'breakdown-of-marriage' standard will . . . prevent the use of misconduct not formally alleged as a bludgeon (by threat of its disclosure) in obtaining extortionate concessions concerning support and the division of property from the opposing spouse—concessions which are frequently inequitable and unworkable, and which do not represent any true agreement."); Merrill, *supra* note 215, at 539 (noting that major goal of Special Committee on Divorce and Marriage Laws in recommending that UMDA be drafted was to eliminate "the hypocrisy and fraud engendered by the administration of the 'Forms of Action' foundation for divorce").

shift to a no-fault approach should itself deprive either women or men of the capacity to negotiate a fair agreement.³¹⁸

Despite her criticisms, Weitzman does not propose a return to the fault system of divorce.³¹⁹ Instead, she identifies four situations which, in her view, present the most serious cases of injustice under the no-fault laws. She then proposes changes in the law to remedy each situation. What follows is a brief summary of her analysis.

(1) First, Weitzman cites the situation of children, who, despite the influence of the fathers' rights movement, and the trend toward joint custody, are still living with their mothers following divorce in most cases.³²⁰ She proposes higher child support awards and a more effective support enforcement mechanism.³²¹

(2) Weitzman finds the situation of the older, long-married housewife without paid employment experience outside the home particularly troubling.³²² To protect her, Weitzman proposes that the property and support awards be structured so as to equalize the standards of living between her household and that of her former husband.³²³ Weitzman also advocates that women of this group, particularly those for whom the family home is a major asset of the marriage, should be allowed to continue living in the family home after divorce.³²⁴ This recommendation holds even if no children re-

318. The UMDA Reporters saw this possibility and sought to prevent it through the property division and maintenance provisions of the 1970 version of the Act. For a discussion of these provisions, see *supra* text accompanying notes 225-29. Section 306 of the 1973 UMDA provides that the terms of a written separation agreement concerning maintenance and property division are binding on the court "unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, . . . that the separation agreement is unconscionable." UMDA § 306 (1973). This provision, which appeared first in the 1970 version of § 306, was hailed as "extremely important" by the Report of the NOW Marriage and Family Committee. See NOW Marriage & Family Comm. Report, *supra* note 285, at 4. The Committee preferred, however, to set up "standard scales . . . for both child support and alimony" as a way to overcome the "tremendous disadvantage" of the dependent spouse in marital negotiations. *Id.* at 3. Other observers as well have recognized the continued need to provide safeguards against unfairness in marital negotiations under a no-fault approach to divorce. See, e.g., Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015, 1016 (1985); Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1454-58 (1984).

319. L. WEITZMAN, *supra* note 7, at 366, 382-83.

320. *Id.* at 216-17.

321. *Id.* at 379-80.

322. *Id.* at 330-32.

323. *Id.* at 380.

324. *Id.* at 381.

main in the custody of the divorced wife, and applies as an exception to any equal division rule.³²⁵

(3) Weitzman's data show that mothers with sole custody of children who live as single heads of household are economically disadvantaged relative to their former husbands.³²⁶ She urges that these women be allowed to continue to live in the family home with the children for a period of time as a form of child support.³²⁷ She also suggests early, high balloon payments of spousal support to enable these women to secure job training for positions that will allow them to become relatively self-supporting.³²⁸

(4) Weitzman's fourth unfair case is less precisely defined. She points to the disadvantaged situation of the forty-year-old divorced woman who works at a relatively low-level job.³²⁹ This woman may have sacrificed her own career development to help her husband advance in his chosen profession. Weitzman recommends a division

325. *Id.* at 387. California State Senator Gary K. Hart attempted to implement Weitzman's recommendation by proposing an amendment to CAL. CIV. CODE § 4800.7, which presently authorizes a "family home award" under some circumstances to the spouse having child custody. CAL. CIV. CODE § 4800.7 (West Supp. 1986) (discussed *supra* note 292). Hart's bill would have authorized the court to "reserve jurisdiction and temporarily defer the sale of the family home where the adverse economic, emotional, and social impact on an older spouse in a marriage of long duration, which would result from the immediate loss of a long established family home are not outweighed by economic detriment to the other spouse." S.B. 1750, § 1, *amended* Reg. Sess., May 5, 1986. S.B. 1750 failed passage in the Senate Judiciary Committee on May 6, 1986. 1985-86 SEN. JOURNAL 5564.

If S.B. 1750 had been enacted, it would have carried out Weitzman's recommendation only partially. It was not limited to wives, and it did not create an absolute right on the part of either spouse to continue living in the family home. But Hart's bill was less vulnerable to constitutional challenge on grounds of sex-based discrimination than Weitzman's proposal. The California Supreme Court has interpreted the state constitution to require strict scrutiny of classifications based on sex, *see* *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 15-20, 485 P.2d 529, 538-42, 95 Cal. Rptr. 329, 338-42 (1971), thus imposing a more stringent standard of review under the state equal protection clause than the United States Supreme Court has required under the federal Constitution. *See* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (statute that classifies persons on basis of gender will be upheld upon showing that classification serves important governmental objectives by means "substantially related to the achievement of those objectives") (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

326. For a summary of Weitzman's data on this point, see *supra* text accompanying notes 304-12.

327. L. WEITZMAN, *supra* note 7, at 381.

328. *Id.* The recapture provisions of the Tax Reform Act of 1984, by requiring that, in order to qualify as alimony, any payments in excess of \$10,000 per year must continue for at least six consecutive years and must not be reduced in any one year by more than \$10,000 below the payment made in the preceding year, may discourage balloon payments. *See* Note, *The Effect of the Tax Reform Act of 1984 on Divorce Financial Planning*, 24 J. FAM. L. 283, 289-90 (1985-86).

329. L. WEITZMAN, *supra* note 7, at 381-82.

of the husband's career assets as part of the property award; compensation to the woman for detriment to her own career; and job training.³³⁰

Weitzman argues that the disadvantages to women and children reflected in these four cases can be traced most immediately to the change from a fault to a no-fault system of divorce. In the introduction to her book, Weitzman thus previews her research:

Yet these modern and enlightened reforms have had unanticipated, unintended, and unfortunate consequences. In the pages that follow we shall see how gender-neutral rules—rules designed to treat men and women “equally” have in practice served to deprive divorced women (especially older homemakers and mothers of young children) of the legal and financial protections that the old law provided. Instead of recognition for their contributions as homemakers and mothers, and instead of compensation for the years of lost opportunities and impaired earning capacities, these women now face a divorce law that treats them “equally” and expects them to be equally capable of supporting themselves after divorce.³³¹

Toward the end of her book, however, Weitzman recognizes that the disadvantage to women upon divorce results in large part from choices made during marriage that reflect traditional notions of sex roles. Noting that a major defect in the divorce reform effort was the failure of many reformers to realize that they could not simply legislate equality between men and women “without changing the social realities that promote equality,”³³² Weitzman concludes:

It is now obvious that equality cannot be achieved by legislative fiat in a society in which men and women are differently situated. As long as women are more likely than men to subordinate their careers in marriage, and as long as the structure of economic opportunity favors men, and as long as women contribute to their husband's earning capacities, and as long as women are likely to assume the major responsibilities of child rearing, and as long as we want to encourage the care and rearing of children, we cannot treat men and women as “equals” in divorce settlement. We must find ways to safeguard and protect women, not only to achieve fairness and equity, but also to encourage and reward those who invest in and care for our children and, ultimately, to foster true equality for succeeding generations.³³³

330. *Id.* at 382.

331. *Id.* at xi.

332. *Id.* at 365.

333. *Id.* at 365-66.

Weitzman's critique of the aftermath of the California Family Law Act is a powerful one. Her data show clearly that California trial judges, left to their own devices without the special training and experience that a unified Family Court system might have provided, administered the new laws without adequate regard to the different life situations and economic circumstances of divorced women and men.³³⁴ Even so, I question whether the judicial attitudes that produced the unfair results Weitzman documents can be attributed entirely to the legal change from fault to no-fault divorce. Weitzman herself suggests that other factors were significant when she observes that

the reformers [did not] anticipate the profound impact of the women's movement on the consciousness of all the participants in the divorce process. Since the California legal reforms came before the forceful organizational efforts of the women's movement in the 1970s, the reformers did not realize that the concept of "equality," and the sex-neutral language of the new law, would be used by some lawyers and judges as a mandate for "equal treatment" with a vengeance, a vengeance that can only be explained as a backlash reaction to women's demands for equality in the larger society. Thus the reformers did not foresee [sic] that the equality they had in mind for a childless divorcee of twenty-five would be used to terminate alimony for a fifty-five-year-old housewife who had never held a paying job.³³⁵

More broadly, as Max Rheinstein has argued, the relinquishment of the ideal of marriage as a union indissoluble except for fault was itself made possible by a gradual shift in Western civilization away from what he called the "Christian-conservative" ideology toward the "eudemonistic-liberal" one.³³⁶ Similarly, Carl Schneider has recently identified four forces in American culture and institutions that he believes have shaped contemporary family law: "[T]he legal tradition of noninterference in family affairs, the ideology of liberal individualism, American society's changing moral beliefs, and the rise of 'psychologic man.'" ³³⁷ He suggests that the combination of

334. *Id.* at 395-98. Weitzman here supports the need for experienced judges, assisted by expert staff, to handle family law cases. *Id.* Her recommendation on these matters is very similar to the original proposal of the Governor's Commission for a Family Court, described *supra* text accompanying notes 155-60.

335. L. WEITZMAN, *supra* note 7, at 366. This critique mistakenly assumes that the groups active in the reform effort had as one of their goals the achievement of equality between women and men. For criticism of this assumption, see *supra* text and accompanying notes 105-06.

336. M. RHEINSTEIN, *supra* note 1, at 10-11.

337. Schneider, *supra* note 87, at 1807.

these forces has changed the locus of moral decision-making about the family from the legal system to the family itself.³³⁸ He cites the emergence of no-fault divorce as among the “clearest examples” of his hypothesis.³³⁹

If, as Rheinstein and Schneider contend, no-fault divorce was the indirect product of broad social change, their analysis would suggest as well that the judges who interpreted the no-fault laws were themselves affected by these profound changes. Under that view, the shift from fault to no-fault divorce provided the trigger that enabled the judges to identify and apply (or misapply) those changing patterns to the divorce cases they decided, but the social and cultural changes themselves preceded the legal reforms.

Weitzman does not conclude from her research that California or the other states that have followed California in adopting a no-fault standard as the sole basis for divorce should now return to a fault system,³⁴⁰ nor would I offer such a recommendation. But Weitzman pointedly refrains from suggesting that states that have adopted a combined fault/no-fault approach should press forward to abolish their fault grounds. Instead, she implies that the retention of fault grounds might offer some protection to women and children in other states against the disadvantages she has found to exist in California.³⁴¹

I am not persuaded that the retention of fault in divorce has this effect. I suspect, rather, that despite the continued existence of fault grounds on the statute books of thirty-five states and the District of Columbia,³⁴² women do not fare substantially better after divorce in those jurisdictions than they do in the fifteen³⁴³ pure no-fault states.

338. *Id.* at 1807-08.

339. *Id.* at 1809 (“These reforms exemplify the trend I hypothesize because (1) they represent a deliberate decision that the morality of each divorce is too delicate and complex for public, impersonal, and adversarial discussion; (2) they represent a decision that the moral standard of life-long fidelity ought no longer be publicly enforced; and (3) they represent a decision to diminish the extent of mutual spousal responsibility that will be governmentally required.”).

340. L. WEITZMAN, *supra* note 7, at 366, 382-83.

341. *Id.* at 383.

342. For a summary of the fault-based grounds in these states, see *supra* text accompanying notes 20, 22.

343. For a list of the “pure” no-fault states, see *supra* note 19. Not all of the fifteen states with pure no-fault grounds have eliminated fault from their statutes as a factor to be considered by the court when making a financial award. One state, in a provision that seems detrimental to wives, permits adultery to be considered. See FLA. STAT. § 61.08(1) (1985) (“The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony will be awarded to such spouse and the amount of alimony, if any, to be awarded.”); see also Comment, *Alimony in Florida: No-Fault Stops at the Courthouse Door*, 28 U. FLA. L. REV. 521 (1976) (contending it is inconsistent for pure no-

The social and cultural changes mentioned earlier³⁴⁴ that facilitated the national acceptance of no-fault divorce are not limited to the fifteen pure no-fault states. Their influence is national, although their impact may have been felt earlier and accepted more readily in California than elsewhere.³⁴⁵ I would expect that judicial attitudes similar to those Weitzman has documented in California exist in other states as well, regardless of the continued existence of fault grounds for divorce.

I cannot test this hypothesis against a national body of data describing judicial practice comparable to that Weitzman has produced for California, for no such data are yet available. Some roughly comparable empirical work has been undertaken, however, in three states that fall into the group of fifteen jurisdictions that have combined their fault-based grounds for divorce with a conservative approach to no-fault divorce based on separation, rather than on a factual showing of marital breakdown.³⁴⁶ These studies provide some preliminary confirmation of the hypothesis that perpetuation of fault in divorce does not protect women against financial disadvantage. For example, Wishik's study in Vermont covered all divorce cases decided between October 1982 and February 1983 in four Superior Court Districts, a total of 227 cases.³⁴⁷ Wishik does not distinguish between those cases decided on fault grounds and those decided on no-fault grounds, but rather considers them without regard to grounds. She concludes that "Vermont women ap-

fault divorce state, like Florida, to continue to use fault as factor in financial award). In three other states, the court is to take account of the parties' respective "merits" or "character." See HAW. REV. STAT. § 580-47(a) (1984); MICH. COMP. LAWS ANN. § 552.23 (West Supp. 1986); WYO. STAT. § 20-2-114 (1986). Two other states have statutes permitting the court to take account of economic misconduct. See ARIZ. REV. STAT. ANN. §§ 25-318 (property division), 25-319 (maintenance) (1976 & Supp. 1986); MONT. CODE ANN. § 40-4-202 (1985). See generally Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985) (advocating abandonment of fault as criterion for allocation of financial resources during divorce).

344. See *supra* text accompanying notes 336-39.

345. Cf. Foster, *supra* note 218, at 576 (deploring influence of California no-fault divorce model on 1970 version of UMDA, because California "may have the highest divorce rate in the Western world").

346. The three states are New Jersey, New York, and Vermont. See Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 81 (1986) (Vermont); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984) (copy on file in Professor Kay's office) (New Jersey) [hereinafter New Jersey Task Force Report]; Unified Court System, Office of Court Administration, Report of the New York Task Force on Women in the Courts (March 1986) (copy on file in Professor Kay's office) (New York) [hereinafter Report of the New York Task Force]. The fifteen jurisdictions include fourteen states and the District of Columbia; they are listed *supra* note 22.

347. Wishik, *supra* note 346, at 81.

pear . . . to be even worse off after divorce than women are in California, for instance, and in some respects to be worse off than women are on the average nationally."³⁴⁸

Two other studies, conducted in New Jersey and New York, were not limited to divorce, but were broadly designed to document the treatment of women by the court system.³⁴⁹ Both studies, however, include data on the impact of divorce on women that indicate that women in both states are economically disadvantaged by divorce.³⁵⁰ The New York Task Force had available to it a study by two matrimonial lawyers of seventy reported cases applying New York's Equitable Distribution Law.³⁵¹ The authors concluded that "with few exceptions the courts are not treating the wife as an equal partner."³⁵² Neither the New York nor the New Jersey report distin-

348. *Id.* at 98. Wishik's findings include the following: "[L]ess than 7% of spouses receive spousal maintenance awards, and less than 2% receive awards of unlimited duration." *Id.* at 85. Of the 128 cases where the family owned a home, husbands received the home or 60% or more of the equity in the home in 48 cases, while wives did so in 52 cases; an approximately equal division of the equity in the home occurred in 26 cases; and the home was awarded to the children in two cases. *Id.* at 89-90. Child support awards, while "not drastically disproportionate to national figures," *id.* at 94, are inadequate, like those in California, to cover the full cost of caring for the children. *Id.* at 95-96. She also found, based on a sample of 25 families, that "[m]en's per capita income rises 120% after divorce while women's per capita income falls 33%." *Id.* at 97.

349. New Jersey Task Force Report, *supra* note 346; Report of the New York Task Force, *supra* note 346.

350. See New Jersey Task Force Report, *supra* note 346, at 60-82; Report of the New York Task Force, *supra* note 346, at 93-124. The New Jersey report presents only general statistical data, rather than information derived from an empirical study of divorce cases in court. The Task Force recommended, however, that such a study be undertaken and that it cover all divorce cases decided in New Jersey for a period of one year. New Jersey Task Force Report, *supra* note 346, at 82. The matrimonial study was initiated and is reported to be in the process of completion by the Administrative Office of the Courts. See New Jersey Supreme Court Task Force on Women in the Courts, Second Report 3 (June 1986).

351. Cohen & Hillman, Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law, From January 1981 Through October 1984, Analyzed November 1, 1984 (copy on file in Professor Kay's office).

352. *Id.* at 5. The authors thus summarize their findings:

[W]ith the exception of dispositions of marital homes, liquid properties (bank accounts and the like) and, to an extent, pensions, judicial dispositions of marital property upon the dissolution of a marriage reflect that property is not being distributed equally to the marital partners. Except in rare instances, . . . dependent wives, whether they worked in the home or in the paid market place were relegated to one or a combination of the following in an aggregate of forty-nine out of the fifty-four cases susceptible of this analysis: less than a fifty percent overall share of marital property; short term maintenance after long term marriage; *de minimis* shares of business and professional practices which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible equitable distribution or distributive awards; and inadequate or no counsel fee awards. These findings

guished between divorces based on fault and those granted on no-fault grounds. Weitzman cites these two studies in support of her conclusion that women generally fare better in property awards in states like California that require an equal division of marital property than they do in states like New Jersey and New York that follow a system of equitable distribution.³⁵³ She does not, however, draw the further inference that these studies suggest: namely, that the presence of fault as an alternative basis for divorce is not sufficient to protect women against economic disadvantage.

Moreover, the four "unjust" cases that Weitzman uses to illustrate the most serious problems of no-fault divorce are not limited to California and those states that have followed its lead into a pure no-fault approach.³⁵⁴ To be sure, her unfair cases do appear in other pure no-fault states.³⁵⁵ But they arise as well in the other two

demonstrate that the marriage partners' contributions to each other and to the marriage itself are not being viewed as of equal value.

Id. at 3-5. Professor Foster challenged many of Cohen and Hillman's findings, pointing out that, as a general matter, "[t]he authors start from the false premise that New York mandates at least *equal* distribution for the wife rather than *equitable* distribution." See Foster, *A Second Opinion: New York's EDL is Alive and Well and Is Being Fairly Administered*, 17 FAM. L. REV. 3, 3 (N.Y. State Bar Ass'n, Family Law Section, April 1985) (emphasis in original). Cohen and Hillman countered:

The [EDL's] enactment held the promise that after years of second class citizenship, women would finally be treated *fairly* in marriage and divorce. After all, didn't "equitable" mean fair? And what would be fairer, in most cases, than a fifty-fifty split of assets for partners whose partnership was being dissolved? Mandatorily? No. Presumptively? Of course. Fifty-fifty was obviously the starting point.

Cohen & Hillman, A Rejoinder to "A Second Opinion," Report to the New York Task Force on Women in the Courts 1-2 (1985) (emphasis in original) (copy on file in Professor Kay's office). See also Brandes, *1984 Survey of New York Law: Family Law*, 36 SYRACUSE L. REV. 315, 373 (1985) ("Trial courts continue to be stingy to wives, and the trend is that they will be generous only to wives of lengthy marriages. . . . Women are finding extremely bleak the prospects of being successful in litigation and are not doing well under the law."). Cohen and Hillman subsequently reported that the New York spousal maintenance law was amended in 1986 in response to these criticisms to substitute the "standard of living during the marriage" for the "reasonable needs" of the spouse seeking support as the standard for awarding maintenance, and to require trial courts to pay special attention to the reduced or lost earning capacity of a spouse who had forgone a career or education. They praised the new amendment, as well as a companion law toughening enforcement of child support orders, but stated that "more needs to be done." Cohen & Hillman, *Score 2 for Fairness in Divorce Courts*, N.Y. Times, Aug. 13, 1986, at A23, col. 1.

353. L. WEITZMAN, *supra* note 7, at 106-08.

354. For a summary of Weitzman's four unjust cases, see *supra* text accompanying notes 320-30. For a list of the pure no-fault states, see *supra* note 19.

355. In Florida, for example, observers noted an early judicial tendency to grant limited "rehabilitative" alimony, rather than permanent alimony in inappropriate cases. See Murray, *supra* note 13, at 108; O'Flarity, *Trends in No-Fault—No-Responsibility Divorce*, 49 FLA. B.J. 90, 90 (1975). Florida appellate courts, like those in California, found it

groups of states: those that combine fault with the modern breakdown of marriage approach to no-fault divorce,³⁵⁶ and those that more cautiously use a traditional no-fault approach such as a period of separation or incompatibility.³⁵⁷ Wives do not appear to obtain more favorable treatment in the latter two groups of states than they obtain in pure no-fault states. Thus, financial hardship affecting children, Weitzman's first unfair situation,³⁵⁸ is not limited to no-fault states. As she herself demonstrates, the unfairness that results from inadequate and unenforced child support awards is a national problem affecting children of divorce everywhere.³⁵⁹ Others agree.³⁶⁰ Her second case, that of the older, long-married housewife and mother who has no paid employment experience,³⁶¹ portrays a classic victim of divorce whose plight is also identified by others.³⁶² Appellate courts in all three groups of states have found

necessary to remind trial court judges that the no-fault law had not been a mandate to abolish permanent alimony except where the ex-wife was unable to get a job. *See, e.g., Lash v. Lash*, 307 So. 2d 241, 242 (Fla. Dist. Ct. App. 1975) ("There is apparently a feeling that the passage of the 'no-fault' divorce law in 1971 had the effect of abolishing permanent alimony except where the wife (or the husband, as the case may be) is unable to get a job. We know of no controlling decision to this effect . . ."). A more recent study of how Florida judges are applying the rehabilitative alimony provision found that current practice "promotes inequitable distribution of marital property, penalizes divorcing women, and generally violates women's rights." Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667, 669 (1984-85).

356. These states are listed *supra* note 20.

357. These states are listed *supra* note 22.

358. L. WEITZMAN, *supra* note 7, at 379-80. For a summary of this situation, see *supra* text accompanying notes 320-21.

359. L. WEITZMAN, *supra* note 7, at 262-64.

360. *See, e.g., Chambers, Comment: The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1621-26 (1982) (suggesting that, in time, public attitudes may cease to hold parent responsible for child support if parent no longer lives with child in familial relationship).

361. L. WEITZMAN, *supra* note 7, at 380-81. For a summary of this situation, see *supra* text accompanying notes 322-25.

362. *See, e.g., Krauskopf, Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 292-95 (1985); Shaffer, *No-Fault Divorce*, 2 EDITORIAL RES. REP. 779, 795 (Cong. Quarterly, Inc., Oct. 10, 1973) (citing the "discarded older wife, living alone and in privation, unwanted in the job market and stripped of the economic security she earned by many years of unpaid labor as mother and housewife, unrewarded for her contribution to the success of her husband's career" as one of two "classic pictures of the suffering ex-wife" that make up the myth of alimony; the other "classic picture" is described *infra* note 365); *see also* WISCONSIN GOVERNOR'S COMM'N ON THE STATUS OF WOMEN, REAL WOMEN REAL LIVES: MARRIAGE, DIVORCE, WIDOWHOOD 44-45 (1978) (presenting "true story" of two housewives who had worked with their husbands on family farms but upon divorce had no claim to any property). Fineman is critical of the Wisconsin Commission's use of these "horror stories" as part of the reform effort in that state, noting that both stories were drawn from legal cases outside Wisconsin. Fineman, *supra* note 12, at 854 n.188. She argues that the symbolic use of the stereotypical disadvantaged housewife produced a distorted view of the problems facing divorced women and led the Commission to propose inadequate solutions to those problems. *Id.* at 856-57. Weitzman's data show,

it necessary to remind trial court judges of their obligation to protect the older divorced homemaker's financial security.³⁶³ The diffi-

however, that the disadvantaged older housewife is not merely a mythical creature, and that her problems are especially acute in a period of transition characterized by shifting social attitudes toward the role of women and changing legal standards. L. WEITZMAN, *supra* note 7, at 380-81.

363. *States With Mixed Fault and Modern No-Fault Grounds* (listed *supra* note 20): In Alabama, fault continues to be a factor in the financial award, even where the divorce is granted on the no-fault ground of incompatibility, and courts do rely on the husband's misconduct in setting the award to older, dependent wives. *See, e.g., Cooper v. Cooper*, 382 So. 2d 569, 571 (Ala. Civ. App. 1980) (alimony increased from \$200 per month for five years to \$1000 per month; court observed that "[a]t the age of nearly sixty and without income or employable skills, it is clearly arbitrary and unjust to deny the wife alimony from a culpable husband after thirty-four years of marriage"). The older woman's financial security is also protected, however, even in the absence of misconduct on the husband's part. *See, e.g., Cinader v. Cinader*, 367 So. 2d 487, 489 (Ala. Civ. App. 1979) (error to deny periodic alimony, thus limiting 54-year-old wife with no work experience to \$7200 alimony in gross plus property award after 36-year marriage; no mention of fault). The wife's marital misconduct is sometimes mentioned as a factor considered in limiting the award to her. *See, e.g., Baldwin v. Baldwin*, 420 So. 2d 785, 786-87 (Ala. Civ. App. 1982) (affirming trial court's order setting aside to each party their inherited properties, dividing personal property, and ordering husband to pay wife only \$400 per month as periodic alimony; after 40-year marriage, where wife was employed outside home for only nine months, trial court found that her conduct had contributed substantially to breakdown of marriage, and that her inherited estate was more valuable than husband's estate). Where both spouses were involved with "third parties" during the marriage, however, their fault seems to cancel out. *See, e.g., Nolen v. Nolen*, 398 So. 2d 712, 714 (Ala. Civ. App. 1981) ("When the parties are equally at fault in contributing to the failure of the marriage the element of fault should be disregarded, even with respect to a consideration of division of property and award of alimony.") (citing *Dees v. Dees*, 390 So. 2d 1060 (Ala. Civ. App. 1980)). *See generally* Cook, *Family Law: Surveying 15 Years of Change in Alabama*, 36 ALA. L. REV. 419, 455-56 (1985).

In other states in this group, the courts have been attentive to the needs of the older divorced spouse without regard to the husband's fault. *See, e.g., Lukas v. Lukas*, 83 Ill. App. 3d 606, 618, 404 N.E.2d 545, 554 (1980) (affirming award of permanent alimony to 53-year-old wife who had not worked outside home for 25 years of 31-year marriage; no mention of fault); Krauskopf, *supra* note 362, at 278, 292-94 (discussing Missouri cases concerning "displaced homemaker"), 288-92 (discussing relevance of fault of spouse obligated to pay alimony and spouse seeking alimony); *Murphy v. Murphy*, 116 N.H. 672, 675, 366 A.2d 479, 482 (1976) (reversing, as abuse of discretion, maintenance award of \$25 per week to 50-year-old wife after marriage lasting approximately 25 years; although wife is nurse, her health prevents her from working more than two or three days per week); *Hedin v. Hedin*, 370 N.W.2d 544, 548 (N.D. 1985) (full-time homemaker in 28-year marriage was disadvantaged by divorce and in need of husband's continued support; although wife was working two days a week and earning \$200 take-home pay per month, trial court erred in not awarding her rehabilitative alimony); *Koepke v. Koepke*, 12 Ohio App. 3d 80, 81, 466 N.E.2d 570, 572 (1983) (affirming trial court's award of alimony without set expiration period where wife, age 56, had not worked outside home for over 30 years and had few marketable skills; no mention of fault); *Savage v. Savage*, 658 P.2d 1201, 1206 (Utah 1983) (affirming trial court's award of \$2000 per month in alimony to wife who had not worked outside home for last 18 years of 20-year marriage; case decided before addition of irreconcilable differences ground; no discussion of fault); *Molnar v. Molnar*, 314 S.E.2d 73, 79 (W. Va. 1984) (reversing award of "rehabilitative alimony" to 53-year-old wife after 25 years of

cult situation of the young mother burdened with the care of

marriage; wife was working as life insurance application processor and earning \$438 net per month; court questions whether "an older dependent spouse who has a full-time job that appears commensurate with his or her educational skills" should be required to undergo further rehabilitation).

States With Mixed Fault and Traditional No-Fault Grounds (listed *supra* note 22): *Johnson v. Steel, Inc.*, 94 Nev. 483, 489-90, 581 P.2d 860, 864 (1978) (reversing award of "rehabilitative" alimony to wife, aged 39 at end of 20-year marriage, who had never worked outside home and had no marketable skills, finding trial court failed to give adequate consideration to whether wife could develop earning capacity within time allotted for rehabilitative alimony; no discussion of fault); *Kay v. Kay*, 37 N.Y.2d 632, 637-38, 376 N.Y.S.2d 443, 447-48, 339 N.E.2d 143, 146-47 (1975) (affirming Appellate Division's increase of trial court's order awarding permanent alimony of \$18,000 per year to \$31,000 per year; observing that wife had remained at home, with husband's concurrence, for duration of 23-year marriage and should not now be required to go to work; divorce granted on ground of husband's cruelty and abandonment, but that was not mentioned in discussion of alimony award); *Herring v. Herring*, 286 S.C. 447, 451-52, 335 S.E.2d 366, 368-69 (1985) (approving earlier adoption of rehabilitative alimony in *Eagerton v. Eagerton*, 285 S.C. 279, 328 S.E.2d 912 (S.C. Ct. App. 1985), but holding evidence insufficient to award rehabilitative alimony to wife, aged 46 after 25-year marriage, who had no secretarial or industrial training, and who earned \$280 per month after separation working as door-to-door salesperson for World Book Encyclopedias and as substitute teacher; no discussion of fault).

States With Pure No-Fault Divorce Grounds (listed *supra* note 19): This group of states includes some that continue to use fault as a factor in the financial award, and others that have eliminated fault from that aspect of divorce as well as from the grounds for divorce. For a discussion of the fault factor in financial awards, see *supra* note 343. Appellate courts in both groups of states have tried to protect the older dependent wife. *States That Consider Fault*: See, e.g., *Lash v. Lash*, 307 So. 2d 241, 243 (Fla. Dist. Ct. App. 1975) (trial court erred in granting rehabilitative, rather than permanent, alimony to 44-year-old wife after 26-year marriage); *Kretzschmar v. Kretzschmar*, 48 Mich. App. 279, 286-89, 210 N.W.2d 352, 356-57 (1973) (holding that fault may be considered on matters of alimony, support, property division, and child custody and remanding for such consideration; wife had been homemaker for 26-year marriage, which broke up over husband's affair with another woman; trial court had denied dissolution because of wife's desire for reconciliation, but appellate court held that marital breakdown had been established; matter remanded to different trial judge); *In re Marriage of Williams*, 714 P.2d 548, 550-52 (Mont. 1986) (affirming trial court's award of \$162,597 in maintenance, payable in ten installments, to wife based on her "career value losses," in becoming full-time homemaker and mother rather than working in career appropriate to her college degree in art; sum arrived at by placing value of \$76,313 on wife's lost retirement benefits, and \$86,284 in salary differential, measured by difference between what she would have earned had she worked during marriage and what she will be able to earn after dissolution). *States That Do Not Consider Fault*: See, e.g., *Lindsay v. Lindsay*, 115 Ariz. 322, 330, 565 P.2d 199, 207 (Ariz. Ct. App. 1977) (reversing as abuse of discretion trial court's failure to reserve jurisdiction to modify maintenance award of \$400 per month for three years to 49-year-old wife after marriage of approximately 25 years); *In re Marriage of Ramer*, 187 Cal. App. 3d 263, 213 Cal. Rptr. 647 (1986) (trial court abused discretion in initially awarding only \$550 spousal support plus right to occupy family home to wife after 22-year marriage; parties had four children, two still living at home; wife had not worked outside home, possessed no special skills or training for employment, and was not in good health; wife was ordered to pay monthly installments on house in amount of \$517.90; on remand after its initial award was reversed, trial court increased award to \$900, a sum also held on second appeal to

children, Weitzman's third case,³⁶⁴ is also well-known in the divorce literature.³⁶⁵ Her circumstances are in part a function of the unfairness identified in case one: without adequate and reliable child support payments, she has neither the time nor the resources to build a higher standard of living for herself and her children. Like that of the children in case one, her problem is a national one.³⁶⁶ Weitzman's fourth case encompasses a variety of situations in which decisions made during marriage have had the effect of limiting the wife's capacity for self-support.³⁶⁷ One such situation has been identified in all three groups of states: that of the wife who worked to support the family while her husband undertook professional training. While states vary in their approaches to the "Ph.T." (Putting Hubby Through) problem, their solutions do not vary according to whether fault remains part of their approach to divorce.³⁶⁸

constitute an abuse of discretion; if retrial is necessary, appellate court orders case assigned to different trial court judge); *see also* California cases cited *supra* note 290; *Sinn v. Sinn*, 696 P.2d 333, 336-38 (Colo. 1985) (en banc) (trial court abused discretion in limiting maintenance award of \$300 per month to two years where wife was over 50 years old, had not worked outside home since 1960, and her primary skills were those of homemaker and mother); *In re Marriage of Grove*, 280 Or. 341, 571 P.2d 477 (setting guidelines for maintenance awards in cases of long marriages where parties are in mid-40s or older), *modified*, 280 Or. 769, 572 P.2d 1320 (1977) (en banc).

364. L. WEITZMAN, *supra* note 7, at 381-82. For a summary of this situation, see *supra* text accompanying notes 326-28.

365. *See, e.g.*, Krauskopf, *supra* note 362, at 281-82; Shaffer, *supra* note 362, at 795 (citing "young mother unable to seek work because of her responsibilities for the children, living in privation or forced on relief because her husband neglects his obligation to support them" as one of two "classic pictures of the suffering ex-wife"; for the other, see *supra* note 362).

366. *See* Chambers, *supra* note 360.

367. L. WEITZMAN, *supra* note 7, at 381-82. For a summary of the fourth case, see *supra* text accompanying notes 329-30.

368. *States With Pure No-Fault Divorce Grounds* (listed *supra* note 19); *See* Wisner v. Wisner, 129 Ariz. 333, 340-41, 631 P.2d 115, 122-23 (Ariz. Ct. App. 1981) (husband's medical education, license, and certificate not property subject to division on divorce, but his education may be considered in the financial award; where wife did not work to support husband during his education, and where parties lived together for six years after husband began practicing medicine, wife shared in fruits of husband's education and trial court's award from community assets plus spousal maintenance to wife was not unreasonable); *compare* Pyeatte v. Pyeatte, 135 Ariz. 346, 351, 357, 661 P.2d 196, 201, 207 (Ariz. Ct. App. 1982) (reaffirming *Wisner*; declining to enforce as too uncertain oral agreement that wife would work to support husband through law school, and that husband would thereafter work to support wife through master's degree program; holding wife entitled to restitution of her financial contributions to husband's direct educational expenses and his living expenses while he was student); *see In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (remanding wife's claim for interest in husband's medical degree and his enhanced earning capacity as doctor for reconsideration in light of CAL. CIV. CODE § 4800.3 (West Supp. 1986), which became effective while case pending; § 4800.3 allows reimbursement to marital community, not supporting spouse, for community contributions to student spouse's education, with rebuttable presumption that reimbursement would not be justified if

Finally, even if the continued recognition of marital fault as an alternative basis for divorce or as a factor in the financial determina-

marriage endured ten years or more after student spouse's education was completed); *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969) (husband's legal education is not tangible community property capable of valuation and division on divorce); *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978) (en banc) (husband's M.B.A. degree is not property); *Hughes v. Hughes*, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983) (husband's college degrees are not property subject to distribution as lump sum alimony because their value, based on future earning capacity, is too speculative to calculate); *Hernandez v. Hernandez*, 444 So. 2d 35, 36 (Fla. Dist. Ct. App. 1983) (husband's medical degree is not property subject to special equity for purposes of equitable distribution; reverses as too speculative trial court's award to wife of \$250,000, representing 25% of husband's medical education valued at \$1 million; husband attended foreign medical school, had failed the United States medical licensing examination four times, and was making less at time of trial than wife earned as legal secretary); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) (husband's potential for increased earning capacity made possible by his law degree, but not the degree itself, is asset subject to distribution on dissolution); *Lovett v. Lovett*, 688 S.W.2d 329, 331 (Ky. 1985) (husband's medical degree is to be treated as source of maintenance, not as property subject to division); *Woodworth v. Woodworth*, 126 Mich. App. 258, 261, 266, 337 N.W.2d 332, 334, 336 (1983) (husband's law degree resulted from mutual sacrifice and effort of both parties and is therefore marital asset subject to division; its value is measured by husband's increased earning capacity); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 759 (Minn. 1981) (employs mathematical formula for determining equitable award to compensate the working spouse for her contribution to education of student spouse); *Magruder v. Magruder*, 190 Neb. 573, 575, 578, 209 N.W.2d 585, 586, 588 (1973) (modifying award of alimony to supporting spouse to reflect her contribution to husband's medical education; dissent finds award exorbitant, and charges majority with importing fault into Nebraska's no-fault law by punishing husband for breaking up marriage to seek other women); *In re Marriage of Washburn*, 101 Wash. 2d 168, 179-80, 677 P.2d 152, 157, 159 (1984) (declines to decide "somewhat metaphysical question" of whether professional degree constitutes property; sets out four factors to be considered in taking supporting spouse's contribution into account in making equitable division of property and setting maintenance award; factors include financial contributions to student spouse, lost income during period student spouse attended school rather than worked, lost career opportunity of supporting spouse, and future earning potential of both spouses, including increased earning capacity of professionally trained spouse); *Haugan v. Haugan*, 117 Wis. 2d 200, 211-15, 343 N.W.2d 796, 802-04 (1984) (outlining several approaches available to trial court judges for compensating supporting spouse for costs and forgone opportunities while student spouse was in school, including formula set out in *DeLa Rosa*; lost opportunity costs while student spouse was in school; and enhanced earning capacity of student spouse); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822-23 (Wyo. 1984) (husband's master's degree in accounting is not property, but supporting spouse is entitled to adjustment of equities, varying with circumstances of case; trial court's award affirmed since wife was to blame for breakup of marriage, since she had lived with husband for twelve years and had received some benefit from his degree, and expert testimony indicated that master's degree was less valuable to husband, accountant in private practice, than it would have been had he taken academic job).

States With Mixed Fault and Modern No-Fault Grounds (listed *supra* note 20): *See In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244-46, 470 N.E.2d 551, 559-60 (1984) (husband's osteopathy degree and license to practice surgery are not property subject to division, but both are relevant factors to be taken into account in distribution of property; trial court's disproportionately larger property award to wife was sufficient,

tion were shown to enable women to obtain higher settlements, I would still want to ask whether that outcome is worth the cost of

since wife did not request maintenance or equitable relief for unjust enrichment); *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987) (husband's medical degree and license to practice are not marital assets subject to division upon divorce, nor is present value of his future earned income subject to equitable assignment, but court may consider increased earning potential engendered by degree in setting alimony award and assigning estates of parties); *Scott v. Scott*, 645 S.W.2d 193, 196, 198 (Mo. Ct. App. 1982) (approving equitable award to wife who supported family while husband attended law school, but disapproving trial court's terming award "property settlement"); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 115 syl. para. 1, 492 N.E.2d 131, 131 syl. para. 1 (1986) (neither husband's veterinary degree nor present value of his enhanced earning capacity are marital assets subject to distribution on divorce, but future value of professional degree or license acquired by spouse during marriage is element to be considered in setting alimony award); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984) (neither husband's dental degree nor potential earning capacity stemming therefrom is distributable property; wife, who obtained certificate in dental hygiene during marriage, did not request alimony); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250, 259, 262 (S.D. 1984) (holding wife's medical degree is not property subject to division, but in proper case reimbursement or rehabilitative alimony can be awarded to supporting spouse; trial court may consider all relevant factors, including direct financial contributions to student spouse, forgone opportunities by supporting spouse, and duration of marriage following completion of student spouse's education; here, husband was properly denied alimony); *cf. Warren v. Warren*, 655 P.2d 684, 687-88 (Utah 1982) (affirms order granting wife property valued at \$209,250 (including \$95,500 that remained of her \$200,000 inheritance received prior to marriage) and alimony of \$400 per month for four years, with right to seek extension; wife was full-time homemaker who used part of her inheritance to pay family expenses while husband attended engineering school; majority does not discuss wife's potential rights in husband's education, but dissent argues that wife should at least have been credited with \$146,000 she spent for marital obligations from her inheritance, and that she should have been given permanent alimony).

States With Mixed Fault and Traditional No-Fault Grounds (listed *supra* note 22): *See Archer v. Archer*, 303 Md. 347, 357-58, 493 A.2d 1074, 1079-80 (1985) (husband's medical degree and license are not marital property, but chancellor may take account of circumstances surrounding acquisition of degree as well as professional spouse's future income when setting alimony award); *Mahoney v. Mahoney*, 91 N.J. 488, 496-501, 453 A.2d 527, 532-34 (1982) (husband's M.B.A. degree does not constitute property subject to equitable distribution on divorce, but reimbursement or rehabilitative alimony may be used in appropriate cases to prevent manifest unfairness to supporting spouse); *Muckleroy v. Muckleroy*, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972) (husband's medical license is not community property subject to division on divorce); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 583-89, 489 N.E.2d 712, 715-18, 498 N.Y.S.2d 743, 746-49 (1985) (husband's medical license is marital property subject to distribution under New York's Domestic Relations Law § 236(B)(1)(c); court rejects use of rehabilitative alimony or reimbursement of direct financial contributions as inconsistent with economic partnership concept underlying § 236; values professional license by enhanced earning capacity it affords holder); *Hubbard v. Hubbard*, 603 P.2d 747, 751 (Okla. 1979) (per curiam) (husband's increased earning capacity as doctor is marital asset subject to equitable distribution); *Frausto v. Frausto*, 611 S.W.2d 656, 659-60 (Tex. Ct. App. 1980) (husband's medical degree is not community property subject to division on divorce; reverses award of \$20,000 to supporting wife as reimbursement, since wife did not contribute that sum to enhancement of any "property" owned by husband, and she did not request reimbursement in any event).

perpetuating the blackmail and other abuses that accompanied the fault system.³⁶⁹ I do not conclude from Weitzman's study that the change from fault to no-fault divorce was a mistake.³⁷⁰ Nor, I repeat, does she.³⁷¹ Rather, we both perceive that the immediate task lying ahead is that of correcting the judicial attitudes that produced the unfair applications of the no-fault laws, or, failing that, of reducing the scope of judicial discretion by changing particular aspects of those laws in an effort to obtain fair results for both divorcing spouses despite those attitudes.³⁷² Beyond that concrete and immediate task, however, I believe a more basic challenge lies ahead: we must explore new ways of looking at the family, ways that will perhaps reduce the inequality between women and men when their familial relationship comes to an end. I will explore briefly one such possible reconceptualization below.

V. EPISODIC ANALYSIS AND EQUALITY IN DIVORCE

Contemporary young women and men, about to enter their first marriage, probably see themselves as equals before the law. The legal prerogatives granted to husbands over wives, which prompted Lucy Stone and Henry Blackwell to issue their famous "Protest" as they prepared to marry in 1855,³⁷³ have largely disappeared. Thus, while traditional marriage law assigned obligations by sex, placing

See also Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980); Nelson, *Comment: Treatment of a Professional Degree or License in a Marital Dissolution*, 47 MONT. L. REV. 449 (1986).

369. See *supra* text and accompanying notes 313-18. See also Friedman, *supra* note 98, at 659-64 (describing abuses under fault system); WISCONSIN GOVERNOR'S COMM'N, *supra* note 362, at 42-43 ("This 'fault' requirement has necessitated long and painful legal proceedings; has permitted spouses in dead marriages to blackmail each other, emotionally and financially, over 'grounds'; and has caused many good and honest people to lie—or at least to exaggerate—in order to end a marriage.").

370. See also Lauerma, Book Review, 2 BERKELEY WOMEN'S L.J. 246, 249-52 (1986) (concluding that Weitzman's data prove only that judicial interpretations of no-fault laws, rather than laws themselves, are responsible for many of problems she identifies).

371. L. WEITZMAN, *supra* note 7, at 366, 382-83. I have made the same observation *supra* at text accompanying notes 319, 340.

372. I understand David Chambers to be making essentially this same point when he rejects the judicial discretion inherent in equitable distribution laws as in violation of his view that governments should adopt a stance of "supportive neutrality" in the distribution of property between separating couples. He believes that an alternative more consistent with a principle of neutrality "would be for legislators to adopt a fixed rule of distribution that most closely reflects the aspirations and values of the largest numbers of their citizens, and to augment this rule with an express authorization to couples to contract for a different distribution." Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 820 (1985).

373. Worcester Spy, 1855, reprinted in H. KAY, *supra* note 95, at 220.

the duty of support upon the husband and the duty of caring for home and children upon the wife,³⁷⁴ recent interpretations of the constitutional guarantee of equal protection have invalidated many of the classifications based on sex.³⁷⁵ Despite modern views about equality between the sexes, however, many couples still choose to follow the traditional allocation of family functions by sex.³⁷⁶ Such a choice typically produces a family in which the wife and children are dependent upon the husband and father for support. That relationship may be satisfying while the marriage is a functioning one. But if the marriage ends in divorce, the former spouses may discover that their choice of a traditional relationship has disabled the woman as much as the earlier laws disadvantaging married women ever did, and that it has created an unwanted ongoing support obligation for the man.

Weitzman's study has made clear that, in the absence of appropriate court orders, the consequences of the traditional allocation of marital responsibilities by sex is detrimental to women upon divorce. All of her four "unjust" divorce cases³⁷⁷ flow from the earlier decision made during marriage that the man would develop his capacity to produce income, while the woman would devote herself primarily to the non-income producing activities of care of home

374. See H. CLARK, *supra* note 75, at 181-82.

375. In *Orr v. Orr*, 440 U.S. 268 (1979), the Supreme Court invalidated an Alabama statute that limited alimony to wives. The Court has also struck down a Louisiana law that conferred sole management of community property upon husbands. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). The Court has not been as precise in its rulings concerning laws that distinguish between the rights of mothers and fathers of illegitimate children to consent to their adoption. Compare *Lehr v. Robertson*, 463 U.S. 248 (1983) (rejecting father's claim that adoption order was obtained in violation of due process and equal protection clauses) with *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (sustaining father's claim that statute permitting unwed mother, but not unwed father, to block adoption of their child by withholding consent violates equal protection clause).

376. For studies discussing the extent to which couples choose traditional roles, see *supra* note 74. Kathleen Gerson identifies four factors that affect whether young women tend to choose work or domesticity: first, the presence or absence of a stable relationship with a male partner, together with his attitude toward children; second, whether her work outside the home was characterized by blocked or expanding opportunities; third, the income level of her husband; and fourth, whether she experienced mothering and homemaking as fulfilling or disappointing. K. GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 193-95 (1985). Gerson concludes that women who give priority to their husband's career, who find their own work opportunities limited, whose husbands were willing and able to provide the economic support to enable them to withdraw from paid work, and who found mothering and homemaking fulfilling tended to choose domesticity. *Id.* at 92-122.

377. For a summary of Weitzman's four unjust cases, see *supra* text and accompanying notes 320-30.

and children. This decision accounts in large part for Weitzman's most widely cited finding: that one year after divorce, men's postdivorce standard of living has increased by 42 percent while that of women has declined by 73 percent.³⁷⁸ The discrepancy, as Weitzman explains, is largely the result of the presence of children in the woman's household who share her available income, and the man's relatively greater capacity for self-support.³⁷⁹ Women's dependency upon their husbands for part or all of their support during marriage, together with their willingness to assume their traditional role as caretakers of children, are the social and cultural constraints that give rise to their vulnerability at divorce.

I asked earlier whether, in order to implement equality between the sexes, legal significance should be accorded at the dissolution of the family unit to the consequences of choices made concerning sex roles during the existence of the family relationship.³⁸⁰ It seems clear that, at least in the short run, the answer to that question must be an affirmative one. It is necessary to take steps to alleviate the situation of those women who are trapped in circumstances neither they nor their husbands anticipated, and that they cannot now avoid. Courts³⁸¹ and legislatures³⁸² have acknowledged this obliga-

378. L. WEITZMAN, *supra* note 7, at 339. For sources citing this finding, see *supra* note 311.

379. *Id.* at 340-43.

380. See *supra* text following note 95. See also Müller-Freienfels, *Equality of Husband and Wife in Family Law*, 8 INT'L & COMP. L.Q. 249, 261, 266 (1959).

381. See cases cited *supra* notes 363, 368.

382. The experience in Minnesota is instructive. The Minnesota legislature amended its maintenance statute to curb a judicial tendency to prefer temporary support awards over permanent ones. See Act of May 31, 1985, ch. 266, § 2, 1985 Minn. Laws 1186, 1186-87 (amending MINN. STAT. ANN. § 518.552 (West Supp. 1986) to add: "Nothing in this section shall be construed to favor a temporary award of maintenance over a permanent one, where the factors under subdivision 2 justify a permanent award."). Representative Bishop, the author of the amendment, indicated that it was intended to override a recent decision of the Minnesota Supreme Court. Letter from Representative Bishop to Professor Kay (Sept. 16, 1985) (copy on file in Professor Kay's office). That decision was expressed in two companion cases, *McClelland v. McClelland*, 359 N.W.2d 7, 10-11 (Minn. 1984) (reversing permanent maintenance award of \$2000 per month to 44-year-old wife who had not worked outside home for 20 years, but suggesting that trial court, in changing award to "rehabilitative" alimony, should reserve jurisdiction to modify award if necessary); *Abuzzahab v. Abuzzahab*, 359 N.W.2d 12, 14 (Minn. 1984) (holding that 49-year-old wife who had not worked outside home for 20 years was not entitled to permanent spousal maintenance because she was "capable of attaining a degree of self-support through employment"). It is not clear that the amendment has achieved its goal. The amendment was noted, but not applied, in a case that arose prior to its effective date. See *Griep v. Griep*, 381 N.W.2d 865, 870 & n.1 (Minn. App. 1986) (affirming denial of permanent maintenance to wife who had not worked outside home at her previous clerical job for 21 years; court commented that trial court's award of four years of temporary maintenance that decreased over period from \$1800 per month to \$500 per month was based on "careful consideration of appellant's apparent ability to

tion, and its implementation deserves high priority on the current agenda of divorce law reform.³⁸³

In the long run, however, I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce. I do not mean to suggest that these choices are unjustified. For most couples, they are based on the presence of children in the family. The infant's claim to love and nurturance is a compelling one both on moral³⁸⁴ and developmental³⁸⁵ grounds. Throughout history, the choice of the mother as the primary nurturing parent has been the most common response to the infant's claim. Grounded in the mother's unique capacity to give birth³⁸⁶ and to suckle the infant,³⁸⁷ that choice has seemed self-evident. But other choices are possible. Episodic analysis³⁸⁸ offers a theoretical structure within which men and women can view their

re-enter the job market"); *see also* *Catania v. Catania*, 385 N.W.2d 28, 30 (Minn. App. 1986) (holding trial court did not abuse its discretion by failing to reserve jurisdiction to modify award of temporary maintenance of \$1400 per month for six years to 52-year-old wife who had not worked outside home for 31 years; noting that wife could move to modify award prior to expiration of six-year period). The trial court entered its decree in *Catania* on May 5, 1985, about three weeks before May 31, 1985, the effective date of the amendment to § 518.552. Had the amendment been operative, it might have supported a contrary result in the trial court's award.

The New York legislature has also acted to curb abuses in the application of its Equitable Distribution Law. For a discussion of the New York law, *see supra* note 352.

383. I have made some recommendations on this point elsewhere. *See Kay, supra* note 6, at 314-19.

384. *See E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN* 143-44 (1980) (arguing that the child's immaturity and dependence upon parents requires that parents elevate their children's interests above their own).

385. *See S. FRAIBERG, EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING* 28-32 (1977).

386. *See E. WOLGAST, supra* note 384, at 25-29 (arguing that mothers, rather than fathers, are primary parents because mother does not normally have reason to doubt that baby she bears is her own, while fathers may have doubts about their paternity, and may refuse to claim child if they doubt its paternity). Modern reproductive technology may ultimately make this argument obsolete. *See Note, supra* note 79, at 197 (arguing that "[t]here are two maternal actors in surrogate arrangements: the intending mother who initiates the biological process and later fulfills the social process of child rearing, and the surrogate mother who carries out the biological process and then ends her role as mother."). In the case of embryo transplants, three maternal actresses are possible: the genetic mother who is the egg donor; the gestational-birth mother who nurtures the fetus during pregnancy and then births the infant; and the "intending" mother who participates in raising the child to maturity.

387. *See S. FRAIBERG, supra* note 385, at 24-26; *see also* sources cited *infra* note 401.

388. "Episodic analysis" is the name I have given to an analysis that accords legal significance to biological reproductive sex differences only during the specific episodes when those differences are being utilized for reproductive purposes. For a summary of this argument, *see supra* text accompanying notes 59-60.

responsibilities to each other and to their children in a different light. By emphasizing the bright line that separates the unique female tasks of pregnancy and childbirth from the common male and female responsibility for childrearing, episodic analysis suggests that, when both parents are available, neither should become the primary nurturing parent. In what follows, I will explore the possibility of applying episodic analysis, developed earlier to examine equality in the workplace between men and women, to examine equality between them in the family setting.³⁸⁹

Serious discussion of the possibility of shared parenting for children, and for infants in particular, as a way of achieving equality between women and men is very recent. Thus, in 1964, Alice Rossi identified the contemporary belief that motherhood is a full-time occupation for adult women as a major obstacle to equality between the sexes.³⁹⁰ In seeking institutional levers for achieving sex equality, she proposed several "mother substitutes"³⁹¹ who might provide care and supervision for the children of middle-class working mothers. She explored hired domestic help as an initial remedy,³⁹² and looked forward to the establishment of a network of child-care centers.³⁹³ But she dismissed a solution previously shown to be widely used by working class mothers: reliance on relatives, such as fathers, older siblings, grandparents, and others.³⁹⁴ Middle-class husbands, she suggested, could not care for children because their work hours are typically the same as those of their working wives: "[T]here can be little dovetailing of the work schedules of wives and husbands in the middle class as there can be in the working class."³⁹⁵ Rossi's proposals in 1964 did not contemplate that mothers and fathers would share equally in the rearing of their children. Instead, she marshalled the existing social and psychological data to show that women would be better off and children would not be harmed if the period of childrearing that occupied a woman's full time attention was reduced to fifteen years.³⁹⁶

More recently, other writers have contended that recurring psychological patterns harmful to our society can be broken only if we

389. I noted earlier some difficulties in extending episodic analysis from the employment setting to the family unit. *See supra* text and accompanying notes 62-74.

390. Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 *DAEDALUS* 607, 615, 624-25 (1964).

391. *Id.* at 629.

392. *Id.* at 630-31.

393. *Id.* at 631-33.

394. *Id.* at 629.

395. *Id.* at 629-30.

396. *Id.* at 615-24.

modify existing childrearing practices to include men. Thus, Nancy Chodorow has argued, using psychoanalytic theory, that exclusive nurturance of infants by women leads to the reproduction of personality structures that support existing patterns of sex inequality.³⁹⁷ She proposes equal parenting by fathers and mothers as a way of lessening the rigidity of gendered personality and instilling in both women and men the positive capacities of each.³⁹⁸ In addition, emerging notions of a child's right to have a close relationship with both parents support the idea on grounds both of legal theory and child development.³⁹⁹

Once the topic is opened for serious discussion, however, competing considerations are raised. Chief among these are two: first, the uniform historical practice in most primate and all known human societies of assigning the task of child care to the female;⁴⁰⁰ and second, the assertion that this particular division of function is based firmly on biological sex differences.⁴⁰¹ Thus, Kathleen Gough speculates that the emergence of group hunting among ape-like humans produced the division of labor by sex because nursing mothers could not range as far as other hunters and, accordingly, were restricted to hunting small game close to home.⁴⁰² In her view, "family life built around tool use, the use of language, cookery, and a sexual division of labor, must have been established between about 500,000 to 200,000 years ago."⁴⁰³ The lengthy pe-

397. N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 205-09 (1978).

398. *Id.* at 216-19. *Accord* D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 110-14 (1977) (giving impressionistic account of psychological constraints in adults said to arise from exclusive female nurturance of infants, and urging that we reorganize child care to make world of infancy male as well as female domain).

399. *See* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533-37 (1984).

400. Gough, *The Origin of the Family*, 33 J. MARRIAGE & FAM. 760, 760 (1971).

401. *See, e.g.*, E. WILSON, *SOCIOBIOLOGY* 220 (abridged ed. 1980) ("The key to the sociobiology of mammals is milk. Because young animals depend on their mothers during a substantial part of their early development, the mother-offspring group is the universal nuclear unit of mammalian societies."). *Compare* M. MEAD, *supra* note 67, at 191 ("The mother's nurturing tie to her child is apparently so deeply rooted in the actual biological conditions of conception and gestation, birth and suckling, that only fairly complicated social arrangements can break it down entirely."). *See also* S. FRAIBERG, *supra* note 385, at 23-28 (describing "biological program and social tradition" of breast-feeding, practice said to further intimacy between mother and infant that facilitates human attachment).

402. Gough, *supra* note 400, at 763; *cf.* Zihlman, *supra* note 67, at 110 ("At the earliest stages of human evolution, a pronounced division of labor by sex is unlikely, though there was probably a tendency for males, or even females without young, to range in groups more widely for food than those mothers with young.").

403. Gough, *supra* note 400, at 764.

riod of dependence of the human infant serves as the basis for an efficient division of labor within the family by function, if not by sex, even today.⁴⁰⁴

Rossi, in a recent change of perspective, draws on an evolutionary framework to suggest that there are differences between the sexes in the ease with which they can learn certain things.⁴⁰⁵ She notes that “[b]iologically males have only one innate orientation, a sexual one that draws them to women, while women have two such orientations, a sexual one toward men and a reproductive one toward the young.”⁴⁰⁶ She concludes that the female attachment toward infants is innate, while male attachment is a socially learned role: “Fathering is often non-existent among other primates, and, among humans, it is more learned from women or required by the norms of kinship systems than it is innately predisposed in the male himself.”⁴⁰⁷ In a more recent exploration of this theme, Rossi argues that parenting styles of men and women show the same gender differences found in other contexts outside the family, and suggests that these differing styles are rooted in basic sexual dimorphism.⁴⁰⁸ Increased co-parenting, she concludes, will not produce sons who are more like daughters, as she understands Chodorow to suggest, but instead will have the effect of encouraging more androgyny in children of both sexes.⁴⁰⁹

Rossi’s analysis has been challenged by others, who claim that in attempting to demonstrate the relevance of biological data for social scientists she has given too much weight to biological factors in explaining social practices.⁴¹⁰ Even if Rossi is correct, however, in attributing the contemporary persistence of a division of labor by sex within the family to ancient biological adaptations, it does not follow

404. Cf. P. ENGLAND & G. FARKAS, *supra* note 68, at 83-93; see also Lein & Blehar, *Working Couples As Parents*, in *FAMILY IN TRANSITION: RETHINKING MARRIAGE, SEXUALITY, CHILD REARING, AND FAMILY ORGANIZATION* 420-37 (A. Skolnick & J. Skolnick 4th ed. 1983).

405. Rossi, *A Biosocial Perspective on Parenting*, 106 *DAEDALUS* 1, 4-5 (1977).

406. *Id.* at 5.

407. *Id.*

408. Rossi, *Gender and Parenthood*, 49 *AM. SOC. REV.* 1, 9 (1984).

409. *Id.* at 10.

410. See, e.g., J. SAYERS, *supra* note 94, at 152-55 (providing critique of Rossi’s “biological essentialist” brand of feminism); McClintock, *Viewpoint*, 4 *SIGNS* 703, 706-09 (1979). McClintock’s essay is part of a panel that criticized Rossi’s approach on political, as well as scientific, grounds. The panel appears as *Viewpoint: Considering “A Biosocial Perspective on Parenting,”* 4 *SIGNS* 695 (1979). In her response, Rossi explains that her intent was “to urge social scientists to widen the range of what they consider significant variables in studies of family behavior to include physiological ones, in the belief that this will increase the power of our explanations of human behavior.” Rossi, *Reply*, 4 *SIGNS* 712, 713.

that those adaptations will continue to ensure the survival of healthy offspring in modern society. The bond formed between the nursing mother and the infant motivated the mother to provide for the child's continuous care and security, enlisting the aid of a male as she did so.⁴¹¹ The intimacy created between mother and child could then develop over time so that it enabled the growing child to develop the capacity for human intimacy and attachment.⁴¹² But breast-feeding is no longer universal in human society,⁴¹³ and even one of the most ardent advocates of the child's right to the continuous care of an adult during its early years recognizes that the essential bond of intimacy can be created by the "wisdom" of mothers in the absence of breast-feeding.⁴¹⁴ If that is so, then "wise" fathers, as well, can and do form intimate bonds with infants growing out of a repeated pattern of daily interaction and care.⁴¹⁵ A strategy for childrearing that will bind both fathers and mothers to the nurturance of the child seems better suited to its growth and development under modern conditions in which the child's natal family is less frequently the unit in which it reaches maturity.⁴¹⁶

Episodic analysis offers such a strategy by permitting mothers to recognize that their unique role in reproduction ends with child-

411. See Gough, *supra* note 400, at 763-64. In primate societies, the female may have enlisted the aid of more than one male. S. HRDY, *supra* note 67, at 153-59 (hypothesizing readiness of primate female to engage in non-reproductive sexual activity as strategy for involving several males in contributing to protection of her offspring, or at least in refraining from harming them).

412. See S. FRAIBERG, *supra* note 385, at 54-61.

413. Breast-feeding declined in the United States during the 1940s and 1960s to a low of fewer than a quarter of babies being breast-fed; it grew in popularity in the mid-1970s and 1980s, when more than sixty percent of mothers in the United States breastfed. P. SIMKIN, J. WHALLEY & A. KEPPLER, *PREGNANCY, CHILDBIRTH AND THE NEWBORN* 236 (1984).

414. S. FRAIBERG, *supra* note 385, at 27-28.

415. See, e.g., Pruett, *Infants of Primary Nurturing Fathers*, 38 *PSYCHOANALYTIC STUD. CHILD* 257, 269 (1983) (discussing development of infants ranging in age from 2 to 24 months who were raised primarily by their fathers; concluding that "[t]here appears to be a very literal 'taking in' of these babies by the fathers as a profound psychological event, metaphorically analogous to the physiologic incorporation by the mother of her growing fetus").

416. See Brazelton, *Issues for Working Parents*, 56 *AM. J. ORTHOPSYCHIATRY* 14, 16 (1986) (urging that efforts to involve fathers in processes of birth, delivery, and infant care be increased). Weitzman reports that "[t]he total number of children affected by divorce [more than two million each year] has more than tripled since 1960," adding that other scholars project "that more than half of all the children in the United States will experience a parental divorce . . . before they reach the age of eighteen." L. WEITZMAN, *supra* note 7, at 215 (emphasis in original). The child's attachment to its absent parent, however, survives the marital break-up. In Wallerstein and Kelly's study of post-divorce families the non-custodial biological father's emotional significance to his children had not greatly diminished five years after the divorce. J. WALLERSTEIN & J. KELLY, *supra* note 101, at 307.

birth.⁴¹⁷ It allows fathers to see themselves as essential to the child's nurturance and development. With the help of this insight, men, like women, should be able to draw an important aspect of their self-esteem and identity from their parental roles. Women, like men, should be able to lead productive, independent lives outside the family. Female dependency should no longer be the necessary result of motherhood.

I do not propose that the state attempt to implement this view of family life by enacting laws requiring mothers to work or mandating that fathers spend time at home with their children.⁴¹⁸ But since, as I noted earlier,⁴¹⁹ Anglo-American family law has traditionally reflected the social division of function by sex within marriage, it will be necessary to withdraw existing legal supports for that arrangement as a cultural norm.⁴²⁰ No sweeping new legal reforms of marriage and divorce will be required, however, to achieve this end. It will be enough, I think, to continue the present trend begun in the nineteenth century toward the emancipation of married women,⁴²¹ and implemented more recently by gender-neutral family laws,⁴²² as well as the current emphasis on sharing principles in marital property law.⁴²³ The present experiment in many states with joint cus-

417. I intend the term "childbirth" used in this sentence to include a brief period for the mother's medical recovery. The capacity for lactation is a biological sex difference associated with reproduction that may become functional following childbirth. Unlike pregnancy, however, breastfeeding is not an unavoidable consequence of reproductive conduct. See Kay, *supra* note 10, at 35 n.174.

418. Advocacy of family regulations of this sort would concede the propriety of laws compelling fathers to work and mothers to stay at home. Chambers's model of "supportive neutrality," which excludes both types of regulation, seems a wiser governmental policy. See Chambers, *supra* note 372, at 814 ("The guiding principle for government would be that it would not directly prohibit or coerce (or make adverse decisions based on judgments about) any form of family conduct, unless it could point to specific and substantial secular harms caused by the conduct."). If men and women choose to allocate their marital functions by sex, however, they should consider entering into pre-nuptial contracts that safeguard the financial interests of the dependent spouse and children in the event of divorce.

419. See *supra* text accompanying note 75.

420. Olsen has argued persuasively that the notion of nonintervention in the family, prevalent in the nineteenth century, actually provided legal support for the hierarchical family. See Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 845-55 (1985).

421. See C. DEGLER, *supra* note 76, at 332-33; H. CLARK, *supra* note 75, at 219-29. See generally Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. FLA. L. REV. 1 (1975) (examining trends in property ownership between husband and wife).

422. See generally H. KAY, *supra* note 95, at 163-319 (providing cases and materials concerning sex discrimination in family law); H. KAY, 1986 SUPPLEMENT TO TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 49-67 (1986) (same).

423. See generally Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 NEB. L. REV. 120 (1986) (arguing UMPA, by promoting value of sharing, promotes equality between husband and wife and strengthens marital unit as

tody⁴²⁴ will draw strength from shared parenting during marriage, for that practice will lead to the expectation that shared parenting after divorce should be the normal custodial arrangement for children.⁴²⁵ There is some evidence that fathers who remain involved with their children after divorce are likely to provide for the support of those children.⁴²⁶ That tendency, reinforced by a strengthened enforcement procedure where necessary, should go far towards mitigating the financial hardship of divorce for children. Further, if children are no longer predominantly in the day-to-day care of their mothers after divorce, the large disparity between men's and women's household standard of living that Weitzman discovered to exist one year after divorce⁴²⁷ should be greatly reduced: the father's income, like that of the mother today, would then be shared with the children in his household. If this much is accomplished by strategies that facilitate a continued attachment between fathers and children after divorce, then the trend begun in California toward eliminating fault from all aspects of marital dissolution can continue

whole); Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677 (1987) (collecting practical reasons for adopting UMPA to reflect partnership approach to marriage and property); Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1978) (supporting adoption of sharing principles in marital property law because they reflect and reinforce fundamental characteristics of marriage).

424. See sources cited *supra* note 38.

425. See Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 65 (1985) (arguing for constitutionally mandated "presumption of joint custody of parents over their children upon divorce, which could be rebutted only by clear and convincing evidence that an award of joint custody in a particular case would be detrimental to the children"); see also Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 15-28 (1986) (supporting joint custody as policy that offers greater independence to some women).

426. See Chambers, *supra* note 360, at 1627 (citing Furstenberg and his own earlier work as indicating that fathers who pay child support tend to visit their children regularly, and indicating that this fact may favor policy of coercive enforcement). Weitzman finds no correlation between men's compliance with child support and their complaints about the mother's interference with their visitation rights, thus negating the theory that men do not pay if they are not allowed to see their children. See L. WEITZMAN, *supra* note 7, at 297. She adds, however, that "[a] significant portion of women who complained of noncompliance also complained about their ex-husband's failure to visit the children." *Id.* at 298 (emphasis in original). This observation lends support to the point I make in the text: that fathers who remain involved with their children through joint custody arrangements or liberal visitation schedules may be more willing to support them. Some data indicate, however, that even fathers who had complied with their court-ordered support obligations terminated payments when their children attained majority at age eighteen, despite the children's continued need for support during their college years. Wallerstein & Corbin, *Father-Child Relationships After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109, 116-21 (1986).

427. L. WEITZMAN, *supra* note 7, at 339. For a summary of Weitzman's findings on this point, see *supra* text accompanying notes 311-12, 378-79.

to work itself out without the risk of financial harm to dependent women and children.

If these changing trends in family law and structure continue along the lines I have sketched out above, they will bring fathers, as well as mothers, into conflict with the present organization of the labor market. Working mothers today are often viewed as marginal employees whose advancement is hindered by their child care responsibilities.⁴²⁸ Although laws forbidding discrimination in employment by sex have been invoked to invalidate the most blatant practices that once excluded mothers of young children from the labor market,⁴²⁹ our failure as a nation to develop an adequate policy that permits women both to work and to care for their children⁴³⁰ has forced many women to give up their own advancement to meet what they see as the essential needs of their children.⁴³¹ If fathers join mothers in giving high priority to spending time with their children, they will face the same structural constraints on their job and career development that presently hinder women.⁴³² Ironi-

428. See Fuchs, *Sex Differences in Economic Well-Being*, 232 *SCIENCE*, Apr. 26, 1986, at 459, 462-64. Fuchs points out that motherhood can have an adverse effect on women's occupational choice and hourly earnings in several ways: first, if women leave the labor market when they have children; "[s]econd, even when mothers stay in the labor force, responsibility for children frequently constrains their choice of job: they accept lower wages in exchange for shorter or more flexible hours, location near home, limited travel, and the like"; third, time and energy devoted to child care and housework is likely to be diverted from market work; and fourth, a woman who expects to have several children is less likely to invest in her own human capital through education or employment experience. *Id.* See generally Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 *BERKELEY WOMEN'S L.J.* 89 (1986); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 *B.U.L. REV.* 55 (1979).

429. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (court of appeals erred in interpreting § 703 of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, as permitting one hiring policy for women and one for men, where each has pre-school-age children).

430. See S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 66, at 31 ("[U]ntil very recently almost no national policy in the United States has addressed the problem of working mothers, either from the perspective of their physical well-being, protection of their jobs, protection of income, or their children's well-being. No legislation yet assures women that their health and medical care expenses will be met at the time of maternity, or that they will be financially protected at that time, or that their infant will be assured of parental care, at least for a brief time after birth.").

431. See, e.g., S. HEWLETT, *supra* note 311, at 18-47 (reporting personal experiences); D. FALLOWS, *A MOTHER'S WORK* 8-23 (1985) (same); see also R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 131 (1986) ("[T]he absence of a high-quality, coherent, comprehensive day-care policy is a key factor in the perpetuation of poverty among women and children.").

432. Economic factors may discourage men from adopting this course. See P. ENGLAND & G. FARKAS, *supra* note 68, at 191-92. These writers note that "gender role change [since 1950] has been asymmetric, with greater movement of women into traditionally male spheres than vice versa," and point out that

cally, however, because men have not traditionally participated in childrearing, employers may be even less receptive to fathers who wish to accommodate their work to their parenting than they have been to similar requests from women.⁴³³

Other contemporary industrial western countries have put in place maternity policies designed to permit working mothers to receive care during pregnancy and childbirth, to spend a brief period of time with the infant without loss of job security, and to obtain a cash benefit during the period of leave that helps minimize economic loss resulting from reproductive activity.⁴³⁴ I believe that maternity benefits that cover pregnancy and childbirth are properly restricted to women, and may, indeed, be required even in the absence of other work-related health or disability benefits for all workers in order to avoid job discrimination against women workers.⁴³⁵ No similar limitation is necessary or justifiable, however, for child-rearing benefits. Nevertheless, in all but three countries, benefits covering childrearing are not available to fathers.⁴³⁶ I agree with

[w]ithin a culture that has not only devalued female activities, but especially devalued men who are like females, a major alteration in pecuniary or nonpecuniary rewards is required to induce men to [adopt traditionally female roles]. Yet just as rising wages have made the opportunity-cost of time spent in child care greater for women, so too has this effect operated for men during the 1950s and 1960s.

Id. See also K. GERSON, *supra* note 376, at 226 (“[I]f jobs became more sexually integrated and the disparity between male and female earnings narrowed, women and men would find it more economically rational to share equally in parenting.”); Note, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265, 1283-98 (1986) (discussing job discrimination against caretaking fathers and proposing remedies).

433. Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1300 (1982).

434. S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 66, at 14. The authors describe these maternity-related policies as characterized by three paramount benefits:

1. Health and medical insurance for mother and child, including coverage of hospital and physician expenses during pregnancy, at the time of childbirth, and for postnatal care.
2. The right of an employed woman to a leave from work for a specified period at the time of childbirth, with the assurance of job protection as well as protection of seniority, pension entitlements, and other fringe benefits.
3. A cash benefit paid to the woman during this leave, provided through the social insurance or social security system, or by the employer, and equal to all or a portion of the insured wage, for a similarly specified period.

Id.

435. Kay, *supra* note 10, at 28-32; cf. Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 718-20 (1986).

436. S. KAMERMAN, A. KAHN & P. KINGSTON, *supra* note 66, at 14-24 (Sweden, Norway, and Finland are exceptions).

Wendy Williams that a policy that limits childrearing benefits only to women is not an appropriate model for a society that is committed to the achievement of equality between the sexes.⁴³⁷ Nor, I would add, is such a policy well-designed to encourage the strategy for ensuring the healthy survival of offspring that I have suggested above as useful in modern societies: that of fostering the intimacy that permits bonding and nurturance between fathers and infants.⁴³⁸ Far more conducive to that strategy is a national policy that clearly identifies childrearing with both fathers and mothers, and provides adequate social and economic support to enable both parents to undertake that crucial responsibility.⁴³⁹ With such a national parental policy in place, the way will be open for future men and women to work out for themselves the implications of a greater equality in marriage.

CONCLUSION

If indeed women and men who form family units in the future are willing to consider allocating the responsibilities created by their association, including the nurturance of their children, in gender-free ways, and if family law is indeed tending toward a sex-neutral form that is supportive of such choices, the conditions that presently produce inequality between men and women at divorce may gradually

437. Williams, *supra* note 45, at 376-79.

438. See *supra* text accompanying note 416.

439. Such a policy is proposed in H.R. 925, 100th Cong., 1st Sess. (1987) (entitling employees to parental leave upon birth, adoption, or serious illness of child). See also Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal Treatment for Women*, 4 LAW & INEQUALITY 143, 146 (1986). Ginsburg outlines an "affirmative action plan" containing three points:

First, it would promote equal educational opportunity and effective job training for women, so they would not be reduced to dependency on a man or the state. Second, my plan would give men encouragement and incentives to share more evenly with women the joys, responsibilities, worries, upsets, and sometimes tedium of raising children from infancy to adulthood. (This, I admit, is the most challenging part of the plan to make concrete and implement.) Third, the plan would make quality day care available from infancy on. Children in my ideal world would not be women's priorities, they would be human priorities.

Id. See also K. GERSON, *supra* note 376, at 226-27 (calling for national policies that would reduce obstacles facing both sexes in integrating work and childrearing).

What child care arrangements are "adequate" is a controversial topic. Compare S. FRAIBERG, *supra* note 385, at 81-88 (insisting that adequate "mother substitute" for children under age three must be person who would be as close and responsive to child as one of its parents, and recommending adult-child ratio of one-to-four for children from age three to age six) with D. FALLOWS, *supra* note 431, at 51-69 (surveying range of child care and day care facilities presently available). See generally *Child Care Symposium Issue*, 25 SANTA CLARA L. REV. 239 (1985) (discussing range of legal issues relevant to provision of child care).

disappear. It will then be clear, if it is not clear already, that those who call for a return to traditional family values seek to maintain women's dependent role in the family.⁴⁴⁰ Even those feminists, like Weitzman, who want to change the no-fault divorce laws to prevent present disadvantage to women who have chosen traditional roles in the past, may inadvertently perpetuate female dependence by proposing solutions that might encourage future women to continue to select traditional roles.

If, instead, with the insight provided by episodic analysis, women are able to look at childbearing as a function separate from child-rearing, and if we women become willing to accept fathers as co-parents, so that our identity, like theirs, is developed from our own consciousness, rather than derived from our status as mothers, I think we will be better able to see marriage in a new light. Our recognition of what marriage and shared parenting can be is only the first step in an effort to build a society in which children can grow up free of sexist stereotypes. But we women must take that first step. Centuries of human experience show that if we do not take the lead, marriage and the family will never change.

440. See, e.g., A REPORT OF THE WORKING GROUP ON THE FAMILY, *supra* note 41, at 44-45.

Most mothers of children under the age of 18 do not work full-time outside the home; in fact, only 41 percent do. Of married mothers with children under six, only 33 percent work full-time for any period during the calendar year and only 23 percent work full-time year around. Unlike Sweden, for example, the mothers of America have managed to avoid becoming just so many more cogs in the wheels of commerce.

Id. at 44 (footnote omitted).