
A Feminist Perspective on Divorce

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Abstract

Feminist perspectives on divorce proceed from the ways in which women's positions at divorce systematically differ from men's positions. Although there has been a large-scale increase in mothers' labor force participation, there has been no corresponding increase in fathers' domestic contributions, and women continue to bear the overwhelming responsibility for child rearing. In substantial part because of this division of labor within the family, divorcing women, on average, face bleaker financial prospects and enjoy closer emotional ties to their children than do their former husbands. Existing divorce law, with its emphasis on each party's self-sufficiency, limited provision for child support, and gender-neutral custody principles, does not fully recognize or address these differences.

Feminists differ in the responses they propose to these issues. "Liberal feminists" believe that women's domestic responsibilities will inevitably place them at a disadvantage and favor policies that encourage men to assume a proportionate share of family responsibilities. "Cultural feminists," or "feminists of difference," believe that it is not the fact that women care for children but that child rearing is so undervalued which is the source of the problem. "Radical feminists" believe that it is impossible to know whether women's involvement in child rearing would differ from men's in a different society and focus on the ways in which marriage and work force policies perpetuate male dominance. All agree, however, that existing law contributes to the relative impoverishment of many women and children and that, even when the rules purport to be gender-neutral, they are administered in systematically biased ways.

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In considering "feminist perspectives" on divorce, it is important to note that there is not one feminist perspective, but many. Feminism generally is defined not in terms of a particular position or set of positions, but by an insistence that women's experiences, varied as they are, be taken into account.¹ Accordingly, feminist perspectives on divorce focus on the implications of divorce for the lives of women² and their children.³

The implications of the existing system are stark and relatively uncontroversial. Women generally earn less than men. Marriage increases the economic gap as married women, who bear the overwhelming responsibility for child rearing, earn less than single women, while married men increase their earnings over single men. At divorce, mothers overwhelmingly retain physical custody of their children.

Fineman concludes that, under the present divorce system in which divorce awards neither close the earnings gap nor account for the full costs of child rearing, women are asked to "meet greater demands with fewer resources" than their former husbands.⁴ Mason terms the result "the equality trap."⁵ In this era of high divorce rates, children have access to a smaller share of society's resources, and

mothers confront more direct conflicts between their abilities to provide for themselves and to care for their children than in earlier generations.⁶

Although virtually all feminist analysis of divorce starts with this picture, there is little agreement on the solution. "Liberal feminists"⁷ believe that it is the gendered division of labor itself which ensures women's subordination to men and that, unless there is genuinely shared responsi-

important consequences upon divorce: (1) it increases disparities in earning capacity and (2) it encourages mothers to develop closer relationships with their children than fathers do.

Recent changes in the status of women have been overwhelmingly characterized by the large-scale movement of married middle-class mothers into the labor market¹¹ but not by a corresponding increase in fathers' participation in homemaking. Bergmann estimates that working women averaged 28.1 hours of "unpaid" family work per week to their husband's 9.2 hours and that husbands of wives with full-time jobs averaged about two minutes more housework per day than did husbands in housewife-maintaining families.¹² Combining paid and unpaid labor, Fuchs concluded that, between 1960 and 1986, women increased their total hours by almost 7% while men's fell by the same proportion.¹³ Wives, whatever their work force participation, still assume an overwhelmingly greater share of the responsibility for the family's domestic needs than do their husbands.¹⁴

This gendered division of labor within the family has consequences for women's earning capacity. Economists attribute the "wage gap" that Mason characterizes as the single "most consistent observation about women in the labor force"¹⁵ to a combination of discrimination (including channeling women into low positions segregated by gender),¹⁶ differences in human capital,¹⁷ and family responsibilities. While economists differ considerably in the relative importance they attribute to each factor,¹⁸ they agree that each contributes to the wage gap and that each factor reinforces the other.¹⁹ Economists Blau and Ferber note that "even a relatively small amount of initial labor market discrimination can have greatly magnified effects if it discourages women from making human capital investments, weakens their attachments to the labor force, and provides economic incentives for the family to place priority on the husband's career."²⁰ Such patterns reinforce, in turn, employer prejudices and gender role stereotypes and may thus affect women who never marry and never have children.²¹

Apart from the earnings gap between men and women generally, there is substantial evidence that married women, because of family responsibilities, experience a drop in earning capacity with life-

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bility for child rearing, equality is impossible.⁸ "Cultural feminists," or "feminists of difference," believe that the major problem is not that women disproportionately care for children, but that society so undervalues child rearing.⁹ In between are many feminists who believe that equality requires both greater sharing of the responsibility for child rearing and greater support for the child-rearing role.¹⁰

In setting forth feminist perspectives on divorce, this article starts with the critique that animates virtually all feminist writing about the family, that is, identification of the ways in which the gendered division of labor during marriage leads to the effective impoverishment of many women and children, and in which women's greater involvement with their children increases their vulnerability at divorce. The article then examines the failure of the existing system to provide adequately either for child rearing or for greater equality between men and women, and reviews proposals to change the existing provisions for custody and financial allocations in accordance with their proponents' respective visions for the future.

The Gendered Division of Family Responsibilities

For women, assessing the impact of divorce starts with an examination of the gendered division of responsibility within the family. This division of labor has two

long consequences. First, human capital theorists posit that interruptions in labor participation have a major effect on earnings. Polachek finds that, while levels of educational attainment are comparable for men and women, women experience more labor market interruptions than do men and that approximately half of the wage gap between all male and female workers can be explained on the basis of those interruptions.²² Second, studies show that income varies with family status. Blau and Kahn note that, in the United States during the late 1980s, single women made 95.52% of what single men made while married women made only 59.44% of what men made.²³ By the age of 40, married women make only 85% of the wages per hour earned by unmarried women while married men earn more than unmarried men at every age.²⁴ Finally, a comparison of age earning profiles for men and women demonstrates that, while women's earnings lag only slightly behind men's during women's early years in the labor force, women miss out on the rapid increase in earnings men experience in their late twenties and thirties, the peak childbearing years for women.²⁵ Taking these factors together, Fuchs concludes that "I do" has a very different price for women than for men.²⁶

The differences between men and women and between single and married workers magnify the disparity between husbands' and wives' financial prospects at divorce. Maccoby and Mnookin found that, where both spouses worked during the marriage, the women, on average, earned only half as much as the men.²⁷ Fuchs's 1985 data show that, where both spouses worked outside the home, three of four husbands had hourly earnings greater than their wives, and for half the couples, the wife's wage was less than two-thirds that of her husband.²⁸ Adding the fact that married women work fewer hours outside the home, Hewlett emphasizes that, on average, married women earn less than half the amount earned by married men.²⁹ Women's greater participation in the labor force has not meant participation on the same terms as men.

While there is little dispute that, at divorce, women, on average, face bleaker financial prospects than their husbands and that the division of responsibilities within marriage contributes to the financial gap, there is less recognition of the other major difference between divorcing

couples—mothers' greater, and qualitatively different, attachment to children.³⁰

Until Becker's article, the taboo was particularly strong among feminists and particularly strong in the legal academy.³¹ With the first wave of modern feminism focused on the workplace, feminists feared that, by acknowledging the special role of motherhood for many women, all women would be defined exclusively in motherhood's most restrictive terms.

As Becker documents, there is a growing literature that suggests substantial differences in the way mothers and fathers relate to their children, with important implications for divorce policy. Although this literature is necessarily more subjective than that assessing financial factors, the empirical data that exist supports Becker's assertions. She notes two studies in particular. Genevie and Margolies, who interviewed a representative sample of mothers, report that more than 90% feel that mothers' love is different from other forms of love.³² They describe it as more intense, involving a greater feeling of

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identity, "a feeling that one's child is part of oneself."³³ The mothers surveyed overwhelmingly believed that fathers are less emotionally involved with their children than mothers are, and a "shocking 50 percent . . . did not think much of their husbands as fathers, describing them, in varying degrees, as uninvolved and overly critical."³⁴

While the Genevie and Margolies study interviewed only mothers, a study of what the researchers term "dual-mother families"—families in which both husband and wife "mother"—reports similar results. In this study, both parents identified themselves as the "primary caretaker" and performed at least 35% of the child care. Nevertheless, both mothering mothers and mothering fathers in this study reported that the mothers were more emotionally involved in their children's lives and felt the connection between self and child as sharper and more unconscious,

more “primary.” The researchers found that both mothers and fathers agreed that it would be the mothers who would actually be more devastated by the actual loss of a child.³⁵

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The studies that Becker cites are inherently limited.³⁶ Nonetheless, the study results correspond to literary attempts to capture the experience of mothering³⁷ and to much observed behavior. At divorce, mothers are much more likely to seek physical custody of their children than are fathers, and noncustodial mothers are more likely to remain in contact with their children than are noncustodial fathers.³⁸

As with financial disparities, there is little dissent regarding the fact that gender differences exist in parents’ relationships with their children; at the same time, there is considerable controversy over the cause and the implications.³⁹ Radical feminists emphatically reject the attribution of observed gender differences to women’s “true” preferences; they maintain that it is impossible to know what women would prefer in the absence of the patriarchal system which now exists.⁴⁰ Liberal feminists fear that any emphasis on the way in which women “mother” differently from fathers will resurrect an ideal of motherhood that precludes women’s access to status, power, and independence;⁴¹ therefore, they prefer, as a matter of strategy, not to call attention to such differences. Only cultural feminists, or feminists of difference, have been willing to address the issue directly.

Nonetheless, it is difficult to address divorce policy without considering the implications of differences in the way parents relate to their children. Fineman, whose work marks the emergence of the feminism of difference within family law, stresses the importance of defining feminist methodology, not in terms of grand theory, but in terms of the concrete impact on the lives of women.⁴² Central to

that impact, Fineman maintains, are the material and emotional circumstances that arise from women’s greater connection to their children, culturally determined or not. She invokes Fuchs⁴³ to explain that it is not the fact that women raise children which places them at a disadvantage, but “that, on average, women have a stronger demand for children than men do, and have more concern for children after they are born.”⁴⁴ Fineman concludes that taking women’s concern for children into account is essential to effective divorce reform, and that “[c]ontemporary custody discourse trivializes women’s emotional investment in their primary caretaking relationship with their children. It is perhaps on this level that reformist discourse has been least sensitive to women’s reality.”⁴⁵

Feminist perspectives on divorce, in assessing the impact on women and children, proceed from the two important differences men and women experience at divorce: different financial prospects and different perceptions of their relationship to their children. The feminist critique of divorce policy, despite the disagreement on objectives, focuses on the ways in which existing law fails to take those differences into account.

The Limitations of Existing Divorce Policy

Existing divorce law largely reflects the reforms adopted in the wake of recognizing no-fault grounds for divorce. Much of the controversy that attends modern divorce centers on two issues: (1) is the movement from fault to no-fault responsible for the inadequate provision for women and children in modern divorce law, and (2) do the existing grounds for such provisions provide an adequate basis for future decisions?

The Adoption of No-Fault Grounds for Divorce

Historically, the primary societal provision for child rearing has been the insistence that child rearing occur within lifelong unions in which husbands and wives were assigned highly differentiated roles, and the wife’s position was legally and practically dependent on the husband’s. Traditional marriages emphasized the husband’s role as head of household and his obligation to provide support.⁴⁶ Wives were expected to subordinate their

own opportunities to the needs of their families. Family law enforced the exchange by making divorce difficult and potentially expensive for the responsible party. The permanence of marriage provided a measure of security but at the expense of the parties' independence and freedom to manage their own lives.

Reformers justified no-fault initiatives as a way to remove the hypocrisy and deceit inherent in a system that made divorce available only if one party and only one party were at fault.⁴⁷ Yet, no-fault did more than simply eliminate abandonment, adultery, and extreme cruelty as prerequisites for divorce; it dismantled the traditional provisions for child rearing without agreement on a new system to take its place. Traditional marriage involved an exchange of promises to remain married "until death do us part." Breach of those promises, that is, fault, influenced custody and, in many jurisdictions, it determined alimony and property divisions. "Innocent" wives were to be awarded support in accordance with the standard of living enjoyed during the marriage and their husband's ability to pay; "guilty" wives could find themselves ineligible for alimony altogether. While support awards in practice were rarely generous for the "innocent" spouse⁴⁸ and not always draconian for the "guilty," the law largely succeeded in its principal objective: reinforcing societal sanctions against divorce.

In most jurisdictions, with the passage of no-fault legislation, marriage became, for all intents and purposes, terminable at will. While the no-fault principle in its narrowest sense required only that the absence of desertion, adultery, or extreme cruelty not bar a divorce both parties wanted, a majority of the no-fault states went further and barred consideration of fault altogether. If one party wanted a divorce, the other could not prevent it, and the financial and custody decisions that followed would be made independently of the events that precipitated the breakup.⁴⁹ Thus, no-fault necessarily eliminated the fault system's principal justification for postdivorce adjustments: the guilty spouse's continuing responsibility for the well-being of the family left behind. At the same time, the fact that the new system was implemented during a period of changing gender roles also reduced the importance of the major practical concern compelling postdivorce support: the dependence of women. The traditional system, which em-

phasized the exchange of the husband's support for the wife's domestic services, viewed women as specially suited for the care of young children and largely incapable of self-support. With the increasing work force participation of married middle-class mothers⁵⁰ and women's growing insistence that they were self-sufficient equals, the very concept of "support" or "special roles" seemed archaic.

Under the Uniform Marriage and Divorce Act (UMDA) of 1970, the primary objective became a "clean break." Following divorce, there would be no continu-

No-fault divorce dismantled the traditional provisions for child rearing without agreement on a new system to take its place.

ing obligation from one spouse to another. The only surviving relationship would be with the children. To the extent one spouse needed assistance, an adjustment in the property division, rather than a support award, was preferred because the property division could be finalized with the divorce. Support in any form was justified by "need," and need was defined in terms of a dependent spouse's ability to become self-sufficient, not in terms of ability to provide for the children or to enjoy a standard of living comparable to that of the other spouse.⁵¹ Given these limited objectives, courts that provided alimony at all favored "transitional" or "rehabilitative" awards, that is, support payments for relatively short periods designed to give dependent spouses time to find a job or to acquire additional education or training.⁵² Women who had been full-time homemakers over the course of a marriage spanning a quarter century were expected to become self-sufficient within a few years. Moreover, even this limited provision for support was conditioned on the husband's ability to pay.⁵³ The new law contained no recognition that husband's and wife's financial positions at divorce might reflect the gendered division of family responsibilities during the marriage, with one party taking from the marriage the financial benefit of those arrangements while the other bore the corresponding loss.⁵⁴

In determining custody, Fineman describes a transformation from a system of “old, tested, gendered rules that permitted predictable, inexpensive decisions” explicitly favoring women to a complex legal determination “in which a man who pursues a custody case⁵⁵ has a better than equal chance of gaining custody.”⁵⁶ The changes resulted from two factors. First, the traditional rules, which recognized an explicit presumption favoring mothers in determining the custody of children “of tender years,” were eliminated in favor of gender-neutral standards.⁵⁷ Second, with the refusal to consider any aspect of the parties’ relationship. Many states, for example, enacted statutes favoring joint physical and legal custody without regard for whether the parents could cooperate sufficiently to make it work in practice,⁵⁸ in other states, courts consider the “best interests of the child” prospectively only. In such determinations, the father’s greater financial resources, even if they are the product of his lack of involvement with the children during the marriage, might outweigh the mother’s greater contact and emotional commitment.⁵⁹

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While mothers still overwhelmingly retained physical custody under the new rules, they did so in part because few fathers sought custody.⁶⁰ In a study of two counties in California, for example, researchers found that the courts awarded joint legal custody in 79% of all divorces even though mothers retained sole physical custody in two-thirds of those cases.⁶¹ Fathers thus acquired greater decision-making power without a corresponding increase in responsibility; mothers continued to assume the primary caretaking role with less security and recognition.

The combination of the changes in the grounds for divorce, support, and custody amounted to a wholesale withdrawal of legal recognition and financial support for the child-rearing role. Weitzman chronicled the results in California⁶² and

concludes: “Just one year after legal divorce, men experience a 42% improvement in their postdivorce standard of living, while women experience a 73% decline.”⁶³ Although Weitzman’s data were drawn only from select counties in California, the overall picture she presents has been borne out so consistently in different parts of the country that the major part of her findings have become paradigmatic.⁶⁴

So long as divorcing women do not enjoy the employment prospects of their former mates and they bear the disproportionate responsibility for child rearing both during and after marriage, and there is no substantial postdivorce economic adjustment, a precipitous decline in the living standards of divorced women and the children in their custody is inevitable.

The controversy surrounding Weitzman’s work centers on two issues: the size of the disparity she finds, and the suggestion that no-fault is responsible, neither of which is central to the feminist implications of her work.

Duncan and Hoffman,⁶⁵ without contesting the drop in per capita income that Weitzman reports or the failure of divorce awards to address such earning disparities, dispute her conclusion that women experience a 73% drop in their standards of living. Weitzman arrived at the 73% figure by taking the per capita income figures and applying them to a needs standard calculated in accordance with the Bureau of Labor Standards Lower Standard Budget for an urban family adjusted for family size and composition.⁶⁶ Attempting to perform the same calculations, Duncan and Hoffman find Weitzman’s figure of 73% “suspiciously large”; they recalculate the drop in living standards at 33%. In addition, as Weitzman herself notes, both Weitzman’s and Duncan and Hoffman’s calculations overstate the increase in men’s standards of living to the extent that they lose out on or need to purchase substitutes for the services their wives performed without pay, but understate the drop in women’s income to the extent that there is less than full compliance with support orders, a common occurrence in the families studied.⁶⁷ As Duncan and Hoffman acknowledge, however, these methodological issues go to the magnitude of the decline women and children experience, not to the existence of serious gender-based inequities.⁶⁸

The second issue, of somewhat greater concern to feminists, is the suggestion that no-fault is responsible for the dire economic circumstances women and children face at divorce. Singer uses Weitzman's own data to emphasize that the financial awards made under fault-based divorce never lived up to the law's promise to protect the standard of living enjoyed during the marriage,⁶⁹ and Jacob concludes that, because of shortcomings in Weitzman's research design, her "evidence falls far short of conclusively demonstrating that changes in no-fault, property and custody law are responsible for the economic plight of divorced women."⁷⁰ Garrison's data demonstrate that, at least in New York, changes in the underlying rules governing divorce allocations had a much more significant impact on divorce awards than the adoption of no-fault grounds for the divorce itself.⁷¹

Even if the empirical data were less equivocal, however, there would be little feminist support for a return to fault. Weitzman herself does not advocate reintroducing fault principles,⁷² and Kay emphasizes the importance of taking out of divorce the "blackmail" that prompted no-fault reforms in the first place.⁷³ Singer, invoking a liberal feminist perspective, emphasizes the ways in which the fault system constituted a "double-edged sword" that reinforced the value of a woman's domestic activities in ways that restrict "women's options outside the home and risk hurting women in the long run by suggesting that the causes and cures for inequality lie solely in the domestic sphere."⁷⁴ Fineman, while otherwise rejecting much of the liberal feminist concern that family law reform will hurt women's position in the workplace, rejects altogether the emphasis on the traditional family that is central to the fault system.⁷⁵ Given the myriad difficulties with the fault system, the larger issue is not whether no-fault grounds for divorce are an improvement over fault grounds, but whether the property, support, and custody provisions adopted in the wake of no-fault reform provide an adequate basis for the future.⁷⁶

The Adequacy of Existing Divorce Doctrine

The true divorce revolution concerns not the generosity of divorce awards, but the permanence of marriage. Fault princi-

ples, which arose during an era in which marital bonds were treated as sacred obligations that no "man" could put asunder, were never intended to treat marital dis-

The law does not recognize a continuing obligation from one spouse to the other following divorce and it does not meaningfully enforce the obligation it does recognize—the one to the children.

solution as anything other than a rare—and tragic—exception to the general order. When popular acceptance of divorce increased and the pent-up demand skyrocketed, liberalized divorce became inevitable.⁷⁷ No-fault swept the 50 states within 16 years of the original California legislation, and whatever the debate about causation, there is no question about the correlation.⁷⁸ Within 10 years after the adoption of California's trailblazing legislation, the divorce rate had doubled.⁷⁹ One of every two marriages now ends in divorce. Between 50% and 60% of the children born in the early 1980s are likely to experience the break-up of their parents' marriage by age 18.⁸⁰ Whereas in 1960 nine of every ten families had a husband and a wife, by the year 2000 only three of four will.⁸¹ Rhode and Minow estimate that "70% of all single-parent families are headed by divorced or separated women and half of all female headed households are poor."⁸² Under the fault system, marriage, not divorce awards, served as the principal source of provision for children. Marriage is no longer so dependable.

In this context, the critical issue becomes not whether no-fault is better or worse than the fault system it replaced, but whether current law adequately provides for child rearing in an era of divorce. On this score, Weitzman's critics do not dispute her finding that divorce is economically disastrous for many women and the children in their custody. The simple explanation for Weitzman's findings is that the law does not recognize a continuing obligation from one spouse to the other following divorce and that it does not meaningfully enforce the obligation it does recognize—the one to the children.

Weitzman documents the elements that prevent the existing system from responding more adequately.⁸³ First, the expectation that divorce would represent a clean break with no continuing obligation from one spouse to another was realistic only to the extent that the property settlement constituted an appropriate resolution of the couple's combined affairs. Few marriages end with significant accumulations of property, and, in those marriages with some property, it consists overwhelmingly of the family home. Therefore, even if all available property were awarded to the custodial parent, it is unlikely to be enough to meet the family's postdivorce needs, and there is little evidence that any state has ever attempted to use the property division in that way.

Although the law recognizes a clear continuing obligation to children, fathers bear relatively little of the postdivorce responsibility for child rearing.

Under no-fault, California mandates a fifty-fifty division of community property.⁸⁴ In other states, despite clear statutory authority to use the property division to redress need, Reynolds's work demonstrates that divisions in which a custodial mother receives more than 50%, that is, more than the share to which she is entitled without taking need into account, are rare.⁸⁵ Accordingly, a clean break with no surviving financial obligation following the divorce would necessarily impose substantial hardship—and constitute a clear denial of the costs of child rearing—in all but the wealthiest families.

Second, existing law provides no coherent legal basis for thinking about spousal support, and the courts do not fully implement the legal bases that exist. The provisions in the UMDA that limit spousal support to cases in which a spouse is incapable of self-support or employment outside the home are minimal at best. Long-term homemakers who earn a fraction of their former husband's salaries are, in the language of the UMDA, "able to support [themselves] through appropriate employment," and the custodial mothers of small children limited to low-paying jobs with flexible hours do not

have children "whose conditions or circumstances make it appropriate that the custodian not be required to seek employment outside the home."⁸⁶

Although a growing number of states also recognize lost earning potential as a basis for spousal support, few fully implement such provisions where they exist, and the recent appellate decisions reversing the failure to award support to long-term homemakers have done little to address the circumstances of mothers who bear responsibility for young children.⁸⁷ Weitzman's California study and the similar studies carried out in other states demonstrate that spousal support for any period is rare. Weitzman found alimony awarded at all in only 17% of the divorces she examined;⁸⁸ Maccoby and Mnookin claim that the current California rate in the two relatively wealthy counties they studied is closer to 30%, but put the national total at only 8.1%.⁸⁹

Third, although the law recognizes a clear continuing obligation to children, fathers bear relatively little of the postdivorce responsibility for child rearing, child support awards do not begin to make up the differences, and compliance is poor at the levels awarded. Unlike the provisions for spousal support, child support guidelines permit consideration of the "financial resources of the custodial parent" and often of the impact of custody on the custodial parent's employment prospects.⁹⁰ Nonetheless, child support awards have never accounted for more than a small fraction of child care costs because (1) they tend to focus on immediate expenses, excluding the larger impact of children on the custodial family;⁹¹ (2) they end at age 18 and therefore exclude higher education altogether;⁹² (3) they have often been set in accordance with vague standards that permit the courts to decide what is "reasonable and just";⁹³ (4) with relatively lower-earning fathers, courts tend to consider the hardship an award would impose without balancing it against the hardship lack of an award would impose on the custodial family;⁹⁴ (5) with higher-earning fathers, the courts tend to limit awards to the children's immediate expenses without considering the different standards of living that result;⁹⁵ (6) particularly with custody awards that involve a degree of joint physical custody, the courts may reduce the support award because of the greater sharing of caretaking responsibility without fully considering the impact on the lower-

earning spouse;⁹⁶ and (7) in balancing the two parents' contributions, courts often give undue weight to financial contributions while caretaking efforts remain largely invisible.⁹⁷ Compounding the paucity of the awards has been a wholesale lack of compliance. The most frequently cited figures come from a 1981 study that found no payment in 25% of all cases and partial payment in another 25%.⁹⁸ While more recent studies show some improvement, overall compliance remains poor and declines over time.⁹⁹

The level of child support has been so egregiously low that Congress has amended federal child support laws five times since 1980.¹⁰⁰ State law now requires employers to withhold child support payments from delinquent parents, and starting in 1994, from all parents, whether delinquent or not.¹⁰¹ The 1984 legislation required states to adopt discretionary guidelines, and the 1988 legislation made the guidelines mandatory. While feminists have hailed the new laws, particularly the emphasis on mandatory guidelines and automatic withholding, it is much too early to assess their effectiveness. It remains to be seen whether the new laws will be enforced with appropriate rigor for those able to pay without draconian consequences for the poor,¹⁰² whether they will adequately balance financial and non-financial contributions, particularly for noncustodial mothers,¹⁰³ and whether they will fully redress what Okin terms the "effect of judges' tendency to regard the husband's postdivorce income as first and foremost his."¹⁰⁴

Finally, the structure of the new laws leaves women with relatively little leverage in negotiating the settlements that account for the overwhelming majority of divorce awards. The fact that court-ordered spousal and child support awards are relatively low and difficult to obtain places the primary burden on the party who wishes to secure a transfer of assets. Under such a system, those most in need face the greatest difficulty in garnering the resources to retain the legal representation necessary to secure an adequate hearing and, thus, may be the most pressured to accept an adverse settlement.¹⁰⁵ Moreover, game theory predicts that the party with the greater concern for the children will be more willing to trade his or her own well-being to secure custody or other concessions for the benefit of the children, placing women at a further dis-

advantage.¹⁰⁶ Interview studies demonstrate that many men threaten to ask for custody as a ploy in negotiations to reduce the amount of child support.¹⁰⁷ Others seek joint physical custody in an effort to substitute greater parenting for reduced financial obligation.¹⁰⁸ The impact of this

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type of strategic bargaining is difficult to test empirically although virtually all theorists, whether conservative economists or family law feminists, emphasize its importance.^{106,109} Maccoby and Mnookin, in one of the few divorce studies not to rely exclusively on court records, tried to measure the impact and found that mothers who obtained sole physical custody in high-conflict cases did not appear to receive less support at a statistically significant level. At the same time, for the smaller group of mothers whose divorce decrees provided for joint physical custody but mother residence (a group of cases settled on average later in the bargaining process), a higher degree of legal conflict appeared to be associated with lower child support awards.¹¹⁰ Maccoby and Mnookin could not explain these results, but they credited, among other things, the use of support schedules and community property rules which, in California, are far less flexible than elsewhere.¹¹¹ Given the low level of support available generally and uncertainty in the resolution of an issue so much more critical, on average, to women than to men, women have no more reason to expect favorable outcomes from the great majority of cases that settle than they do from litigation.¹¹²

Taking these factors together, Weitzman presents a compelling account of the ways in which women and the children in their custody are disadvantaged in the aftermath of divorce. In entering marriage, fathers, but not mothers, are free to devote the central part of their energies to enhancing their careers, and at divorce, they retain the full advantage from that investment. Mothers devote far more of their energies to the family during mar-

riage, bear the disproportionate share of the child-rearing costs afterward, and receive little recognition or support for their sacrifices. Divorce awards, when they occur at all, reflect reluctance to impose a substantial hardship on former husbands far more than the needs or contributions of former wives and children. Under such a system, Weitzman's findings of economic hardship are not only unequivocal, but axiomatic.

Feminist Proposals for Reform

The overriding factor underlying the feminist critique of existing divorce policy is that child rearing is important and expensive and that it is an expense borne disproportionately by women. The egalitarian model of husbands and wives holding comparable jobs and sharing domestic responsibilities largely does not exist. The pretense that men and women stand on equal footing at divorce

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effectively assigns custodial mothers primary responsibility for both caring for and supporting their children. When high rates of mother custody are combined with high rates of divorce and low levels of support, what emerges is an overall shift in the responsibility for child rearing from parents to mothers.¹¹³

The consequence of this shift is not just more work for women. Middle-class women, that is, well-educated women with good employment prospects, face a clear choice between family and career. Many have delayed or foregone marriage and had fewer children once married.¹¹⁴ Although the most recent data show that more of these women are now choosing to become single parents rather than forego parenthood altogether, the net result is a smaller cohort of middle-class children as a percentage of the total.¹¹⁵ Moreover, of those children born to middle-class parents, many end up being raised in conditions of relative poverty because of divorce.

Finally, children born in working-class or poor families are more likely than middle-class children to experience divorce, and their mothers are less likely to be awarded support at all.¹¹⁶ The hardships divorce imposes on middle-class women and children constitute a disaster for the poor. Taken together, these changes amount to a systematic disinvestment in the next generation. In 1986, the proportion of children living in poverty was almost double that of adults while, in 1960 and 1970, the poverty rate for children was only one-third the adult rate.¹¹⁷ Although divorce is not the only cause, it is a major contributing factor to a wholesale decline in the well-being of American children.¹¹⁸

While there is little dissent from this picture, there is less agreement about why it occurred or about how to fix it. The cultural feminist critique places major responsibility on what Fineman terms "the illusion of equality." In her 1983 account of divorce reform in Wisconsin, Fineman blames the poverty of existing divorce discourse and the refusal to acknowledge the value of maternal nurturing.¹¹⁹ She claims that divorce reform and, indeed, discussions of the role of women in society generally, focus on two images: women as victims, dependent on men, and handicapped by their inability to participate in the labor market on male terms, and women as equals, fully capable of succeeding on the same terms as men. Missing, Fineman believes, is recognition of the needs of children, of the importance of nurturing for their well-being, and of the fact that mothers, upon divorce, are asked to meet greater demands with fewer resources than their former husbands. Fineman terms the concept of equality an "illusion" that devalues women's connections to their children and prevents recognition of the support needed for the child-rearing role.¹²⁰ She echoes Weitzman's conclusion that ". . . we cannot treat men and women as equals in the 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."¹²¹

Kay, in her review of no-fault divorce and its aftermath, agrees that the unequal position of men and women at divorce results from the unequal division of labor during the marriage and that, at least in

the short run, there must be legal recognition of the financial consequences of those roles.¹²² Kay nonetheless expresses the concern shared by many liberal feminists that we should not 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. According to Kay, episodic analysis¹²³ offers a theoretical structure within which men and women can view their 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 child rearing, episodic analysis suggests that, when both parents are available, neither should become the primary nurturing parent. She believes that men, like women, should be able to draw an important aspect of their self-esteem and identity from their parental roles and that 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.¹²⁴ To implement this view of family life, Kay notes that "since . . . Anglo-American family law has traditionally reflected the social division of function by sex within marriage, it will be necessary to withdraw existing legal supports for that arrangement as a cultural norm."¹²⁵

While the liberal feminist embrace of shared parenting and the cultural feminist dismissal of the "illusion of equality" seem diametrically opposed, much of the theoretical conflict disappears in practice. Kay's embrace of shared parenting is aspirational; she sees joint custody, for example, as "draw[ing] strength from shared parenting during the marriage" without addressing whether it is appropriate in a marriage in which one parent bore the entire responsibility for child rearing.

Fineman, in contrast, focuses on the ways in which the concept of equality imposes a straitjacket on divorce decisions made in the context of existing marriages in which there are neither equal employment opportunities nor equal assumption of domestic responsibilities. Czapanskiy bridges much of the gap between the two positions by using the distinction between volunteers and draftees to explain the ways in which the existing system reinforces the traditional division of household labor.

Czapanskiy observes: "Fathers are given support and reinforcement for being volunteer parents, people whose duties toward their children are limited, but whose autonomy about parenting is broadly protected. Mothers are defined as draftees, people whose duties toward their children are extensive, but whose autonomy about parenting receives little protection."¹²⁶

We should not encourage future couples entering marriage to make choices that will be economically disabling for women.

She argues that the key to achieving Kay's goal of shared parenting in a world characterized by the inequalities that Fineman describes is to emphasize the relationship between rights and responsibilities. She is critical of the emphasis of fathers' rights groups on equal division of family assets (as though the children did not exist) and equal authority over the children's future (as though differences in parental contribution did not exist) but not equal responsibility for the children's well-being. Czapanskiy concludes that equal rights should follow from, not precede, and cer-

tainly not be independent of, shared responsibilities.

Implementation

Most feminists, whatever their differences in emphasis, would embrace both greater sharing of parental responsibilities and greater support for child rearing as important objectives. In considering the best ways to accomplish these ends, there are both broad areas of agreement and some differences on particular proposals. But there is no dissent regarding the connection between the gendered division of responsibility for child rearing and the disadvantages women experience in the workplace and at divorce. Most feminist scholars would advocate broad-based reform that includes exami-

Virtually all feminist writing about the workplace emphasizes the need to make employment more compatible with child rearing.

nation of the workplace as well as the family, and public as well as private support for child rearing.

Workplace Reform

In considering alternatives, proposals for reform extrinsic to divorce are essential and may well command the broadest support. Virtually all feminist writing about the workplace emphasizes the need to make employment more compatible with child rearing. For fathers to be able to participate more effectively in their children's upbringing and for mothers to avoid the economic marginalization that presently accompanies their child care responsibilities requires reform of the workplace. Adequate and affordable day care, more flexible hours and leave, and greater provision for interrupted and part-time employment without assessment of a substantial career advancement penalty would contribute to greater recognition and support for the caregiving role. Liberal feminists, like Kay and Okin, who emphasize the importance of shared parenting, view these reforms as essential.¹²⁷ Feminists of difference, such as Fineman and O'Connell, who place great-

er emphasis on the special qualities associated with maternal caregiving, also embrace the reforms as important for women's protection.¹²⁸

Public Support

Virtually all scholars of the family similarly conclude that adequate provision for children requires a greater degree of public support. While divorce reform may improve the quality of life for middle-class children, in many poor families, the parents' combined postdivorce resources cannot adequately provide for the children. Moreover, the primary private solutions, expanded support obligations and more effective enforcement, work particular hardship on the fathers and mothers least able to pay.¹²⁹ As Glendon has extensively documented, the United States "stands at an extreme point" in comparison with Western European countries in its failure to provide either public or private support for the casualties of divorce.¹³⁰ Drawing on an extensive body of feminist literature challenging the traditional distinctions between public and private, Rhode and Minow emphasize that "marriage has presented a promise—between the members of the couple and also between the couple and society—that the costs of traditional gender roles will not be borne by women alone but will be spread throughout society."¹³¹

The Allocation of Resources at Divorce

Addressing divorce itself, feminists emphasize the need for a more equitable allocation of resources and burdens. The single most consistent theme is the need to reexamine the allocation of resources following divorce. Weitzman charges that "[t]he omission of the career assets from the pool of marital property makes a mockery of the equal division rule."¹³² Okin is convinced that it is judges' tendency "to regard the husband's postdivorce income as first and foremost his" that best explains judicial reluctance to order adequate levels of support under discretionary standards, and she joins Weitzman in embracing the principle that "[b]oth postdivorce households should enjoy the same standard of living."¹³³ Fineman and Kay, in the midst of their disagreement on virtually everything else, share enthusiasm for such proposals, commonly referred to as "income sharing," that would equalize the postdivorce

living standards of the two resulting households.¹³⁴

There are three principal justifications for income sharing. First, as Singer notes, postdivorce income, particularly in families with children in which the higher-earning spouse is not also the primary caretaker, inevitably reflects the division of labor within the marriage. Wage earners can devote themselves fully to their work and still enjoy children largely because of the contributions of the other spouse. Caretakers who cut back on their own employment do so at least in part in reliance on the income of the other spouse. Given the difficulties of calculating the impact of marriage on postdivorce earning capacity, and the fact that adjustments are inherently limited by the higher-earning spouse's ability to pay, equalization of postdivorce standards of living offers a certain, easily administered solution that underscores the concept of marriage as a shared enterprise. Singer accordingly proposes that postdivorce income be equalized for a period proportionate to the length of the marriage with separate provision for child support.¹³⁵

There are two primary criticisms of this model of income sharing. The principal feminist criticism is that an exclusive emphasis on husband and wife does not go far enough in providing for children, particularly if the children are still young and the marriage was a short one. These feminists emphasize, therefore, a second rationale: the continuing responsibility of both parents for the well-being of the custodial family. Rutherford suggests a per capita income division for a period that may exceed the length of the marriage.¹³⁶ Most other proposals, like Okin's, advocate comparable standards of living (rather than equal income) for the two resulting households, either for a period proportionate to the length of the marriage or until the children reach the age of majority, whichever is longer.^{136,137}

The other major criticism centers on the fact that, while a portion of postdivorce income may be jointly determined, another, potentially larger, portion is individually determined, particularly after short marriages or marriages without children. Ellman argues vigorously that the husband is not responsible for societal discrimination generally or for the choices his wife makes before the marriage and that any adjustment of postdivorce income should

therefore be tied to the effects of the marriage.¹³⁸ Glendon has long maintained that "childless and child-rearing marriages involve different social, political and moral issues and should therefore be analyzed separately,"¹³⁹ suggesting that an income-sharing approach justified for one type of marriage might not be appropriate for all. Feminist writers such as Rutherford, however, respond to both types of criticism with a third rationale for income sharing. Noting that all men benefit from the societal discrimination against women and that, even in marriages without children, women assume a much greater share of the domestic responsibilities, she concludes that income sharing ought to redress the general inequality in men's and women's prospects even if the income disparity in a particular marriage does not reflect the marital division of labor. Singer, while also advocating that income sharing be independent of the presence of children, bases her conclusion on an investment theory of marriage that treats marriage as an economic partnership in which the spouses exchange implied promises to share postdivorce income.¹⁴⁰ For Singer, income sharing depends on the same partnership principles that underlie the equal division of marital property, not on the particular arrangements of a given relationship.

Whatever rationale is adopted, the tension between treating marriage as a shared enterprise and doing justice in individual cases acquires particular force when the higher-earning spouse and the primary caretaker are the same person. If the spouse of an unemployed alcoholic both supported the family and provided the only care the children received during the marriage, why should that spouse's income, the only income available for the support of the children after the divorce,

"Income sharing" would equalize the postdivorce living standards of the two resulting households.

be shared with the other spouse? While the injustice of the result is obvious, the issue poses particular difficulties for feminists because of distrust of judicial discretion

and a reluctance to recognize exceptions to the concept of marriage as an economic partnership. Rutherford would nonetheless recognize a limited exception where a spouse had contributed neither income nor domestic services during the marriage, unless the lack of contribution resulted from non-self-inflicted incapacity.¹⁴¹

Income sharing, at least in its broadest forms, represents the clearest feminist response to the financial issues now ad-

Feminists who place the greatest priority on dismantling traditional gender roles have the greatest enthusiasm for joint custody.

dressed by both spousal support and child support provisions. Virtually all feminists emphasize the need to replace discretionary standards with firm and easily administered rules to overcome judicial bias. Most feminists, like Okin and Williams, emphasize the importance, in both symbolic and practical terms, of securing recognition of postdivorce income as jointly rather than individually owned. Many feminists, particularly the feminists of difference, insist on treating the mother-child relationship as a unit rather than addressing the needs of women separately from the provision for children.¹⁴² Finally, many feminists agree with Singer that only income-sharing proposals adequately recognize differences among women and adequately provide both for those women in traditional roles and for those women in nontraditional roles.¹⁴³

While there is broad feminist support for income sharing, there is no similar consensus behind any of the other proposals. The leading alternative is recognition of lost career opportunities as an expanded basis for alimony. Family law scholars such as Krauskopf and Parkman have long discussed this concept, there is increasing recognition in the case law, and Ellman recently argued for recognition of lost income potential as the sole basis for alimony.^{138,144} Nonetheless, there is considerable feminist hesitation about the concept. O'Connell, drawing on Fineman's work, criticizes such proposals because of the victim imagery they employ.¹⁴⁵ Women are measured in terms of

a male model of full work force participation and compensated to the extent they fall short. Singer further objects that alimony connotes the transfer to a financially needy and deserving wife of assets belonging to her ex-husband and, thus, fails to recognize a wife's ownership interest in her husband's career assets. Additionally, she contends that, because alimony is thought to involve the transfer of assets, its availability continues to depend upon both the need of the recipient spouse and the financial ability of the obligor. She believes that each of these can be, and has been, manipulated to the disadvantage of divorcing women.¹⁴⁶ Most feminists, like Singer, prefer income sharing.

A second set of proposals involves expanding the definitions of marital or community property to include professional degrees, pensions, and other assets acquired over the course of the marriage. Although there is feminist support for these proposals, none offers the possibility of a comprehensive approach without including postdivorce income. The dividing line between career enhancement that results from acquisition of a master's degree and career enhancement that results from ability to work overtime, between retention of an existing career with children and investment in a new one, is highly arbitrary. Only recognition of the full range of interactions between the division of labor within the marriage and postdivorce income offers an adequate basis for adjustment.

Finally, while there is feminist support for recent changes in child support enforcement, child support provisions remain focused on the children's immediate expenses rather than on the overall well-being of the custodial family. Genuinely shared parenting must include recognition of the impact of child rearing on both parents' households and of the importance of the postdivorce households to the well-being of children.

Child Custody

The broad consensus of feminists regarding the need to provide greater support for child rearing and to address the financial consequences of divorce does not carry over to the issue of custody. Feminists who place the greatest priority on dismantling traditional gender roles have the greatest enthusiasm for joint custody. Bartlett and Stack present a classic liberal feminist defense of joint physical and legal custody in

arguing that feminist critics have focused on the concrete and immediate effects of joint custody laws but have ignored the law's expressive or symbolic power to alter social expectations and norms.

According to Bartlett and Stack, "From the point of view of ideology, rules favoring joint custody seem clearly preferable. Joint custody stakes out ground for an alternative norm of parenting. Unlike the 'neutral' best interests test or a primary caretaker presumption, these rules promote the affirmative assumption that both parents should, and will take important roles in the care and nurturing of their children. This assumption is essential to any realistic reshaping of gender roles within parenthood. Only when it is expected that men as well as women will take a serious role in childrearing will traditional patterns in the division of childrearing responsibilities begin to be eliminated in practice as well as in theory."¹⁴⁷ They argue that many of the criticisms of joint custody result from judicial bias and that better implementation, rather than an alternative standard, offers the best way to promote women's interests.

In contrast, Becker presents the feminist case for a maternal deference standard in which courts defer to a fit mother's custody preferences, whether she prefers sole maternal custody, sole paternal custody, joint legal and physical custody, or something in between. Becker starts by arguing that "mothering and fathering continue to be different activities; mothers tend to be more intensely involved in their children's lives and tend to have greater empathy for their children."¹⁴⁸ She continues that, ". . . regardless of whether we should make equal parenting our primary goal, it is not occurring. Women continue to be the primary caretakers physically and emotionally even in dual-wage families. Women continue to invest more emotionally in children than men. We continue to socialize our daughters to do so. We should not, therefore, ignore their pain when they lose custody at divorce. Rather, we must judge custody standards in light of the emotional needs of women and children."¹⁴⁹ In concluding that even a primary caretaker standard does not adequately address the needs of women and children, Becker reviews implementation of such a standard in West Virginia. She demonstrates systematic bias against women, especially at the trial court level and especially where (1) the fathers did

more than the average father; (2) the mother "voluntarily" separated from the child at some time for some reason; and (3) the mother was sexually active outside marriage.¹⁵⁰ Becker emphasizes that, in considering these issues, judges applied a less favorable standard to women than to men, even when operating under a standard thought to favor women. After a review of the alternatives, she concludes that only explicit deference to maternal preferences (a "maternal deference" standard) can overcome pervasive male bias in the application of otherwise neutral standards and provide adequate recognition and protection for women on an issue so central to their well-being.

While few other feminists have embraced an explicitly gender-based standard, there is strong support for a primary caretaker preference. Fineman, like Becker, emphasizes the "qualitative differences between the contributions of primary caretakers (typically mothers) and primary earners (typically fathers) to the upbringing of children."¹⁵¹ She is particularly critical of joint custody statutes "which formally grant fathers equal control over their children, regardless of who provides the day-to-day care and nurturing."¹⁵² To reward "demonstrated care and concern for children," Fineman advocates a primary caretaker standard that she believes will "ensure a good future for children in

In contrast, Becker presents the feminist case for a maternal deference standard in which courts defer to a fit mother's custody preferences.

our culture" by encouraging "nurturing and concern for children in a concrete way." Such a standard, Fineman acknowledges, "may currently operate to the advantage of mothers, but if we value nurturing behavior, then rewarding those who nurture seems only fair."¹⁵³

Scott, who supports Fineman's effort to reward demonstrated care and concern for children, is nonetheless critical of a winner-take-all custody system that ignores the reality of the many modern marriages in which caretaking is shared, albeit in a variety of different ways. She proposes a proportional custody system in which par-

ents are awarded joint legal and physical custody in accordance with the level of responsibilities they assumed during the marriage.¹⁵⁴

The dispute over the nature of the maternal role is central to the divisions in modern feminism. The differences between those who favor dismantling the gendered division of responsibility for children and those who celebrate mothers' special connections to their children are largely unbridgeable. Nonetheless, there are at least four aspects of custody that command broad feminist agreement: systematic discrimination against women

The dispute over the nature of the maternal role is central to the divisions in modern feminism.

in litigation and mediation; inadequate response to domestic violence; inappropriate resolution of high-conflict disputes; and inequitable distribution of rights and responsibilities following divorce.

Bartlett and Stack, in their defense of joint custody, mention judicial bias against women as an important factor undermining effective implementation; they place particular emphasis on the tendency of judges to take more seriously the demands of men's jobs than women's and the failure to restrain male efforts to coerce, antagonize,¹⁵⁵ and manipulate their former spouses. Becker and Fineman base at least part of their appeal for maternal deference and primary caretaker standards, respectively, on distrust of judicial discretion. The fact that outcomes in litigated cases (men win more than 50% of the cases studied) diverge so radically from settled cases (sole maternal physical custody in 80% to 90% of cases nationally) and so often employ gender-stereotyped assumptions persuade virtually all feminists to favor restricted judicial discretion.

Similarly, however much many feminists agree that fathers should remain involved in their children's upbringing, they also share broad concern about requiring such contact in inappropriate cases. The legal system has historically downplayed the incidence and importance of domestic

violence and has responded ineffectually where its existence is indisputable.¹⁵⁶ Many courts do not recognize spousal abuse as grounds for denying custody or visitation despite the evidence linking parents' conduct to subsequent abusive behavior by children who grow up with such role models and despite the need for continued cooperation between mother and father to make joint physical or legal custody or visitation effective.¹⁵⁷

More complex is the resolution of high-conflict disputes. A number of studies emphasize the role of conflict as a destructive factor in children's adjustment to divorce. Fineman fears joint custody creates an incentive for husbands to seek shared physical or legal custody as a form of retaliation against their wives and for courts to impose joint legal or physical custody as a literal splitting of the child to avoid decisions in difficult cases.¹⁵⁸ Joint custody proponents like Bartlett and Stack similarly acknowledge the potential for abuse and argue that strict guidelines are necessary to preclude joint physical or legal custody in inappropriate cases, such as those involving domestic violence, and to guard against the use of shared custody as an extension of marital manipulation and discord.¹⁵⁹

Finally, virtually all feminists agree that the current allocation of rights, responsibilities, and resources is inequitable. Czapanskiy effectively summarizes the criticisms of many feminists when she concludes that "what is wrong with joint custody is that it adds rights rather than responsibilities. And what many parents and children need are responsibilities rather than rights."¹⁶⁰ Like Bartlett and Stack, Czapanskiy starts with the proposition that the expressive goal of the new ideal ought to be a fifty-fifty division of parental responsibilities and that both parents' relationship and responsibilities to the child should continue after divorce. Like Becker and Fineman, however, she also believes that the care women provide is undervalued. To remedy this, Czapanskiy advocates proportionality in the assignment of parental responsibilities with far greater recognition given to the "nonparallel allocation of nonfinancial responsibilities," that is, the fact that mothers assume a much greater proportion of day-to-day care. Rather than describe the resulting arrangement in terms of either primary caretaker or joint custody preferences, Czapanskiy advocates

a “parenting plan” in which parents discharge their respective obligations through a combination of custodial and financial contributions to the child that bring into better balance the full range of children’s needs (from buttered toast for breakfast to college financing) and the variety of parental contributions.

Conclusion

Despite their divisions, feminists agree that the large-scale movement of married mothers into the labor market has not been accompanied by a correspond-

ing increase in men’s assumption of domestic responsibilities and that, in an era of high rates of divorce, women bear a disproportionate share of the burden of child rearing without access to a commensurate share of the family’s resources. While feminists may disagree as to whether genuinely shared child rearing, independent of gender roles, is possible or desirable, they embrace Okin’s conclusion that justice requires protection for those whose assumption of domestic responsibilities renders them vulnerable.

1. See, in particular, Bartlett, K.T. Feminist legal methods. *Harvard Law Review* (1990) 103:829-88. Despite this broad definition of feminism, many women would reject the feminist label. Much of the rejection is based on the political and symbolic role of feminism over the past two decades. First, feminism is often identified with professional women and their concerns, sometimes to the exclusion of other women. Second, feminism emerged when the primary feminist struggle was to secure greater acceptance in the workplace and is often perceived as denigrating the domestic roles women have traditionally performed and the women who continue to perform them. Third, because feminists have sought to identify the ways in which the existing system subordinates women’s interests, their focus has raised fears that feminists are antimen and, therefore, antifamily. Finally, there is the word itself. “Feminism,” unlike the term “women’s movement,” sounds radical, ideological, and inflexible, like “communism” or “fascism.” For a fuller account of the reaction, see Faludi, S. *Backlash: The undeclared war against American women*. New York: Crown Publishers, 1991.

Feminism, however, has never been limited to its more radical, elite, or even more egalitarian elements. Indeed, much of the feminist writing of the 1980s and 1990s has sought to address women’s experiences more broadly, recognizing the diversity of these experiences and paying greater attention to the distinctive roles women play. See, for example, Harris, A.P. Race and essentialism in feminist legal theory. *Stanford Law Review* (1990) 42:581-616; see also Matsuda, M. When the first quail calls: Multiple consciousness as jurisprudential method. *Women’s Rights Law Reporter* (1989) 11:7-10. Feminists, for example, have been in the forefront of those celebrating the special contributions mothers make and denouncing the straitjacket which the ideology of equality imposes on women. As a movement with any intellectual coherence, feminism, which embraces a wide variety of political positions, can be defined only in terms of its insistence on addressing women’s distinctive perspectives and concerns. For a discussion of these developments, see Dailey, A.C. Book review: Feminism’s return to liberalism. *Yale Law Journal* (1993) 102:1265-86. See also Villmoare, A.H. Women, differences, and rights as practices: An interpretative essay and a proposal. *Law and Society Review* (1991) 25:385-410.

2. A thorough feminist critique might well start with questioning the exclusive focus of this volume on divorce. The importance of divorce in modern American society stems from reliance on the nuclear family as the primary mechanism for ensuring the financial well-being of children. There are many feminist critiques of the traditional family and of the work force structure that makes access to a man’s higher earning capacity central to the financial well-being of women and children, but they are beyond the scope of this article. For a review of the relationship between family and workplace, see Williams, J. Woman and property. In *A property anthology*. R.H. Chused, ed. Cincinnati, OH: Anderson, 1993. For a critique of the traditional family, see Eisenstein, H. The public/domestic dichotomy and the universal oppression of women. In *Contemporary feminist thought*. Boston: G.K. Hall, 1983. See also Eisenstein, H. The state, the patriarchal family, and working mothers. In *Families, politics and public policy: A feminist dialogue on women and the state*. I. Diamond, ed. New York: Longman, 1983.

Moreover, the emphasis on divorce necessarily focuses on those families with enough money to fight over. See, for example, Weitzman, L.J. *The divorce revolution: The unexpected social and economic consequences for women in America*. New York: Free Press, 1985. In poor families, financial awards are less important, and custody is less likely to be an issue than in wealthier families (see p. 233). Accordingly, divorce law, cases, and disputes, and the corre-

- responding feminist critiques, tend overwhelmingly to focus on the concerns of the middle class. A broader discussion would necessarily examine provision for the family outside the divorce system. See, for example, Erie, S.P., Rein, M., and Wiget, B. Women and the Reagan revolution: Thermidor for the social welfare economy. In *Families, politics, and public policy: A feminist dialogue on women and the state*. I. Diamond, ed. New York: Longman, 1983.
3. One of the divisions among feminists is disagreement over the importance of children. Some feminists, particularly "cultural feminists," or "feminists of difference" (see discussion below), believe that one of the important differences between men and women is that women care about children more than men do, are more willing to sacrifice their own interests for those of their children, and are at a disadvantage in negotiations with men as a result. These feminists believe that increasing the importance society attaches to children will benefit women and that emphasizing the importance of children should be a central part of feminist strategy. Other feminists, particularly "liberal feminists" or "sameness feminists," have attacked the identification of women's interests with children's interests and insisted that women's interests be considered in their own right. For a discussion of the differences between the two groups, see generally Williams, J. Deconstructing gender. *Michigan Law Review* (1989) 87:797-845. For a discussion of how these differences affect divorce and other social policy issues, see Joffe, C. Why the United States has no child care policy. In *Families, politics and public policy: A feminist dialogue on women and the state*. I. Diamond, ed. New York: Longman, 1983. Carbone, J., and Brinig, M.B. Rethinking marriage: Feminist ideology, economic change, and divorce reform. *Tulane Law Review* (1991) 65:953-1010. Fuchs, V. *Women's quest for economic equality*. Cambridge, MA: Harvard University Press, 1988, pp. 67-72.
 4. Fineman, M.A. *The illusion of equality: Rhetoric and the reality of divorce reform*. Chicago: University of Chicago Press, 1991, p. 176. For documentation of the wage gap and its causes, and the impact on children, see discussion below in notes nos. 15-26, 118, and the accompanying article text.
 5. Mason, M.A. *The equality trap*. New York: Simon and Schuster, 1988.
 6. The higher incidence of divorce and the inadequacy of divorce awards is part of a more general shift away from the traditional family (a two-parent household consisting of a breadwinner and a caretaker) as the exclusive societal mechanism for child rearing. For a discussion of the combined impact of these changes on children, see below. For a discussion of the conflicts women experience in an era of both greater employment opportunities and lesser recognition of the domestic roles they continue to perform, see note no. 5, Mason, for a feminist account and, for an economic account, Parkman, A. *No-fault divorce: What went wrong?* Boulder, CO: Westview Press, 1992. For a comparison of the feminist and the economic perspectives, see note no. 3, Carbone and Brinig; see also Carbone, J. Equality and difference: Reclaiming motherhood as a central focus of family law. *Law and Social Inquiry* (1992) 17:437-90.
 7. The terminology is Robin West's. See West, R. Jurisprudence and gender. *Chicago Law Review* (1988) 55:1-72.
 8. See, in particular, Kay, H.H. Equality and difference: A perspective on no-fault divorce and its aftermath. *Cincinnati Law Review* (1987) 56:1-90, and Bartlett, K.T., and Stack, C.B. Joint custody, feminism and the dependency dilemma. *Berkeley Women's Law Journal* (1986) 2:9-41, and the discussion of their work below, in notes nos. 122-125, 147, and the accompanying article text.
 9. See, for example, notes nos. 3 and 4. Cultural feminists agree with those who favor traditional family values in their emphasis on the importance of motherhood and child rearing. They disagree in that they believe women should be able to devote themselves to children without becoming dependent on or subordinate to men in doing so.
 10. See, for example, Czapan斯基, K. Volunteers and draftees: The struggle for parental equality. *U.C.L.A. Law Review* (1991) 38:1415-81. In addition, there is a radical feminist perspective that rejects both accounts. Catharine MacKinnon argues that there is no reason to believe that women's existing preferences reflect women's true preferences, that is, the preferences women would choose in a society free from patriarchal oppression. See MacKinnon, C. Feminism, Marxism, method and the state: Toward feminist jurisprudence. *Signs* (1983) 8:635-58. See also Littleton, C. Restructuring sexual equality. *California Law Review* (1987) 75:1279-337, and Lerna, G. *The creation of patriarchy*. New York and Oxford: Oxford University Press, 1986, p. 229. Radical feminists, however, tend to concentrate their critique on marriage and the traditional family rather than on divorce. For example, see note no. 2, Eisenstein.
 11. The labor force participation of women generally increased from 35% to 51% in the period from 1960 to 1986; for mothers of young children, the percentage rose from 20% to

- 50%. See note no. 3, Fuchs, p. 13. Working-class mothers have never had the luxury of staying out of the labor force. See Chafe, W. *Women and equality: Changing patterns in American culture*. New York: Oxford University Press, 1977, p. 23.
12. Bergmann, B. *The economic emergence of women*. New York: Basic Books, 1986, p. 263. Robinson reports a generational change, however, finding that, between 1965 and 1985, women's time spent on housework declined from 27 to 20 hours a week while the time spent by men increased from 5 to 10 hours a week. Robinson, J.P. Who's doing the housework? *American Demographics* (December 1988) 10:24. Hochschild's findings, however, are closer to Bergmann's. Hochschild, A., with A. Machung. *The second shift: Working parents and the revolution at home*. New York: Viking, 1989.
 13. See note no. 3, Fuchs, p. 78.
 14. For a review of the sociological and economic literature attempting to explain the failure of men to assume greater responsibility for housework, see England, P., and Farkas, G. *Households, employment and gender*. New York: Aldine, 1986, pp. 94-99.
 15. See note no. 5, Mason, pp. 123-24. Mason observes that the wage gap remained relatively constant, with women earning about 60 cents for every dollar earned by men, for more than half of a century. For a comprehensive examination of the differences between men and women's earnings, see Goldin, C. *Understanding the gender gap: An economic history of American women*. New York and Oxford: Oxford University Press, 1990. See note no. 3, Fuchs, p. 49. By the late 1980s, however, the wage gap finally began to narrow. See also Okin, S.M. *Justice, gender and the family*. New York: Basic Books, 1989, p. 144. Susan Moller Okin notes that, in 1987, women who worked year-round at full-time jobs earned 71% of the amount earned by full-time working men and that the increase to 71% was as much the result of a drop in men's income as of a gain in women's. For comparison, see also Younger, J. Light thoughts and night thoughts on the American family. *Minnesota Law Review* (1992) 75:891-915. By 1991, the hourly gap, as opposed to Okin's earnings gap, had narrowed to 78%. See, again, Goldin, p. 73. Economists attribute some of the change to an increase in women's human capital.
 16. See note no. 3, Fuchs, p. 56. Economists differ significantly in the importance they attribute to discrimination at least in part because they disagree on how to define and measure it. Victor Fuchs explains that some economists attempt to measure the extent to which the wage gap is the result of differences in human capital (typically about half of the gender differential) and then assume that the rest is the result of discrimination. He finds these studies flawed, partly because the characteristics controlled for, such as experience, may themselves reflect discrimination and partly because these studies fail to account for other gender-based differences such as those in mortality. See note no. 14, England and Farkas, pp. 159-63. England and Farkas note that statistical measures of discrimination are difficult because "we seldom have data containing information on the qualifications of applicants and employees, their preferences for job placement and promotion, and the resulting occupational distribution" and because of the feedback problems that Fuchs emphasizes. They rely, therefore, on studies of managerial attitudes that reveal consistent prejudices favoring male applicants over female applicants for higher-paying jobs to demonstrate the existence of discrimination, although the studies on which they rely fail to indicate the degree to which such discrimination has changed over time.

Fuchs and England and Farkas agree with other economists, however, that a major factor in the wage gap is the tracking of women into lower-paying jobs. Economists attribute between 6% and 39% of the wage gap to such occupational segregation, depending on the methodology and number of positions used. For a review of these studies, see Hewlett, S.A. *A lesser life: The myth of women's liberation in America*. New York: Warner Books, 1986, p. 430. Hewlett sets the overall figure at about 15%. Economists argue that discrimination excluding women from higher-paying "male" jobs "crowds" women into the lower-paying occupations open to them, depressing wages further as supply increases. See note no. 14, England and Farkas, pp. 166-72. England and Farkas observe, though, that this thesis does not correspond sufficiently well with empirical data to provide a full explanation, and they argue that other factors, including employer discrimination against positions identified with women and the interaction of discrimination with family responsibilities, are necessary to provide a complete picture. For a comprehensive review of these issues, see note no. 15, Goldin.
 17. In what England and Farkas, note no. 14, termed in 1986, "the most exhaustive analysis to date," Corcoran and Duncan attributed 44% of the earnings gap between white men and women to experience, that is, years out of the labor force since completing school, years of work experience prior to one's current job, years with present employer, the proportion of working years that were full time, absences due to illness of oneself or others, limits placed on hours or location, and the like. Corcoran, M., and Duncan, G.J. Work

- history, labor force attachment, and earning differences between the sexes. *Journal of Human Resources* (1979) 14:3-20. The relationship between the earnings of African-American men and women is more complex, given the interaction of race and gender. For a summary of the statistics showing the gap between African-American men and women to be narrower than that between white men and women, see Bruch, C.S., and Wikler, N.J. Economic consequences. *Juvenile and Family Court Journal* (Fall 1985) 36:5-26.
18. See note no. 16, Hewlett, p. 74. Conservative economists attribute a higher percentage of the wage gap to differences in human capital and family responsibilities; liberal economists attribute a higher percentage to discrimination.
 19. See note no. 3, Fuchs, pp. 60-64. Fuchs emphasizes that "[w]omen's homemaking responsibilities reduce their earnings, and, in a feedback loop, the lower earnings induce behavior that further depresses women's labor market opportunities." See also note no. 14, England and Farkas, for an explanation of the feedback effects that they find pervasive between the employment and household aspects of sexism. For a discussion of the differences among economists on the relative importance of discrimination, see Bergmann, B. Feminism and economics. *Academe* (September/October 1983) 69:22-25.
 20. Blau, F.D., and Ferber, M.A. *The economics of women, men and work*. Englewood Cliffs, NJ: Prentice-Hall, 1986.
 21. "The expectation of a domestic division of labour between men and women encourages a sex-stereotyping in education and the labour market which puts all women, whether or not they ever become mothers, at a disadvantage relative to men." Joshi, H., and Newell, M.L. Family responsibilities and pay differentials: Evidence for men and women born in 1946. Discussion Paper No. 157. London: Center for Economic Policy Research, March 1986.
 22. Polachek, S.W. Women in the economy: Perspectives on gender inequality. Paper presented at the U.S. Commission on Civil Rights Conference on Comparable Worth. June 6-7, 1984. See also Polachek, S.W. Occupational segregation and the gender wage gap. *Population and Research Review* (1987) 6:47-67. Other studies attribute between 25% and 44% of the wage gap to work tenure. See, for example, note no. 17, Corcoran and Duncan (44%), and Rytina, N.F. Tenure as a factor in the male-female earnings gap. *Monthly Labor Review* (April 1982) 105:32-34 (25%).
 23. Blau, F.D., and Kahn, L.M. The gender earnings gap: Learning from international comparisons. *AEA Papers and Proceedings* (1992) 82:533-38.
 24. See note no. 3, Fuchs, pp. 59-60.
 25. See note no. 16, Hewlett, pp. 83-84. The author also notes that the number and spacing of children affect the wage differential as well.
 26. See note no. 3, Fuchs, pp. 58-60.
 27. Maccoby, E.E., and Mnookin, R.H. *Dividing the child: Social and legal dilemmas of custody*. Cambridge, MA: Harvard University Press, 1992, p. 59. Some 53% of the divorcing women, however, had not worked full time during the marriage, 31% had not worked outside the home at all, and the others had been employed less than 30 hours a week.
 28. See note no. 3, Fuchs, p. 52.
 29. See note no. 16, Hewlett, p. 82. See also Bianchi, S.M., and Spain, D. *American women in transition*. New York: Russell Sage Foundation, 1986, p. 202. Bianchi and Spain observe that the 26% of all wives who work full time earn 63% as much as the average full-time working husband while the average wife who works for pay earns only 42% as much as the average husband.
 30. Becker, M. Maternal feelings: Myth, taboo, and child custody. *Review of Law and Women's Studies* (1992) 1:133-224. Becker terms maternal feelings, "myth and taboo." The myth is that all women find their greatest emotional fulfillment in children, especially infants, while all fathers are emotionally distant from their children, especially infants. The taboo is one "against realistically exploring either the intense pleasures or the difficulties and the pains of women's relationships with their children" (see p. 136).
 31. See note no. 4, Fineman. Becker cites Martha Fineman as one of the first family law scholars to acknowledge the different positions of mothers and fathers. See Sanger, C. M is for the many things. *Review of Law and Women's Studies* (1992) 1:15-67 for a review of the literature on motherhood. Outside family law, there has been greater discussion of these issues. See, in particular, Chodorow, N.J. What is the relation between psychoanalytic feminism and the psychoanalytic psychology of women? In *Theoretical perspectives on sexual difference*. D.L. Rhode, ed. New Haven, CT: Yale University Press, 1990.

32. Genevie, L., and Margolies, E. *The motherhood report: How women feel about being mothers*. New York: Macmillan, 1987.
33. See note no. 32, Genevie and Margolies, p. 84.
34. See note no. 32, Genevie and Margolies, p. 319.
35. Ehrensaft, D. *Parenting together: Men and women sharing the care of their children*. New York: Free Press, 1987, p. 114.
36. In the first study, the researchers interviewed only mothers; in the second, a nonrandom sample of mothers and fathers. Both studies relied on self-reports, and both are inevitably influenced by cultural reinforcement of existing gender stereotypes. Moreover, the studies focus on perceptions of mothers' emotional involvement and identification with their children; they do not establish that all mothers experience the same involvement, that fathers are incapable of similar feelings, or that these emotional connections necessarily make for better parenting.
37. See generally note no. 31, Sanger; Rich, A. *Of woman born: Motherhood as experience and institution*. New York: W.W. Norton, 1986; French, M. *Her mother's daughter*. New York: Ballantine, 1987; Swigart, J. *The myth of the bad mother: The emotional realities of mothering*. New York: Doubleday, 1991.
38. For a systematic review of the data suggesting that women have a greater demand for children than men, see note no. 3, Fuchs, pp. 67-73. Fuchs concludes that the "evidence concerning a gender difference with respect to children is not air-tight, but its appearance in so many different contexts makes this explanation more credible than any other that has been proposed."
39. There is not necessarily a "feminist" position as to whether gender differences in nurturing exist just as there is no necessary feminist position on the existence of earning disparities between divorcing spouses. Rather, there is a feminist critique of the studies employing economic or other social science methodologies to the extent those studies exclude women's perspectives or otherwise reflect systematic bias. See, for example, note no. 4, Fineman, pp. 127-43.
40. See, in particular, note no. 10, MacKinnon.
41. See Williams, J. Domesticity as the dangerous supplement of liberalism. *Journal of Women's History* (1991) 2:69-88. Williams, for example, says of Carol Gilligan's work on gender differences in moral reasoning that "Gilligan identified, not differences in women's actual behavior, as she assumed, but instead women's 'voice' in a much more literal sense: she gave a status report on female gender ideology in the late twentieth century." (Emphasis in original.) Williams's critique would apply with similar force to the studies on which Becker relies.
42. See note no. 4, Fineman, p. 8.
43. See note no. 3, Fuchs, p. 68. The author observes: "Suppose women were better than men at producing and caring for children but had no particular desire to do so, while it was the men who wanted the children and cared more about their welfare. We would probably still see the same division of labor we see now, but men would have to pay dearly for women's services. The present hierarchy of power would be reversed."
44. See note no. 3, Fuchs, p. 8.
45. See note no. 4, Fineman, p. 174.
46. See note no. 8, Kay, p. 78.
47. See note no. 8, Kay, p. 62.
48. Whatever the law, alimony awards of any kind never occurred in more than a small percentage of all divorces, and "guilt" barred alimony only in some, not all jurisdictions. See, in particular, Singer, J. Divorce reform and gender justice. *North Carolina Law Review* (1989) 67:1103-21; Melli, M. Constructing a social problem: The post-divorce plight of women and children. *American Bar Foundation Research Journal* (1986) :759-72.
49. State law varies considerably, however, in the degree to which fault considerations can still be taken into account. See note no. 8, Kay, pp. 68-77.
50. See note no. 11, Chafe. Working-class mothers had never had the luxury of staying out of the labor force.
51. The 1970 Uniform Marriage and Divorce Act (UMDA), for example, authorized a court to award maintenance only if the spouse seeking the award "(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 conditions or circumstances make it appropriate that the custodian not be required to seek employment outside the home." UMDA Sec. 308(a)(1), (2) (1970). This language was retained in the 1973 version. The UMDA did allow, however, the custodial parent's resources to be considered in determining child support. See UMDA Sec. 309 (2) (1970).

52. See note no. 2, Weitzman, pp. 164, 167; Krauskopf, J. Limited duration alimony: Uses and abuses of limited duration alimony. *Family Law Quarterly* (1988) 21:573-89; Garrison, M. The economics of divorce: Changing rules, changing results. In *Divorce reform at the crossroads*. S.D. Sugarman and H.H. Kay, eds. New Haven, CT: Yale University Press, 1990, documents the decline in permanent alimony awards but disputes a connection with no-fault. But see note no. 8, Kay, p. 58, which argues that appellate courts reversed many trial court awards as inadequate.
53. See note no. 2, Weitzman, pp. 189-90.
54. The two clearest examples are the ones most often cited in the divorce literature: the spouse who puts the other through school only to find the marriage ending upon graduation (that is, just as the return on the investment is about to be realized) and the spouse who sacrifices her own earning capacity to raise the children so that the other spouse is free to pursue his career. In both instances, the married couple undertook investments in which, so long as the marriage lasted, they both expected to share the costs and the benefits. In both instances, the divorce separated the costs from the benefits, assigning the gain to one party and the loss to other. For a more systematic discussion of these issues, see note no. 3, Carbone and Brinig, pp. 998-1000.
55. See note no. 4, Fineman, p. 221. Fineman does not distinguish between physical and legal custody in this passage, and the studies she cites refer to both forms of custody.
56. See note no. 4, Fineman, pp. 79, 80, 90. The author cites two studies: note no. 2, Weitzman, pp. 231-35, and Polikoff, N. Why mothers are losing: A brief analysis of criteria used in child custody determinations. *Women's Rights Law Reporter* (1982) 7:235-43. Weitzman's figures show that, in 1977 in Los Angeles, 63% of the small number of fathers who requested either physical or legal custody received it, a figure that includes both contested and uncontested cases. Polikoff cites Weitzman and four other studies of court records. Three of the studies show men winning about half the time; the other, 38% of the time. See also note no. 30, Becker, pp. 182-83, 192-201. Becker further reports two studies, one in a North Carolina county under a best interests standard and her own study of West Virginia appellate cases applying a primary caretaker standard, in which fathers received sole physical custody in more than 60% of litigated cases at the trial level. Becker and Polikoff also review individual cases to demonstrate the bias toward women in the decisions. See also note no. 27, Maccoby and Mnookin, p. 273. The authors suggest selection bias to the extent that only the fathers with the strongest claims pursue them through the conclusion of litigation. Maccoby and Mnookin find that, where custodial conflicts are resolved after a court-appointed evaluation, through negotiations on the courthouse steps or through adjudication, there is a fifty-fifty division between mothers and fathers.

See note no. 4, Fineman, p. 174. In the end, Fineman's point is not so much that mothers are losing custody, but that the legal system trivializes mothers' emotional connections with their children by failing to grant express legal recognition of the importance of those connections and increases the likelihood of biased decision making in the process.
57. The express maternal presumption common earlier in the century has disappeared and is widely believed to be unconstitutional. Virtually all states decide custody in accordance with a "best interests of the child standard." Thirty-seven states authorize joint legal and physical custody awards, with a few states requiring the agreement of both parents and a few states recognizing a rebuttable presumption that joint custody is in the child's best interests. One state, West Virginia, has adopted a primary caretaker standard in which sole legal and physical custody is awarded to the parent who assumed the greater responsibility for the child's care during the marriage. See Bruch, C.S. And how are the children? *Internal Journal of Law and the Family* (1988) 2:106-26.
58. See note no. 27, Maccoby and Mnookin, pp. 273-74. "Our most disturbing finding . . . concerns the frequency with which joint physical custody decrees are being used by high-conflict families to resolve disputes." See also note no. 57, Bruch, pp. 109, 122 for a review of the studies assessing joint custody.
59. See note no. 30, Becker, p. 178, at notes nos. 173 and 174; see also note no. 4, Fineman, p. 132, and note no. 57, Bruch, p. 113.
60. See note no. 5, Mason, p. 87.
61. See note no. 27, Maccoby and Mnookin, pp. 107-108.

62. See note no. 2, Weitzman.
63. See note no. 2, Weitzman, p. 339 (emphasis in original deleted).
64. See, for example, Arendell, T. *Mothers and divorce: Legal, economic and social dilemmas*. Berkeley: University of California Press, 1986 (90% of the women in the small sample studied found themselves at or near the poverty line; four years later, only 9 of 60 had been able to halt the economic fall prompted by divorce, p. 37); Duncan, G., and Hoffman, S. What are the economic consequences of divorce? *Demography* (1988) 25:641-45 (reporting 30% drop for women); Wallerstein, J.S., and Kelly, J.B. *Surviving the breakup: How children and parents cope with divorce*. New York: Basic Books, 1980 (three quarters of the divorced women studied in an affluent county experienced a significant decline in their standard of living); Wishik, H.R. Economics of divorce: An exploratory study. *Family Law Quarterly* (1986) 20:79 (120% gain for men; 25% drop for children, 33% drop for women, assuming all support paid); McLindon, J. Separate but unequal: The economic disaster of divorce for women and children. *Family Law Quarterly* (1987) 21:351-409; Bell, R.B. Alimony and the financially dependent spouse in Montgomery County, Maryland. *Family Law Quarterly* (1988) 22:225-84; Rowe, B.R., and Morrow, A.M. The economic consequences of divorce in Oregon after ten or more years of marriage. *Willamette Law Review* (1988) 24:463-84; see note no. 52, Garrison.
65. See note no. 64, Duncan and Hoffman.
66. See note no. 2, Weitzman, pp. 337-38.
67. See note no. 2, Weitzman, pp. 324, 341.
68. Krauskopf observes: "Even those who criticize Weitzman's figures differ on amount, not on significant disparity in standard of living between ex-husbands and ex-wives." Krauskopf, J. Theories of property division/spousal support: Searching for solutions to the mystery. *Family Law Quarterly* (1989) 23:253-78.
69. See note no. 48, Singer, pp. 1106-10.
70. Jacob, H. Faulting no-fault. *American Foundation Research Journal* (1986) 1986:773-80. Kay similarly argues that the broad social and cultural changes that preceded and produced no-fault legislation may be more responsible than no-fault itself for the events Weitzman describes. See note no. 8, Kay, p. 67.
71. See note no. 2, Weitzman, pp. 90-101. In arguing that no-fault reforms are responsible for the plight of divorced women and children, there are three principal arguments. The primary one is that no-fault eliminated the bargaining power of an innocent spouse whose consent was necessary for the divorce. See note no. 2, Weitzman, pp. 26-28. Elizabeth Peters compared financial awards in states that recognized no-fault grounds with the awards in states that did not and found a modest but statistically significant correlation between no-fault grounds and lesser financial awards. Peters, E. Marriage and divorce: Informational constraints and private contracting. *American Economic Review* (1986) 76:437-54. Jacob, however, using different data, found no correlation. Jacob, H. Another look at no-fault divorce and the post-divorce finances of women. *Law and Society Review* (1989) 23:95-115.

The second argument, which I have explored at length in this article, is that, contemporaneously with the change to no-fault grounds, legislatures changed the substantive bases for divorce awards. Garrison's empirical findings lend support to this hypothesis.

The third argument is that divorce awards have been lower under no-fault because of judicial misapplication of the new rules. See, in particular, note no. 8, Kay, p. 77; note no. 2, Weitzman, pp. 358-61.
72. See note no. 2, Weitzman, pp. 366, 382-83.
73. See note no. 8, Kay, p. 62.
74. See note no. 48, Singer, p. 1113.
75. See note no. 4, Fineman, pp. 11-12.
76. Fault is relevant to this issue in only one limited respect. Fault-based divorce treated marriage as a contract in which the parties promised to remain married for life and in which the "remedies" imposed at divorce could reflect breach of that promise. Recognition of no-fault grounds for divorce did not eliminate those remedies, but barring consideration of fault for any purpose did. Without identification of the party responsible for the divorce, there could be no recognition of the benefits of the parties expected from the continuation of the marriage. See note no. 3, Carbone and Brinig, p. 958.
77. For a review of the economic and empirical literature on the relationship between the divorce rate and the adoption of no-fault, see note no. 6, Parkman, pp. 71-79. Parkman ar-

- gues that “[i]t appears that no-fault divorce was a response to rather than a cause of the forces that caused an increase in the divorce rate” and that, following adoption of no-fault, there was an increase in the divorce rate for a short period which reflected, at least in part, pent-up demand. For a review of the historical and sociological forces underlying no-fault, see note no. 8, Ray, pp. 66-67.
78. See note no. 6, Parkman, pp. 71-79.
 79. See note no. 6, Parkman, pp. 72-73.
 80. See note no. 15, Okin, p. 160. Okin also notes that divorce rates are dramatically higher for African Americans. In 1983, there were 126 divorced white women for every 1,000 married women; for black women, the ratio was 297 to 1,000. In 1985, 28% of ever-married white women and 49% of ever-married black women were separated, divorced, or widowed.
 81. Krause, H.D. Child support reassessed: Limits of private responsibility and the public interest. In *Divorce reform at the crossroads*. S.D. Sugarman and H.H. Ray, eds. New Haven, CT: Yale University Press, 1990, p. 177.
 82. Rhode, D.L., and Minow, M. Reforming the questions, questioning the reforms: Feminist perspectives on divorce law. In *Divorce reform at the crossroads*. S.D. Sugarman and H.H. Ray, eds. New Haven, CT: Yale University Press, 1990. See note no. 15, Okin, p. 160. Okin also notes: “Contrary to popular prejudice, female-maintained families with children consist in only a fairly small percentage of cases of never-married women raising children alone. They are in the vast majority of cases the result of separation or divorce.” From 1980 to 1990, however, census data show that, of the children living in single-parent families, the percentage living with a divorced or separated parent fell from 73% to 62% while the percentage living with a never-married parent increased from 14.6% to 30.6%. U.S. Bureau of the Census. *Households, families, and children: A 30-year perspective*. Current Population Reports, Series P-23, No. 181. Washington, DC: U.S. Government Printing Office, 1992, p. 39. See note no. 113 below. The increase in births to never-married parents is likely to accelerate the declining importance of marriage but without any necessary implications for the well-being of divorced mothers and their children.
 83. See note no. 2, Weitzman.
 84. See note no. 8, Ray, pp. 42-43.
 85. Reynolds, S. The relationship of property division and alimony: The division of property to address need. *Fordham Law Review* (1988) 56:827-916.
 86. See note no. 51, UMDA Sec. 308(a)(1),(2) (1970).
 87. Estin provides a systematic examination of the lack of support in existing legal provisions for family caregivers. She argues that recognition of lost earning capacity is most commonly invoked to justify support for older women divorced after a long marriage and is rarely awarded to younger women capable of self-support. Estin, A. Maintenance, alimony, and the rehabilitation of family care. *North Carolina Law Review* (1993) 71:721-803.
 88. See note no. 2, Weitzman, pp. 32-36.
 89. See note no. 27, Maccoby and Mnookin, pp. 129-30. The authors note that the level of the California awards is slightly lower than the U.S. average and that compliance is also lower. They suggest that, in other states, only fathers with relatively high incomes are ordered to pay spousal support and that these men have greater ability and propensity to pay.
 90. See note no. 8, Ray, p. 49.
 91. See note no. 2, Weitzman, pp. 270-74. Maccoby and Mnookin report that child support payments constitute no more than a fraction of mothers’ postdivorce family income. See note no. 27, Maccoby and Mnookin, p. 130.
 92. See note no. 2, Weitzman, pp. 278-81.
 93. Hunter, N.D. Women and child support. In *Families, politics and public policy: A feminist dialogue on women and the state*. I. Diamond, ed. New York: Longman, 1983, p. 207.
 94. See note no. 15, Okin, p. 165. It is also rare for combined spousal and child support payments to exceed a third of a man’s income. See note no. 6, Parkman, p. 82.
 95. See note no. 93, Hunter, p. 206.
 96. See note no. 93, Hunter, p. 208. See also note no. 57, Bruch, p. 115. Bruch, however, notes some improvement on this issue. See also note no. 27, Maccoby and Mnookin, p. 155, indicating a negative correlation between joint physical custody and child support in high-conflict cases.
 97. See note no. 10, Czapanskiy.

98. See note no. 15, Okin, p. 165.
99. See note no. 27, Maccoby and Mnookin, pp. 250-51. Maccoby and Mnookin's more recent study in two California counties found that more than half (57%) of the fathers fully complied, 23% paid nothing, and 19% made partial payments. On average, fathers paid between two-thirds and three-fourths of the child support awarded, and compliance diminished over time.
100. Title I of the Family Support Act of 1988—The quest for effective national child support enforcement continues. *Journal of Family Law* (1990-91) 29:149-70.
101. See note no. 81, Krause, p. 170.
102. See note no. 81, Krause. Krause argues that child support enforcement laws have now gone about as far as they can without imposing unfair hardships on men, and he joins David Chambers in maintaining that such laws are already being enforced in counterproductive and unduly harsh ways on teenage fathers, particularly those from poor and minority backgrounds. See also, in particular, note no. 93, Hunter, pp. 207-14. Many feminists who otherwise favor strict child support enforcement are concerned about the possible disproportionate effect on poorer men and believe that the only possible satisfactory solution is a greater assumption of public responsibility. See also note no. 27, Maccoby and Mnookin, p. 265. Maccoby and Mnookin conclude: "In sum, not only could most fathers in our sample afford to pay the full amount of support awarded; they could afford to pay more."
103. While feminists generally applaud the principle that all parents are responsible for their children, they are concerned about the lack of recognition of nonfinancial contributions. Noncustodial mothers often contribute more in nonmonetary ways than noncustodial fathers, and the insistence that all parents contribute some child support whatever their income may work a particular hardship on a noncustodial mother who earns much less than the custodial father and yet contributes more than the average noncustodial father to the child's upbringing. See generally note no. 10, Czapanskiy.
104. See note no. 15, Okin, p. 165.
105. See note no. 27, Maccoby and Mnookin, pp. 109-12. The authors found that legal representation had a strong impact on custody outcomes.
106. See note no. 3, Fuchs, pp. 67-73. See note no. 6, Parkman, pp. 81-82. *Game theory* is defined as "a theoretical approach to interactive decision making, used in economics to analyze situations where prices and quantities are the outcome of bargaining by individual participants, rather than the automatic result of a competitive market." See also note no. 3, Fuchs, p. 71.
107. See note no. 2, Weitzman, p. 310. Weitzman puts the figure at one-third. See also note no. 5, Mason, p. 83, and note no. 64, Arendell, pp. 23-24. See also note no. 27, Maccoby and Mnookin, p. 102. Maccoby and Mnookin found that 20% of the fathers in their study who told the researchers that they wanted maternal custody in fact requested joint physical custody or paternal custody.
108. See note no. 93, Hunter, p. 208.
109. See note no. 2, Weitzman, p. 310; and Mnookin, R.H., and Kornhauser, L. Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal* (1979) 88:950-97.
110. See note no. 27, Maccoby and Mnookin, p. 158. In the group of mothers who obtained sole physical custody, high conflict was a negative factor in predicting support awards, but the results were not statistically significant.
111. See note no. 27, Maccoby and Mnookin, p. 157. The authors also note the possibility that the custody threats, on average, were not that credible. One wonders if the difference between the two populations—mothers who received sole custody as opposed to mothers who received joint physical custody but mother residence—may not have been that the fathers in the latter sample had more credible threats. See p. 151, Table 7.6, indicating that 40% of the cases settled after evaluation resulted in joint physical custody compared with 25% of the cases settled after mediation and 19% of the cases settled earlier.
112. Mandatory mediation also complicates women's prospects, although the effect is not the product of mediation per se, but of the interaction of mediation with women's weaker economic position and the existence of laws favoring joint custody and limiting economic support. See Grille, T. The mediation alternative: Process dangers for women. *Yale Law Journal* (1991) 100:1545-610.
113. The other part of this picture is an increase in births to never-married mothers. See note no. 2, Weitzman. While such an increase has no particular implications for divorce policy, any comprehensive child care policy needs to address the issue directly. Most feminists

posit that it is not single-parent families per se that are the problem, but the inability of single mothers, given the gendered nature of market employment, to provide adequately for their families. Joan Williams, who provides a liberal feminist critique of Carol Gilligan's work, and Martha Fineman, who presents a cultural feminist defense of female-headed families, agree on this point. See notes nos. 2 and 4. See also note no. 3, Williams.

114. See note no. 3, Fuchs, pp. 96-104.
115. For higher-earning women, the increase is a small but sharp one: from 3% to 6.4% for college-educated women and from 3% to 8.3% for professional women in the period from 1982 to the present. Ingrassia, M. Daughters of Murphy Brown. *Newsweek*, August 2, 1993, p. 58, citing U.S. Bureau of the Census figures released in July 1993. According to these figures, 62.5% of all American children were considered middle class in 1989 compared with 74.6% in 1969. During the same time period, the percentage of low-income children rose from 19.4% to 29.1% and the percentage of high-income children grew slightly, from 6.0% to 8.4%. See note no. 82, U.S. Bureau of the Census, pp. 23-181.
116. See note no. 3, Fuchs, p. 89; note no. 15, Okin, p. 160; note no. 2, Weitzman, pp. 178-82.
117. See note no. 3, Fuchs, p. 107.
118. See note no. 3, Fuchs, pp. 104-10.
119. Fineman, M. Implementing equality: Ideology, contradiction and social change. *Wisconsin Law Review* (1983):789-886.
120. See note no. 4, Fineman, p. 175.
121. See note no. 2, Weitzman, pp. 365-66.
122. See note no. 8, Kay, p. 79.
123. See note no. 8, Ray, p. 80, at note no. 388. Ray defines *episodic analysis* as "an analysis that accords legal significance to biological reproductive sex differences only during the specific episodes when those differences are being used for reproductive purposes."
124. See note no. 8, Ray, pp. 80-81, 85.
125. See note no. 8, Kay, p. 85.
126. See note no. 10, Czapanskiy, p. 1416.
127. See note no. 3, Williams.
128. O'Connell, M.E. Alimony after no-fault: A practice in search of a theory. *New England Law Review* (1988) 23:437-513.
129. See, for example, note no. 81, Krause, pp. 166-90.
130. Glendon, M.A. *The transformation of family law*. Chicago: University of Chicago Press, 1989, p. 237. See also Glendon, M.A. *Abortion and divorce in western law*. Cambridge, MA: Harvard University Press, 1987.
131. See note no. 82, Rhode and Minow, p. 194.
132. See note no. 2, Weitzman, p. 388 (emphasis in original deleted).
133. See note no. 15, Okin, pp. 165, 183 (emphasis in original deleted).
134. See note no. 119, Fineman, p. 878, and Kay, H.H. An appraisal of California's no-fault divorce law. *California Law Review* (1987) 75:291-319.
135. See note no. 48, Singer, p. 1120. Singer undertook the article, in part, as an effort to set out a justification for Weitzman's income-sharing suggestions, suggestions that also rest on the principle of recognizing the spouse's equal contributions to the marriage.
136. Rutherford, J. Duty in divorce: Shared income as a path to equality. *Fordham Law Review* (1990) 58:539-92.
137. See note no. 15, Okin, p. 138. Glendon and Fineman, without directly commenting on income sharing, have suggested that the first principle at divorce ought to be adequate provision for children and that any division between the adults ought to follow the provision for children even if that imposes a greater hardship on the noncustodial parent than on the custodial one. Glendon, M.A. Family law reform in the 1980's. *Louisiana Law Review* (1984) 44:1553-73. See note no. 4, Fineman, p. 177. For that reason, Fineman is critical of an exclusive reliance on an equal division that reflects marital contributions and prefers an emphasis, like that of Okin and Rutherford, on the custodial family's continuing needs.
138. Ellman, I. The theory of alimony. *California Law Review* (1989) 77:1-81.
139. See note no. 137, Glendon, p. 1560.

140. See note no. 48, Singer, pp. 1113-18.
141. See note no. 136, Rutherford, p. 589.
142. See note no. 4, Fineman, p. 11; see note no. 137, Glendon, p. 1560. It is for this reason as well that feminists reject the assertion of fathers' rights groups that mothers' benefits from custody should be balanced against fathers' financial advantages. Divorce divisions are not two-way affairs; the children's interests are independent from the parents', not identical with the mother's. A mother's strong preference for or benefit from a particular custody arrangement should not justify the child's impoverishment.
143. See note no. 48, Singer, pp. 1117-18.
144. See note no. 68, Krauskopf; see note no. 6, Parkman.
145. See note no. 128, O'Connell, p. 503.
146. See note no. 48, Singer, p. 1116.
147. See note no. 8, Bartlett and Stack, pp. 28, 32-33.
148. See note no. 31, Chodorow, p. 142.
149. See note no. 31, Chodorow, p. 167.
150. See note no. 30, Becker, pp. 195-97. Becker notes an unusually high rate of reversal on appeal in these cases but emphasizes the often prohibitively high cost of appeal.
151. See note no. 4, Fineman, p. 181.
152. See note no. 4, Fineman, pp. 91-92.
153. See note no. 4, Fineman, pp. 183-84.
154. Scott, E.S. Pluralism, parental preference, and child custody. *California Law Review* (1992) 80:615-72.
155. See note no. 8, Bartlett and Stack, pp. 37-39.
156. See note no. 8, Bartlett and Stack, pp. 20-21.
157. Cahn, N.R. Civil images of battered women: The impact of domestic violence on child custody decisions. *Vanderbilt Law Review* (1991) 44:1041-97.
158. See note no. 4, Fineman, pp. 6, 94, 180.
159. See note no. 8, Bartlett and Stack, pp. 35-37. The authors, however, favor imposition of joint custody even when "both parents do not at the outset agree to such an arrangement" and support additional research and experimentation to promote increased use of joint custody in relatively difficult cases. As evidence of the successful use of joint custody in acrimonious divorces, the authors cite McKinnon, R., and Wallerstein, J. Joint custody and the preschool child. *Behavioral Sciences and the Law* (1986) 4:169-83; Greif, J.B. Fathers, children and joint custody. *American Journal of Orthopsychiatry* (1979) 49:311,318; Roman, M., and Haddad, W. *The disposable parent: The case for joint custody*. New York: Holt, Rinehart and Winston, 1978; Wolley, P. Shared custody. *Family Advocate* (Summer 1978) 1:6,7,33; and note no. 64, Wallerstein and Kelly, pp. 130-31, 218.
160. See note no. 10, Czapanskiy, p. 1468.