About the Authors

David L. Chambers is professor of law at the University of Michigan.

Marsha Garrison is professor of law at Brooklyn Law School.

Herma Hill Kay is the Richard W. Jennings Professor of Law at the University of California, Berkeley.

Harry D. Krause is the Max L. Rowe Professor of Law at the University of Illinois at Urbana-Champaign.

Martha Minow is professor of law at Harvard University.

Robert H. Mnookin is the Adelbert H. Sweet Professor of Law at Stanford University.

Deborah L. Rhode is professor of law at Stanford University and director of the Institute for Research on Women and Gender.

Stephen D. Sugarman is professor of law at the University of California, Berkeley, and director of the Program in Family Law of the Earl Warren Legal Institute.

Franklin E. Zimring is professor of law at the University of California, Berkeley, and director of the Earl Warren Legal Institute.

Divorce Reform

at the Crossroads

STEPHEN D. SUGARMAN

HERMA HILL KAY, Editors

With a Foreword by Franklin E. Zimring

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Introduction

STEPHEN D. SUGARMAN

Divorce is an especially critical issue today. Divorce rates have climbed so rapidly that half of all marriages and the children of them will be touched directly. This means more families being supported by single parents, more child custody arrangements to be worked out, more remarriages and stepparent interests to be concerned about, more children who spend a portion of their youth living apart from their biologic parents, and so on. For all too many Americans, primarily women and children, divorce means being plunged into poverty.

This is a book about divorce law and policy written by legal scholars. Several chapters describe and appraise two decades of change in various aspects of domestic relations law. Several others feature divorce law's impact, both reporting for the first time the results of large-scale empirical studies and reassessing the past work of others. Some of the chapters are centrally about future reform—what divorce law should become or is likely to become.

Broadly speaking, the book has two themes: what has happened so far since the no-fault divorce revolution began in the 1960s, and how future reforms should be shaped. In general, the first four chapters are about the last twenty years, and the last three are about the next twenty. Chapter 1 tells the history of divorce reform from the 1960s to the present, including very recent legislative responses to several of no-fault's critics. Chapters 2 and 3 introduce new findings on child custody arrangements and the economic outcomes of divorce. Chapter 4 sets the barely begun legal recognition of stepparents in the context of our equivocal feelings about the roles stepparents should and do play. Chapters 5 and 6 explore the financial obligations that former spouses ought to have toward each other and that noncustodial parents ought to have toward their children. Chapter 7 completes the volume by providing feminist perspectives on several of the topics explored earlier.

Although many who write about divorce appear to have a certain type of couple in mind, it is important to emphasize at the outset the diversity among divorcing couples. Although a majority of divorces involve minor children, two in five do not. Even though many long-married couples di-

vorce, a majority of marriages that end do so before the couple's fifth wedding anniversary. Although most divorced spouses will remarry in fewer than five years, a significant minority will never remarry. And, of course, divorce occurs in all social classes and ethnic groups. These facts mean that there is no stereotypical couple (if there ever was) around which one can structure marriage, divorce, and remarriage policy. The law must serve this diversity of families with different needs.

Just as divorcing couples vary, so does no-fault divorce law. As Herma Hill Kay explains in chapter 1, although the broad concept of divorce without fault has now been accepted throughout America, the national norm does not reflect the pioneering California regime, where unilateral divorce is available without delay. Many states require a considerable waiting period if only one party proposes a no-fault divorce, and in a few states including New York, no-fault divorce is available only by mutual consent.

Some lament the shift to no-fault divorce. They find it worrisome that in such a short time society so fully abandoned a regime under which, formally at least, the state carefully regulated when divorce would be permitted. Moreover, most states have skipped over, as it were, the idea of divorce by mutual consent to embrace unilateral divorce. Watching no-fault in operation, these critics bristle when they see that spouses can end their marriage without taking into account the interests of the children and that a guilty spouse can so readily sever marital ties from an objecting and innocent one.

Whatever sympathy there may be for this viewpoint, talk of reregulating divorce is virtually absent from the current discourse about reform. One reason is that in these times of moral uncertainty, where traditional religious values no longer dominate public policy concerning the family, there can be no easy agreement on which divorces we should to try to curb. Indeed, there is considerable sentiment for the proposition that only the spouses themselves can know the answer. Another reason society is likely to continue to delegate the decision to terminate a marriage to the realm of private ordering is that, as a practical matter, there is no very good policy alternative. The fault principle worked badly in practice. Simply giving one party a veto creates undesirable incentives and does not help when both parents put their own interests way above their children's. Nor does it seem promising to provide the children with an ombudsman or separate advocate who could block the divorce. The couple might then just live apart. Besides, how is an outsider to determine the best interests of a young child other than by imposing on the family the ombudsman's own values? Therefore, the authors here assume that for the foreseeable future, states will neither require the moving party to demonstrate socially condemned behavior by the other nor stop divorces in the name of the best interest of children.

In describing and assessing the no-fault divorce revolution, commentators accent different contexts. In the previous paragraphs the focus has been on the grounds for divorce. But many take the no-fault regime to include as well the rules governing property division, spousal support, child support, and child custody—those key issues that must be settled between the parties beyond the bare fact of the divorce itself. Indeed, these are the areas in which most no-fault critics have sought change and where, following the initial wave of no-fault enactments, most legislative action has centered. Even more broadly, discussion of no-fault comprehends not merely the formal law and its changes but also the judicial application and enforcement of the divorce regime. Most widely, some look at no-fault as part of the general environment in which the new system is functioning. That environment can include, for example, the roles of men and women in the labor force and in home life, the place of stepparents and biologic parents after second marriages, and the public commitment to the financial well-being of those involved in divorce. The chapters that follow attack the subject with a range of wide-angle and telephoto lenses.

Some writers and many state legislatures endorse the view that, whereas it is right to remove fault as a ground for divorce, fault should remain a factor in the allocation of rights and responsibilities of individual couples concerning both their financial matters and the custody of their minor children. One of the key actors in California's initial adoption of no-fault, Herma Hill Kay, challenges that view here, arguing instead that states nationwide should remove fault considerations altogether from the divorce process.

Many have charged that no-fault divorce has harmed women. It is important to distinguish among different meanings of this claim. Some have contended that women are worse off under no-fault than they were under the fault system. But no-fault might be harmful to women in another sense—one that is indifferent to women's treatment in the past. Rather, women may fare badly as compared with some other standard—for example, as compared with how men fare or as compared with how women *should* be treated. Still another perspective is that though women have always been shortchanged by divorce, the problem is more acute now that the divorce rate is so much higher.

The chapters that follow examine these issues in a variety of ways. They

present contrasting interpretations of how no-fault has functioned so far and several images of how it ought to function in the future. In addition to examining the consequences of no-fault, including its perhaps unintended consequences, this book addresses matters that the original no-fault reformers did not consider.

Has no-fault divorce undermined the ability of women to obtain physical custody of their children? Robert Mnookin's new findings on child custody desires, requests, and outcomes in California, reported and discussed in chapter 2, suggest that in most cases it has not. Nor does he find a large incidence of strategic bargaining whereby a divorcing spouse asks for more custody than he or she actually wants in order to obtain some other advantage in the settlement.

Have divorcing women suffered financially because they have lost bargaining power as a result of the shift in the grounds of divorce from fault to no-fault? Combining the results of her new New York study, reported in chapter 3, with the findings of earlier studies, Marsha Garrison concludes that, overall, they have not.

Do divorced women obtain significantly less property and spousal support under the no-fault regime than before? Reassessing the data presented in the most prominent study in the field, Lenore Weitzman's *The Divorce Revolution*, I argue in chapter 5 that they do not.

Yet all the authors here who address the issue agree that a large proportion of divorced women, especially those with young children, face very serious financial problems and a reduced standard of living. Hence, regardless of the role that the adoption of no-fault may have played, this plight ought to be a matter of high priority for future reform. What should be done?

A large proportion of women now deals with this predicament by remarrying fairly soon after divorce, although many do not. Some may be effectively pushed into a new marriage they might otherwise not wish to make. Other women seek to increase their earnings in the paid labor force. This may be difficult, given inadequate child-care facilities. In any event, many simply do not have this option. They are already working up to their earning capacity and have no real prospects of making more money, either because of discrimination in the marketplace or because of the limited skills they possess, having previously devoted themselves to homemaking. Some newly divorced mothers are forced actually to reduce their earnings once they become single parents because their former husbands are no longer available to shoulder some of the child-rearing and home-care duties.

Should society make divorced fathers pay more, and if so, on what basis? These are complicated and controversial questions about which the authors here have differing views. A longtime advocate of effective child support enforcement, Harry Krause, discusses in chapter 6 America's increased success in this direction. But he cautions that trying to meet the financial needs of children of divorce only from the wallets of their noncustodial fathers may be a wrong approach, arguing that many of them cannot meet, or in fairness cannot be expected to meet, the obligations being imposed on them. In chapter 5, I examine a wide range of grounds on which increased spousal support might be based, rejecting several theories that various writers have proposed and providing support for some others. Herma Hill Kay, in chapter 1, offers a program for a "nonpunitive, nonsexist, and nonpaternalistic" regime of financial rights and obligations of the parties. And what should be the role of stepfathers? Their highly ambiguous status is explored by David Chambers in chapter 4, where the law's traditional rejection of any special rights or obligations of stepparents is described and evaluated.

Should society better support the needs of divorced spouses and their children? Several authors here say it should. Deborah Rhode and Martha Minow argue in chapter 7 that society ought to stop trying to treat divorce as a private matter and accept public responsibility for its consequences. Since public policies have contributed importantly to gender inequality, reform, they argue, must extend well beyond domestic relations law. What exactly society should do differently is more controversial. Rhode and Minow offer a vision in which further divorce reform is but a part of a broader transformation of society and the roles of men and women. Kay concurs in this vision, but other authors here have less sweeping outlooks.

The reader will find some tension among the authors—for example, on subjects such as whether (and if so, how) wives who made economic sacrifices for their husbands should be compensated upon divorce, and whether (and if so, how) new family connections made by former spouses should influence their ongoing postdivorce financial obligations to each other.

All agree, however, that divorce reform is now at an important crossroads. This volume seeks to cast light on the various paths that future reform might follow.

5 Dividing Financial Interests on Divorce

STEPHEN D. SUGARMAN

This chapter addresses the financial impact of no-fault divorce, especially its alleged harmful impact on women.[1] We can assess no-fault's impact from quite different perspectives. One encompasses contrasting what has happened under the new regime with what it promised. It turns out that not much can be made of this comparison, however, because divorce reformers did not seem to have given the question a great deal of thought. Certainly, no representations were made that, as a result of no-fault, women would fare better financially than in the past or that they could look forward to a standard of living after divorce equal to that of their former husbands.[2] Rather, no-fault divorce primarily sought to rid domestic relations law of the bad features of the old system—bitter recriminations, private detectives, cooperative lying about adultery, the stigma of being divorced, and so on.

At the same time, no-fault advocates surely did not intend to make women financially worse off.[3] But, according to several observers, the new system, unintentionally, has had this result. On this view, no-fault divorce might be described as yet another example of good liberal intentions gone (at least partly) awry.

This seems to me to be the main (although by no means the only) theme of Lenore Weitzman's enormously influential book *The Divorce Revolution*, which compares outcomes under the new regime with outcomes under the old. The first part of this chapter explores that sense of "impact." Yet my conclusion is the opposite of Weitzman's. Reexamining her data, I argue that there is little reason to think that women as a class are importantly worse off financially under California's unilateral, no-fault divorce system than they were under the pre-1970 fault regime (or would be were the fault regime still in place). This does not, I should emphasize, speak to whether women fare well, or as well as they ought, under no-fault, but only to their comparative position (generally poor) under both the old and the new systems.

The remainder of this chapter explores "impact" by comparing the current regime with what the rules for dividing financial interests between

husbands and wives on divorce should be.[4] The second part examines several approaches that are favored by others but that I consider to be unproductive. First, I explain my objections to partially reintroducing the fault principle—either by employing it around the fringes of divorce law for cases of extreme misbehavior or by trying to base no-fault divorce rules on presumptions of fault. Next, I scrutinize and reject the contention that convincing solutions for divorce law may be found in analogies to traditional contract law or partnership law.

The third part examines behavioral incentives. This material is designed to canvas in a systematic way how divorce law might influence conduct at various points in the couple's relationship—premarital, during marriage, on divorce, and postdivorce. The significance of these behavior-shaping forces to divorce policy is importantly empirical—how much do they really matter? There are few firm data on this question, however, and I have my doubts about their magnitude.

In the final part I explore a variety of fairness claims upon which no-fault rules might be based. I criticize as unconvincing the assertion that the financial goal on divorce ought to be to equalize the (long-run) standard of living of the former spouses. In the process I argue that Weitzman's claim that under no-fault divorce women fare drastically worse financially than do men is exaggerated.

I also criticize theories for allocating financial interests on divorce that are rooted in detrimental sacrifices that one spouse is said to have made to the advantage of the other. I offer instead three separate fairness-based arguments that I think have considerable persuasive power in determining what is just for divorcing couples. One is rooted in the principle of necessity, a second rests on the right to fair notice, and the third I call merger over time.

The chapter ends by sounding a theme of Deborah Rhode and Martha Minow's chapter: ought there not be some collective responsibility for the financial well-being of spouses after divorce?

Fault and No-fault Outcomes Compared

Are women *importantly* worse off under the no-fault regime than they were under the fault regime? I do not believe that Weitzman's California data, comparing results before and after the adoption of no-fault in 1970, demonstrate that they are—despite her interpretation to the contrary. Rather,

Table 5.1. Percent of Divorcing California Husbands and Wives Who Obtain a Family Home (or Its Equity), by Year

	1968	1977
No house to divide	60	54
Majority to wife	24.5	21
Majority to husband	6.5	9
Equal division	9	16
	100%	100%

my reading of her data is that however poor the financial position of just-divorced women may look under no-fault, this basically reflects a long-standing pattern. My conclusion certainly does not imply that the no-fault system is necessarily fair to women but rather that, on the whole, it is not importantly more unfair to them than was the fault system.[5]

It is conventional to say that there are two categories of financial interests to be allocated on divorce—property and future earnings—with separate principles and mechanisms governing their division. Since this is what the law formally does and is how Weitzman attacked the problem, I will adhere to this convention.[6]

With respect to property, I believe Weitzman's data primarily show that more than half of divorcing couples do not have a significant amount of (conventional) property to divide up.[7] Therefore, for those couples the wife cannot be importantly worse off on this dimension under no-fault as compared with the old system. Neither now nor then has there been anything significant to award to her.

Other divorcing couples, however, have one and ordinarily only one important piece of property to divide, and that is the couple's home. So the question I asked of Weitzman's data is, do women get the family home significantly less often under the no-fault system? As I read table 5.1, which I have constructed from information reported in Weitzman's book, the differences are very small; for example, women obtain a majority interest in the family home less often about three and a half times out of a hundred. Put differently, Weitzman's data suggest that for every one hundred divorcing couples, fewer than a handful of homes go to men post-no-fault where they went to women pre-no-fault. More houses were equally divided in 1977; but more couples owned houses then.[8]

Table 5.2. Percent of Divorced California Wives Awarded Spousal Support, by Year

	1968	1972	1977
No spousal support	81	87	83
Some awarded	19	13	17

Table 5.3. Percent of Divorced California Wives with Different Lengths of Marriage Awarded Alimony, by Year

	1968	1972	1977
Under 5 years	13	5	4
Over 10 years	31	30	38

When I look at the data on spousal support from future earnings, I see the same general picture. The story was supposed to be that before no-fault women were regularly awarded alimony and for life, whereas now they often obtain no spousal support, or lower amounts, and then only for short periods. But Weitzman's data show (a point she properly makes a great deal of) that fewer than 20 percent of divorced California women were awarded alimony in 1968.[9] In brief, it is a myth that alimony was routinely imposed under the fault system.

How does the no-fault system compare? As table 5.2, again constructed from Weitzman's book,[10] shows, between 94 and 98 percent of women were treated the same under both systems in terms of whether or not they were awarded spousal support. Put the other way, between two and six women in a hundred do not get alimony who previously did. I do not deny that this is a change, but it hardly seems an important change.

In table 5.3 spousal support award data are presented in terms of the duration of marriage.[11] It reveals that women with short-duration marriages (under five years) fared somewhat better under the fault system, but that those with longer marriages (over ten years) are probably doing slightly better under the no-fault system. This result is hardly consistent with the stories often told about no-fault in which the longer-term married woman is seen as having been most victimized by the change. Once again, this by

no means argues that long-term married women are treated well by divorce law; it addresses only their relative treatment under the two regimes.

Do women who receive spousal support receive less (in constant dollars) than those who received awards under the old system? Not as I read Weitzman's data. Those with awards in the 1968 sample received an average of about $300 a month (in 1984 dollars).[12] By contrast, those with awards in the 1977 sample received a mean of about $575 a month and a median of about $367 (in 1984 dollars).[13] To be sure, since the 1977 sample included proportionately more longer-married women receiving spousal support awards, as compared with the 1968 sample, one might predict somewhat higher average awards, but given the data Weitzman reported, I do not think I can adjust for that. Therefore, at least I can say that the change to the no-fault regime does not seem to have been accompanied by lower sums being awarded to those women who receive awards. Nor does Weitzman claim this has happened.

What about the duration of the awards? Remembering that 81 percent of women before and 83 to 87 percent of women after received no award, nonetheless, did those who received awards in the past at least have longer awards? Here there does indeed, at least at first blush, seem to be an important distinction between the two regimes. Whereas 62 percent of the awards were said to be permanent before, only 32 percent were after.[14]

But this does not tell the whole story. First, many women remarry fairly soon after their divorce (within five years) and typically under the old rules their "permanent" awards then ended. As a result, for those women a longer guarantee turned out not to be important in terms of the money they received.

Second, alas, large numbers of men have always defaulted on their continuing spousal support obligations, and increasingly so as the date of divorce recedes in time. Therefore, once again the value of a permanent award is often less than the legal formality suggests. None of this is to imply that it is either fair or unfair for support awards to be of permanent duration. But these factors make me quite skeptical about whether that extra one third of women with permanent awards in 1968 (constituting about six in a hundred women divorced that year) actually found the durational feature of their award a significant advantage in practice.

In sum, I am simply unconvinced that Weitzman's data from actual court records show that California women as a group fare importantly worse under no-fault as compared with how they fared under the fault system.[15] Yet, when one reads her book one is led to the opposite conclusion. Why is this?[16]

For her, the point is to focus on those cases where there is some property to divide and where some alimony or spousal support is awarded, and to demonstrate for such cases a statistically significant change in result. I, in contrast, am looking at all divorced women and am considering the magnitude of any shifts that have occurred in that context. Thus, where Weitzman finds lots of change and an alarming trend, I see that overall things are pretty much the same as always.

Which is the more helpful view of the data? Weitzman has performed a very valuable function. Not only has she collected and analyzed extremely interesting information, but by doing so she has played a key role in making further divorce reform an important policy issue. But the problem I have with her emphasis upon a comparison of the old and new systems is that it suggests a solution I am confident she would reject.

That is, suppose the law were changed so that the patterns of property and spousal support awards under no-fault were altered, and women were no longer, in Weitzman's terms, worse off under no-fault than before. Would that "solve" the problem? To the contrary, surely most policy analysts concerned about the situation of women after divorce, including Weitzman, would be wholly unsatisfied with such a result. Or suppose that Weitzman had found that women were better off under no-fault to the same extent that she found them worse off. Would no-fault then be seen as a big success story? I somehow doubt it. Instead, I imagine, Weitzman would have written a different book, but still emphasizing the financially weak postdivorce position of women—something like "the far-from-finished divorce revolution."

Ironically, even though I strongly believe that getting women back to where they were financially under the fault regime is very much the wrong goal of divorce law, it is perhaps oddly good for the political future of women's interests that Weitzman found the changes she did. Otherwise, it might have put the discussion of further divorce reform on the back burner, or at least cast it in a less appealing light.

Nevertheless, for those who are concerned about the plight of women under no-fault divorce, Weitzman's research convinces me that what is required as a persuasive theory, or at least a well-argued program, for allocating financial interests on divorce that is not at all anchored in a comparison with how women fared under the fault system.[17] That will be the focus of the remainder of the chapter.

Some False Starts

A Residual Role for Fault?

My discussion will assume that we will not go back to a system of conditioning divorce upon fault-finding in individual cases. Nonetheless, I will air here some ideas about potential residual roles for fault in a no-fault scheme.

Even if the decision to grant a divorce is not based on fault, the rules pertaining to financial rights (and the custody of children) could depend upon marital conduct, as remains the case in some states and in other countries today. Plainly, the rhetorical force of an attack on the California-style no-fault system can be enhanced if set in the context of an innocent and a guilty spouse. For example, a specific case of a faithful, older woman who has been cruelly abandoned by her husband for another woman may evoke in many people the feeling that this woman should have special financial entitlements even if she should not be able to block the divorce.

Although my purpose here is not to try to make the case for the California-style no-fault divorce regime, my assumption is simply that, overall, the social costs of considering fault, even when restricted to determining the divorcing couple's financial rights and duties, are thought to outweigh the benefits—even though that means abandoning the attempt to "do justice" in individual cases. That someone may not like the way no-fault divorce works when the other spouse is unilaterally divorcing her or him, but likes it when it is the other way around, hardly demonstrates that the shift to a thoroughgoing no-fault regime was a mistake.[18]

Yet the exclusion of fault considerations from the parties' financial settlement need not be an all-or-nothing matter. For example, even relatively pure no-fault accident compensation schemes still typically recognize a residual role for fault in extreme cases.[19] In workers' compensation, intentional self-injury, on the one hand, bars worker claims, and especially bad employer conduct, on the other, leads either to an enhanced compensation award or the right to sue in tort on top of the workers' compensation award. Even in New Zealand, where accident law has essentially been obliterated and replaced with a comprehensive accident victim compensation plan, victims still retain the right to sue, in extraordinary cases, for punitive damages.

Analogously, we could maintain a role for fault in that small proportion of divorce cases involving especially reprehensible conduct. One way to do that would be to apply to such situations different rules for property division and spousal support.[20] Alternatively, perhaps, the wronged spouse could be allowed a separate tort suit for damages that would supplement the basic no-fault rules of domestic relations law.[21]

In either event, however, I believe we would have considerable difficulty in achieving a social consensus as to what sort of conduct in the marriage context is to be considered equivalent to the malicious or despicable behavior that generates punitive damages in torts cases today. I imagine that simple adultery would not; on the other hand, spousal battering probably would. Yet other situations might be quite ambiguous.

Without reasonably clear standards, however, we run the risk of reinjecting fault into nearly every divorce case. Indeed, in order to ward off the risk of a suit for legal malpractice and for whatever bargaining leverage it might bring, divorce lawyers could be strongly tempted routinely to include a tort claim (or a claim for an enhanced, fault-based, divorce award) on behalf of every one of their clients. That would surely be an undesirable result if the social goal was to have an essentially no-fault system that provided extra financial compensation only to victims of extreme marital behavior thought to occur in, say, 5 percent or fewer of the cases. One strategy for preventing such an outcome would be to restrict extra awards to cases involving essentially physical, rather than emotional, harm. But given the American tort law experience in other contexts, it is by no means clear that excluding all emotional harm–based claims in the divorce setting would be either a desirable or an administratively feasible screening device. Hence, on balance, this approach may be rather more alarming than attractive.

Irrebuttable Presumptions of Fault?

Some people might ideally prefer the law to be based on fault, believing that the propriety of the conduct of the parties during the marriage should be the key determinant of their financial rights and obligations on divorce. At the same time they may conclude that it is not desirable to try to administer a regime that requires determining in each case who is in the wrong. Might we instead sensibly run a no-fault system that seeks to approximate fault through the use of irrebuttable presumptions? I doubt it.

Surely, deeming either the party who files for divorce or, alternatively, the one who is sued to be the innocent one, and the other party the guilty one, would be unacceptable, especially in view of the undesirable incentives such presumptions would create. So, too, I think the public would find it wrong to adopt a regime premised on the assumption that men (or women) are

usually at fault. Nor does it seem fair to view as the innocent one either the primary caretaker of the children (where there are children), or the lower earner, or the one who does not want to remarry immediately, or any other non-fault category that I have been able to think of.

Even if there were considerable overlap between fault in many specific cases and the criterion used, the problem is that the simultaneous over-inclusiveness and underinclusiveness of any such criterion makes it highly offensive when those irrebuttably presumed against are not in fact at fault and when those who are in fact at fault fall outside of the presumption.

To be sure, we effectively presume fault in other areas of the law, such as in tort law when we impose strict liability on manufacturers of defective products. Yet, at least in that setting, the risk of liability can be planned for, insured against, and ultimately distributed among the purchasers of the product, any one of whom might have had the bad luck to encounter the dangerous item. But this is simply not analogous to the marriage and divorce setting. Presumed fault liability here is more analogous to a rule that would jail anyone found in possession of what turned out to be stolen goods with no consideration given to how the defendant actually obtained them (for example, as a bona fide purchaser or through an unsuspicious gift).

This difficulty with using presumptions of fault does not make it unacceptable for the law intentionally to favor, say, women or, say, primary caretakers—so long as that preference is based upon reasons other than the presumed fault of the other spouse. This does highlight the need for those "other reasons" to be convincing, however. Otherwise, critics may be tempted to characterize specific proposals as irrebuttably presuming, for example, that the man or that the woman is at fault.

Marriage as Contract?

Can marriage be thought of as a contract in which fairness is found by applying ordinary contract principles to determine the allocation of the husband's and wife's financial rights and duties on divorce? I do not think so.[22]

Marriage, at least in this century, is typically said to be best understood as a status, rather than as a contractual, relationship. Yet I believe that ordinary contract law provides a much better analogy to the law governing the marriage relationship under the fault system than under the no-fault regime.

By this way of thinking, marriage in the past was like a long-term contract for an indefinite period in which both parties made promises for a lifetime together. When one breached, this was supposed to lead to the award of damages to the other in the form of property transfers and alimony obligations.

Today, however, although we can still talk about marriage as a contract, under pure no-fault divorce like that available in California, it is more like a contract-at-will from which either party can unilaterally walk away. There is no place for the concept of breach and resultant damages. The analogy, rather, is to the way we traditionally have thought about employment relationships, where an employee could quit and an employer could discharge for any reason. Interestingly enough, employment relationships in modern times are increasingly subject to "wrongful discharge" limitations that give rise to suits for damages, indeed sometimes punitive damages, against the breaching party. But since "wrongful discharge" is clearly rooted in bad conduct, this analogy does not fit modern marriage law so long as we are going to stick to no-fault principles.

The upshot is that, under no-fault, the contract law analogy provides no guidance for the allocation of the couple's property, and if it says anything about spousal support, it would appear to reject it. Although "no-fault, no-responsibility" divorce law might be what society wants,[23] it is not persuasive to reach that normative solution simply by pointing to the law of contracts-at-will. The question is whether our society's values concerning marriage "contracts" are the same as those concerning contracts-at-will, and to determine that requires looking outside of contract law to see what our values are.

Marriage as Partnership?

Perhaps a better legal analogy to no-fault divorce can be found in partnership law. The idea is that through marriage the man and woman have joined together (50-50?) in an economic partnership, which, like partnerships generally, can be dissolved by either party. On the ending of the marriage partnership, like other partnerships, there is to be a winding up of the partnership's activities and a distribution of the partnership assets. In traditional partnership law there are some special tortlike rules governing unusual cases where one partner is seen to take unfair advantage of the other party by breaking up the partnership. But since these turn on fault and are thus inconsistent with my assumptions about no-fault divorce, I put them aside here.[24]

Under the partnership analogy all earnings generated by the couple during the marriage would seem to belong to the partnership, as would any things bought with those earnings and any earnings left unspent and saved or invested. In traditional financial partnerships, ongoing distributions are often made that exceed the immediate consumption needs of the partners. These sums cease to be partnership assets, and the individual partners can separately invest them or spend them as they wish. In the marriage setting, however, it is as though, as a general rule, all the extra income and asset appreciation of the partnership is simply retained and reinvested in the partnership. But given the nature of marriage partners, as contrasted with ordinary financial partners, this seems right.

At the same time, just as financial partners contribute only some of their property to the typical partnership, certain items of property belonging to the husband and wife could be seen as outside the marital partnership and not subject to division on the marriage's termination. They might include assets the parties bring to the marriage and do not commingle with other marital property, and those gifts and inheritances separately received by either party during the marriage and maintained separately.[25]

If marriage under no-fault is to be seen as a conventional partnership, no formal distinctions would be made between long- and short-duration marriages; to be sure, in long-duration marriages, there might be more assets to distribute. So, too, the family home would not be treated differently from any other asset. The implication of minor children would be ambiguous since there is no obvious counterpart in ordinary partnerships. Does gaining custody mean that you have obtained a partnership asset, or merely that you have assumed a partnership liability for which you should be compensated?

Most important, under the partnership analogy there would be no spousal support. That is, in the traditional partnership, even though the partners agree to make their earning capacity available to the partnership during its lifetime, they ordinarily just walk away from the dissolved partnership with all their own human capital. This applies both to the human capital they brought to the partnership and to any enhanced human capital they gained during the operation of the partnership.

As with the contract law analogy, however, it does not follow that there should be no spousal support obligation after a no-fault divorce just because there seems to be no parallel in partnership law. We could adopt this solution to make the analogy complete, but that requires first making up our minds as to what is socially desirable.

Traditional financial partners, of course, may anticipate certain problems of partnership breakup and, if they wish, enter into alternative arrangements at the outset. For example, they might want to agree to certain buyout provisions, or notice provisions, or postpartnership client-sharing provisions, in order both to induce each other to form the partnership initially and, in case of a falling out, to govern their financial relationship on terms different from what the default rules of partnership law provide. They also might agree to be other than 50-50 partners originally. Perhaps married couples could also be encouraged to make specific agreements in advance. But, in fact, nowadays nearly no one does so. (This practice seems largely restricted to the very rich and those entering into second marriages who want to protect the financial interests of children of the first marriage as against the second spouse.)

In view of that, and on the grounds that marriage is a very special sort of financial partnership, we could instead try to think about what special partnership terms marrying couples would likely agree to, a topic I will explore more fully below. But this, of course, takes us away from using the provisions of current partnership law as the basis for resolving the couple's financial rights and obligations.

Finally, we could, of course, keeping fairly close to conventional terminology, decide to treat the parties to a marriage partnership as permanently joining their human capital upon entering into marriage. Alternatively, we could decide to give the divorcing parties back their premarriage human capital but divide between them their enhanced earning power. Or we could elect to divide enhanced human capital only under certain circumstances, such as when one spouse made a specific financial sacrifice for the other. Or we could elect to have rules for human capital sharing that are meant in some way to replace the fault-based part of regular partnership law that we have excluded from divorce law. But the question is, *should* we treat human capital in one of those ways (or in other ways)? Imagining that we could do it, and further recognizing that our solution can then fit reasonably comfortably into only moderately altered partnership law models, hardly provides the answer.

Behavioral Incentives

This part explores the prospects of divorce law serving a behavior-channeling function at various stages in the relationship between the cou-

ple. The idea is that divorce rules could be selected on the ground that they promote socially desirable conduct and discourage socially unwanted conduct.

One way to think about desirable incentives is in terms of what private agreements would-be husbands and wives might make if they were actually to face up to the contingency of a no-fault divorce and to plan for that possibility in a rational way. The important assumption here is that the parties would find it in their mutual interest to include incentive features in such an agreement that would maximize their mutual well-being. Of course, individual couples might have reason to prefer quite different terms that a uniform no-fault divorce law could not accommodate. Nevertheless, there might be widespread consensus on certain matters. Divorce law, at least to the extent it reflected these norms, could then be seen as a kind of standard form marital partnership agreement governing the allocation of financial interests on the ending of the marriage.

If this idea were pressed far, it might generate interest in providing the details of divorce law to couples who are about to marry, so that those who wanted a different deal might actually negotiate variations on the standard form (or there might be several standard forms from which the parties could select). There are, however, considerations that cut the other way. First, I believe there would be reluctance to introduce officially the reality of frequent divorce into a celebratory occasion that pretends to the contrary. Second, I would be concerned that at the time of marriage the parties would not negotiate rationally with each other over the divorce contingency. Because entering into marriage in our society is thought more often to be the result of romantic love than hard-headed business bargaining, there is reason to fear that many individuals would not insist upon terms that would sufficiently protect themselves. On the other hand, some couples might choose to incorporate into their agreements extravagant promises intended more to symbolize their anticipated undying love than to deal realistically with what would seem right if love faded.

Moreover, there are considerations relevant to a desirable divorce law that go beyond what the couple might prefer. First, society at large may also have legitimate interests in how the parties to a marriage and divorce behave. Second, were unmarried couples really to negotiate a marriage and divorce deal as business dealings are traditionally negotiated, both specific individual would-be spouses, and possibly men in general, would have considerably more bargaining chips (and hence would be in a superior bargaining position). In thinking about designing a divorce law that would stand

in for the solution that the parties would reach, would we really want to take into account such mismatches in bargaining power? Or would we not instead want to think in terms of couples making arrangements from, at least in some respects, more equal initial positions?

With these considerations in mind, I turn now to illustrate a number of ways in which financial rules under a no-fault regime could influence the actions of the couple, a topic that has begun to engage the attention of economists. Before starting down the list, however, I offer two caveats. On the one hand, it is critical to consider whether the financial incentives that any proposed divorce law creates will actually affect conduct in an important way. If not, then the instrumental use of these rules for behavior-channeling purposes loses much of its relevance. On the other hand, as I will explain in the next section on fairness considerations, providing behavioral incentives is unlikely to be the only purpose of divorce law even if its contours promise significantly to sway how people act.

Whether or Not to Marry

One place to begin is at the beginning, with the question of the impact of divorce rules on marriage. One reviewer of Weitzman's book argued that if her proposed pro-wife reforms were enacted, men would become reluctant to marry and that one consequence would be that divorced women over age thirty-five would be far less likely to remarry than today.[26] Whether this prediction is right is another matter, but it raises an important issue. Surely we can agree that the state should not create significant incentives not to marry.

At the extreme, clearly the divorce regime could significantly deter marriage—at least if it could not be altered by agreement, and if living together outside of marriage did not carry the same financial consequences. Suppose, for example, that on divorce each party completely owned the other party's human capital, or suppose the rule was that on divorce a woman owned both her own and all of her former husband's human capital. This is not to argue that even such regimes as these would necessarily eliminate marriages. To be sure, such rules would give women considerably strengthened economic power as compared with the present system; indeed, where unilateral no-fault divorce is permitted, they could elect to walk away from a marriage at any time and for any reason and take their husband's earning capacity with them. Yet women could, of course, choose not to exercise all their power, and, in the end, many would not do so—if for no other reason

than that to press their rights to the full would cause many former husbands to stop working or to flee into hiding, leaving the assertive wife with nothing. With that in mind, many men, in order to gain the advantages of marriage, might be willing to take the risk that, if their marriage did end in a divorce, they would not in fact have to turn over all of their future earnings to their former spouse.

Of course, people today are not actually suggesting that on divorce women be awarded all of their husband's human capital, and even very pro-wife reforms that are being proposed may not have an important impact on entry into marriage. Still, given the growing acceptability of cohabitation outside of marriage, this is a factor to look for—a constraint perhaps—in designing a divorce law regime. After all, it is not only society's interest in marriage that is at stake; it hardly helps women to be handed such future economic clout as to prevent them from obtaining their more important current objective of getting married.

I have so far considered the law's potential impact on men's willingness to marry, but there is the other side as well. Elizabeth Landes has theorized that a legal policy against the award of spousal support on divorce discourages women from marrying; and she found just such an effect through an empirical study, albeit as measured by a weak data set.[27]

To Specialize or Not in Certain Functions during Marriage

Several scholars have suggested that certain divorce rules may be desirable in order to help couples arrange for their preferred allocation of marital roles.[28] They suppose that it is often the mutually advantageous thing for couples to specialize, with the woman (usually) not taking on a paid work force role and emphasizing, instead, having children, running the household, and emotionally supporting her spouse.

But these analysts suggest that this desired specialization of function may not come about if women fear that on divorce they will be left financially unprotected and without the ability to earn much money themselves. Given such fear, the wife might enter the paid work force after all—to the couple's detriment as the couple sees it. The wife makes this second best choice so as to create, in effect, an insurance policy against the contingency of divorce. On the other hand, this line of reasoning goes, if divorce law promised to compensate women for forgoing the development of their own earning capacity, then the law could pave the way for women to invest in their husband's (and family's) human capital instead of their own. With the security of such divorce rules, the woman might follow her (and the couple's) preferred path and stay at home.

Notice here that even though individual couples may see such specialization of function as good for them, others might well object to what they see as society promoting such specialization—both symbolically and by actually facilitating such role separation. These objectors, who typically want largely to rid our society of gender-linked roles, would prefer that individual couples bear short-term losses for what would be claimed as longer-term gains for people generally. In short, there may be a clash between what the couple prefers given the society they confront, and what others want a new society to look like (or what couples might prefer were society changed).

In any event, even if the idea of facilitating specialization had considerable appeal in theory, I wonder how important this incentive is (or would be) in practice. Many women today invest in their husbands and their children, rather than in their own economic independence, but seemingly without the divorce law protections favored by those scholars concerned about specialization. Indeed, this is an important part of Weitzman's complaint. Of course, perhaps there would be even more specialization of function were more generous divorce guarantees made to women—and less so if such guarantees were lacking and women became more aware of how financially precarious certain role specialization could be in a world of unilateral no-fault divorce.

To Initiate Divorce Proceedings or Not

Whereas many people want the state to be neutral as to whether couples divorce, others would like to discourage divorce, especially where minor children are involved.[29] Despite this difference of opinion, surely we can agree that we do not want rules that promote divorce. To pick up the specialization-of-function theme again, the other side of the coin is that if divorce laws do not provide certain protections for women, and if women choose to invest in their husbands and children anyway, then husbands may later find themselves in a position where they are tempted to exploit their spouses by divorcing. The argument here rests on the assumption that by having children and devoting themselves to home life, women often contribute disproportionately to the couple's well-being at the early part of the marriage, whereas men's most important contributions often come later once their earnings peak.[30] Where that is true, the claim is that after the woman has done her part, divorce law should deny the man an incentive to

expropriate her contribution by divorcing before doing his share. Without such protection in the divorce laws, it is argued, the law gives men who have enjoyed benefits without repaying them too great an incentive to pull out of the marriage.

Without doubting that many middle-aged men in our society may be in a position to exploit their wives in the way this model assumes, the extent to which men actually initiate divorce proceedings for that reason is uncertain.[31] Another way to put it is to ask how much less likely are men to seek divorce if the price of leaving were significantly increased in cases where the family pattern fits this model. In general one might anticipate that taxing divorce would serve to discourage it. But the specific issue here is the elasticity of demand for marital freedom of men who would be subject to the burden of compensating for benefits obtained in the way imagined here, and I do not think we have good data about that.

Quite apart from the specific concern about husbands expropriating their wives' past contributions to the marriage, it might be imagined that, in general, the party with more financial independence is more likely to initiate a divorce, so long as he or she can hold onto that economic advantage. In principle, then, increasing the cost of divorce to the financially stronger party could reduce that party's propensity to split.

On the other hand, it is also worth noting that by requiring compensation to lower earners in order to remove the financial incentive for higher earners to divorce them, we at the same time economically position more dependent spouses to initiate divorce proceedings. Fairness considerations aside, this factor undercuts the idea that imposing an exit tax on higher earners, payable to their lower-earning spouses, necessarily reduces the incentive for divorce.[32]

Whether or Not to Cooperate during the Divorce Process

No-fault divorce in California is supposed to be obtainable simply and unilaterally. But in practice, either party often can choose to make the proceedings easy and friendly or nasty and burdensome for the other. I think we could agree, other things being equal, that the desirable social policy under a no-fault regime would be to discourage spouses from making the process of obtaining a divorce trying for each other.

Of course, the no-fault principle itself is meant to promote cooperation by making legally irrelevant to the grant of divorce conduct of the parties during the marriage that, when fought over by them and their lawyers, is

thought to have the effect of both protracting the divorce process and making it arduous on both sides. The additional behavioral incentive point here is that no-fault divorce law's financial allocation rules may also have a significant impact on how people behave once one or both decide there is to be a divorce. For example, if one side foresees that she (or he) will be drastically worse off financially after the divorce, that may create a strong incentive to delay the divorce as long as possible, by forcing protracted negotiations over children and financial matters.[33] Of course, the financially stronger party should be in a position to bribe the other not to hassle and delay, but that may require a certain rationality in the bargaining process that may elude a significant share of divorcing couples.

How to Act after Divorce

Both the parties and society have interests in the former couple's postdivorce behavior, including such matters as how hard the former spouses work, how much contact the noncustodial spouse has with their children, and whether the former spouses remarry. Divorce law rules can play a role in these matters.

Like any income transfer mechanism, divorce law can create disincentives concerning postdivorce work effort. Suppose the man is ordered to pay spousal support to the woman in an amount that will vary as both his and her future incomes vary. For example, he may be asked to pay 25 percent of his earnings minus 25 percent of her earnings. Such an order can discourage both from earning more income because each party nets less from every extra dollar he or she might make.

From the woman's viewpoint (in our example) an order requiring the husband to transfer even a fixed sum of income or wealth, either monthly or as a lump sum, can affect her decision to enter the paid labor force. Even though in this case she will not lower her spousal support by becoming employed, nonetheless, if the standard of living such a transfer provides is sufficient, all things considered, she may simply elect not to become employed at all.

Normally, there is strong public sentiment in favor of encouraging people to make productive use of their abilities in the paid labor force. To the extent that this sentiment applies to the divorced couple setting, it suggests the desirability of fixed (and perhaps time-bounded) transfers between spouses. Of course, the price that must be paid to overcome these employment disincentives may be unacceptable. For example, it could mean abandoning on-

going transfers that carefully mesh with need or ability to pay and that might otherwise be desirable. Moreover, at least where the care of minor children is involved, there is considerable controversy over whether the divorced custodial parent (typically the mother) should enter the paid labor force.

On the whole, social policy currently favors promoting the visitation of children by noncustodial parents. The divorce rules may influence such conduct, although the direction is not entirely clear. Does having the noncustodial spouse regularly pay money to his former wife and children actually prompt him to visit more? Or do ongoing financial obligations lead to disputes that cause her to block access to the children?[34]

Finally, most people probably do not want divorce law to discourage remarriage. From that perspective it would, other things being equal, seem advantageous for the payee of spousal support to receive either a fixed sum or time-bounded payments rather than payments that terminate on remarriage. Should the subsequent marital situation of the payor of support affect his (or her) continuing obligation to the previous spouse? Such adjustments could influence a decision to remarry at all, to remarry someone who brings children along, and to have children in the new marriage. But no assessment of incentives alone can resolve these questions because at stake here is the meaning of fairness as between first and second families which is necessarily implicated in any resolution to this issue. This brings me to questions of fairness generally.

Fairness Considerations

Once it can be agreed upon what constitutes marital property as contrasted with individual assets of the spouses[35]—and assuming for this purpose that the spouses' human capital is not marital property—I think that most people are comfortable today with the notion that fairness, at least presumptively, suggests an even split of the divorcing couple's marital property.[36] After all, once it is recognized that the couple might have consumed all that they together earned or were given, it strikes most people as intuitively right that they should divide whatever is left unspent. Moreover, both the law and practice seem to be moving in that direction. But as mentioned earlier, apart from the family home, these rules are usually not very important. This is especially so for those many low-income divorcing couples who have debts that roughly equal, and sometimes exceed, their meager assets.

Therefore, the important controversy concerns what claims the spouses

might fairly have to each other's future earnings—or to an adjustment in the allocation of their marital property *because* of considerations rooted in their anticipated future income. This is an acute controversy because if women generally are going to fare significantly better in the couple's division of their financial interests on divorce, a convincing case is going to have to be made that they are entitled to more of their former husbands' postdivorce income than they now obtain. Again, this is particularly important for relatively lower-earning couples, where the only way that husbands can typically contribute to the postdivorce financial well-being of their former wives is through spousal support.

Just as the previous part canvassed a series of behavioral incentives that might sensibly influence divorce policy, this part reviews several possible fairness-based norms. My main theme is that fair principles for dividing future income are far less evident than others suggest.[37] Although I reject several norms that have been prominently endorsed, I offer three other principles that I find reasonably persuasive.

The Equal Living Standards Principle

Perhaps Weitzman's most frequently quoted finding is this: "The research shows that, on the average, divorced women and the minor children in their households experience a 73 percent decline in their standard of living in the first year after divorce. Their former husbands, in contrast, experience a 42 percent rise in their standard of living."[38] I contend that not only is this conclusion both exaggerated and misleadingly precise, but also that, in any event, such disparities by themselves say nothing about the fairness of the way no-fault divorce is functioning. Following that discussion I search for what arguments might be made on behalf of the principle that no-fault divorce should assure former spouses equal living standards and find nothing persuasive.

Without explaining precisely where her calculations went astray, Saul Hoffman and Greg Duncan have already shown that Weitzman's much-repeated finding about the decline in divorced women's living standards is inconsistent with previous research, implausibly large, and incompatible with other data she reports.[39] They suggest that a 30 percent decline in living standards for women in the first year of divorce, rather than the 73 percent Weitzman claims, is far more likely to be typically the case. Although 30 percent is by no means a trifling amount, the difference between the two estimates is dramatic.[40]

It is also not clear that the most sensible time period for comparing the financial circumstances of the former spouses is the first year after divorce.[41] When I think about the point one year after divorce, I imagine that relatively few men or women have remarried, and that, whereas he is probably both settled back into his job and settled into new quarters, her life, especially if she has their children, may be still very much in transition.[42] Admitting that this is a loose generalization and that its accuracy in individual cases may depend, for example, upon the time between when the marriage broke up and when the divorce occurred, it will serve to make my point. Let us now consider instead the situation that might pertain if we compared the living standards of former couples three or five or ten years after divorce. By then, many more women may have entered the paid labor force or may have increased their earnings.[43] Also, many women and even more men would be remarried and both burdened with new responsibilities and aided by a new spouse. As a result, it is certainly possible that the differences between the earlier divorced men's and women's living standards would be considerably less than they appear to be one year after divorce.

If this surmise is right, then the wisdom of measuring men/women differences for the first year after divorce depends on what the purpose of the measurement is. If, for example, we are interested in how financially well positioned the former spouses are to carry on with their lives as singles, then Weitzman's approach seems to make sense. If instead (or in addition) we are interested in long-run financial consequences of divorce as reflected in terms of the former spouses' standards of living, then it would have been better if Weitzman had provided similar data for periods of time longer removed from the initial divorce.

I also have some concerns about how one goes about making comparisons between men's and women's living standards after divorce. I will assume initially that the goal is to concentrate on comparing incomes, rather than trying to measure utility levels. Even so, one must contend with the matter of "imputed" income. For example, economists point out that the rental value of the family home to whoever is still living in it creates imputed income. So do do-it-yourself activities. Consider, for example, as Weitzman recognizes, that wives traditionally do most of the housework and that after divorce former husbands are deprived of this benefit, and thus have a lowered standard of living to that extent. I could not find any indication that these imputed income items were included by Weitzman in the measurements reported in her book. Another question is whether the comparison should be in terms of gross income or, say, income after taxes and reasonably necessary work expenses (including child-care expenses). I would think that the latter, although perhaps more difficult to ascertain, would be a more appropriate basis of comparison. It would appear that Weitzman used gross income figures in her study.[44]

Next, if there are children and one spouse has primary physical custody, then a comparison of the spouses' living standards somehow has to take into account the expenses of the children. One solution would be to assume that child support awards (or payments) take care of that need. On this approach, one would exclude the child support from both the payor's and payee's income and would ignore the existence of the children. But if, realistically, the custodial spouse spends more than the child support payments for the needs of the children, this is an inadequate solution that would overestimate the financial condition of the custodial parent. Understandably, then, Weitzman sought to compare the living standard of the noncustodial parent with how well the custodial parent (usually the woman) and the children can together live on all of their income.[45]

Yet, an approach that considers only the financial burden of the children and gives no weight to the nonfinancial benefits that children produce takes us back to wondering about the wisdom of the initial choice to compare incomes rather than utility. To be sure, sometimes the children are a drag that neither party wants. Parents without physical custody may clearly value the leisure they have obtained more than whatever benefits they would derive from custody of their children. In these situations, men-women differences (where women have custody) are reduced, rather than exaggerated, by looking at income differences. But where women have physical custody of the children and men feel that they have, as a result, lost something terribly important to them, it is deeply troubling to compare the former spouses' living standards in terms that treat the children solely as a liability. And as Robert Mnookin points out in chapter 2, substantial numbers of divorcing husbands claim they want more physical custody of their children than they are able to obtain.[46] Since it is unclear how one would go about dealing with this consideration, this just reinforces the ambiguity that surrounds the measuring of former spouses' comparative states.

Nonetheless, let me assume that, even after taking into account all the points just made, recently divorced men were still shown to enjoy a significantly higher standard of living than recently divorced women. Indeed, I am willing to assume for these purposes that men's living standards typically go up and women's down. Is that unfair? I do not think we can possibly say so without having a theory of what would be fair. Such disparities would

certainly show that divorce, at least initially, is financially bad for women (and children) and good for men, and might, for example, be the basis for predicting that men would be more likely to initiate divorce than women. But until it is shown that fairness requires equal living standards, these differences would only be facts.

Although Weitzman does not, as I see it, really try to ***argue*** for the equal living standards norm, at several places she seems to endorse it.[47] Just what is the case for it? I am still trying to figure that out.

While it is in some sense true that in the typical marriage vow the couple agrees to support each other forever, they also in the same sense promise to love each other and stay married forever. Since they are free to change their minds about the latter, something more needs to be added to the equation to explain why the former obligation would nonetheless continue. There are, after all, many marriages that end in less than one year, and a majority end in less than ten years, often without children.[48] And if the equal standard of living principle is not meant to apply to all marriages and forever, on what basis is it meant to be limited? Once we go down that road—for example, for a period of five years, or for as long as the marriage lasted, or only for marriages lasting more than fifteen years—then it is really some other principle that is being applied.

Although women typically begin their divorces with lower standards of living than their former husbands, it is also the case that they typically enter marriage with lower personal economic prospects in the paid labor force. Even though it may be that men as a class have partly caused women's condition in the job market, I do not see why the particular man, who now happens to be a former husband, should be responsible for redressing this much larger social problem. In short, I think that a case for society-based income transfers from men to women, or strong affirmative action plans favoring women over men in employment settings, would be easier to make than the case that a former husband should remain a lifetime provider for his former wife.

Another puzzle is whether, under the equal living standards idea, the lower earning spouse would be assured only some specified standard of living that is once and for all determined at the time of the divorce. That, however, would not seem to capture the point as I see it. Rather, is it not the idea that their future financial condition is to be bound up with both of their financial futures just in the way that it would have been had they remained married (even though they did not)? But implications of that, it seems to me, are disquieting in other ways. What, for example, are we to do about all the

changed circumstances that occur when they go their separate ways—such as a second marriage (and the assumption of new family obligations) and then, possibly, a second divorce?

In the end, the case for equal standards of living seems to me to rest on a tautology: the spouses were equal partners in marriage, and everything they have, including their future income potential, is theirs and is to be divided equally on divorce. But this begs the question of whether the moment of marriage should indeed be seen to merge their human capital together, and a convincing case for that has yet to be made. In the sections ahead I consider other principles by which one spouse might fairly be thought to obtain rights to at least some of the human capital of the other.

Need

Many no-fault divorce laws now emphasize meeting "need" as a key basis for determining the division of financial interests on divorce—at least with respect to spousal support.[49] How justified is this norm? One fundamental problem we face in answering that question arises from the uncertainty about what is meant by "need."

Are we to focus on what sum, if any, is necessary to keep the spouse in question out of poverty, as defined by the official poverty level or by the Bureau of Labor Statistics' budget for a low-income household? Or is need more of an "opportunity" or "transitional" notion, such as what is needed for someone to take steps to become reasonably self-sufficient (such as to go to school, or to have job training, or to have time to pull one's life together)? Or does need have psychological overtones that make it important for people not to descend to a significantly lower income/social class? On this latter view, because people become accustomed to certain life-styles, they soon "need" more money than they might otherwise. If this sounds like an odd notion of need, notice that the Social Security system's method of providing benefits to elderly wives and widows was originally sold to Congress in 1939 on grounds of need, with benefits based upon the earnings of husbands. As a result, the wife's standard of living during the marriage becomes important in determining how much Social Security she gets.

Is it possible to select among the various notions of need in a convincing and principled way? I once thought that progress on this question could be made by thinking about it in terms of John Rawls's "original position."[50] We would ask ourselves what system of rules people would prefer if they did not know, for instance, whether they would be men or women, earners or not, or

married or not. But I am now doubtful that this approach takes the analysis anywhere. If nothing else, Rawls's "difference principle" already calls for a societywide scheme of equalized incomes (except where inequality can be justified, generally on incentive grounds, as making the worst off better off). In the absence of such a world, it is exceedingly tricky to decide how to apply his principles to but one area. Indeed, as I have already noted, one of the important controversies about divorce law is why it ought to serve to reduce inequalities between the sexes arising from forces outside the marriage relationship.

Necessity

Nonetheless, there is at least one need-related concept that perhaps can be convincingly carried over from other areas to divorce law. It is the notion of necessity, and from it would follow the conclusion that a former spouse can be said to have a duty to support the other former spouse in order to avoid grave financial hardship.

Necessity-based rights arise when one is critically dependent upon another and the dependent one is thought fairly to have a claim for assistance from the one specially positioned to provide it. For example, if a guest in your home becomes ill, you can hardly eject the person out into the cold night where he is quite unlikely to be able to care for himself.[51] Nor can you properly refuse a sailor the use of your dock when it is needed to protect the sailor from the life-threatening dangers of a storm.[52]

Note well that properly invoking the necessity doctrine depends upon a showing that it is right to single out the one who is asked to provide the support from among all of society. That is why, for example, you may be said to have a duty to provide comfort to a hiker caught in a snowstorm who happens to discover your isolated cabin, but not to the needy panhandler whom you and many others pass on the street.[53]

Analogously, a divorcing spouse appears to be a very appropriate person to single out as having the duty to prevent the other spouse from suffering a severe hardship, especially since the now needy party would ordinarily have been financially dependent upon the other spouse during the marriage. Moreover, the couple's past intimacy alone may be seen as a convincing basis for imposing this duty. On that ground, for example, a necessity claim would also accrue at divorce to a spouse who had long been a substantial earner but only just became disabled and incapable of self-support.

Yet there are problems with a divorce regime that rests on the principle of necessity. On the one hand, by analogy to other necessity cases, this would seem to impose a duty to support the other at only some minimum, severe-hardship-avoiding level, and that may be thought far more miserly than is instinctively sensed as just. On the other, it is ambiguous how long a necessity-based claim ought to last. Certainly at some point—but *when* is rather difficult to say—after the intimate connection between the parties is long over and there has been time for the dependent one to make choices about his or her future, it no longer seems justified to single out the former spouse as the responsible party, even if the other remains in dire need.

A further problem is that although the needy party may seek to impose a duty arising out of necessity on the other former spouse, where both are fairly poor the latter may not be able to afford to discharge it or could do so only through a significant self-deprivation. Alas, in all too many cases today, the financial question being decided on divorce is less how to share affluence than it is how to allocate poverty. This suggests that society as a whole may have a larger role to play here. Indeed, the question whether it would not be better for government to plan in advance for predictable situations of necessity by adopting a sensible public income transfer scheme designed to discharge this duty is one to which I will return in the conclusion.

The Expectations of the Parties

Does what the divorcing spouses financially deserve from each other turn on a thoughtful appreciation of the "expectations" of husbands and wives? The idea here is that fairness requires that people's legitimate expectations be reinforced through the law. The main difficulty with this line of thought is that, for the most part, it has the analysis reversed. Since we live in a time when there are no consensus expectations on so many issues concerning marriage and divorce, what we are actually looking for here are new norms to adopt that will then serve to create expectations in the future.

It is true that more and more couples today are marrying, knowing that they might later divorce. In this new state of affairs, we could inquire as to what they expect to be their rights and obligations if their marriage ends. But, because of social uncertainties, asking them is not likely to be terribly revealing. For example, at the broadest level, do couples expect that they should be able to make a clean break or do they expect to have ongoing financial claims on each other long after their emotional and physical intimacy has ended? I think most people's feelings would be rather fuzzy.[54]

When a marriage ends in divorce, the spouses, of course, suffer disappointed expectations in the sense that they had earlier anticipated the mutual sharing of their combined earnings in the future. But this hardly tells us whether they mutually expected that the higher earner would share post-divorce earnings with the lower earner in the event their marriage terminated. In the end, I believe that any arguments couched in the language of expectation, if persuasive, would rest more securely on some other ground.

Unjust Enrichment

One such ground might be "unjust enrichment." Consider again the familiar examples of those wives who have invested in their husband's career and/or in their home life instead of in their own future earning capacity. While this may seem like a revisit of the section on incentives, the point here is different. Now the claim is not that a woman needs a certain divorce law regime in order to get her to act as the couple wishes or in order to keep the man from exploiting and then divorcing her. The point is, rather, that when there is a divorce, unless she is awarded a fair return on her investment, he may be unjustly enriched at her expense.[55]

I have several problems with this idea, however. First, consider some of its ambiguities. Determining what might be a fair return on the wife's investment is a complicated matter. Should it be a share of the husband's enhanced earning power? Or should it be measured by the wife's opportunity costs? Or should we concentrate instead on what it will now take to boost her future earning capacity? Over these choices there is today considerable controversy, even among those who favor the idea of some spousal entitlement in these settings.

Furthermore, it is not self-evident that this approach would, on balance, actually favor women. After all, because they live on their husbands' income, for example, significant numbers of women are enabled to attend college or to obtain other further training after they are married. Indeed, it is possible that this pattern is more common than the opposite. That alone would not dispose of the matter, however, since those could be the very cases in which the couple is much less likely to divorce.[56] The point is that the potential impact of rules concerning rights in the other party's enhanced earning power ought to be studied very carefully before being adopted, if we wish to avoid renewed criticisms about "unintended" effects of reforms.

More generally, I am troubled by the basic idea that through self-sacrifice

one spouse would earn rights in the other's enhanced earning power, or "career assets," as Weitzman terms it. The strongest way I can think of to put the claim goes like this: "I sacrificed something for us, expecting us to benefit in the future. Now that we are getting divorced, because of my sacrifice, I, standing alone, am in some way disadvantaged and, you, standing alone, are in some way advantaged. If I am not compensated, you will be unjustly enriched at my expense and that would be an unfair outcome." This statement emphasizes both a loss on one side and a gain on the other. It rests on an asserted expectation of future gain, and on an asserted causal connection between the sacrifice made and the present plight.

Three familiar examples are typically said to fit this claim. In the first example, the wife works as a secretary while the husband goes to medical school. Now he is a professional, and she is not, and their marriage breaks up. In a second scenario, they have kids. She stays home to raise them while he pursues his career. Then their marriage breaks up. And third, rather than working on her own career, she gives dinner parties and otherwise socializes with his business friends while he pursues his career. Then their marriage breaks up.

But are these scenarios really examples of the generalized pattern I set out above? Often they are not. For example, in the secretary/medical student situation, it will frequently not be true that it was her sacrifice that enabled him to go to medical school. This is not to deny that she sacrificed for them. Perhaps her working enabled him to go to school without borrowing (or with borrowing less), or perhaps it enabled them to get married while he was in medical school. But he often would have gone to medical school anyway.

The same point can apply to the mother-at-home example. Frequently, it is not that her conduct enabled him to pursue his career (which he would have pursued anyway), but rather that it enabled them to have children. Again, this is not to deny that she sacrificed her career development for them. But that is different from saying that her sacrifice was the cause of his career development.

Even the "corporate wife" role is, at least sometimes, more a matter of pleasure for her than more salary for him, even if going to conventions, company picnics, and the like keep her from exploiting her own income potential.

Moreover, these three are hardly the only examples of detrimental sacrifice in marriage. Suppose, for example, he drops out of high school so they can get married and together have their baby she is carrying. He goes to

work at a gas station. Now he has sacrificed his career opportunities for them and is disadvantaged when their marriage later breaks up.

Or, as another example, suppose they both sacrificed by delaying having children, working hard to save money for the time they could afford to be parents. Before that happens, however, the marriage breaks up. But whereas one party has a new partner, the complaining party does not. The latter is left disadvantaged by not readily being able to have children now, whereas the other party takes half of their savings along to the new partner and promptly starts a family.

Or suppose one spouse, say the husband, passes up an opportunity to move to a new job for the sake of the family's stability, and the marriage later breaks up. Maybe the wife not only gets the kids but moves away. He now says that whereas he sacrificed for them, he does not get the long-run benefit that was envisioned—being together with the children.

This brings me back to the earlier example in which she stays home and cares for the kids while he pursues his career. Suppose he argues that he sacrificed his leisure time by working especially hard at the office so that they could afford to have kids, but now that the marriage breaks up he is left with a loss and she a gain, assuming she gets the kids and he does not.

As a final example, suppose he works overtime to the point of haggardness, while she spends lots of time at fitness centers. He enjoys having a fit and lovely wife. Then their marriage breaks up, and she takes her good health and good looks with her. He is stuck with his ulcer.

The point of these examples is to show that there are many circumstances, besides the three with which I began, in which one party has sacrificed for the benefit of the marriage, expecting a long-run benefit that is not realized. Moreover, not only is that party now disadvantaged by the sacrifice, but also the other party takes advantages obtained during the marriage away with her or him. Are all these advantages and disadvantages to be carefully accounted for and redressed on divorce? Or should all of them be seen as risks of disappointed expectations that are simply to be assumed as part of the risk of divorce?

Of course, as illustrated by my examples, it is not only money that the disadvantaged partner may sacrifice or that the advantaged partner may take away. But it is not clear to me why that should be required if the case for spousal compensation is based on a theory of "unjust enrichment."

Furthermore, there are additional problems lurking here even in the three initial examples—where the wife puts the man through medical school, or stays home to have children, or entertains his business colleagues. First, if he does have higher earnings because he was able to focus on his career, then often they will have already benefited as a couple from those higher earnings. If so, is her sacrifice ever considered repaid? For example, suppose the doctor and his wife live together for ten high-income years after he completes his training. Has she not by then already obtained a fair return on her investment? If so, when has that occurred?

Second, basing entitlements at divorce upon a careful accounting of investments and earning power enhancement could lead to enormous differences that I find bizarre. For example, the wife who helps put her husband all the way through medical school presumably will be entitled, even after ten or twenty years of marriage, to a great deal more compensation than would one who married and supported him starting in his third year. So too there will presumably be radically different treatment of the woman who, ten years ago, instead of marrying him lived with him while in medical school, or of one who was his girlfriend and was supportive of him in various ways, but married him only afterward.

All these factors make me think that unjust enrichment is the wrong way to think about divorce. The three typical examples upon which that theory rests are perhaps better understood as illustrating that, because of social conditioning in our society, marriage very often means quite different roles for men and women—which roles coincide with women on divorce being financially dependent and men financially independent. From that perspective, maybe it would be better to base women's claims for support on divorce on how long they functioned in the wife's role. Norms based on marriage duration are examined in the next two sections.

Merger over Time

The unjust enrichment concept seems to put enormous weight on the relationship between the parties during the critical years when the other spouse happened to most increase his or her earning capacity, rather than on the total length of the marriage relationship. So, too, the equal standard of living norm seems indifferent to the length of the marriage, as though the couple's human capital merges during the wedding ceremony.

A different approach is to see the spouses as merging into each other over time. In this model, the longer they are married, the more their human capital should be seen as intertwined rather than affixed to the individual spouse in whose body it resides. This idea is consistent with the notion that human capital needs constant renewal—a regular tune-up, repair, and parts

replacement model, if you like. After a while, one can less and less distinguish between what was brought into the marriage and what was produced by the marriage. Moreover, the longer the marriage, the longer the spouse in a dependent role has likely submerged her or his independent identity and earning capacity into the marital collective.

One way to implement such a concept would be to give each spouse a percentage interest in the other's human capital/future earnings based upon the duration of the marriage. For example, one might obtain a 1.5 percent or 2 percent interest in the other for every year together, and presumably this interest would survive the remarriage of either party. Such a regime might be subject to minimum vesting rules restricting when the right accrues (such as after three or five years of marriage), and it might possibly be subject to a ceiling (such as 40 percent or twenty years).[57]

One clear attraction of this model is that it works to the benefit of long-term homemakers as compared with those with only brief marriages. So, too, it would call for far more spousal support for long-term homemakers as compared with long-term marriages where the earnings of the spouses had been fairly even.

Treating human capital as called for in the merger over time model would make it, in a certain sense, analogous to the typical pattern we see with conventional marital property. That is, at the beginning of the marriage the property the couple has (apart from wedding gifts) is generally thought to be the separate property of the one who brought it to the marriage. But over time, more and more of their property becomes theirs collectively, as it is either obtained with their earnings or results from the commingling of formerly separate property with other marital property.

Although I believe that many people would find this merger over time principle fair, it is not the only norm I can imagine that increases the lower-earning spouse's claim as the marriage lengthens.

Fair Notice

A different model I call "fair notice" would guarantee support to a lower-earning divorced spouse for a period of time based on the length of the marriage. The level of support would be based upon the other spouse's ability to pay and would be intended, to the extent possible, to minimally disrupt both spouses' living standards for the period of the support. This approach is based on the general idea that a party ought to have a duty to provide adequate notice before terminating what was intended as (and may well have become) a long-term relationship.

Marriages, like long-term contracts generally, are not like impersonal quick market transactions where parties can easily find other sellers and buyers. In such long-term relationships, where people know the contract may end, where they know there will likely be dependence, where fault rules are not going to be available to police the contract's termination, and where no insurance is available to cushion the loss that one side might suffer on the ending of the deal, special contract-ending arrangements seem appropriate. At a minimum, I believe that the parties are entitled to some fairness-based, mutual insurance–like rules designed to protect against what can be very unequal burdens of termination. Specifically, each should be required to give the other substantial notice before he or she can cut off the support the other has grown to rely upon. Thus, for the period of the notice, the couple's financial affairs would remain largely intertwined.

In this model, the filing of the divorce action would likely trigger the notice period. Although some might favor a uniform notice period for all divorces, it seems to me that the length of the notice period required is more sensibly related to the length of the marriage. I base this on the fact that it typically takes longer to unravel dependencies of longer duration. Whether the notice period should be equal to the marriage's length, or to half or a quarter of it, and whether it should be subject to a maximum are questions I put aside for now.

Since in cases of extremely short marriages, the time it takes after the filing to achieve the divorce would generally be sufficient notice, this model's operation would be consistent with the typical lack of postdivorce spousal support in such marriages today. Similarly, it would be broadly consistent with what is commonly termed "rehabilitative alimony"—spousal support for a modest and fixed term—that is often awarded in marriages of modest duration. This model would also call for considerable notice in long marriages, thus perhaps demanding longer spousal support than Weitzman found is being awarded to older, long-married divorcées generally.

Let me illustrate how the fair notice model differs from the merger over time model. Whereas under both models lower earners in ten-year marriages would be entitled, other things being equal, to substantially more money than they would be in five-year marriages, the nature of their entitlement differs. In the fair notice scheme, the couple would, generally speaking, continue to fully share their income for a fixed period based on the mar-

riage's duration—for example, for five years after a marriage of ten years. By contrast, in the merger over time plan, the couple shares their income for the rest of their lives, but the proportion they share is less—for example, 20 percent after ten years of marriage.[58] The fair notice model has the advantage, if it is indeed an advantage, of leading to a clean financial break between the former couple. The merger over time model has the advantage of providing the lower-earning spouse a secure (at least in principle) long-term financial base upon which to rebuild an economic future. (In practice, under both models, many couples might elect to convert these periodic payment obligations to one-time lump sum settlements at the time of divorce.)

One potential conceptual difficulty with the fair notice norm arises when the lower earner brings the marriage to an end. First consider the case where the lower earner has behaved in a way, even a socially undesirable way, that leads the higher earner to want a divorce. In such a setting, given the no-fault philosophy, I do not find it troubling that under the fair notice principle the higher earner, in effect, has to buy his or her freedom from the other over time. But where the lower earner wants out of the marriage (say, to marry someone else) and the higher earner does not, I suspect that some will find dismaying the idea that the moving party is entitled to a period of notice. I have considered whether this objection might be avoided by entitling to notice only the party who is sued for divorce. But I have rejected that solution on the ground that it gives too much bargaining power to the higher earner. In the end I conclude that the objection to entitling a divorce-seeking lower earner to a notice period is not a telling criticism. After all, that party could have remained in the marriage, thereby imposing an even longer duty of support on the other. By announcing an intention to end their marriage, the moving party, in effect, informs the other that his or her future obligation is limited.

More deeply at stake here, I believe, is something that is at stake in all the models considered in this part that would impose on the higher earner the duty to provide, out of future earnings, support for the lower-earning former spouse. In those cases, however few in proportion, in which the lower earner is seen by the other to be significantly and primarily at fault in the breakup of the marriage, it is likely to be galling to the higher earner to have to turn over postdivorce earnings whatever the earlier nature and duration of the couple's marriage. And since men typically are the higher earners, this is a concern that I believe men have about any reforms that would significantly increase the financial burdens of divorced men generally. This anxiety traditionally resulted in legal rules that freed husbands from alimony and more generous

property-sharing burdens when their wives were guilty of adultery. That sort of result, however, is fundamentally at odds with the no-fault concept and should be rejected. Assuming, therefore, that no individualized inquiry into fault is to be made, then I see no proper basis for reducing husbands' burdens generally just because some wives are wrongdoers, especially when no adjustment has been made the other way on account of the fact that some husbands are wrongdoers.

The real question in this no-fault world becomes whether there ought to be some sort of social insurance scheme that, among other things, would help spread the risk that higher-earning spouses might individually be imposed upon unfairly.

Conclusion

When all is said and done, because of the limited spousal and child support that they currently are forced to pay, divorced men under today's regime are generally able to take on new family responsibilities and, without having to boost their earnings far above their former level, they can contemplate supporting a new household at a standard of living that is not too far below that of their old family. Indeed, they can even imagine financially coping with a new wife who brings children along. By contrast, divorced women, especially those with children, generally find themselves under great economic pressure to remarry if they wish to regain anything of the standard of living they had while married.

Put this way, many people conclude that this imbalance is unfair. Certainly many people will not like the image of a divorced woman being forced into another marriage that she might not otherwise choose to make. And many will not like the female dependency implications of both sides of this equation—that a woman must marry to achieve a familiar standard of living and that a man would think in terms of having to support his new wife (and perhaps her children from a former marriage).

Yet, to return to a theme discussed earlier, is not the imbalance between men and women basically true before a first marriage as well? Because of inequalities in the financial prospects of men and women in the paid labor force, marriage is at the outset a more promising route to a higher standard of living for women than it is for men. Although we may object to those inequalities between men and women, I ask again whether divorce law is the place to correct them. Moreover, even if we observe individual women

sacrificing their own careers in individual marriages, is not the point of most feminist writing about this that such behavior is more a matter of general cultural pressure than oppression by individual husbands? On that basis, again, a collective solution seems more fitting.

I have in this chapter put forward several grounds that would justify a legal policy of spousal support on divorce and that could lead to higher levels and a greater frequency of spousal support than Weitzman found in California. Some of these grounds rest on incentive concerns, assuming we can agree on the intended behavioral objectives and that we believe there is at least a substantial chance that conduct would actually be shaped by such rules. Others derive from fairness norms, three of which I find at least somewhat persuasive and have called "fair notice," "merger over time," and "necessity." Although these different justifications can be seen to call for somewhat different implementing solutions, a crude synthesis would seem to argue for a spousal support formula that reflects primarily the duration of the marriage and the individual financial prospects of the parties on divorce.

But ought there not be some public responsibility here as well? The Social Security system currently provides non-means-tested financial support to dependent spouses (the overwhelming proportion of whom are women) on the occasion of the death, disability, or retirement of their family's main breadwinner—at least when those dependent spouses are elderly or caring for a minor child. And those benefits are related to the past wages of the spouse who no longer is earning income for the household. Ought not that program be expanded, or some new program of reasonably similar design be constructed, to alleviate the substantial risk lower-earning spouses take that divorce will be a financial shock? The precise basis for financing this sort of social insurance benefit—that is, the extent to which higher-earning divorced spouses, marrieds in general, and earners in general should contribute—I save for another time (although I note that there is considerable room in such a scheme for redistributive features of the sort found in Social Security that could go a long way to ease the financial plight now faced by the poor single mother).

What seems clear to me now is that with such a public financial base in place the debate over new ways of allocating private financial interests between divorcing husbands and wives would be much less divisive. Those championing women's interests would feel less of a need to reach so far, and those defending men's interests would feel less threatened. To be sure, to support social insurance benefits on the occasion of divorce is to open one up

to the charge that this fosters even more divorce. Yet not only am I skeptical about how true this charge is, but I do not think we can be very optimistic about the future of marriage and the family if we insist that these relationships be importantly glued together by financial dependence and obligation.