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BURNING DOWN THE HOUSE: TOWARD A THEORY OF MORE EQUITABLE DISTRIBUTION

Barbara Stark*

INTRODUCTION

Property Division at Divorce

The state, conspicuous by its absence from the private sphere of the family,¹ intervenes when there is a fissure in that sphere, some disruption in the family. At divorce, when the private sphere breaks apart completely, it is the state which ultimately assesses each party's contribution to their marriage and determine their ongoing obligations, if any, to each other.² Divorce is the point at which a family's most private concerns become subject to the values and procedures of the public sphere. Society as well as the individual family is affected by the state's determina-

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1. See Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *Politics and the Law* 121-24 (D. Kairys ed. 1982) (discussing absence of law in the private sphere). See also Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 649 (1984) (noting that "Marriages can rot, [and] love can fade . . . without any contribution . . . from the legal system. Divorce is a legal act, and it changes the legal status of the partners.").

2. Divorce is ubiquitous. W.J. GOODE, *WOMEN IN DIVORCE* (1965). From 1970 to 1977, the national divorce rate increased by 79%. OFFICE OF HUMAN DEV. SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., *HELPING YOUTH AND FAMILIES OF SEPARATION, DIVORCE, AND REMARRIAGE* 3 (1980). The divorce rate is no longer increasing, however. NEWSWEEK, Aug. 24, 1987, at 54. Equal numbers of men and women are affected, of course, notwithstanding the frequent perception of divorce as a "woman's issue." See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change—A Study of the Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 831 n.145.

Most parties resolve divorce disputes through private negotiation. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959 (1979). These "private decisions will be shaped by the content of the rules that govern in the absence of a contract." Wald, *Introduction to Symposium on the Family, the State, and the Law*, 18 U. MICH. J.L. REF. 799, 802 (1985).

tions, from our subconscious perception of what is "natural"³ to the labor force impact⁴ of the new underclass,⁵ i.e., female-headed households. As the English legal scholar Kevin Gray has suggested, the law regulating spousal property is an index of social relations.⁶

During the marriage, husbands and wives control their property according to their own perceptions of fairness or power.⁷ Division

3. L. PEATTIE & M. REIN, *WOMEN'S CLAIMS: A STUDY IN POLITICAL ECONOMY* 128 (1983) [hereinafter *WOMEN'S CLAIMS*]. See generally Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 849 (1985) [hereinafter *Myth of State Intervention*].

4. See Fineman, *supra* note 2, at 823; Hacker, *Women at Work*, N.Y. REV., Aug. 14, 1986, at 26 [hereinafter *Women at Work*]. See generally Blau & Farber, *Women in the Labor Market: The Last Twenty Years*, in *WOMEN AND WORK: AN ANNUAL REVIEW* 20-40 (Larwood, Stromberg & Gutek, eds. 1985) [hereinafter *WOMEN AND WORK*].

5. See L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985). But cf. N.Y. Times, Dec. 22, 1986, at A21, col. 3 (citing congressional study challenging Reagan administration's position that the decade's rise in poverty is attributable to an increase in teenage pregnancies and single parent households; high unemployment and falling wages found to be the factors most responsible); *American Women: Three Decades of Change: Hearings Before the Joint Economic Comm.*, 98th Cong., 1st Sess. 58-59 (1983) [hereinafter *American Women*] (noting that from 1959 to 1979 women increased as a percentage of poor adults, but that a declining percentage of all women were poor).

6. L. WEITZMAN, *supra* note 5, at xv. See also E. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES* 5-9 (1986) (discussion of United States Supreme Court's role in facilitating social change and analysis of pivotal family law cases between 1968 and 1973 in which the Supreme Court "overturned legal doctrines that were impeding the adjustment of law to changes already well advanced").

The complex interrelation between property awards and spousal and child support is beyond the scope of this Article, although some commentators suggest that it may be inappropriate to consider these factors in isolation. See, e.g., Mnookin & Kornhauser, *supra* note 2, at 959. Courts generally do not. See, e.g., *Daly v. Daly*, 179 N.J. Super. 344, 350, 432 A.2d 113, 116 (App. Div. 1981). A detailed analysis of a divorce judgment's separate components may be helpful, however, in facilitating the development of coherent, consistent, and predictable standards. Such standards are essential to counteract the abuses of discretion which too often characterize decisions in this area of the law. See generally Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415 (1981). But see Ford, *Rehabilitative Alimony: A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285, 288 (1984).

Moreover, the distinctions between the functions of property, child support and alimony awards should not be blurred. It is assumed for purposes of this Article that spousal support, if any, is nominal and that child support should reflect the payor spouse's fair share of the amount needed for such support. In fact, in 1983 the mean child support received was \$2,340. Only two million of the four million women owed child support during that year were paid in full. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WOMEN IN THE AMERICAN ECONOMY* 36 (1986) [hereinafter *WOMEN IN THE AMERICAN ECONOMY*]. The significant problems of inequitable child and spousal support merit their own discussions.

7. See generally Scanzoni, *A Historical Perspective on Husband-Wife Bargaining Power and Marital Dissolution*, *DIVORCE AND SEPARATION* 20, 31 (G. Levinger & O. Moles eds. 1979) [hereinafter *DIVORCE AND SEPARATION*] (attributing increase in divorce rates

upon divorce reflects the extent to which society is willing to recognize, condone, or rectify that hitherto private arrangement.⁸ For purposes of property division, the court's main focus is on the parties' past conduct; that is, their actions during the marriage that is being ended.⁹ In dividing their property, the court is in a better position to settle accounts between the parties than to influence their future behavior.¹⁰

The difficult issues of fairness raised by equitable distribution, complicated by the usually intense emotions and highly subjective perceptions of the parties, are generally approached through three deceptively simple questions.¹¹ First, what property is subject to distribution?¹² Second, how is it to be divided? Third, how is it to be valued? This Article will focus on the first two questions, which address the theoretical basis of equitable distribution as contrasted with the third, which focuses more on its implementation. The ways in which courts answer these questions provide a rich opportunity to examine one aspect of the process through

during previous fifteen years to the development of the "equal-partner" model in marriage).

8. See, e.g., *Painter v. Painter*, 65 N.J. 196, 213, 320 A.2d 484, 493 (1974) (equitable distribution statute empowers courts to allocate marital assets between spouses regardless of ownership). It may also reflect an institutionalized misperception of that arrangement. This is a time of transition for our society as well as for the parties, however. *American Women*, *supra* note 5, at 42 (statement of Barbara R. Bergmann). The rate of change, and our immersion in it, complicates the analysis. See generally *Myth of State Intervention*, *supra* note 3, at 849 (discussing marital property arrangements in the early 19th century); DiLeo & Model, *A Survey of the Law of Property Disposition Upon Divorce in the Tristate Area*, 56 ST. JOHN'S L. REV. 219, 220 n.2 (1982) (noting that equitable distribution and community property systems were responses to a common law system under which legal title was dispositive).

9. For purposes of spousal and child support, by way of comparison, the court looks ahead to the parties' anticipated future needs, and attempts to induce them both to cooperate so as to meet those needs. The wife, for example, may be expected to obtain herself in a specific period of time. *Kulakowski v. Kulakowski*, 191 N.J. Super, 609, 468 A.2d 733 (Ch. Div. 1982). The husband may be expected to maintain a certain income level. *Barba v. Barba*, 198 N.J. 205, 486 A.2d 928 (App. Div. 1985).

10. This is not to suggest that the court is in a good position to settle accounts. Indeed, as explained below, it is rarely able to do so. See *infra* text at Sec. III.

11. *Rothman v. Rothman*, 65 N.J. 219, 232, 320 A.2d 496, 503 (1974). See also Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 778 (1982).

12. The focus here is on the *kind* of property subject to distribution, rather than factors such as mode or time of acquisition, which may be considered in deciding whether or not to include an asset as marital property. See, e.g., *Brandenburg v. Brandenburg*, 83 N.J. 198, 209-10, 416 A.2d 327, 333 (1980) (assets acquired after spouses' physical separation eligible for equitable distribution).

which the laws of the state and constraints of the marketplace affect the most intimate affairs of individuals.¹³

Division of Labor

Few would dispute that labor is divided on the basis of gender in this country.¹⁴ In the private sphere of the home, women remain primarily responsible for housekeeping and nurturing tasks.¹⁵ In the public sphere of the marketplace, a disproportionate number of women remain isolated in the "pink collar ghettos"¹⁶ of nursing, teaching, and clerical work.¹⁷ In both spheres,

13. See generally *Public Hearing Before Commission on Sex Discrimination in the Statutes on Marriage and Family Law* (1980) (statement of New Jersey State Senator Wynona Lipman); *Work and Family: A Changing Dynamic*, BUREAU OF NATIONAL AFFAIRS (1986) [hereinafter *Work and Family*]; W.J. GOODE, *supra* note 2; Friedman, *supra* note 1, at 654 ("Divorce, whatever else it is, is legal behavior. . . . [It] cuts off inheritance rights. Remarriage reassembles those rights. A society where few people own property . . . can make do without cheap, easy divorce. The poor in such a society divorce with their feet."). The law of property division reflects, as well as influences, social transformation. Cf. Clark, *The New Marriage*, 12 WILLAMETTE L. REV. 441, 452 (1976) (noting that "the courts are especially ill-equipped by their procedure to judge what prevailing community conduct is").

See also Friedman, *supra* note 1, at 665-66 ("Some kinds of social change act mostly in the instrumental sphere. They create needs for new or altered legal instruments, and by and large they get them Other kinds of social change are less technical They may divide class against class, or they may call into question patterns of moral hegemony. They divide society into warring normative camps.").

14. Indeed, this may be a proper subject for judicial notice. See *Stanton v. Stanton*, 421 U.S. 7, 15 (1975) (taking judicial notice of women's increasing participation and responsibilities in the public sphere). See generally K. MARX, *German Ideology*, reprinted in E. FROMM, *MARX'S CONCEPT OF MAN* 205-56 (1976) (describing the division of labor within the family unit).

15. WOMEN IN THE AMERICAN ECONOMY, *supra* note 6, at 7 (noting that "most working women meet the usual demands of housework and family care in addition to their work in the labor force"); Ms., Feb. 1988, at 19 (citing B.F. Kiker, U.S.C., data from Panel Study of Income Dynamics conducted by Survey Research Center, Institute for Social Research, U. Mich.).

16. See *Women at Work*, *supra* note 4. Cf. *The Job Market Opens Up for the 68-Cent Woman*, N.Y. Times, July 26, 1987, Week in Rev. (noting that women have attained higher representation in most occupations, but that there remains an "overwhelming concentration of women in some jobs"—secretary, nurse, child care—that pay far less than comparable jobs in fields which are dominated by men).

17. Of 44 million working women in 1985, approximately 80% were employed in the service industry. In 1982, health services ranked second in the proportion of women workers, 36th in average hourly wages. NOW-NJ Newsbreaks, July 1987, at 3 (reprinted from AFL-CIO News citing study by Professor Karen Brodtkin Sacks). See generally Madden, *The Persistence of Pay Differentials: The Economics of Sex Discrimination*, WOMEN AND WORK, *supra* note 4, at 76.

women's work has historically been devalued.¹⁸

Her husband's earnings act as a buffer for the married female wage-earner, affording her some relief from her own inadequate wages or lack of job opportunities. She loses this buffer at divorce, when she must meet greatly increased expenses with greatly reduced income.¹⁹ To the extent that couples conform to male-breadwinner/female-homemaker stereotypes, the hardship for the woman is exacerbated.²⁰

The thesis that marriage gives men an advantage in the public sphere of money and power at the expense of women is a familiar one.²¹ Married women typically assume the lioness' share of household and childcare responsibilities, freeing their husbands to pursue careers.²² At divorce, the husband has more seniority, greater status and higher salary in his job than the wife in hers,²³

18. Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. FLA. L. REV. 1, 13 & nn.42-44 (1975) [hereinafter Kulzer] ("The history of discrimination against women in employment is well documented. Despite corrective legislation, employed women earn much less than men and the wage gap is widening, in part because women are concentrated in low-paying occupations."). See also O'Neil, *Role Differentiation and the Gender Gap in Wage Rates*, in WOMEN AND WORK, *supra* note 4, at 50. This has frequently been accompanied by the glorification and romanticization of the private sphere. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-1500 (1983) [hereinafter *Family and Market*].

19. Professor Weitzman has described the wife's situation most dramatically in her oft-cited statement that women's standard of living decreases by 73% at the time of divorce, while men's standard of living is raised by 42%. L. WEITZMAN, *supra* note 5, at 323; See, e.g., Schulman, *Book Review*, 8 FAM. ADVOC. 35(2) (1986); Winner, *Book Review*, N.Y.L.J., Dec. 6, 1985. This may be attributable in part to the increased costs of maintaining two households rather than one. Since the wife usually has a much lower income than her spouse, meeting these expenses will be that much more difficult. Cf. Hacker, *American Apartheid*, N.Y. REV., Dec. 3, 1987, at 29 [hereinafter *American Apartheid*] (noting that "black women are more likely to take jobs because their husbands' earnings are low, or their households do not have a male breadwinner").

20. While a woman's own workforce participation is probably her best assurance of a decent standard of living, I am not suggesting that an emphasis on workforce access is appropriate in all cases, nor that it alone can counteract discrimination in the marketplace, especially against older women. See Sackett & Munyon, *Alimony: A Retreat From Traditional Concepts of Spousal Support*, 35 DRAKE L. REV. 297, 317 (1985-86). See also Comment, *Divorce for the Older Homemaker in Michigan: Who Gets Alimony Now?*, 1985 DET. C.L. REV. 40, 50 [hereinafter *Divorce for the Older Homemaker*]; Marshall, *Rehabilitative Alimony, An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667, 669 (1984-85).

21. See, e.g., P. CHESLER & E. GOODMAN, WOMEN, MONEY & POWER 11-16 (1976).

22. *Family and Market*, *supra* note 18, at 1547 n.185.

23. See WOMEN IN THE AMERICAN ECONOMY, *supra* note 6, at 7 (noting that "many [working women] choose work that will fit around . . . their family responsibilities, a complication and impediment to occupational advancement not faced by most men").

if she has a job at all. It is problematic whether the former wife can be adequately compensated for the disadvantages conferred by marriage by means of the divorce process, specifically through property distribution or spousal support.²⁴ It may be argued, moreover, that the former husband is no more personally responsible for the gender-based division of labor and the resultant inequities than the former wife. He, too, may have legitimate complaints about an arrangement that has burdened him with virtually all financial responsibility for the family and discouraged or precluded his development as a nurturing human being.²⁵

Burning Down the House

Divorce may be viewed as the destruction of the private sphere:²⁶ "burning down the house" since it no longer serves its intended purpose. However unsatisfactory the marriage, it may well have been the homemaker's only alternative to destitution. The private sphere may be seen as her only shelter from the harsh demands of a job market that discriminates against her. While the destruction of the private sphere usually has a greater impact on the homemaker spouse, whose life and work have been centered there, the breadwinner spouse may claim that any property accumulated was acquired through his paid labor outside the home. This Article will explore the ways in which the property division aspect of the divorce process may redress, or aggravate, the hardships and inequities for both parties.

Many commentators have noted the often devastating financial impact of divorce on women. Several have urged the adoption of laws designed to improve women's post-divorce finances. Professor Lenore Weitzman, for example, argues that the extent to which the husband's earning capacity has increased during the marriage should be considered "property" subject to distribution at the time of divorce. Although I agree with much of Professor

24. Alimony, which may be considered an award of intangible property, is normally a claim on the supporting spouse's future income. J. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 632 (1978).

25. See Kulzer, *supra* note 18, at 3 n.11 (noting that men have had "too little choice," insofar as they have been discouraged from working at home and taking care of children).

26. Where both parties hope to maintain an ongoing relationship with the children of the marriage, it may be necessary to construct some new edifice, some intersection of their respective newly created private spheres. See Shultz, *Contractual Ordering of Marriage: A New Mode for State Policy*, 70 CALIF. L. REV. 204, 272 & n.239 (1982) [hereinafter *Marital Contracting*].

Weitzman's underlying analysis, in this Article I will discuss some of the problems raised by her proposed solution.

A key theme in the analyses of these commentators is the notion that the gender-based division of labor, particularly in the home, is somehow inevitable. I disagree with this premise, which is belied by the trends toward women's increased participation in the labor force, men's increasing assumption of responsibility in the home (albeit at a slower rate) and the almost universal repudiation of fault grounds for divorce. Thus, "burning down the house" is also a metaphor for the rejection of the traditional breadwinner/homemaker model of marriage. The image, moreover, suggests the futility of attempting to reconstruct an approach to divorce out of the ashes of discredited assumptions about gender roles.

A Proposal

The major premise of this Article is that gender-based division of labor, in the marketplace as well as the home, is responsible for women's impoverishment. The minor premise is that divorce contributes to that impoverishment insofar as it exacerbates that division of labor, which it may do simply by failing to address it. Accordingly, fairness requires that this division of labor be taken into account when dividing property at the time of divorce. I propose that there be a presumption in favor of a greater distribution of property to the woman when the parties have divided their labor in the home in accordance with gender stereotypes.²⁷ I will argue that fairness further requires that such favorable treatment stop short of perpetuating dependence, or any other continuing relationship between the parties inconsistent with the autonomy of each.

There are two competing goals here. First, the proposal at-

27. This is hardly a radical proposition. Legislatures and matrimonial judges have been taking this into account for years. Indeed, most states recognize the nonmonetary contributions of the homemaker spouse. Freed & Walker, *Family Law in the Fifty States: An Overview*, 20 FAM. L.Q. 331, 360-61 (1987) (noting that "the trend is toward recognition by all states"). The problem is that they have been doing so implicitly, thus neglecting to create coherent precedent. See *infra* text accompanying notes 30-92. However well-established as a practical matter, the doctrinal basis for the proposition has not been developed. It is a goal of this Article to begin to do so. See generally Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 26 (1987) (noting "linkage between subordination of [minorities] in one area of life and their opportunities in another" in the employment discrimination context).

tempts to compensate women for prior unfairness within the marriage. Second, it seeks to encourage autonomy, particularly for women. I conclude that while this proposal may increase fairness, it remains for the most part unobtainable through property distribution or any other aspect of the divorce process.

Outline of the Article

This Article is divided into three sections. The first section will attempt to define fairness and discuss some of the impediments to its achievement in the context of property distribution.

The second section will explain why fairness as defined in the first section requires (1) a presumption in favor of awarding women who have primarily worked in the home more than half of the marital property and (2) the exclusion of enhanced earning capacity from property division at the time of divorce.

The third section will discuss the limited capacity of the divorce process, particularly the division of property, to address the inequities resulting from the dissolution of the marital relationship. While noting that some relief may be provided through a construction of equitable distribution statutes that explicitly takes into account the unequal positions of the parties,²⁸ this section will conclude that fairness is for the most part unobtainable through the divorce process. The potential for perpetuating or deepening unfairness through that process, on the other hand, is great and must be assiduously avoided.²⁹

I. A THEORY OF FAIRNESS IN PROPERTY DIVISION

In the majority of states, courts attempt to effectuate an "equi-

28. The disadvantaged spouse has frequently received less than half of the family's property under equitable distribution statutes in states with a common law tradition. L. WEITZMAN, *supra* note 5, at 48. See, e.g., *Perkins v. Perkins*, 159 N.J. Super. 243, 387 A.2d 1211 (App. Div. 1978); *Esposito v. Esposito*, 158 N.J. Super. 285, 385 A.2d 1266 (App. Div. 1978). See generally L. WEITZMAN, *supra* note 5. This section will argue that such statutes nonetheless can and should be construed in her favor.

29. Although I offer some general suggestions, this Article is basically intended as a broad theoretical inquiry. See generally Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039 (1985) (arguing for the articulation and rigorous analysis of the theoretical underpinnings of family law). Professor Schneider's definition of theory is adopted here: "'Theory' has painfully numerous connotations; here, I mean by it no more than systematic explanation at some level of abstraction of how law acts or why it should act in a particular way." *Id.* at 1041.

table" distribution rather than an equal division of property³⁰ at the time of divorce. While a great deal of rhetoric has been generated by the term "equitable," and a great many criteria promulgated to guide the finder of fact,³¹ it is not clear what equitable means in this context. This section first discusses the general criteria considered by the courts; that is, the parties' past contributions to the marriage and their present needs. Second, it explains why these criteria are unfair and lead to unfair results. The focus here is on the need for an explicit acknowledgement of the actual context in which the criteria are applied. Because our culture is stratified by gender, the needs and contributions of the parties cannot be compared without expressly taking gender into account.³² I then sketch an approach that seeks to increase fairness by specifically addressing the division of labor in the particular

30. There are forty-one common law property states in which the courts have equitable power to distribute property upon divorce, either in the form of property distribution or maintenance. Freed & Walker, *supra* note 27, at 356. See also Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 819 (1985) (noting that nearly all of the states which formerly required distribution of property solely on the basis of legal title now have "equitable distribution" statutes). See DiLeo & Model, *supra* note 8, at 222 n.7 (discussing support by the National Organization of Women (NOW) of amendment to New York's equitable distribution statute providing presumption in favor of equal division. The amendment was defeated because of perceived need to respond flexibly to differences in marriages. "Critics . . . countered that 'flexibility' and its concomitant subjectivity would lead to unfair results with an overwhelmingly male judiciary undervaluing wives' roles as homemakers."); cf. Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 587 (1982) [hereinafter Kennedy] ("Those who don't see [the decisionmaker] as 'one of us' will suspect, the minute he begins to speak of distribution, that he is more of a player than a referee, and those of his own group begin to worry that he will go over to the enemy."). See generally COMPARATIVE LAW OF MATRIMONIAL PROPERTY (A. Kiralfy ed. 1972) [hereinafter COMPARATIVE LAW] (comparing laws of property distribution in Belgium, England, France, Germany, Italy and the Netherlands). See also Bruch, *supra* note 11, at 777 (discussing reasons for most states' "reluctance to follow California's lead" of community property).

31. A fair process, in which a neutral judge compensates for unequal bargaining power between the parties, is assumed. But cf. Mnookin & Kornhauser, *supra* note 2, at 993 ("There may well be cases in which one spouse (stereotypically the husband) is highly sophisticated in business matters, while the other spouse is an innocent lamb being led to the slaughter. But married couples more typically have similar educational and cultural backgrounds, and most individuals perceive very well their own financial interests and needs at the time of divorce.").

32. Cf. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-71 (1984) (discussing the need to extend and enrich legal paradigms through the construction of a broad temporal frame, on the assumption that "the obvious problem . . . serves as a symptom of a potentially larger problem of social disorganization." *Id.* at 54.) Here, inequitable distribution is the "obvious problem," symptomatic of the larger problem of the gender-based division of labor.

marriage. Finally, I suggest general factors which might be productively considered either for further development of the specific proposal, or for generating a better alternative.

A. Factors Taken Into Account by Equitable Distribution Statutes.

In the landmark case *Painter v. Painter*,³³ the New Jersey Supreme Court set forth the criteria for determining the division of property at divorce. These include:

"respective age, background and earning ability of the parties, duration of the marriage, standard of living of the parties during the marriage, money or property each brought into the marriage, present income of each, property acquired during the marriage by either or both, source of acquisition, current value and income-producing capacity of such property, debts and liabilities of the parties, present mental and physical health of the parties, probability of continuing present employment at present earnings or better, effect of distribution upon ability to pay alimony or support, and gifts from one spouse to another during marriage."³⁴

New York's equitable distribution statute sets forth similar criteria.³⁵ These checklists indicate the two basic concerns of the

33. 65 N.J. 196, 320 A.2d 484 (1974).

34. *Id.* at 211, 320 A.2d at 492 (quoting *Painter v. Painter*, 118 N.J. Super. 332, 335, 287 A.2d 467, 469 (Ch. Div. 1972)). The court further noted the criteria approved by the American Bar Association in connection with the Uniform Marriage and Divorce Act:

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

Id. at 212, 320 A.2d at 492.

35. N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1986). Subsection 236(B)(5)(d) outlines criteria to be considered in making the distribution. These include the income and property of each party; the duration of the marriage and the age and health of both parties; the needs of the custodial parent; spousal support; the loss of inheritance and pension rights upon dissolution of the marriage; contributions as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; the liquid or non-liquid character of all marital property; the probable future financial circumstances of each party; the impossibility of evaluating an asset; tax consequences; wasteful disposition of assets by either spouse; and any other factor which the court shall expressly find to be just and proper.

courts and the legislatures:³⁶ (1) the needs of the parties at the time of divorce and (2) their contributions during the marriage.³⁷ Consideration of the listed factors will presumably enable the factfinder to quantitatively ascertain both.³⁸

These are necessary considerations, but in my view not sufficient. I submit that "need" and "contribution" cannot be fairly determined without taking into account the cultural bias which causes us to define these terms differently for men and for women. Moreover, the prevailing gender-based division of labor³⁹ not only renders the needs of women more acute at divorce but also results in the trivialization of their past contributions.⁴⁰

See Freed & Walker, *supra* note 27, at 360-64 (examples of typical judicial and statutory guidelines in determining property distribution and/or maintenance).

36. Cf. Chambers, *supra* note 30, at 819 (citing length of marriage, parties' capacity for self-support and parties' contribution to the acquisition of property as factors typically considered by courts).

See generally Kennedy, *supra* note 30, at 564-65 (discussing grounds for distinguishing between courts, legislatures and administrative agencies as lawmakers).

37. See, e.g., DiGiacomo v. DiGiacomo, 80 N.J. 155, 157, 402 A.2d 922, 923 (1979) (noting plaintiff's argument that "defendant had contributed nothing to the marriage since [the parties' separation] and that hence it would be inequitable to allow her to share in property thereafter acquired"). Cf. Arthur & Shaw, *On the Problem of Economic Justice*, JUSTICE AND ECONOMIC DISTRIBUTION 7 (J. Arthur & W. Shaw eds. 1978) [hereinafter Arthur & Shaw] (noting that utilitarianism has been criticized because it does not "take seriously enough the differences between persons. The happiness of each person should not count equally in the total, without regard to his or her past behavior.").

38. Community property statutes presumptively require an equal division of property at divorce. Special circumstances, as well as marital fault, may be considered under these statutes, except California's. Freed & Walker, *supra* note 27, at 353. For a discussion of characteristics of community property, see I. BAXTER, MARITAL PROPERTY 107-16 (1973). The applicability and operation of my proposal under community property statutes is beyond the scope of this Article. This is not to imply that community property is without appeal, or that in certain circumstances the test suggested here will not produce the same result. Indeed, women generally fare better under such laws. L. WEITZMAN, *supra* note 5, at 48.

39. Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 346 (1980) [hereinafter *Keeping Women in Their Place*]. Gender, of course, affects not only what kind of work we do, but what we do when we are not working, and how we act and think. See generally C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). This Article focuses on better compensating women at divorce for the work they did while at home. The terms "division of labor" or "work or labor force segregation," as used in this Article, refer to this "gender-based division of labor."

40. Some states, such as New York, require the homemaker's contribution to be taken into account by statute. DiLeo & Model, *supra* note 8, at 258 & nn. 136, 138. For a detailed listing of statutes with "homemaker" provisions, see Freed, *Factors for Equitable Distribution*, A PRACTICAL GUIDE TO NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW 201-03 (1980). English courts also take housework into account. Kiralfy, *The English Law in COMPARATIVE LAW*, *supra* note 30, at 197.

Matrimonial courts and state legislatures have implicitly taken the gender-based division of labor into account for years. They have done so by attempting to ascribe some value to the homemaker's contribution⁴¹ and by attempting to address her inability to earn a decent wage. The results, however, have been uneven. The lack of a coherent, principled approach to this question has left the courts with little guidance.⁴²

Courts have been hampered in fashioning an equitable remedy by the pretense, implicit in the law, that the couples before them consist of two individuals, possessing equal social status and correspondingly equal bargaining power, who have mutually defined the terms of their relationship.⁴³ This proposal assumes that if the division of the labor in the home conforms to the traditional breadwinner/homemaker model, the couple contains members of two classes. A female homemaker is a member of a disadvantaged class and should be recognized as such.⁴⁴ What is needed is an approach that not only explicitly takes the gender-based division of labor into account, but that also addresses the ways in which

41. See, e.g., *Gibbons v. Gibbons*, 174 N.J. Super. 107, 114, 415 A.2d 1174, 1178 (App. Div. 1980) (noting that wife's nonremunerated efforts in raising children, making a home and providing a "myriad of personal services in providing physical and emotional support" were at least as essential as husband's contributions, court upheld equal division of assets); cf. *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401, 346 A.2d 434, 436 (App. Div. 1975), *certif. denied*, 69 N.J. 391, 354 A.2d 319 (1976) (wife in disruptive marriage could be awarded less property where unsettling home life did not contribute to husband's business success).

42. It is at least an open question whether the value of homemaker services can be adequately expressed in monetary terms. There are several reasons for this including the tendency of household work to expand to fill all available time. For the Marxist definition of domestic labor, see A DICTIONARY OF MARXIST THOUGHT 135-37 (T. Bottomore ed. 1983). See generally *infra* note 57.

43. See generally Glendon, *The New Family and the New Property*, 53 TUL. L. REV. 697 (1979). Professor Weitzman strains to justify compensation to the wife on the basis of some implied contract. L. WEITZMAN, *supra* note 5, at 376. Contracts between spouses are void at law but recognized in equity only if they are fair and equitable. *Carlsen v. Carlsen*, 72 N.J. 363, 370, 371 A.2d 8, 12 (1976).

The premise here is that the homemaker wife is a member of a disadvantaged class, and entitled to compensation whether or not she expected it or ever felt she had sufficient leverage to demand it.

44. See *Muller v. Oregon*, 208 U.S. 412, 422 (1907) ("Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislature designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."). See generally J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 293-324 (1978); Jones, *The Dynamics of Marriage and Motherhood*, *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* 46, 59 (R. Morgan ed. 1970); J.S. MILL, *THE SUBJECTION OF WOMAN* (1929).

the effects of that division of labor may have been exacerbated by the parties' roles within the marriage.

B. Fairness Problems With Existing Criteria

1. Perpetuation of an Unfair Status Quo

The need/contribution criteria might be fair if the respective needs and contributions of the husband and wife were comparable.⁴⁵ But they are not. The gender-based division of labor imposes tremendous burdens on women. Indeed, the combined effect of women's private sphere responsibilities and men's domination of the public sphere makes it impossible for most women to earn a decent living.⁴⁶

Each married couple determines how to deal with this ubiquitous division of labor. This determination is usually tacit, a result of the choices made regarding their respective responsibilities within the marriage.⁴⁷ If those choices conform to the breadwinner/homemaker model, the woman is likely to be seriously disadvantaged at the time of divorce.⁴⁸ In what is usually considered the traditional model,⁴⁹ women assumed responsibility for nurtur-

45. See *Family and Market*, *supra* note 18, at 1512, discussing "the extent to which the assertion of state neutrality between juridically equal husbands and wives is open to the same attacks as is the asserted state neutrality between juridically equal entrepreneurs and workers."

46. See Warshaw, *Study Finds More Women Working and They Still Earn Less Than Men*, *Star Ledger*, Feb. 7, 1988, § 1, at 53. See *WOMEN IN THE AMERICAN ECONOMY*, *supra* note 6, at 28-36. Many women, of course, cannot earn anything at all. *Id.* at 37. It is as if men have the wind at their backs, and women have it in their faces.

47. Cf. Burt, *Coercive Freedom: A Response to Professor Chambers*, 18 U. MICH. J.L. REF. 829, 832 (1985) (discussing the state goals that might be advanced by enforcing agreements regarding their relationship between unmarried couples, including protector of the weaker party).

48. Men have incentives besides altruism for rejecting this model. As a practical matter, two incomes are usually needed to maintain a middle-class standard of living. See *infra* note 88. Thus, he has the same reason she has had for supporting his work; it is necessary for their mutual benefit. Moreover, just as women come to appreciate the satisfactions of the breadwinner role, men are increasingly cognizant of the gratification obtainable through nurturing and creative work in the private sphere. See Bartlett & Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986) [hereinafter *Dependency Dilemma*].

49. It may be argued that the term "traditional" is a misnomer, in that the tradition is of fairly recent vintage, developing only when paid labor outside the home became widespread. See Kulzer, *supra* note 18, at 46 n.238 (noting that "the full-time housewife is a relatively recent phenomenon and one that is now declining"). See generally *WOMEN'S CLAIMS*, *supra* note 3.

ing, housekeeping, and caretaking tasks⁵⁰ and men worked primarily outside of the home, providing the family's income. In the late nineteen-eighties, although a majority of women work outside the home,⁵¹ they still do most of the necessary work in the home as well.⁵² This reflects as well as reinforces the division of labor in the public sphere of the marketplace and the state,⁵³ where women perform nurturing tasks in daycare centers and schools, clerical housekeeping tasks in offices and caretaking tasks in hospitals. Employers in these ill-paid fields may actually benefit from the weak labor force attachment⁵⁴ necessitated by the woman's private sphere responsibilities.⁵⁵ Both the historical depreciation of women's work⁵⁶ and this weak labor force attachment reinforce women's economic dependence on their husbands. While it may be argued that such dependence benefits neither

50. Taub & Schneider, *supra* note 1, at 117, noting that, "[T]hroughout this country's history . . . [w]omen have instead been largely occupied with providing the personal and household services necessary to sustain family life."

51. WOMEN IN THE AMERICAN ECONOMY, *supra* note 6, at 1. See *Women at Work*, *supra* note 4, at 26 (noting that women have taken 80% of the new jobs created since 1980). A woman may, of course, be an underpaid childcare worker, or otherwise a victim of the gender-based division of labor in the public sphere. This Article does not, however, seek to hold the husband accountable for the impact of gender stereotyping outside the home.

My proposal does not distinguish between a husband who prevents a wife from working outside the home and a husband whose wife decides that it is not worthwhile for her to do so. Thus, it could be argued that a husband who is neutral or even supportive about his wife's work may be penalized for the effect of the marketplace over which he has no direct control. I think it is more accurate to conceptualize this proposal as imposing a small portion of the burden suffered by the wife on the husband. In short, the proposal functions as a mechanism for shifting some of the impact of marketplace discrimination from the wife to the husband. Additional incentives are required to encourage the wife's labor force attachment and the husband's assumption of greater childcare and homemaking responsibilities.

52. Ms., *supra* note 15. Kulzer, *supra* note 18, at 13.

53. Cf. *Family and Market*, *supra* note 18, at 1501 (distinguishing between civil and state components of the public sphere).

54. Weak labor force attachment refers to a work history characterized by part-time work, seasonal work, or work interrupted by sometimes lengthy periods of childcare. See WOMEN AND WORK, *supra* note 4.

55. See *Keeping Women in Their Place*, *supra* note 39, at 349, suggesting that "attitudinal factors figure significantly on both the supply and demand sides of the picture." See generally Gilder, *Women in the Work Force*, THE ATLANTIC, Sept. 1986.

Increased labor force participation of mothers of young children has been especially dramatic. See WOMEN IN THE AMERICAN ECONOMY, *supra* note 6, at 8. Sixty-two percent of mothers of school age children were in the labor force in 1980. *American Women*, *supra* note 5, at 14. By 1986, most mothers (72%) who worked were employed full-time. SENATE FINANCE COMM., 100TH CONG., 1ST SESS., DATA RELATED TO WELFARE PROGRAM FOR FAMILIES WITH CHILDREN 159 (Comm. Print 1987) [hereinafter SENATE FINANCE COMM. REP.].

56. See *supra* notes 16 & 48, and *infra* note 59.

husband nor wife, it is clearly the wife who suffers more from it at divorce.

a. Women's work in the private sphere

Where the wife has been a full-time homemaker, courts have recognized the need to take her domestic services into account in determining an equitable distribution of property, but have found that assessing the homemaker's contribution is difficult for several reasons. First, it has been suggested that the very nature of the work makes it inherently resistant to commodification.⁵⁷ When attempts are made, such services are almost invariably undervalued,⁵⁸ reflecting the historical debasement of women's work. Even if an appropriate value could be determined for the services themselves,⁵⁹ the question of compensation for lost opportunity remains.

These problems, difficult to resolve in the case of the full-time homemaker, become subtler and less determinable in the case of

57. See generally Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1923 n.260 (1987) (discussing commodification of homemaker services).

58. As suggested in the introduction, the study of this hitherto "private" concern; i.e., the value of the wife's work in the home, becomes, at time of the divorce, a question of broader public policy, i.e., the value of housework in market terms. There have been innumerable efforts to at least develop a method to ascertain this value. While the wide range of values reflects the wide range of interests of those promulgating the various approaches, there is little serious dispute that the value of such work is astronomical. In *WOMEN'S CLAIMS*, *supra* note 3, at 38, for example, the authors suggest three approaches, all based on 1976 Bureau of Economic Analysis statistics. First, they provide two methods of calculating market cost, which they estimate either at a national replacement cost of \$566 billion to hire individuals to do general housework, or a national service cost of \$789 billion to hire market specialists, such as launderers or caterers. A second method is replacement cost which would be 33% of the GNP while the service cost amounts to 46% of the GNP. The third method is the lost opportunity cost: that is, what could have been earned by the houseworker had she been working for pay. This is calculated as \$1037 billion gross compensation, \$887 billion net compensation, and net return, after working costs are deducted, \$777 billion. Gross lost opportunity value would be 61% of the GNP, net compensation would be 52%, and net return 46%. See generally J. AREEN, *supra* note 24, at 635. See also Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 404-05 (1984-85) [hereinafter *Nurturing Leaves*], discussing the value of caregiving work primarily done by women.

59. Addressing the historical undervaluation of caring work, Professor Taub offers a creative approach in the context of parental leaves from employment: "Rather than specifying any particular sum [for caring work] the proposal here suggests a source of figures: salaries paid military medical and paramedical personnel. No one is likely to argue that such figures are inflated, and by drawing on a male tradition of acknowledged public service, the process of rate setting can itself help endorse the value of caring work." *Nurturing Leaves*, *supra* note 58, at 405.

the working wife who is a part-time homemaker.⁶⁰ Her labor force attachment has usually been significantly weaker than that of her husband. If there are children, it was she who took a few years off to care for them, and she who stayed home if a child was sick. Even if both husband and wife were working, she did most of the housework, cooking, shopping, and family errands—aptly characterized by one court as “myriad personal services . . . providing physical and emotional support.”⁶¹ If he had a career opportunity that required a move, the family relocated, regardless of the impact on her employment. She has spent considerable time, energy and skill nurturing other family members, and has typically deferred her own ambitions.⁶²

Under existing guidelines for property division, the former wife is unlikely to be awarded even half the marital property.⁶³ If the division of labor within the marriage is analyzed in terms of its impact on the parties' positions in the marketplace, however, it becomes apparent that her husband has had the opportunity to benefit at the wife's expense. The issue is not whether he has actually done so; whether he was using his extra time to amass a fortune or to squander one should not determine the proportion of such property to be awarded to the wife.⁶⁴ The focus should not be on the husband's possibly enhanced earning capacity, but on the wife's lost, or at least deferred, opportunity to develop her own earning potential because of her work in the home. In short, she should be compensated if she has effectively lost a job through divorce and he has not.

b. Men's domination of the marketplace

The division of labor within the home is reinforced by the division of labor in the marketplace.⁶⁵ Because of the woman's relatively limited access to higher paying jobs, her paid labor is worth

60. In 1975 and 1985, more than half of all working women were married. *WOMEN IN THE AMERICAN ECONOMY*, *supra* note 6, at 6.

61. *Grayer v. Grayer*, 147 N.J. Super. 513, 371 A.2d 753 (App. Div. 1977).

62. See generally *Family and Market*, *supra* note 18, at 1505, noting tradition relegation of altruism to the family context.

63. L. WEITZMAN, *supra* note 5, at 48.

64. It may have an effect, however, on the amount of property accrued, though. In some states, moreover, economic misconduct is a factor to be considered in property distribution. Freed & Walker, *supra* note 27, at 487.

65. See generally Taub & Schneider, *supra* note 1, at 117-20 (discussing women's legal exclusion from the public sphere).

less to the family than that of her husband.⁶⁶ It appears to benefit both of them for him to work outside the home and for her to do more of the uncompensated tasks within it.⁶⁷ In order to determine whether this particular allocation of work is fair, a threshold question is whether a "free and rational" person would agree to it.⁶⁸ We may find that "free and rational" men are unlikely to agree to perform homemaking and nurturing tasks in exchange for room and board, but that "free and rational" women consistently do so. Before considering whether "rational" women simply enjoy different activities than "rational" men, we should determine whether such choices are "free." What are the woman's alternatives? What are the man's? I would argue that the individual woman's personal preference is at least in part a function of women's comparative lack of opportunity in the marketplace.⁶⁹

Is it fair to blame the individual husband for the inequities of the marketplace? An emphasis on blame is inappropriate here.⁷⁰ My focus is more on compensating the wife for her presumably

66. Fineman, *supra* note 2, at 831. According to Professor Fineman, women are paid less than men with similar qualifications:

While there have been some gains by white collar and professional women, women at the lowest wage rates have not experienced much progress. There was no evidence, at least as of 1974, that the situation was getting better for women. In fact, it was getting worse. Statistics at that time indicated what we now take for granted; i.e., that the 'new poor' are single parent families headed by women.

Id. But cf. N.Y. Times, *supra* note 5.

67. See generally Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 8-9 (1977) (setting forth typical reasons for this pattern of choice). Cf. Rawls' difference principle, i.e., "that economic goods should be distributed equally unless an unequal distribution would work to the benefit of all, especially the worst off." Arthur & Shaw, *supra* note 37, at 7-8. Cf. Griffin, *Some Problems of Fairness*, ETHICS 100, 104 (Oct. 1985) (arguing that "the most powerful objection to utilitarianism is that it cannot account for fairness").

68. Griffin, *supra* note 67, at 117.

69. See Finlay, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 97 YALE L.J. 914, 931-40 (1987). See generally Griffin, *supra* note 67, at 117; C. GILLIGAN, *supra* note 39, at 12-23 (arguing that men and women have different concepts of achievement).

70. Cf. Thomson, *Preferential Hiring*, in EQUALITY AND PREFERENTIAL TREATMENT 18, 38-39 (M. Cohen, T. Nagel & T. Scanlon eds. 1977) (arguing that, in order to remedy past discrimination in university hiring, it is not "entirely inappropriate" for young white males, however personally innocent of wrongdoing, to pay the cost because they may have directly benefited from such discrimination in the past or, at the very least, had "the advantage in the competition which comes of confidence in one's full membership, and of one's rights being recognized as a matter of course"). But see Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson*, EQUALITY AND PREFERENTIAL TREATMENT 40, 42 (distinguishing compensation of individuals from collective compensation of groups).

less than free assumption of her gender role than on punishing the husband for his assumption of his. I would argue, however, that he may fairly be held accountable to the extent that his own marriage incorporates and reinforces the gender-based division of labor.⁷¹

Women's relegation to the private sphere facilitates men's participation in the marketplace in at least two ways. First, women's problems of access, and their struggle to balance work and family commitments once they obtain a job, effectively remove them from competition with men, especially for higher level jobs. Second, the weaker the wife's labor force attachment, the more available she is to provide support services for her working spouse. Men have powerful incentives to view traditional "women's work" as a matter of personal preference.⁷² I am not proposing that a wife should be compensated to the extent that her husband has profited from this division of labor, simply that she is entitled to some recompense because he has had the opportunity to obtain a benefit at her expense.⁷³

2. Female Underclass

The growth of a new underclass comprised of female headed households is well documented.⁷⁴ Although women's impoverish-

71. However well established as a practical matter, the doctrinal basis for the proposition has not been developed. Cf. Griffin, *supra* note 67, at 112-13, discussing "free-rider problem" in which one person may enjoy a benefit only if others abstain. The example given is that one person may enjoy a log fire, but if everyone does so the pollution would outweigh the pleasure. To what extent is the husband's participation in the public sphere contingent upon the wife's renunciation of it?

72. See *Family and Market*, *supra* note 18, at 1510 ("[T]he assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives."). Cf. *Keeping Women in Their Place*, *supra* note 39, at 402 (urging the expansion of the concept of discrimination to include benevolent and unconscious acts).

73. Cf. Arthur & Shaw, *supra* note 37, at 5 ("Some, of course, think that for one person to have more than another is intrinsically unjust, but disparity of wealth itself cannot be the source of the injustice. (Only in a cosmic or poetic sense is it unjust for me to thrive on my Iowa farm while you barely eke out an existence in the Yukon.) If we are to speak of justice at all, there must be some relation between the parties by virtue of which a right is violated or an unfairness done."); cf. *Wisner v. Wisner*, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981) (court stated that in every marital relationship, the parties agree to a division of labor, the value of which is consumed during the marriage). Some commentators suggest that she is entitled to compensation for lost opportunity. See, e.g., Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201 (1982-83).

74. L. WEITZMAN, *supra* note 5, at 323; WOMEN IN THE AMERICAN ECONOMY, *supra* note 6,

ment is more a consequence of gender segregation⁷⁵ than of divorce, there can be no doubt that the impact of the gender-based division of labor is felt more keenly after divorce.⁷⁶

The disparity in wealth between divorced men and women may reflect a number of factors: the disparity in wealth between men and women generally (regardless of marital status or the wide differences in wealth between those with different degrees of labor force attachment), education, or family responsibilities. But one function of the divorce process should be to narrow any such difference, at least insofar as it may be attributable to the marriage. To the extent it fails to do so, the process may be considered unfair.⁷⁷ Moreover, in some cases such disparity may be a result of the divorce process itself, which thus becomes inherently unfair.

3. Dissatisfaction with Process

A process may be fair even though many of those who experience it do not consider it so.⁷⁸ For many reasons, including the impossibility of translating into market terms the emotional cost of a broken marriage, it may be inevitable that the divorce process will be perceived as unfair by the parties. Minimizing this perception of unfairness is nevertheless of great importance in this context, since that perception undermines the law as well as impeding its enforcement. The existing law of property distribution unnecessarily contributes to that perception of unfairness. I submit that the explicit recognition of the parties' division of labor within marriage, while not making anyone happier about divorce, might make both parties feel that they have been treated more fairly.

The perception of unfairness of the process may be traced to

at 36-39; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 633 n.210 (1986).

75. Bloom, White & Asher, *Marital Disruption as a Stressful Life Event*, DIVORCE AND SEPARATION, *supra* note 7, at 194 (citing Brandwein, Brown & Fox (1974)). See generally Taub & Schneider, *supra* note 1.

76. Not only do they lose the buffer of the husband's earnings, but they often find themselves with virtually all responsibility for childcare. See generally *Dependency Dilemma*, *supra* note 48 (response to critique of joint custody).

77. See Bruch, *supra* note 11, at 776 ("[the] system stands in need of reform . . . marriage [shouldn't] entail . . . strikingly disparate post divorce wealth").

78. Consider, e.g., the vast number of habeas petitions containing allegations of unfairness, dismissed by the courts. S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1529 (3d ed. 1975) (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967)).

three main factors, all of which are addressed by my proposal. First, equitable distribution is unpredictable.⁷⁹ As a result, negotiation or litigation is more extended than it would be if the parties could correctly assess the risks of proceeding.⁸⁰ It is also more expensive, for the courts as well as the parties.⁸¹ A presumption in favor of awarding more than half the marital property to women whose work in the home comported with gender prototypes would provide additional and much needed guidance to the parties, their lawyers and the courts.

Second, the parties are likely to consider the division of property unfair to the extent it requires them to maintain a post-judgment relationship.⁸² The point of divorce is to effectuate a clean separation so that each party may start a new life "free of the bonds of matrimony" as provided in the judgment of divorce. A person who has paid the psychological and monetary price of divorce, and finds that she still must deal with her former spouse, has not gotten what she bargained for. She is likely to feel cheated. My proposal expressly takes this into account, rejecting any division that requires the parties to maintain an ongoing relationship or that is otherwise inconsistent with the autonomy of each.⁸³

79. *Marital Contracting*, *supra* note 26, at 240 n.109 (noting conflict between law of property division and couples' expectations).

80. See Mnookin & Kornhauser, *supra* note 2, at 957 (noting the importance of appropriate standards for property division, and the impact of such standards on negotiated settlements). See generally Kennedy, *supra* note 30, at 573 (increasing the predictability of property distribution would meet Professor Kennedy's efficiency criteria in that it would improve the system from both parties' perspectives by reducing transaction costs).

81. Interminable matrimonial litigation imposes a substantial burden on judicial resources. See generally *New Jersey Committee on Matrimonial Litigation, Phase Two, Final Report*, N.J.L.J., July 16, 1981 (Supplement).

82. See DiLeo & Model, *supra* note 8, at 254-55 (discussing "economic desirability of retaining [a business, corporation or profession] free from any claim or interference by the other party"). *But cf.* C. GILLIGAN, *supra* note 39, at 62-63 (discussing the high priority that women generally place on the "web" of their relationships). It may well be important for many women, especially those with children, to maintain some kind of relationship with their former spouses. This is not the same as being compelled by court order to maintain a financial relationship. Indeed, the latter may interfere with the cultivation of the "web" described by Professor Gilligan.

83. See generally Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Approach*, 55 N.Y.U. L. Rev. 1, 8-15 (1980) (discussing autonomy historically and within the family context).

The proposal need not preclude all post-divorce economic obligations, particularly if justice between the parties cannot be established by liquidation of existing tangibles at the time of divorce. See Comment, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313,

The third factor contributing to the perception of unfairness is the notion that the essence of the parties' relationship, their implicit bargains, are not considered by the court. In this sense, it may be argued that dissatisfaction with the divorce process has increased since the inception of no-fault divorce because these factors were taken into account, however indirectly, by means of fault grounds. Fault grounds provided a mechanism for addressing, if not rectifying, inequities arising from gender roles. Fault divorce was not only a tool for punishing errant spouses, but for bringing emotionally loaded questions of power, duty and accountability within the marriage before the court.

In adopting no-fault divorce laws, we have recognized that not all of these questions may be susceptible to legal resolution⁸⁴ especially in the absence of a coherent consensus as to the parties' rights and responsibilities within marriage. The repeal of the fault statutes may be viewed, in part, as the repudiation of the traditional model of marriage. But to the extent that breadwinner/homemaker stereotypes persist, their effect should be taken into account by the law. If divorce is to be fair, the extent to which a gender-based division of labor remains a part of our society must be explicitly addressed during the divorce process.

326-30 (1981) [hereinafter *Professional Goodwill as Community Property*] (characterizing this scenario as "precisely the situation in which the nonprofessional spouse needs the greatest protection"). *Id.* at 329. The author suggests periodic payments or the execution of a promissory note payable in installments.

The point is not that an obligation cannot extend beyond the boundary of the marriage, but that the obligation can only be recompense for an obligation incurred within that boundary and that it is finite, discrete and defined by that source. "In division of community property, the proper and relevant issue is present existence and value, or value at the time of dissolution of the marital community. *Id.* at 321. *Contra Domestic Relations: Consideration of Enhanced Earning Capacity of Recently Educated Spouse in Divorce Settlements*, 17 *SUFFOLK U.L. REV.* 901 (1983) (advocating compensation for spouses who enable their partners to earn a graduate or professional degree).

Joint ownership of the marital home after divorce raises interesting issues not developed here. See, e.g., *Schaeffer v. Schaeffer*, 184 N.J. Super. 423, 446 A.2d 537 (App. Div. 1982). Under the proposal presented, the goal would be to minimize the joint decisionmaking where such joint ownership was unavoidable, a not infrequent occurrence. See generally *Bruch*, *supra* note 11, at 775 (1982).

84. Cf. J. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Advocates be Wise Negotiators?*, 34 *UCLA L. REV.* 863, 873 (1987) (comparing the lawyer's reduction of a situation to its legal components, preferably liquidated, with the wise negotiator's embrace of the "messy richness" of human affairs).

C. *A Proposal for Reform*

When dividing marital property, the court should first analyze the extent to which the parties' roles within the marriage conformed to the traditional division of labor, and then consider the factors set forth in cases like *Painter* or the applicable statutes.⁸⁵ If the parties assumed male-breadwinner/female-homemaker roles, and the husband has had an opportunity to benefit from this at the wife's expense, there should be a presumption in favor of a distribution of more than half the marital property to the woman.⁸⁶ Such a presumption acknowledges that the division of labor in the home freed the husband for lucrative activity in the marketplace and that the wife loses more than her ex-husband loses through the destruction of the private sphere. At the same time, there would be no awards for "enhanced earning capacity" or other property awards structured so as to financially yoke the divorced spouses together⁸⁷ or perpetuate the wife's dependence.

This is a very modest proposal. It is not intended to directly affect the ways in which couples structure their relationships during the marriage. Rather, it is suggested as a means of at least partially compensating women who, in retrospect, find that they have been disadvantaged by their assumption of a traditional role. Equally important, it seeks to make the assumption of gender roles within marriage a clearly defined issue in divorce litigation, to be developed in detail by counsel and carefully evaluated by the court. The routine articulation of these concerns in the

85. See *supra* text accompanying notes 33-44.

86. This assumes circumstances under which there would be an equal division but for this presumption, including divisions in community property jurisdictions. Establishment of such a presumption by legislation or judicial determination might be challenged on equal protection grounds, however. See, e.g., *Keeping Women in Their Place*, *supra* note 39, at 409 (citing *Orr v. Orr*, 440 U.S. 268 (1979), and *Stanton v. Stanton*, 421 U.S. 7 (1975) for the proposition that "domestic relations legislation that is justified only by the notion that women will remain in the home likewise has been struck down"); Note, *Constitutional Law—Gender-Based Classifications in Alimony Statutes Violate Equal Protection Clause*, 54 TUL. L. REV. 500 (1980) (noting that gender-based distinctions in alimony statutes have been struck on equal protection grounds).

But cf. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979). The court, which was not bound by the statute since the parties were unmarried, fashioned "equitable remedy" for the separating female/homemaker, male/breadwinner couple. The woman received a lump-sum payment representing future support, and no share of assets acquired during the relationship. This is the converse of my proposal. An affirmative action model may be more appropriate. See *infra* note 94.

87. See generally Kennedy, *supra* note 30, at 571-74 (discussing paternalistic and distributive motives in rulemaking).

context of formal legal proceedings would both validate them and generate fertile debate. Moreover, a painstaking case by case approach may well be necessary to refine a concedely rough proposition.⁸⁸

A presumption based on the division of labor within the private sphere should make "equitable" distribution more so for several reasons.⁸⁹ To the extent that the proposal provides incentives for women to enter the marketplace, it addresses the problem of the perpetuation of a sexist *status quo*. By awarding women more property, it could brake the growth of a female underclass. By increasing predictability and minimizing post-judgment interaction with the former spouse, the proposal could curb widespread dissatisfaction with the divorce process itself.⁹⁰

It may be argued that the proposed mechanisms will have the opposite effect. The assurance that the husband will not have to share his post-divorce earning capacity with his former spouse, for example, may encourage men to devote even more time to their careers. Similarly, it may be suggested that women will cling to their homemaker roles if they can be certain that doing so will assure a future award of most of the marital property.

I think that these scenarios are unlikely for several reasons. First, most people do not expect to get divorced during the often extended period in which they divide responsibilities within the home. Even if they did, this proposal would not enable either spouse to better exploit the other. Second, some portion of the husband's post-divorce earning capacity will remain available to his former wife through support awards.⁹¹ Third, the wife who is

88. Cf. Schneider, *supra* note 74, at 602 (discussing feminist consciousness raising as a form of praxis "which transcends the theory and practice dichotomy"). By bringing the discussion of gender roles to the matrimonial court, this proposal seeks to promote "consciousness raising" among those who might not consider themselves feminists.

89. See *infra* text accompanying notes 130-40. For a discussion of criteria to be considered in evaluating the effect of reforms on women, see Schneider, *supra* note 74, at 648 & n.271. Cf. Bruch, *supra* note 11, at 779 (suggesting reforms to "enhance substantive fairness by promoting three sometimes conflicting goals: comparable treatment of both spouses, protection for their children, and predictability").

90. See Kressel, Lopez-Morillas, Weinglass, & Deutsch, *Professional Intervention in Divorce: The Views of Lawyers, Psychotherapists, and Clergy*, *DIVORCE AND SEPARATION*, *supra* note 7, at 260, for explanations of dissatisfaction with the process. For descriptions of such dissatisfaction see C. Metz, *Divorce and Custody for Men* 127 (1968).

91. Theoretically, she could be awarded a substantial portion of any post-divorce increase. She may claim entitlement to the same standard of living they enjoyed during the marriage. An increase in the husband's earnings may enable him to meet that standard, and justify its award by a court. It has been noted, however, that if income remains con-

awarded the bulk of the marital property under this proposal will still be worse off, in most cases, than she would have been had she been able to establish a niche for herself in the marketplace. Limiting her compensation to a single discrete award, moreover, minimizes the tendency of such compensation to promote dependency. Finally, it is unlikely that the proposal would backfire given current trends towards two income households, men's increasingly active role in the private sphere, and women's increasing labor force participation.⁹²

By formulating an approach that takes the prevailing division of labor into account, I have attempted to articulate a flexible paradigm⁹³ for property distribution consistent with broader social goals. The critical elements of such an approach are the acknowledgment and rejection of gender stereotypes⁹⁴ and the promulgation of appropriate rules crafted to encourage both husbands and wives to develop themselves as productive, nurturing individuals, capable of participating and contributing in the private sphere of the home as well as the public sphere of the marketplace. Both parties should be rewarded for both kinds of contributions to the marriage.⁹⁵ Taking into account the ways in

stant, this is usually unobtainable since there are now two households to be maintained. Foster, *Alimony Awards*, ECONOMICS OF DIVORCE 5-6 (1978); cf. Dunne v. Dunne, 209 N.J. Super. 559 (App. Div. 1986) (supporting parent has an obligation to share benefits of financial achievement with children).

92. See Clark, *supra* note 13, at 443 (noting trends toward elimination of sex stereotypes and two income households).

93. I assume that protecting rights should be as much a concern as outcome in developing an approach to equitable distribution. See generally Arthur & Shaw, *supra* note 37, at 9 (comparing deontological and consequentialist approaches).

94. The incisive distinction between special treatment and affirmative action made by Professors Taub and Williams is equally applicable here:

[A]ffirmative action is not the same as the group based treatment advocated by the opponents of assimilation. Affirmative action assumes that the sexes are inherently similar and resorts to group based treatment solely to overcome an artificial inequality created by discrimination. Affirmative action, in theory at least, self-destructs when the group is brought up to the starting line with everyone else. It is thus an adjunct to the equal treatment, rather than a manifestation of the group treatment approach. (This is not to say that one of the dangers of group treatment—re-enforcement of stereotypes—is not present, but it is minimized by the underlying rationale and limited nature of affirmative action.)

Taub & Williams, *Will Equality Require More Than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV./CIV. RTS. DEVS. 825, 830 n.23 (1985). See also Sher, *Reverse Discrimination in Employment*, in EQUALITY AND PREFERENTIAL TREATMENT, *supra* note 70, at 49.

95. The extent, if any, to which married couples or couples contemplating marriage are aware of or influenced by divorce law is unclear. See Mnookin & Kornhauser, *supra* note

which men and women are already encouraged, if not compelled, to assume stereotypical gender roles within the home, it would be counterproductive to further reward women for homemaking activities or men for working outside the home.

No-fault divorce statutes were a first response by legislatures to conform the law of divorce to contemporary social and economic realities, particularly women's participation in the labor force and their correspondingly increased autonomy. Those statutes were far from perfect, and it cannot be disputed that many women have suffered disastrous financial consequences that they might have been spared but for no-fault.⁹⁶ Fault requirements are unlikely to be resuscitated, however. The change in social roles for both sexes, which is the underlying basis for no-fault, has rendered fault grounds obsolete.

The gender-based division of labor in both the private and the public sphere is steadily, if slowly, decreasing. Yet imbalances between divorcing spouses persist and the law provides inadequate redress. Explicit recognition of this pervasive gender-based division of labor, and its economic consequences, would render property division more equitable during this difficult period of transition.

II. THE THEORY APPLIED—A PRESUMPTION AND THE NEW PROPERTY

In almost all cases the parties leave the marriage with unequal prospects for the future. While the extent to which this may be attributable to the marriage itself is difficult to ascertain, it may be useful to imagine a continuum. At one end the parties have a "traditional"⁹⁷ division of labor within the marriage. The husband is the sole wage earner. His income pays all of the family's expenses. Their health insurance is provided by his employer and their savings are in his employee pension fund. They may have relocated, perhaps several times, to further his career. The wife takes care of the home and family.⁹⁸

2, at 952 n.4.

96. L. WEITZMAN, *supra* note 5, at 26.

97. *See supra* note 49.

98. *See supra* notes 60-62. Under this division of labor, the husband is expected to focus his energies on earning a living in the marketplace, while the wife is expected to diffuse her energy among the myriad tasks involved in maintaining a household. Husbands thus become well remunerated specialists, while the homemaker wife is probably as much of a

At the other end of the continuum, the parties do not conform to the breadwinner/homemaker stereotypes. Indeed, from a description of the parties' roles within the private sphere it is impossible to determine their gender. Both parties work outside of the home and share responsibilities within it.⁹⁹

In this section I will explain why fairness, as described in the preceding section, is advanced by explicitly addressing the couples' location on this continuum, by means of my two-part proposal. In doing so, I will develop the arguments sketched above, that, first, there should be a presumption that the wife is entitled to a greater proportion of the marital property if the couple's division of labor in their marriage conformed to cultural stereotypes.¹⁰⁰ Second, I will argue that enhanced earning capacity should not be considered marital property even if the amount of marital property is otherwise insufficient to compensate the wife.¹⁰¹

A. Background

1. No-fault Divorce Statutes

Courts have long recognized that the dependent spouse is far more disadvantaged by divorce than the supporting spouse, and that the former is almost always the wife and the latter is almost

prototypical generalist as may be found in a culture which does not particularly value generalists. Cf. Marx, *German Ideology*, quoted in E. FROMM, MARX'S CONCEPT OF MAN 42 (1971), envisioning "a society . . . [which] makes it possible for for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd, or critic."

99. See *Having and Sharing It All*, N.Y. Times editorial, Nov. 17, 1987.

100. There is no attempt here to discuss other factors in the relationship, besides a sexist division of labor, to which their roles may be attributed. See generally P. Rose, *Parallel Lives* 269 (1983) (discussing traditional advantages of husbands, such as age, height, wealth, achievement, and social status). The parties' intentions are irrelevant, except insofar as they may rebut the presumption that the choice to conform to stereotypes is not "free." See *supra* text accompanying notes 65-69. See also Blumrosen, *supra* note 27, at 3 (discussing "extraordinary influence" of "disparate impact" concept in the employment context).

101. As a practical matter, this analysis seeks to assure for the financially disadvantaged spouse the benefits of a lump-sum transfer rather than payments over time. See Mnookin & Kornhauser, *supra* note 2, at 962 (noting that future payments must reflect a discount since the total amount is unavailable during the payout period and that there is always a risk of noncompliance). See, e.g., *Daly v. Daly*, 179 N.J. Super., 432 A.2d 113 (App. Div. 1981). See also Note, *New York's Equitable Distribution Law*, 47 BROOKLYN L. REV. 67, 95 (1980) (describing distributive awards under New York statute).

always the husband. Divorce laws which required that the spouse seeking divorce establish fault on the part of the other party traditionally functioned, in part, as a mechanism for redress.

Prior to the enactment of the no-fault statutes,¹⁰² divorce law required a party to assert grounds, such as adultery, cruelty, or desertion, in order to obtain a divorce. This gave leverage to the "innocent" spouse, without whose consent or acquiescence there could be no divorce. An innocent wife could keep the marriage intact until, and unless, her husband agreed to terms acceptable to her. This leverage, however, was often dearly bought, requiring the innocent spouse to remain married to the philandering, abusing or absent spouse. The fault requirement also imposed practical, moral and psychological barriers to divorce.¹⁰³

In the last half of this century, women have entered the labor force in unprecedented numbers, and found alternatives to unsatisfactory marriages besides penury.¹⁰⁴ In 1939, approximately 16% of married women were employed outside the home; by 1940, 27.4% of all American women worked; by 1974, 46% of all American women worked and by 1982 the figure reached 52.1%.¹⁰⁵ In 1977, more than 73 percent of divorced women were working, and the number was increasing.¹⁰⁶ Married women found that the affluent era in which one income could comfortably support a middle class family is over. A clear majority of working mothers has joined the labor force.¹⁰⁷ The societal perception of

102. See generally Friedman, *supra* note 1, at 664-69 for a pithy discussion of the legal history of no-fault divorce.

103. L. WEITZMAN, *supra* note 5, at 9, 14. See Friedman, *supra* note 1, at 653 (discussing historical conflict in divorce law between "two genuine social demands . . . One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."). Sackett & Munyon, *supra* note 20, at 303 (attributing adoption of no-fault to societal perception that moral issues of divorce "did not belong in the courtroom" and that the fault system was hypocritical).

104. See Friedman, *supra* note 1, at 657.

The increase in workforce participation by women is part of a clear, long term economic trend. V. FUCHS, *HOW WE LIVE: AN ECONOMIC PERSPECTIVE ON AMERICANS FROM BIRTH TO DEATH* 127 (1983) (noting that, except for a temporary spurt during World War II, women's labor force participation increased since 1890 at the rate of approximately 3 percentage points per decade until 1950. Since then it has grown "at the unprecedented rate of 9 percentage points per decade.").

105. O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D.L. REV. 225, 239-40 (1985); see also WOMEN'S CLAIMS, *supra* note 3, at 59-61.

106. Nieva, *Work and Family Linkages*, in WOMEN AND WORK, *supra* note 4, at 162.

107. WOMEN IN THE AMERICAN ECONOMY, *supra* note 6, at 7-11. This is a general trend, which does not prevent courts from finding that a mother's workforce participation may

women as necessarily dependent similarly changed.¹⁰⁸ The enactment of no-fault statutes can be seen¹⁰⁹ as an acknowledgment of the transformation of the social role of women.¹¹⁰ By 1980, forty-eight states had followed California and enacted some form of no-fault.¹¹¹

Under no-fault statutes, divorce may effectively be "obtained upon unilateral demand."¹¹² While this does not preclude consideration of marital fault for purposes of dividing property, the trend is to minimize its importance as a factor.¹¹³ The no-fault

be deleterious to the children in a particular situation. See *Smithwick v. Smithwick*, 358 So. 2d 572 (Fla. Dist. Ct. App. 1977), balancing children's need for mother against the wife's youth and marketable skills (training and experience as an x-ray technician), the court awarded rehabilitative alimony for the minority of children and a reasonable period afterward. See generally Uchitelle, *Top Labor Issue: Jobs for Single Mothers*, N.Y. Times, Aug. 5, 1987, B1.

108. *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980). See also Glendon, *supra* note 43, at 701 (arguing that the source of standing and security in society has shifted from family to work. As a corollary, the notion of at-will employment has become less favored in the marketplace and more acceptable in the private spheres of the family. "The only area [in which employment terminable at will] applies more than ever is the unpaid labor force, namely homemakers.").

109. Professor Weitzman provides a detailed analysis of the purposes of the new law. The rising divorce rate led to the perception that divorce was inevitable for some men and women and that the process would be easier for them and their children under a no-fault statute. The new law was also intended to curtail the hostility, trauma, and acrimony created by the fault system. The no-fault statute was also expected to afford divorced men equal treatment. L. WEITZMAN, *supra* note 5, at 16-17. See generally Professor Fineman's excellent analysis of the Wisconsin no-fault experience, *supra* note 4. The Supreme Court has repeatedly noted contemporary women's workforce participation. See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 15 (1975): "Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government, and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice."

110. See N.Y. Times, Nov. 23, 1986, Week in Rev., at 26: "Whatever the signs of an ascendant conservative mood in America, researchers have found steady support in one fundamental area: what men and women view as proper roles for men and women. In 1977 and again in 1985, the National Opinion Research Center asked four basic questions about family relationships. The later results showed a significantly higher endorsement of equality between spouses." The responses show that 16% fewer women—and almost 20% fewer men—think that it is "much better for everyone if the man is the achiever and the woman takes care of the home and the family" in 1985 than had agreed with that statement only eight years ago.

111. L. WEITZMAN, *supra* note 5, at 20.

112. Foster, *supra* note 91, at 9. Accord Clark, *supra* note 13, at 444. But see Portner v. Portner, 93 N.J. 215, 221, 460 A.2d 115, 118 (1983): "A rule that allows one spouse to file an unmeritorious divorce complaint unilaterally and thereby to terminate the other spouse's claim to marital assets is manifestly unfair."

113. Freed & Walker, *supra* note 27, at 487. For tables showing states in which fault is a factor in equitable distribution or alimony, see *id.* at 483-84. See Chalmers v. Chalmers, 65

statutes, according to some commentators, shift power from the spouse who wants to stay married to the spouse who wants a divorce,¹¹⁴ and remove a major disincentive by making divorce less costly and difficult.¹¹⁵

Although few would seriously urge a return to fault requirements for divorce,¹¹⁶ fault grounds provided a useful ideological justification for courts and legislatures to award women a greater proportion of the marital property. This section attempts to set forth a revised doctrinal basis for such property awards. The underlying premise here is that women's dependence is more a function of a ubiquitous gender-based division of labor, often exacerbated by marriage, than of men's marital shortcomings.

2. The New Property

In a 1964 article in the Yale Law Journal, Professor Charles Reich set forth his theory of the "new property".¹¹⁷ Professor Reich argued that the real measure of wealth for individuals could only be determined by taking into account all of their job-related entitlements, including not only salaries, but health insurance, retirement benefits and similar perquisites.¹¹⁸ In her book, *The Divorce Revolution*, Professor Weitzman carries this argument several steps further, contending that employment-related entitlements are the real assets of a marriage and that by exempting these perquisites from equitable distribution, the courts are "divid[ing] the family jewels by first giving the husband the diamonds, and then allocating the semiprecious stones in two equal parts."¹¹⁹

N.J. 186, 320 A.2d 478, 482 (1974) (fault not a factor). *But see* D'Arc v. D'Arc, 175 N.J. Super. 598, 421 A.2d 602 (1980) (husband denied distribution from wife whom he had tried to have murdered).

114. L. WEITZMAN, *supra* note 5, at 26; Kulzer, *supra* note 18, at 6.

115. *See* L. WEITZMAN, *supra* note 5, at 28, noting that, "[S]uperficially this appears fair: few people favor perpetuating dead marriages or something very close to economic blackmail. But the practical result . . . has been a drastically diminished settlement for the economically dependent homemaker."

116. *See* Sackett & Munyon, *supra* note 20, at 306; L. WEITZMAN, *supra* note 5, at 383. "The current no-fault rules enjoy widespread support and legitimacy . . .").

117. Reich, *The New Property*, 73 YALE L.J. 733 (1964). *See* Glendon, *supra* note 43, at 698 (noting that Reich argued that these new forms of property are "also the basis of various statutes in our society, and that as such they should be accorded legal protection analogous to that our legal system has offered to more traditional forms of wealth").

118. *Id.*

119. L. WEITZMAN, *supra* note 5, at 109; *see, e.g.,* Gauger v. Gauger, 73 N.J. 538, 376

There is a broad spectrum of opinion, expressed by commentators as well as the courts, with respect to the divisibility of these "diamonds." There is little dispute as to vested benefits,¹²⁰ such as pensions and retirement funds.¹²¹ These represent definite, specific amounts, certain to be paid.¹²² Courts become more hesitant as assets become more speculative. Professional goodwill, for example, is routinely included in valuation at the time of sale of a professional corporation. It may never be realized despite the best efforts of the employee spouse. Some courts, accordingly, have refused to include professional goodwill as marital property.¹²³ Other courts, reasoning that value only at the time of divorce is of concern, have held that such goodwill should be considered an asset subject to distribution.¹²⁴

A.2d 523 (1977) (noting that "property" is to be given an expansive interpretation for purposes of equitable distribution).

120. See *Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478, 483 (1974) (rejecting argument that equitable distribution provisions of statute, unless applied prospectively, take away vested property rights in violation of the fourteenth amendment); but see *Stern v. Stern*, 66 N.J. 340, 348 (1975) (noting that concept of vesting is probably inapt in this context).

121. Almost all community property states, and the majority of separate property states, allow the courts to divide pensions. L. WEITZMAN, *supra* note 5, at 113. See, e.g., *DiPietro v. DiPietro*, 193 N.J. Super. 533, 475 A.2d 82 (App. Div. 1984); *Allison v. Allison*, 13 FAM. L. REP. 1241 (1987). Distribution of private pensions has been facilitated by the Retirement Equity Act of 1984, which requires plan to comply with court orders and provides for payment to alternative payees. L. WEITZMAN, *supra* note 5, at 115. Even the military has acknowledged the legitimacy of spousal claims to such benefits. *McCarty v. McCarty*, 453 U.S. 210 (1981) (reversing a line of state court decisions permitting the distribution of military retirement pay). See, e.g., *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977). Under the 1982 Uniformed Services Former Spouses Protection Act the court may award up to 50% disposable retirement pay. L. WEITZMAN, *supra* note 5, at 116. See *id.* at 118 for a discussion of the Foreign Services Act of 1980. See generally *YOUR PENSION RIGHTS AT DIVORCE: WHAT WOMEN NEED TO KNOW*, 4 (Wash. D.C., Women's Legal Defense Fund, 1983—includes discussion of wage earner's Social Security payments available to dependent spouse).

122. See Note, *New York's Equitable Distribution Law*, *supra* note 101, at 104 n.47 (arguing for the inclusion of the vested portion of a pension in divisible assets, while noting that the New York statute does not expressly require such inclusion). *Id.* at 101. But cf. *Whitfield v. Whitfield*, 14 FAM. L. REP. 1139 (1987) (New Jersey Appellate Division ruled that non-vested pension rights may be subject to distribution. Rejecting prior holdings, the court held that a wife had an interest in her husband's Air Force pension, notwithstanding his claims that the pension will not be "earned" until he has completed 20 years of service.).

123. See *Professional Goodwill as Community Property*, *supra* note 83, at 319-22; *Depner v. Depner*, 478 So.2d 532 (La. App. 1985); *Pearce v. Pearce*, 482 So.2d 108, *writs denied* (La. App. 1986) (goodwill of professional medical corporation is not subject to distribution); accord *Taylor v. Taylor*, 12 FAM. L. REP. (BNA) (Neb. 1986).

124. California, New Jersey, and Oregon, for example, consider professional goodwill

It has been argued that the value¹²⁵ of professional degrees acquired during the marriage¹²⁶ should also be considered marital property subject to distribution.¹²⁷ Professor Weitzman argues further that salaried employees possess "goodwill" which should be considered a form of marital property. She relies for this novel proposition upon personal injury cases in which seniority, union membership and job security are taken into account.¹²⁸ Finally, Professor Weitzman argues that enhanced earning capacity,¹²⁹

marital property. See *Grayer v. Grayer*, 147 N.J. Super. 513, 371 A.2d 753 (App. Div. 1977). Of the eight community property states, only four have addressed the question of the divisibility of professional goodwill. It has been accepted by California, Washington, New Mexico and rejected by Texas. *Professional Goodwill as Community Property*, *supra* note 83, at 315.

Among the fundamental premises of any community system are (1) *all property* acquired during marriage other than by gift or inheritance or with separate funds is community property, and (2) during the marriage the *time, skills and efforts* of each spouse are assets of the community, and all property acquired with these assets is community property . . . professional goodwill is property acquired with precisely these assets.

Id. at 313. See generally Bruch, *supra* note 11, at 810-13.

125. Whether the cost of obtaining the professional degree should be considered is a different question. In New Jersey, for example, the cost to the supporting spouse may be recouped through the mechanism of reimbursement alimony. Although referred to as "alimony," this resembles a property interest in several ways, including its lack of correlation to the present need of the supporting spouse and the fact that it does not terminate upon the remarriage of the supporting spouse. *Reiss v. Reiss*, 205 N.J. Super. 41, 500 A.2d 24 (App. Div. 1985). See DiLeo & Model, *supra* note 8, at 244 n.83.

126. See Freed & Walker, *supra* note 27, at 508-09 (1987) (survey of states' law with respect to distribution of professional degrees); Loeb & McCann, *Dilemma v. Paradox: Valuation of an Advanced Degree Upon Dissolution of a Marriage*, 66 MARQUETTE L. REV. 495 (1983) (noting that if an award is considered property, it is not subject to modification if there is an increase in value). See generally DiLeo & Model, *supra* note 8, at 243 & nn.80-82.

127. See generally Loeb & McCann, *supra* note 126, at 521 (noting that under Wisconsin law if an award is considered property, it is not subject to modification if there is an increase in value). But see, e.g., *Mahoney v. Mahoney*, 182 N.J. Super. 598, 605-06, 442 A.2d 1062, 1066-67 (1982); *In re Graham*, 194 Colo. 429, 574 P.2d 75, 77 (1978).

128. L. WEITZMAN, *supra* note 5, at 122. See Bruch, *supra* note 11, at 821 (noting that refusal to recognize enhanced earning capacity as an accrued property right denies protection to those who depend on wages alone while giving it to the more affluent). But see *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987) (affirming award of husband's future earnings where wife supported household while husband attended medical school, holding, however, that professional degrees and enhanced earning capacity are not assets subject to equitable distribution and noting that majority of courts that have addressed the issue have not considered professional degrees or licenses property).

129. See *Professional Goodwill as Community Property*, *supra* note 83, at 323 (distinguishing good will, "a presently existing asset with an ascertainable current value" from "future earnings . . . which are not acquired during the existence of the marital community"). *Contra Stern v. Stern*, 66 N.J. 340, 345, 331 A.2d 257 (1975).

that is, the extent to which earning capacity has increased during the marriage, should itself be subject to distribution.

B. The Homemaker Wife Should Presumptively Be Awarded More Than Half of the Marital Property

As long as women lack the same access to and opportunities in the marketplace as men, and as long as they have primary responsibility for the nurturance and welfare of the family,¹³⁰ a woman's decision to devote more time and energy than her spouse to the private sphere of the family should not be considered a function of true free choice.¹³¹ The notion of "free choice" by an individual is illusory in the context of persistent and widespread discrimination against a group of which the individual is a member. To the extent that her marriage has reinforced the societal restrictions on the homemaker's free choice, she should presumably receive some form of compensation from the spouse who has had the opportunity to benefit from the gender-based division of labor at her expense.¹³²

Even if she has not invested her time and energy in the private sphere, moreover, the destruction of the private sphere is more detrimental to the wife than the husband. At divorce the wife loses the buffering effect provided by the husband's earnings against the discrimination faced by women in the marketplace. I am not suggesting that the homemaker spouse should receive more of the marital property merely because she is financially disadvantaged, however. The wife should receive more to the extent that that financial disadvantage may be attributed to the marriage. Leaving aside unmarried mothers, married women have

130. See K. GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* 37 (1983). Similarly, if men are not fully responsible for the financial support of the family, their participation in the private sphere increases. *But see* Kulzer, *supra* note 18, at 13 & n.45.

131. The presumption would be overcome by a showing that neither marital duties, nor spousal discouragement, nor lack of education, training or the means to obtain them were factors in her separation from the public sphere of the marketplace. Courts have been hesitant, however, to adopt presumptions in this context. *See, e.g.,* Papuchis v. Papuchis, 2 Va. App. 130, 341 S.E.2d 829, 830 (Va. App. 1986) (court rejects rebuttable presumption of equal division, and sets forth a survey of other states' approaches to such presumptions).

132. *See generally* Kennedy, *supra* note 30 at 581 (discussing stereotypical policy arguments available to the decisionmaker). It may be argued that to the extent any woman is disadvantaged by this lack of free choice, she should be compensated. *But see* AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (reversing judgment in favor of class in Title VII suit claiming discrimination in compensation, basing its decision in part on refusal to hold State liable for market disparity that it did not create).

demonstrably less income, earnings, and marketability than unmarried women¹³³ and divorced women are much worse off financially than the never married.¹³⁴ While it could be argued that all women should presumably be awarded more than half the marital property to compensate for the discrimination which permeates the marketplace,¹³⁵ the argument here is much more conservative. In the context of divorce, only the adverse affect clearly attributable to the marriage itself can be appropriately addressed.

By explicitly recognizing the unequal roles played by the parties within the marriage, and the unequal opportunities which are a consequence as well as a cause of that division of labor, the court would gain crucial perspective, essential to fair adjudication. This should simplify matters for the courts, by providing a starting point from which to compare the spouses' public and private sphere contributions. This presumption further acknowledges that a distribution of more than half of the property to the wife is not charity, but an entitlement predicated on prior discrimination.¹³⁶ Finally, it expressly addresses the tremendous value of marketplace access and status and the correspondingly great loss resulting from its renunciation.

The actual attainment of fairness is more problematic. As a practical matter, the presumption would have a minimal impact on the "feminization of poverty." Except to the extent it indirectly discouraged gender-based division of labor within the home, it would basically only benefit women with substantial

133. In 1985, 65% of women who had never married were in the labor force, compared to 54% of married women with a husband present. *WOMEN IN THE AMERICAN ECONOMY*, *supra* note 6, at 6. This may reflect the fact that women with greater earning ability feel less compelled to marry. This reinforces my basic proposition, however, since it again indicates the constraints on free choice which relegate some women to the private sphere.

134. *Id.*

135. Such a presumption could be rebutted by a finding that a particular woman, employer or occupation was not affected by such discrimination or that such discrimination had already been remedied, by an antidiscrimination law, for example. See generally *Family and Market*, *supra* note 18, at 1552 (discussing the effect of antidiscrimination law in the marketplace which "benefits a small percentage of women who adopt 'male' roles. Meanwhile, it legitimates the continued oppression of most women.").

136. L. WEITZMAN, *supra* note 5, at 112 (arguing that a career developed during the course of a marriage is as much the product of the couple's joint efforts and resources as income earned or property accumulated). Cf. K. GREENAWALT, *supra* note 130, at 53 ("The claim of individuals to be placed in the positions they would have enjoyed but for some original wrong can be seen either as a compensatory claim to have the wrongs appropriately remedied or as a distributive claim to be given (somewhat late) the positions they would have attained under fair conditions.").

marital assets.¹³⁷ While an award of more than half of the marital property may have significant psychological and symbolic impact, its actual utility depends on the amount of property. The presumption thus promises little for the women in lower income families who are most likely to become further impoverished.¹³⁸

Whether the presumption would affect behavior during marriage is an open question.¹³⁹ If there is any effect, however, I would argue that it would be minimal. Even women who anticipate divorce would be in a better post-divorce financial situation if they developed their own earning capacity, rather than relying on the partial compensation promised by the presumption.

What, then, is the goal of the presumption? First, it is politically important to legally recognize the causes and consequences of a woman's assumption of the homemaker role. Second, my proposal attempts to compensate the homemaker wife to the fullest extent possible without compromising her autonomy, or that of her former spouse.¹⁴⁰ While the award may be small, its timeliness may make it critical. A lump sum at the time of divorce is usually much more helpful to the woman than a larger amount paid out over time.

Unlike awards of conventional property, awards of "enhanced earning capacity," would inevitably affect both parties' post-divorce behavior. Such awards would perpetuate the breadwinner/homemaker roles beyond the marriage, to the detriment of the ex-wife as well as the ex-husband.

C. *Why Enhanced Earning Capacity Should Not Be Subject to Distribution*

Even if most people do not take the probability of divorce into

137. Black women may well be disproportionately represented among the unaffected. See *American Apartheid*, *supra* note 19, at 28 (comparing earnings of black males to those of black females). Although earnings are not assets, when earnings are considered over time there is usually some correlation. See L. WEITZMAN, *supra* note 5, at 65-68 (discussing patterns of home and pension ownership as functions of income over time).

138. See L. WEITZMAN, *supra* note 5, at 59. See generally Loftus, *Report of the New Jersey Supreme Court Task Force on Women in the Courts, June 1984*, 9 WOMEN'S RTS. L. REP. 129 (1986).

139. See Prager, *supra* note 67, at 19; *id.* at 12 (discussing marital property law as a tool of social engineering); Shultz, *supra* note 26, at 211-12 (discussing dual functions of law, i.e., dispute resolution and behavioral control).

140. Cf. Stark, *Spousal Support Since the Enactment of No-Fault Divorce: Small Change for Women*, HELPING CHILDREN & FAMILIES: THE BEST OF AFCC 25TH ANNIVERSARY PROGRAM 52 (Spring 1988).

account when they decide to embark upon careers, divorce law becomes diffused throughout our culture, and its precepts color our acts and expectations. Thus, it is important to consider carefully the broader consequences of a proposed reform. The inclusion of enhanced earning capacity as a marital asset raises several problems.

Awards of enhanced earning capacity should be eschewed because they are fundamentally unfair, not only to the spouse whose earning capacity has been enhanced during the marriage, but also to the spouse who has been encouraged by such awards to settle for vicarious achievement. Such awards are unfair because they tend to perpetuate or exacerbate the impact of the existing division of labor, thus curtailing the autonomy of both parties.¹⁴¹ Finally, such awards objectify the payor spouse.

1. Such Awards Perpetuate Women's Dependence

a. Where the husband has enhanced his earning capacity

If the husband has enhanced his earning capacity during the marriage,¹⁴² awarding the wife a share of this capacity would operate as a disincentive for her to develop her own earning ability.¹⁴³ Why should the ex-wife venture into the marketplace, where her chances are slimmer and her rewards are likely to be less than those of her husband, if she can obtain a comparable benefit without doing so? Such awards, moreover, would perpetu-

141. This assumes that autonomy is of value to both sexes. Professor Gilligan makes a persuasive case that autonomy is much less of a priority for women than it is for men. C. GILLIGAN, *supra* note 39, at 17-22. Its cultivation, however, may be essential, reflecting "the importance of including in the network of care not only the other but also the self." *Id.* at 173. While an assumption that autonomy is of significant value to women could be considered paternalistic, I would argue that it is necessary to avoid "deepen[ing women's] incapacity." Kennedy, *supra* note 30, at 640.

142. In a weighted sample, 1 in 6 husbands had acquired some education during the period of the marriage. L. WEITZMAN, *supra* note 5, at 124.

143. Such a disincentive would adversely affect women in view of the popular consensus that women can and should support themselves. See generally Fineman, *supra* note 2. The Supreme Court has explicitly noted contemporary women's workforce participation. See *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

Discouraging women's labor force participation, moreover, contributes to gender stereotyping. Cf. K. GREENAWALT, *supra* note 130, at 64 (arguing the importance for whites as well as blacks to see a "substantial percentage of blacks in important positions." In a more limited sense, Professor Greenawalt extends his argument for visible participation in the community to women, suggesting that a preference might be appropriate for women seeking teaching positions in colleges and universities, but noting that it could be resisted if sufficient numbers would be likely to be hired without such a preference. *Id.* at 69-70.).

ate the gender-based division of labor by encouraging women to acquire such attributes vicariously. By developing a mechanism for feminine dependence after marriage, the proponents of the new property encourage its continuation within marriage.¹⁴⁴

Inclusion of earning capacity as a marital asset also operates to the detriment of women outside the marriage. Granting women a portion of their husband's enhanced earning capacity supports the notion of a "two person career". Military wives, who follow their husbands from base to base, actively participate in their husbands' careers and play a significant role in their advancement, are a frequently cited example of this phenomenon.¹⁴⁵ This model, however, gravely disadvantages women pursuing military careers who lack such self-sacrificing spouses.¹⁴⁶

Finally, it may be argued that "new property" awards would simply be alimony in disguise. To the extent that such awards would function as alimony, their adoption would be both an invitation to repeat the failure of alimony¹⁴⁷ and redundant.¹⁴⁸ Moreover, like alimony, "new property" awards would be likely to be punitive, thus restoring the discredited concept of property awards predicated on marital fault.¹⁴⁹

144. It may be argued that this is precisely the point, although those taking this position would be more likely to characterize homemaking as an alternative career; rather than as a dependent role. L. WEITZMAN, *supra* note 5, at 371-74. If homemaking is a career, however, it arguably confers no greater rights than any other employment. Upon termination, employees rarely receive an interest in the employers' future profits, which is effectively what is demanded here.

145. See, e.g., L. WEITZMAN, *supra* note 5, at 137.

146. Query whether women actually compete with men in the military rather than advancing on separate tracks. *But see* N.Y. Times, Feb. 2, 1988, at 1. Academic wives may be a better example. See *supra* note 5, at 111 (citing sociologist Hannah Papanek for the proposition that most single income families should be conceptualized as "two person careers").

147. See Stark, *supra* note 140, at n.59.

148. If the speculative enhanced earning capacity is in fact realized, for example, the wife may be able to seek modification of her alimony award. *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974); 75 A.L.R.3d 484; *Mendell v. Mendell*, 162 N.J. Super. 469, 393 A.2d 593 (App. Div. 1978). Alimony is generally a function of the standard of living during the marriage. *Lepis v. Lepis*, 83 N.J. 139, 416 A.2d 45 (1980). While alimony may be modified to reflect a change in the dependent spouse's circumstances, such as illness or loss of a job, she generally has no right to share in her husband's post divorce standard of living.

149. See *supra* text accompanying notes 104-14.

b. Where the wife has enhanced her earning capacity

If obtaining further education suggests at least the desire to increase one's earning ability, the increase in the percentage of women seeking to enhance their earning capacity is greater than the increase in the percentage of men doing so.¹⁵⁰ Where it is the woman who has enhanced her earning capacity, awarding her former spouse a continuing interest in her "new property" will further reduce her income, already presumably lower than that of a comparably employed man.

Again, since women face greater obstacles in the marketplace and must make commensurately greater efforts to enhance their earning capacity than men, further decreasing the benefit would discourage more of them from seeking to do so.¹⁵¹

2. Objectification of the Payor Spouse

A vested property interest is an object, distinct and separable from its holder. "Enhanced earning capacity" has no value until the possessor acts in such a way as to realize that potential value.¹⁵² Advanced degrees, training and seniority are more appropriately considered subjective, nonquantifiable attributes of the person who has acquired them.¹⁵³ The commodification of such attributes should be abjured because it is fundamentally de-

150. See *WOMEN IN THE AMERICAN ECONOMY*, *supra* note 6, at 30 (noting that the educational attainment of women has risen faster than for men in recent years).

151. See generally Prager, *supra* note 67, at 5 n.16 (anticipating evolution of gender neutral social structure and impact on sharing principles).

152. *Professional Goodwill as Community Property*, *supra* note 83, at 319-20, discussing holding in *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972) where court held that professional goodwill, although a property interest, was not community property because it was not vested during the marriage. The author argues that: "This reasoning fails because . . . professional goodwill is regularly bought and sold" and that the possibility of its extinguishment is no different from the possible loss of pension rights because of death, for example.)

Cf. Snyder, *Termination Valuation Dates Provide Key to Dividing Marital Assets*, 120 N.J.L.J. 933, 956 (1987) (discussing recent New Jersey appellate court decisions distinguishing between passive assets, such as savings accounts or certificates of deposit, in which value is enhanced through "mere market factors" and active assets, such as shares in a closely held corporation or a professional practice, in which value is a function of the "controlling" spouse's efforts); see, e.g., *Bednar v. Bednar*, 193 N.J. Super. 330, 474 A.2d 17 (App. Div. 1984).

153. See generally Radin, *supra* note 57, at 1893 & n.159 (discussing Hegel's argument that those "substantive characteristics of personality" which are internal by nature, e.g., intelligence and rationality, are inalienable).

humanizing.¹⁵⁴ It could be argued that it also raises thirteenth amendment problems¹⁵⁵ and contravenes the well settled prohibition against the specific enforcement of personal service contracts.¹⁵⁶ Finally, since defining these attributes as "property" does not remove them from the actual control of the payor spouse, the same difficulties which have so frustrated the courts in attempting to enforce alimony awards would be presented.¹⁵⁷

III. LIMITATIONS OF THE THEORY—WHAT CAN AND CANNOT BE DONE THROUGH PROPERTY DIVISION

A. Where "Equitable" Distribution Is Possible

In some cases rough justice may be accomplished through property division at the time of divorce.¹⁵⁸ Under the proposal set forth above, if the division of labor in the home did not reflect gender stereotypes, a division of marital property in accordance with existing criteria would be considered "fair." This does not mean that the husband and wife would necessarily have equal or even comparable prospects in the marketplace at the time of di-

154. See Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1076-78 (1987) (discussing the arguments of the labor movement that human labor should not be considered a commodity. "Our modern sensibility cringes at the notion that human labor is merely a commodity." *Id.* at 1105.) Cf. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 778-79 (1983) (explaining that every contract creates an enforceable obligation to perform or pay damages, and arguing that an employment contract is self-enslaving only if it attempts to deprive the promisor of the option of substituting money damages for specific performance). In this context, of course, "money damages" would always be an option. In fact, the payee is interested in nothing else.

155. But see Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1938 (1986) (discussing thirteenth amendment analysis in the family context and arguing that the thirteenth amendment does not prohibit "family arrangements that bear a striking similarity to slavery").

156. Although this argument has generally been rejected by the courts in the alimony context, the strong countervailing interest present there; i.e., the wife's need is not necessarily encountered here. If enhanced earning capacity is property, it would theoretically be divisible without such a finding. See J. AREEN, *supra* note 24, at 644-45, "[There] is little attention paid to the question of whether a property award is sufficient to fulfill the need (or fault) principle."

157. See, e.g., D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979).

158. As Professor Weitzman has pointed out, over 60% of divorcing couples have less than \$20,000 in total assets. L. WEITZMAN, *supra* note 5, at 68. While it might seem that this sum could never compensate a dependent spouse, it must be kept in mind that the longer married couples, in which one would expect to find the commensurately greater disadvantaged spouse, have more property. *Id.* at 67-69.

voice. The husband might have been a surgeon earning five times the wife's salary as a nurse, for example, but if their division of work within the marriage did not reflect or reinforce their stereotyped marketplace roles, the wife's economic disadvantage at divorce would not be attributable to her husband under this proposal. She enjoyed the higher standard of living his income permitted them during the marriage and at divorce she will be awarded a fair share of the marital property.¹⁵⁹ Of course, his higher income alone may well have discouraged her from developing her own career, or at least taken away a significant incentive. But unless his higher earnings resulted in her assumption of greater domestic responsibility, he would not be burdened under my proposal. At least he would not be penalized in his capacity as a divorcing spouse. Marketplace inequities require marketplace remedies. An affirmative action plan addressing the need for more female surgeons in the husband's hospital may be appropriate, but it will not directly affect the nurse wife.

There are also cases in which the circumstances of the parties are such that crude justice may be accomplished through the proposed presumption. If the wife, for example, typically assumed responsibility for more than half the housework, she would presumptively be entitled to more than half of the marital property since the operation of gender bias in the private sphere freed the husband for more lucrative public sphere activity.¹⁶⁰ Property division may be "fair" if there is sufficient marital property to indemnify her.¹⁶¹ The time she spent on the housework and the

159. See *infra* text accompanying notes 175-79.

160. See O'Neil, *Role Differentiation and the Gender Gap in Wage Rates*, WOMEN AND WORK, *supra* note 4, at 55 (noting that despite increase in proportion of married women working outside the home, "[w]omen still spend a substantial portion of their adult lives out of the labor force specializing in household activities exclusively"). The husband's household labor could also be taken into account. If he spends as much time on home repairs as she does on housework, for example, the presumption would be inoperative. He would not be benefiting from the gender-based division of labor because it would not be freeing him for lucrative public sphere activity. See Note, *The Need to Value Homemaker Services Upon Divorce*, 87 W. VA. L. REV. 115, 129 (1984) (proposed chart for comparing value of husband's and wife's services in the home). The possible problems of proof here are no more daunting than those encountered by family courts in determining need or contribution of the parties.

161. There are several different approaches for determining sufficiency in this context. This proposal focuses on her lost, and his increased, opportunity. It contemplates compensating her for what she reasonably could have obtained but for the additional increment of time and effort she devoted to the family. It does not use the husband's enhanced earning capacity as a measure of her loss, nor does it attempt to put a dollar value on her time and

time he spent at his job, both for their mutual benefit, may be equal. The point is that if she has effectively lost a part-time job because of the destruction of the private sphere, she is entitled to recompense.

In short, equitable distribution may indeed be equitable if the circumstances of the parties are such that the inequities between them may be redressed by the expanded definitions of need and contribution discussed above; that is, definitions which explicitly take into account the pervasive gender-based division of labor and its impact on women.

B. *Where No Distribution Can Be Considered Equitable*

In most cases property division cannot accomplish equity. There are several reasons for this. First, as a practical matter, most couples have minimal assets,¹⁶² although couples married longer generally have more.¹⁶³ The typical couple simply lacks the resources to counter the effects of societal discrimination, even if limited to its effect in their own home. Second, that which the woman has lost because of her marriage or is losing because of her divorce may simply not be compensable.¹⁶⁴ A niche in the marketplace, once a possibility, may have become unobtainable. Moreover, the destruction of the private sphere may represent the loss of what was considered by her community, her family and the wife herself to be her only domain. She may well be viewed, and view herself, as an interloper in the public sphere. If she manages

efforts in the home. See *supra* text accompanying notes 142-49 and notes 42 & 58. As a practical matter, given the limited assets of most divorcing couples, this may result in an award to the wife of most if not all of the marital property. See *supra* note 158. This would seem particularly unfair if the husband were retired. Under such circumstances, however, it could be argued that if all of the property is divided equally, he will not have benefited at her expense.

162. See *supra* note 158. See also *supra* note 6, urging retention of distinctions between property, alimony and child support awards.

163. L. WEITZMAN, *supra* note 5, at 65-67. In the early 1980's, 40% of all divorces occurred among couples under 30. N.Y. Times, Jan. 12, 1987, at A19.

164. The profound psychological loss of the family and home may affect the husband as well as the wife and is memorialized, rather than effectuated, by the divorce. Bloom, White and Asher, *Marital Disruption as a Stressful Life Event*, in *DIVORCE AND SEPARATION*, *supra* note 7, at 184 (suggesting that divorce may be more stressful for the husband). The loss of the private sphere for the wife may additionally be experienced as the loss of status, and even the loss of self. See generally L. WEITZMAN, *supra* note 5, at 335.

See Griffin, *supra* note 67, at 108 ("A person who centers his life on deep attachments to certain people adopts a whole way of living. He makes commitments that themselves become a powerful source of action; they reduce psychological freedom.").

to brave the marketplace at all, she is likely to find herself restricted to the "pink collar ghetto" where that perception, and her compensation, will be less.

Furthermore, it is unreasonable to expect that matrimonial judges, or matrimonial law, could make the woman "whole" at the time of divorce for two basic reasons. First, the law attempts no comprehensive regulation of the dealings between the parties' prior to, at the time of, or during the marriage.¹⁶⁵ Second, the divorce courts cannot regulate the marketplace.¹⁶⁶

The limitations of divorce law are at least in part a result of the law's reluctance to interfere with the private sphere of the family until that sphere breaks apart.¹⁶⁷ Whether the roles within the family are considered a function of the marketplace¹⁶⁸ or of the state's implicit endorsement of those roles,¹⁶⁹ the state avoids playing an active part until the end of the marriage.¹⁷⁰ There is

165. See Taub & Schneider, *supra* note 1, at 121-24. But cf. *Myth of State Intervention*, *supra* note 3, at 835 (arguing that the terms "nonintervention" and "intervention" are "largely meaningless" to describe the state's role with respect to the family).

166. It nonetheless remains a fundamental premise of this article that family courts and law can profoundly, if indirectly, influence the marketplace.

167. See *Myth of State Intervention*, *supra* note 3, at 840 (rejecting, on ground that the very notion of intervention is meaningless, argument that: "Some people would assert that when the family relationship has broken down, so has any justifiable claim to family privacy, and that state protection of the individual no longer constitutes intervention into the family."). See also *Family and Market*, *supra* note 18, at 1503 (discussing argument that "unequal bargaining power", viewed as a given, implies the futility of any such interference, which will merely result in that "unequal bargaining power" manifesting itself in a new, unregulated form).

168. See *Family and Market*, *supra* note 18, at 1513 & nn.65 & 66 (discussing "lag theory," pursuant to which "changes in the family reproduce but lag behind those in the market"). See *id.* at 1501-08 for a comparison between the state's reluctance to intervene in the marital relationship and its historical disinclination to intervene in the market.

169. See *Myth of State Intervention*, *supra* note 3, at 851 & n.42 (noting that federal tax laws discourage payment for domestic labor and arguing that the state is responsible for reinforcing women's economic dependency on men insofar as government agencies have rejected the concept of comparable worth, continuing to pay women lower salaries than those paid men for comparable work).

170. Schneider, *supra* note 29, at 1048 (noting that "[F]amily law does not regulate family life systematically, but treats it only intermittently."). See Taub & Schneider, *supra* note 1, at 121 (comparing marriage to a contractual relationship: "Despite the fundamental similarity of conflicts in the private sphere to legally cognizable disputes in the public sphere, the law generally refuses to interfere in ongoing family relationships."); *Marital Contracting*, *supra* note 26, at 237 (suggesting that "fears about disrupting domestic harmony lay at the root of the traditional refusal to allow interspousal enforcement of private or public marital obligations. Seemingly, a court need have no concern for domestic harmony once a divorce action has been commenced."). But cf. *Myth of State Intervention*, *supra* note 3, at 836 (arguing that "As long as a state exists and enforces any

no longer a relationship¹⁷¹ to influence at that point. The importance of the divorce proceeding stems from the same fact that limits its effectiveness: the divorce is the only real opportunity for making claims against one's spouse that may be enforced by the state.

C. *A Constructive Role for the State*

The relationship between the state and the family has historically been the subject of passionate debate.¹⁷² The role of family law in creating or defining that relationship is similarly controversial.¹⁷³ This Article has examined some of the problems in achieving fairness at the time of divorce. I have argued that these problems transcend, but are exacerbated by, the division of labor within the private sphere of the marriage.¹⁷⁴ To the extent that

laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so.").

171. There may be a very live controversy. But there is no relationship, as discussed in Hyman, *supra* note 84, at 883-84. Neither party is likely to modulate behavior or demands in contemplation of an ongoing relationship. *But see Marital Contracting, supra* note 26, at 272 (suggesting that divorce "may also function as a rulemaking process that decrees the . . . terms of a beginning "divorce relationship").

172. *See* Wald, *supra* note 2, at 804:

Family law, more than any other area of law, raises issues regarding what kinds of individuals, and what kind of society, we wish to be. It touches areas where opinions are formed by everyone's personal experience, as well as by gender, religion, sexual preferences and ethnicity. . . . Because the problems are so personal, and so important, we may never develop a general theory of family law that generates consensus about the appropriate relationship of state and family.

Cf. Chambers, *supra* note 30, at 820 (attempting to formulate a neutral rule of property distribution, suggests adoption of a fixed rule chosen on the basis of popular support, with the specific provision that couples could contract for a different arrangement. Professor Chambers concedes in a footnote, however, that even such a rule would be likely to violate his neutrality principle insofar as it would reinforce normative standards. *Id.* at 820 n.20.

173. Schneider, *supra* note 29, at 1058:

We need, finally, to discuss directly the purposes of family law. What do we hope to accomplish through it? What functions—intended and unintended—does family law serve? To what extent should we try to use family law to change the ways people behave in families? To change the way people behave generally? To change what people believe? Ought family law limit itself to trying to prevent harm, or can it try to do good?

I would argue that even assuming the most conservative proposition—that "family law limit itself to trying to prevent harm"—requires the explicit recognition of the ways in which our culture discriminates against women who are wives and mothers.

See generally Family and Market, supra note 18, at 1503-07 (setting forth a critique of the classic arguments for nonintervention in the family by the state).

174. The extent to which the division of labor in the public sphere has its origins in the private sphere does not matter for my purposes, since that public sphere division has been

the parties' marital relationship was characterized by such a division of labor, the wife should presumably receive recompense in the form of a greater share of the marital property.

The evident inadequacy of this remedy indicates the need for supplemental relief. While a general discussion of such remedial measures is beyond the scope of this Article, they basically take two forms; (1) measures addressed to improving the situation of *all* women in the marketplace, married as well as unmarried, and (2) measures designed to make the marketplace more responsive to the needs of family members, men as well as women. Making the marketplace fairer for women and more hospitable to families is the most promising approach for making marriages, as well as divorces, more fair.¹⁷⁵

There is no dearth of suggestions regarding ways in which the public sphere could be made more accessible and less hostile to women.¹⁷⁶ The notion of making the marketplace more receptive to the needs of families¹⁷⁷ has also generated vigorous discussion. Whether focusing on women's labor force attachment through affirmative action training and placement programs,¹⁷⁸ or address-

institutionalized and exists independently of its private sphere counterpart. See generally *THE MERMAID AND THE MINOTAUR* 160-97 (1976) (suggesting that "The crucial psychological fact is that all of us female as well as male, fear the will of woman. Man's dominion over what we think of as the world rests on a terror that we all feel: the terror of sinking back wholly into the helplessness of infancy." *Id.* at 161.).

175. See K. GREENAWALT, *supra* note 130, at 70 (noting that employer responsiveness to family needs may be more important for women than hiring preferences). Moreover, by enacting laws that improve the lot of all women, pragmatic legislators may avoid the appearance of interfering with the family. This approach is also more intuitively appealing—to the extent that their impoverishment is a function of gender rather than marital status, married women should not be treated more favorably than their unmarried sisters.

The state may, of course, compound the problem. See Dodson, *Programs Multiply to Help Displaced Homemakers Cope*, N.Y. Times, June 18, 1986, at C1; cf. Letter of J. Sanders, N.Y. Times, June 26, 1986 (criticizing programs for limiting training options to "traditional female occupations, primarily clerical ones," and noting that in national project on higher paid nontraditional occupations for women, displaced homemakers did well in training and on the job and "have continued to reap the benefits of higher pay for the same hours worked ever since").

176. See, e.g., *Task Force on Women in the Courts*, *supra* note 138, at 171-74 (proposals for ensuring equality for women and men in the courts); Taub & Williams, *supra* note 94, at 836-44 & n.84 (urging adoption of a "revitaliz[ed] . . . Griggs doctrine of disparate effects").

177. This assumes that the state has some interest in fostering a "specific kind of human relationship—a relationship in which the question of mutual loyalty and fidelity is not always up for grabs, a momentary and fragile thing." Burt, *Coercive Freedom: A Response to Professor Chambers*, 18 U. MICH. J.L. REF. 829, 831 (1985).

178. See Herbers, *Job Training Efforts in Ma. and Mich. Move Poor Off Welfare*, N.Y.

ing the problems of families through such measures as parental nurturing leaves,¹⁷⁹ these proposals would not only contribute to women's ability to support themselves after divorce, but would profoundly affect the gender-based division of labor itself.

CONCLUSION

The law governing property division at divorce has contributed to the contemporary predicament of women. Almost half of the families in this country are likely to be involved in the divorce process at some point.¹⁸⁰ Divorce is virtually the only time the state explicitly addresses intrafamilial property rights. This represents enormous power, and concomitant responsibility. Through the adoption of a proposal for property division like the one sketched in this Article, divorce law can begin to address the division of labor which pervades the private as well as the public sphere, and its impact on both sexes.

Times, Mar. 30, 1987, at A14 (noting the success of programs involving "counseling, education and training programs far more intensive than any provided in the past" and guaranteeing "continued support services, such as medical insurance and child care, until they are secure in their jobs").

179. Elder, *Ruling Heartens Backers of Bills on Parental Leave*, N.Y. Times, Jan. 14, 1987, at B8. See also *Which Welfare Mothers?*, editorial, N.Y. Times, Sept. 25, 1986, at A30 (noting success of work and training programs for mothers of young children: "The impulse to keep women at home with young children was understandable in 1950; today it is outmoded When adequate child care is provided, the results [of such work and training programs] are encouraging."). As the critics of parental nurturing leaves have suggested, this may well be considered interference with the family. Yet as Professor Wald notes, "Even in a world of formal equality, misuse of power within the family may require state intervention to protect weaker parties." Wald, *supra* note 2, at 801. Professor Wald is referring to "misappropriation" of communal assets or failure to meet support obligation. These examples may be a more conscious exploitation of the weaker party than the maintenance of the ubiquitous barriers to the marketplace, or even the mere failure to help the economically "weaker" party remove or overcome those barriers.

180. L. WEITZMAN, *supra* note 5, at xvii.