

Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony

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This paper will analyze the emerging law and economics justification for alimony. It will argue that while the economic justification for alimony contains some important insights, feminists and other family law scholars should ultimately be wary of attempting to justify postdivorce income-sharing by relying primarily on economic efficiency grounds.

Part I of the paper will briefly sketch the historical and doctrinal developments that have led a number of economists and family law scholars to suggest economic rationales for divorce-related income transfers. Part II will outline the economic efficiency argument in support of alimony. That argument draws heavily on the early work of economists Gary Becker and Elisabeth Landes and has been advanced most recently by Allen Parkman in his 1992 book on no-fault divorce.¹ Economic efficiency arguments also form the core of Ira Ellman's influential theory of alimony,² and these same arguments animate the spousal support provisions of the American Law Institute's *Principles of the Law of Family Dissolution* draft.³

Part III of the paper will highlight the insights offered by the economic approach to alimony and, more generally, by the application of economic analysis to legal issues relating to marriage and divorce. Part IV will critique the economic approach from a feminist perspective.⁴ It will argue

* Associate Professor, University of Maryland School of Law; Visiting Professor, Georgetown University Law Center, 1993-94. I would like to thank the participants in the February 11-12, 1994 Georgetown Law Journal Symposium entitled "Divorce and Feminist Legal Theory" and the Georgetown University Law Center Faculty Research Workshop for their thoughtful comments on earlier versions of this article. Extended and enjoyable conversations with Peg Brinig, June Carbone, and Mitt Regan were particularly valuable in helping me to develop and refine the ideas presented here. Any errors that remain are, of course, my own.

1. ALLEN H. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* (1992).

2. See Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 40 (1989).

3. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (American Law Inst. Preliminary Draft No.4 1993). Revealingly, the chapter containing the principles governing postdivorce spousal support is entitled "Compensatory Spousal Payments."

4. By feminist perspective, I refer to a perspective that takes women and their experiences seriously and that views gender—that is, the social meaning ascribed to one's biological sex—as an important category of analysis. As June Carbone has noted, "[f]eminism generally is defined not in terms of a particular position or set of positions, but by an insistence that women's experiences, varied as they are, be taken into account." June R. Carbone, *A Feminist Perspective on Divorce*, in 4 THE FUTURE OF CHILDREN 183, 183 (Richard E. Behrman et al. eds., 1994). I do not mean, by this explanation, to minimize the diversity of viewpoints and experiences among women, nor to suggest that there can be only a single

that the economic efficiency justification for alimony rests on assumptions that are extremely troubling from the perspective of feminist theory, and that adoption of the economic approach is unlikely to remedy the disparate economic effects of divorce on women and the children for whom they continue to care. Finally, Part V will suggest some directions for an alternative approach to divorce-related financial allocations.

I. HOW WE GOT HERE

Under the fault-based divorce system, alimony was coherent in theory, even if awarded only rarely in practice.⁵ Because divorce was available only where one spouse had breached his marital obligations, alimony functioned as a sort of damages remedy for breach of the state-imposed marriage contract.⁶ Moreover, because that contract was explicitly gender-based and imposed support obligations on husbands alone, only wives were entitled to alimony in the event of a divorce. Alternatively, under the fault-based system, a divorce proceeding could be conceived as a particular type of tort action, and alimony could be justified as compensatory damages for the "guilty" spouse's wrongful conduct.⁷

The advent of no-fault divorce and the demise of the state-imposed marriage contract significantly undermined these traditional rationales for alimony. Because divorce no longer required a showing of fault or breach, a damage remedy seemed inappropriate. Similarly, because marital obligations were no longer officially gender-based, an alimony remedy premised on the husband's support obligation and available only to the wife seemed both anachronistic and discriminatory.⁸ Moreover, while the fault-based

"feminist perspective" on issues relating to marriage and divorce, or on any other legal question. Indeed, an acknowledgment of the partiality of knowledge and a corresponding skepticism of theories that claim to derive from or to generate universal truths is one of the defining percepts of much contemporary feminist thought. See generally Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 867-87 (1990) (discussing feminist epistemologies); Clare Dalton, *Where We Stand, Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L. J. 1, 42-47 (1987-88). For a perceptive exploration of the meaning of feminism as an academic discipline in light of these methodological precepts, see Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L. REV. 225, 230-37 (1993).

5. Studies indicate that fewer than 16% of divorcing wives received alimony under the fault-based divorce system between 1887 and 1922. E.g., Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106 (1989) (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)).

6. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 875-76 (1994). For a discussion of the terms of the state-imposed marriage contract, see Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456-57.

7. See Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of A Theory*, 23 NEW ENG. L. REV. 437, 454-56 (1988) (discussing the parallels between divorce law and tort law).

8. See *Orr v. Orr*, 440 U.S. 268, 271 (1979) (finding unconstitutional Alabama statutes that required husbands, but not wives, to pay alimony).

divorce system emphasized the importance of preserving the marital unit, the no-fault system focused on effectuating the desire of one or both spouses to end their marriage.⁹ Without a societally imposed duty to continue the marriage, justifying financial obligations that survived divorce became problematic.

Divorce reform thus left alimony in somewhat of a theoretical vacuum.¹⁰ Reformers initially sought to fill this vacuum by reconceptualizing alimony as a short-term transition payment designed to enable formerly dependent spouses to become economically self-sufficient as soon as possible.¹¹ To this end, trial courts in a number of jurisdictions largely replaced so-called permanent alimony with short-term "rehabilitative" awards.¹² This shift from open-ended to term-limited awards was also consistent with the reformers' emphasis on effectuating a clean financial break between divorcing spouses.¹³

Beginning in the mid-1970s, a series of empirical studies revealed that this initial reconceptualization of alimony was producing financially devas-

9. See Margaret F. Brinig & June R. Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 867 (1988) ("Divorce is a matter of individual choice, following . . . from the end of mutual affection."); Singer, *supra* note 6, at 1470-71 (noting that, with no-fault divorce, the state has ceded to the spouses themselves the authority to end a marriage).

10. Ellman, *supra* note 2, at 6.

11. See, e.g., Henry H. Foster & Doris J. Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187, 191 (1977-1978) (arguing that with the advent of no-fault divorce, alimony "has come to be regarded as an interim stipend which is available for a relatively short time while a former spouse in need prepares for the labor market"); Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 725 (1993) (alimony reforms direct those who are not currently self-supporting "to 'rehabilitate' themselves quickly and move into the world of full-time paid employment").

12. See, e.g., *In re Marriage of Brantner*, 136 Cal. Rptr. 635 (1977) (reversing trial court award of term-limited alimony to wife who divorced after 25 year marriage with no education or job skills and admonishing that no-fault divorce reforms "may not be used as a handy vehicle for the summary disposition of old and used wives"); *Wieder v. Wieder*, 402 So. 2d 66 (Fla. Dist. Ct. App. 1981) (finding that trial court abused its discretion in awarding only short term rehabilitative alimony to 60 year old wife who divorced in poor health after 23 year marriage); see also Foster & Freed, *supra* note 11, at 191 (noting that with the advent of no-fault divorce, alimony "has come to be regarded as an interim stipend which is available for a relatively short time while a former spouse in need prepares for the labor market"). For a discussion and critique of these developments, see Linda B. Marshall, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667 (1985).

13. See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313-14 (1987) (stating that no-fault divorce philosophy favors clean break with minimal ongoing financial relationships between divorced spouses); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 272 (1989) (describing divorce reformers' assumption that clean break advantaged both homemaker and income producing spouses after divorce); Milton C. Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2314 (1994) (discussing clean break philosophy).

tating results for many divorced women (and their children).¹⁴ In addition, a number of feminist and other scholars began seriously to challenge both the theoretical goal of economic self-sufficiency for all divorcing spouses and the "clean break" philosophy that had accompanied that goal.¹⁵ In the face of these challenges, scholars, courts, and policymakers began to search for other conceptual models to justify alimony in the age of no-fault.

A number of jurisprudential and societal developments made economic analysis a particularly attractive candidate to fill the conceptual void. Over the previous two decades, scholars in a number of disciplines had successfully challenged the ideological and methodological separation between the family and other societal institutions, particularly politics and the market.¹⁶ At the same time, both legal and popular discourse had increas-

14. Perhaps the best known of these studies was Lenore Weitzman's examination of the economic and social consequences of no-fault divorce reform in California. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). Although the results of Weitzman's studies have been questioned, a number of more recent studies have confirmed her basic conclusion—that women and children are disproportionately disadvantaged in financial terms as a consequence of divorce. See, e.g., Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 *FAM. L.Q.* 225, 284 (1988); Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 *J. FAM. L.* 443 (1981-82); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce For Women and Children*, 21 *FAM. L.Q.* 351 (1987); Barbara R. Rowe & Alice M. Morrow, *The Economic Consequences of Divorce in Oregon After 10 or More Years of Marriage*, 24 *WILLAMETTE L. REV.* 463 (1988); Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 *J. CONTEMP. L.* 301 (1990); Charles E. Welch III & Sharon Price-Bonham, *A Decade of No-Fault Divorce Revisited: California, Georgia, and Washington*, 45 *J. MARRIAGE & FAM.* 411 (1983); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 *FAM. L.Q.* 79 (1986). Although it is questionable whether women fared better (economically) under the old fault-based system, it is clear that the no-fault system does not equitably or adequately meet their needs. Cf. Stephen D. Sugarman, *Dividing Financial Interests at Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130-65 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (questioning whether women are significantly worse off under California's no-fault system than they were under the prior fault regime, while acknowledging that divorced women fare considerably worse than men under both regimes). See generally Singer, *supra* note 5, at 1103 (arguing that the economic consequences of divorce are far more serious for women than for men).

15. See, e.g., Estin, *supra* note 11, at 721-22 (criticizing contemporary divorce laws that over-emphasize self-sufficiency norms and undercompensate the caregiver's contribution to marriage); Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 1988 *A.B.A. SEC. FAM. L.* 65 (noting judicial trend away from imposing strict time limits on alimony awards and arguing for indefinite alimony to compensate divorced spouse who devoted more time to homemaking during marriage); Jane Rutherford, *Duty In Divorce: Shared Income As A Path To Equality*, 58 *FORDHAM L. REVIEW* 539, 568-69 (1990) (arguing that "rehabilitative alimony" awarded in lump sum or short period does not account for lower earnings of spouse who has not been employed for period of years or who wishes to continue to devote time to caretaking role after divorce).

16. See GARY S. BECKER, *A TREATISE ON THE FAMILY* ix-x (1981) (asserting that economic approach provides a framework applicable to all human behavior, including behavior in and around families); Singer, *supra* note 6, at 1522-23 (citing social science, sociological, and

ingly come to view family relationships as closely analogous to—rather than fundamentally different from—relationships in other spheres of life, including market interactions.¹⁷ As a result, explanations and models of human behavior that had gained credence in the market realm began to be seen as equally applicable to relations in and around the family.¹⁸

The Supreme Court's evolving privacy jurisprudence during the 1970s and early 1980s also enhanced the appeal of economic analysis, as the Court increasingly anointed the individual, rather than the family or the marital unit, as the exclusive repository of constitutional rights.¹⁹ In particular, the Court's emphasis on decisional autonomy within the family both presaged and reinforced the economists' focus on rational choice and on the individual as the appropriate unit of legal analysis.

In addition to these scholarly and juridical developments, increased societal disagreement about what constituted appropriate "family values" and about the proper link (if any) between moral discourse and family law fueled the search for purportedly neutral justifications for legal obligations within the family, particularly those obligations that had traditionally survived divorce.²⁰ Economic analysis purports to provide just such a morally neutral justification.²¹

Finally, economic analysis—at least on the surface—seems to cohere with notions of formal gender equality and the rejection of rigid gender roles. Economic analysis, in general, assumes a high degree of both individual autonomy and fungibility among subjects.²² Similarly, formal equal-

economic theories that paved the way for application of economic analysis to "noneconomic activities" such as family behavior).

17. Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1534-37 (1994). For an extensive analysis and critique of the rise of "market discourse" in connection with family law issues, see Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605 (1994).

18. See Dolgin, *supra* note 17, at 1520, 1534-35, 1559-64 (describing process by which society's understanding of people within families has increasingly merged with its understanding of people in the marketplace); Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 395-402 (1993) (describing "rational choice analysis" of family behavior).

19. See Dolgin, *supra* note 17, at 1535-47 (discussing cases).

20. Regan, *supra* note 13, at 2306-10; Carl E. Schneider, *Moral Discourse and The Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1812-13 (1985).

21. See, e.g., PARKMAN, *supra* note 1, at 3 ("Economic analysis, based on society's preference for efficient outcomes, provides an alternate explanation to the moralistic one given for the introduction of no-fault divorce."). Whether economic analysis, even in its descriptive form, is in fact morally neutral is contested. See, e.g., Regan, *supra* note 13, at 2313-38.

22. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (1983) (stating economic assumption of consumer sovereignty which holds that individual consumers generally know what is best for themselves); Julie A. Nelson, *The Study of Choice or the Study of Provisioning*, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 23, 25 (Marianne A. Ferber & Julie A. Nelson eds., 1993) ("The phrase 'the economic approach to' is commonly used to mean viewing a problem in terms of choices, especially the individual welfare or profit maximizing choices of autonomous rational agents.").

ity models minimize the importance of gender differences and emphasize the claims of both women and men to be treated as autonomous, rights-bearing individuals.²³ The economic rationale for alimony—unlike more traditional rationales—also seemed consistent with a gender-neutral partnership model of marriage, which rejected the state-imposed marriage contract and viewed spouses as independent and autonomous individuals, each contributing voluntarily to a joint enterprise.²⁴

II. THE ECONOMIC JUSTIFICATION FOR ALIMONY

Unlike traditional theories of alimony, which focus on achieving distributive justice between divorcing spouses, the economic rationale views alimony primarily as a means of encouraging efficient behavior during marriage.²⁵ This efficiency rationale incorporates two attributes characteristic of a normative economic approach to law. First, it adopts an *ex ante*—rather than an *ex post*—perspective for purposes of evaluating the consequences and desirability of various legal regimes.²⁶ Second, it posits efficiency, or wealth maximization, as an overriding objective of legal rules.²⁷

23. See Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 209 (“Formal equality assumes it is possible to ignore an individual’s sex.”); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L. J. 913, 915-916 (1983) (legal theory of equal rights challenges biological determinism and asserts that individuals should be free to choose among social roles and careers on the basis of their individual inclinations and talents); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829 (1990) (liberal feminism argues “that women are just as rational as men and that women should have equal opportunity with men to exercise their right to make rational, self-interested choices”).

24. See Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533, 540 (1991) (describing “evolving marriage paradigm” of equal partnership, in which the division of earning and domestic functions results from mutual agreement between partners).

25. See, e.g., Ira M. Ellman, *Should “The Theory of Alimony” Include Nonfinancial Losses and Motivations*, 1991 B.Y.U. L. REV. 259, 264 (arguing that the economic theory of alimony “asks about the kind of behavior society wishes to encourage in marriage and attempts to fashion an alimony remedy that eliminates the disincentives that would otherwise arise for such behavior”); Elisabeth Landes, *The Economics of Alimony*, 7 J. LEGAL STUD. 35, 35-36 (1978) (“[T]he award and enforcement of alimony payments by the courts encourage optimal resource allocation within marriage, increase the gain from marriage, and encourage the formation, productivity, and stability of marriage.”).

26. See generally Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-11 (1984).

27. Efficiency theorists, when pressed, claim that they define wealth and efficiency expansively to include more than financial well-being. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60 (1983) (defining wealth of society as “the sum of all goods and services in the society weighted by their values”). However, much law and economics writing—including in the family law area—focuses primarily on material wealth. But if efficiency theorists truly mean to define wealth expansively (i.e., to refer to general well-being or human satisfaction), then economic analysis becomes both tautological and incoherent, particularly when more than one person is involved. See Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53,

The efficiency argument in favor of alimony is premised upon three central assumptions. First, efficiency theorists assume that married persons, like other rational individuals, seek to maximize their individual welfare. Second, these theorists suggest that people maximize their individual welfare through the production and acquisition of commodities.²⁸ Thus, efficiency theory conceptualizes marriage as a husband-wife partnership in which both parties desire to maximize joint production of commodities.²⁹ These commodities include not only traditional measures of market wealth, such as income and material goods, but also so-called “household commodities” such as home-cooked meals and time spent with children.³⁰ They also include personal assets—enhancements in the ability of one or both spouses to produce income or other commodities in the future—that economists refer to as investments in human capital.³¹

Third, and perhaps most important for the economic justification for alimony, efficiency theorists invoke the principle of comparative advantage to argue that specialization within marriage enables spouses to maximize their joint production of market and nonmarket commodities.³² This principle holds that, to maximize overall production, the members of a household (or of any organization) should allocate their resources to various activities according to the members’ comparative or relative efficiencies in those activities.³³ Just as businesses increase their output—and hence their productivity—by having employees specialize in specific tasks or aspects of the businesses, so too will married persons maximize their joint production of commodities—and for efficiency theorists, their overall well-being—by

57, 75-83 (1992) (arguing that any attempt to measure social efficiency, as opposed to individual well-being, violates the economist’s commitment to methodological individualism and runs afoul of the proscription on interpersonal comparisons of utility).

28. PARKMAN, *supra* note 1, at 27; see GARY S. BECKER, A TREATISE ON THE FAMILY 20-24 (enlarged ed. 1991) [hereinafter BECKER, FAMILY] (discussing maximization of utility function for commodities).

29. See, e.g., PARKMAN, *supra* note 1, at 27-28; Landes, *supra* note 25, at 40.

30. PARKMAN, *supra* note 1, at 28; Landes, *supra* note 25, at 40 (“Marriages are . . . assumed to be husband-wife partnerships in which both parties desire to maximize their joint expected income. The income of marriage is comprised of household commodities. . . , which are consumption or investment goods specific to the marriage, and the earnings of family members”)

31. See generally GARY S. BECKER, HUMAN CAPITAL 9 (2d ed. 1981) (noting that investments in human capital “influence future monetary and psychic income by increasing the resources in people”).

32. BECKER, FAMILY, *supra* note 28, at 32; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 101-02 (2nd ed. 1986); see PARKMAN, *supra* note 1, at 28 (describing concepts of specialization and comparative advantage in marriage and noting that specialization, while neither absolute nor permanent, tends to increase among married men and women).

33. BECKER, FAMILY, *supra* note 28, at 32; see PARKMAN, *supra* note 1, at 28 (comparing advantage of men in earning higher incomes to advantage of women in “delivering if not raising children” and noting that women’s lower earnings have made them the lower-cost partner to provide child-rearing services).

having each spouse specialize in the productive sector for which he or she is comparatively better suited.

The economist's endorsement of marital specialization follows directly from the economic explanation of why people marry. As Allen Parkman explains, "[t]he economic analysis of the decision to marry focuses on the parties' expectation that marriage will increase their individual welfare—that marriage will expand the 'commodities' available to them compared with those available if they remained single."³⁴ The primary way that marriage achieves this, according to efficiency theorists, is by reaping the gains associated with specialization.³⁵

Because specialization increases productivity, economic theorists contend that an efficient and optimally productive marriage is likely to entail a pronounced division of labor, with one spouse specializing in market-oriented production and the other spouse specializing in the production of nonmarket wealth, including the care and raising of children. Initially, economic theorists were quite comfortable discussing and defending the efficiency of such marital specialization along explicit gender lines.³⁶ That is, theorists generally assumed that women, by virtue of their biology, possessed a "natural" comparative advantage over men in household, as opposed to market, production and that men enjoyed a correspondingly "natural" comparative advantage in market, as opposed to non-market work.³⁷ The efficient household, under this model, was one in which the

34. PARKMAN, *supra* note 1, at 26.

35. To illustrate this principle, Parkman hypothesizes a single man who can produce either \$50 of market commodities, or \$20 of household commodities, or some combination of the two, and a single woman who can produce either \$50 of household commodities, or \$20 of market commodities, or some combination of the two. If each remains a sole producer, each must devote energy to producing both types of commodities. Assuming that both have approximately equal preferences for the two types of commodities, each would choose a production mix that lies in the middle of their respective production possibility frontiers; thus, the man would produce \$20 of market commodities and \$12 of household commodities and the woman would produce \$12 of market commodities and \$20 of household commodities. By joining forces and specializing, both can increase their overall welfare. If the man specializes completely in market production and the woman specializes completely in household production, then they can jointly produce \$50 of market commodities *and* \$50 of household commodities. Assuming an equal division of output, each marital partner now has access to more of each type of commodity than he or she did as a single producer. The greater the disparity in the comparative advantages of the prospective spouses, the greater the potential gain from pooling and therefore the greater the incentive to marry, as opposed to remaining single. *Id.* at 29-30. For a critique of this illustration, see Margaret F. Brinig, *The Law and Economics of No-Fault Divorce*, 26 *FAM. L.Q.* 453, 456-58 (1993) (reviewing ALLEN M. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* (1992)).

36. See, e.g., BECKER, FAMILY, *supra* note 28, at 37-44 (discussing effect of "intrinsic differences between the sexes"); Landes, *supra* note 25, at 40 (calculating optimal degree of household specialization based on extra time wife devotes to household activities in order to free more of husband's time to market and earnings-generating activity).

37. E.g., BECKER, FAMILY, *supra* note 28, at 39 (discussing effects of "biological differences in comparative advantage between the sexes"). Note that this analysis does not

husband specialized in market production and the *wife* specialized in domestic work.

More modern efficiency theorists—perhaps recognizing the divisiveness of these biological assumptions—generally disclaim reliance on intrinsic gender differences. Instead, they link specialization to efficiency by emphasizing the unequal earning capacities of most husbands and wives, and by asserting that men and women tend to invest differentially prior to marriage in sector-specific human capital.³⁸ Ira Ellman, for example, asserts that the economically rational married couple will “shift economic sacrifices from the higher earning spouse to the lower earning spouse, because that shift will increase the income of the marital unit as a whole.”³⁹ Similarly, Gary Becker, in the revised edition of his *Treatise on the Family*, argues that even a small initial difference in the comparative advantages of men and women with respect to market and non-market work—related, for example, to women’s role in giving birth or to wage discrimination in favor of men—is likely to produce a high degree of gender-based specialization in marriage because of the reinforcing effects of additional investments in human capital.⁴⁰

What does the economist’s endorsement of specialization have to do with the justification for alimony? The link is that specialization within marriage is beneficial for both spouses only so long as the marriage stays intact. Divorce changes the picture dramatically. In the absence of alimony or a similar transfer of assets, the spouse who has specialized in household production—who has invested in the marriage, rather than in the market—finds herself economically disadvantaged relative to the spouse who has specialized in market production. Not only has the domestic specialist forgone the opportunity to develop and maintain her own market-oriented human capital, but many of the domestic assets and capacities that she has produced or enhanced during the marriage are of extremely limited economic value (and may indeed constitute an economic drain) in the event of divorce.

A rational spouse—or a rational prospective spouse—who foresees the possibility of these divorce-induced losses is likely to protect herself by investing more in the market and less in the production of marriage-

compare men to women in each sector; rather, it compares each gender’s productivity in the market to that same gender’s productivity in the nonmarket sector.

38. See, e.g., BECKER, FAMILY, *supra* note 28, at 54-79 (supplement to Chapter 2) (describing theory of investment in human capital and noting that women tend to seek development of generalized skills useful in roles as housewife and participant in labor force); PARKMAN, *supra* note 1, at 28-33 (describing the increased production possibilities available as a result of marriage when the male spouse specializes in income earning and the female spouse specializes in household activities); Ellman, *supra* note 2, at 46-48.

39. Ellman, *supra* note 2, at 46.

40. See BECKER, FAMILY, *supra* note 28, at 3-5, 63.

specific goods and services. Alternatively, or perhaps in addition, such a rational, well-informed spouse may insist that her higher-earning partner forgo some of his market-oriented production in order to assume a larger share of childcare and other household responsibilities.⁴¹ But while these strategies are likely to reduce the disproportionate financial losses flowing from divorce, they also reduce the productivity of the intact marriage, because they decrease the degree of otherwise efficient marital specialization.⁴² As Ira Ellman explains, “the strategy the spouses have adopted to reduce the financial loss flowing from marital failure also reduces the financial benefits arising from the intact marriage. Part of the husband’s higher earning potential goes unrealized, to both his detriment and his wife’s.”⁴³

Because the efficiency theorist views wealth maximization as an overriding purpose of marriage, such a decrease in productivity both reduces the overall attractiveness of marriage and increases the likelihood of divorce. Because a nonspecialized marriage is less productive than a specialized one, some prospective spouses will choose not to marry.⁴⁴ Meanwhile, individuals who do marry but then engage in such a suboptimal division of marital labor increase their risk of divorce, because other things being equal, the level of satisfaction in nonspecialized marriages will be lower than in marriages that adhere to a more efficient (i.e., wealth-maximizing) division of spousal labor.⁴⁵

Thus, the efficiency theorist argues, the possibility of financial losses resulting from divorce distorts the incentives that would otherwise lead to efficient, role-specialized behavior during marriage. Alimony is justified, under this view, to remove these distorting incentives and to encourage those spouses who are comparatively better suited for domestic work to “do the right thing” and invest in their marriages rather than in the market.

The economists’ emphasis on specialization and efficiency does more than provide a theoretical justification for alimony; it also plays a major role in determining the availability and appropriate measure of any particular alimony award. Because the purpose of alimony, under this theory, is to

41. See Ellman, *supra* note 2, at 47.

42. See PARKMAN, *supra* note 1, at 36 (“People who do not want to specialize and do not appreciate the commodities made available by their spouse do not gain very much from marriage.”); Ellman, *supra* note 2, at 47-48.

43. Ellman, *supra* note 2, at 47.

44. *Id.* (asserting that, today, men are particularly likely to be deterred); see Landes, *supra* note 25, at 49, 62-63 (noting that specialization within marriage “promotes both the initial formation and continued stability of marriages”).

45. Ellman, *supra* note 2, at 47; see PARKMAN, *supra* note 1, at 36 (“The more people commit themselves to specialized roles, the more they gain from marriage and the more they lose from divorce. . . . Less specialization during marriage increases the probability of divorce.”)

avoid discouraging a lower earning spouse from engaging in efficient marital sharing behavior, an optimal award should neutralize the adverse financial consequences of such sharing behavior for any particular divorcing spouse. The award should thus compensate each particular household specialist for the value of the market opportunities she has forgone as a result of the decision to invest primarily in the marriage.⁴⁶ It should, however, do no more than this.⁴⁷ Thus, to the extent that income differentials between divorcing spouses are not attributable to specialization during marriage, but instead result from investments and choices made prior to marriage, the efficiency justification is inapposite, and alimony is therefore unavailable.

To calculate a household specialist's compensable losses, the economist would compare that spouse's earning capacity at the time of divorce with the earning capacity that she would have enjoyed had she invested her time in marketable skills instead of in marriage-specific activities.⁴⁸ The difference between these two figures, discounted to its present value, would constitute the optimal alimony award.

Combining human capital theory with the economist's endorsement of specialization produces a similar efficiency-based approach to financial entitlements at divorce.⁴⁹ For example, Allen Parkman argues that a spouse who limits her employment or educational opportunities during marriage in order to specialize in domestic production should be viewed as having contributed separate property—in this case, a portion of her human capital—to the marriage.⁵⁰ Because separate property is generally returned to the individual who previously owned it in the event of divorce, Parkman argues that the spouse who sacrifices human capital to the marriage should be compensated for her loss.⁵¹ Parkman would measure

46. Ellman, *supra* note 2, at 51-52; see Landes, *supra* note 25, at 46 (defining efficient alimony award as the value of opportunities forgone by wife as result of making optimal marital investment in household activities).

47. See Ellman, *supra* note 25, at 265 & n.18 ("If the law provides that the claimant be 'made whole'—put back in the position she would have been in had she not engaged in marital sharing behavior—the disincentive that would otherwise be present is eliminated.").

48. Ellman, *supra* note 2, at 78.

49. Although Parkman would rely primarily on property division rather than alimony as the vehicle for effectuating these divorce-related financial adjustments, his underlying theory closely resembles Ellman's.

50. See Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 449-50 (1987) [hereinafter, Parkman, *Human Capital*] (comparing contribution of human capital during marriage to situation in which an individual contributes asset prior to marriage that would be considered separate property); PARKMAN, *supra* note 1, at 132-34 (discussing methods of recognizing and compensating for decreases in a supporting spouse's human capital during marriage); *id.* at 151-52 (proposing model statute). For a critique of the human capital approach endorsed by Parkman and other theorists, see Regan, *supra* note 13, at 2320.

51. Parkman, *Human Capital*, *supra* note 50, at 449-50. Like Ellman, Parkman would measure the compensable loss by comparing the income stream that the sacrificing spouse

the compensable loss by comparing the sacrificing spouse's expected income stream after divorce with the income that the spouse could have expected had she never left the workforce.⁵²

Parkman relies heavily on efficiency notions to explain why such adjustments are necessary. In particular, Parkman argues that the failure to compensate divorcing wives for human capital contributions encourages women to behave inefficiently by causing them to "pursue employment or education when the benefits to the family may not exceed the costs out of their concern about their situation if their marriage is dissolved."⁵³ Requiring compensation for human capital contributions at the time of divorce could provide appropriate financial protection to spouses who specialize in household production at a significantly lower social cost.⁵⁴

III. ADVANTAGES OF THE ECONOMIC RATIONALE

Is the efficiency justification for alimony compatible with feminist approaches to marriage and divorce, and is it likely to alleviate the disparate financial effects of divorce on women and the children for whom they overwhelmingly continue to care? The answer to both questions, I think, is largely no. But the economic justification for alimony offers some tangible benefits to women. Moreover, the economic approach provides some insights that may be useful in understanding—and ultimately in reordering—the relationship among law, family, and gender relations.

First, the economic justification represents a distinct improvement over the early reformers' notion of alimony as a short-term transition payment. In many cases, compensating a divorcing woman for the human capital losses she has incurred as a result of her investment in domestic activities is likely to provide a financial remedy that significantly exceeds that available under current alimony doctrine. Moreover, this economic rationale makes clear why the notion of a short-term transition payment was so inadequate for so many women: merely facilitating a woman's return to the paid labor market fails utterly to take account of the long-term disparities in earning capacity that result from the division of labor during marriage.⁵⁵

can expect to receive at the time of divorce with the income stream that she could have expected if she had never left the workforce. *Id.* at 450. However, Parkman would award the sacrificing spouse only half the value of this difference because he claims that she has already received half the value of her sacrifice. *Id.*

52. *Id.*

53. PARKMAN, *supra* note 1, at 121.

54. *Id.*

55. See Arthur B. Cornell, Jr., *When Two Become One, and then Come Undone: An Organizational Approach to Marriage and Its Implications for Divorce Law*, 26 FAM. L.Q. 103, 130-32 (1992) (advocating compensation based on lost earnings capacity as sound basis of tying remedy to actual losses); Rutherford, *supra* note 15, at 563-64 (criticizing Uniform Marriage and Divorce Act for its failure to compensate divorced spouse for diminished earning capacity and loss of future income).

The economic justification thus takes an important step toward recognizing that women (and the occasional man) who assume primary responsibility for dependent care and other domestic tasks make important contributions to a marriage, and that it is appropriate to compensate them for those contributions in the event that a marriage fails. More generally, the economic approach to divorce appropriately recognizes that the family is an important locus of production, as opposed to merely an emotional or affective realm—a productive center, as well as a haven in a heartless world.⁵⁶

The economic justification also acknowledges what the early reformers chose to ignore: that decisions about the allocation of work and family responsibilities during marriage are likely to have economic consequences that endure long after a marriage is formally dissolved. Thus, it is neither realistic nor appropriate to expect instant rehabilitation or a clean financial break.

Second, the economic justification affords divorcing women and their legal advocates a powerful language in which to frame their legal claims.⁵⁷ Armed with economic theory, a financially dependent spouse can press for post-divorce financial support not merely because she needs it, but also because she has earned it, either by sacrificing her own economic opportunities for the sake of her family or by contributing to the enhancement of her husband's earning power. In this sense, the economic rationale for alimony restores, to at least some divorcing women, an element that the switch from a fault to a no-fault divorce regime took away—the ability to frame their alimony claims in justice-based, as opposed to merely needs-based, terms. Moreover, because the economic theory does not depend on traditional notions of marital fault, the theory avoids the constraints, injustices, and gender stereotypes of the fault-based system of divorce.⁵⁸

Third, the economists' emphasis on human capital as a valuable asset breaks down the sharp distinction that family law has traditionally drawn between alimony and property division. This breakdown is useful because it comports with the general skepticism of feminist theories toward dichotomies and fixed legal categories. Moreover, breaking down the property

56. The textual reference is to CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD* (1977).

57. Feminist theory has long emphasized the power of naming—of ascribing meaning to the world and determining which things count as cognizable categories and claims. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 18-20 (1988) (emphasizing the critique of the male power of naming); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 895-906 (1989) (arguing that the patriarchal bias in legal language can distort what women have to say); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 61 (1987) (“Feminist work has named the power of naming.”).

58. See Singer, *supra* note 5, at 1110-11 (describing the “sex discriminatory nature of the most common grounds for a fault-based divorce”).

versus alimony distinction suggests that many of the arguments used to justify an equal (or at least an equitable) sharing of marital property upon divorce also justify an equitable (if not an equal) division of a couple's post-divorce earnings, at least when those earnings are attributable to investments and decisions made during marriage.

At its core, the principle of equal property division reflects the notion that each spouse contributes equally to a marriage and is therefore entitled to share equally in its benefits and losses.⁵⁹ Human capital theory teaches that the material assets which a couple accumulates provide, at best, only a partial accounting of the benefits attributable to most marriages.⁶⁰ To obtain a true measure of marital gains and losses, one must also consider changes in the spouses' respective earning capacities during the period of the marriage. Thus, human capital theory suggests that to fulfill the promise of equal property division, divorce law must look beyond the couple's material assets and reallocate some portion of the spouses' future income.

Fourth, the *ex ante* focus of the economic approach calls attention to what Carl Schneider has termed the channeling function of family law—the incentives created by legal rules and the effect that such rules are likely to have on various forms of family behavior.⁶¹ Thus, while conventional justifications for alimony tended to be primarily backward looking, economic theories are explicitly forward looking in that they seek to generate rules that encourage particular kinds of marital behavior.⁶² This focus on the *ex ante* effects of legal rules, including rules governing the financial consequences of divorce, is valuable to feminists for at least two reasons. First, it provides a useful antidote to the overly particularistic and reactive orientation of much of family law by focusing attention on influencing behavior rather than on responding to it. Second, an *ex ante* orientation tends to undermine the myths—so often used to dismiss feminist reform proposals directed at the family—that law is inherently incapable of affecting relations within the family and that legal reform efforts purportedly directed toward that end are largely futile.⁶³

59. See *id.* at 1114 (noting that equitable division of marital property represents an “initial application” of theory that spouses are equal investors entitled to equal proceeds of marriage).

60. See Joan M. Krauskopf, *Recompense For Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 381-386 (1990) (applying human capital to family investment decisions); Parkman, *Human Capital*, *supra* note 50, at 439-41.

61. See generally Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

62. Ellman, *supra* note 2, at 51-52.

63. For examples of such arguments, see DAVID L. KIRP ET AL., *GENDER JUSTICE* 173-76 (1986) and GILBERT Y. STEINER, *THE FUTILITY OF FAMILY POLICY* 177-217 (1981).

Of course, economic theorists are neither the first nor the only scholars to focus on the ex ante effects of various divorce compensation schemes. Furthermore, it is not clear that the marital behavior that the efficiency theorist seeks to encourage is in women's long-term interest. Herma Hill Kay, for example, has cautioned against adopting alimony schemes that "encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce."⁶⁴ But focusing on the ex ante effects of various legal rules at least allows us to talk explicitly about what sorts of marital and family behavior we wish to encourage, rather than pretending that these are purely private or personal matters or that they are somehow outside the scope of appropriate family law and policy discourse.

IV. A FEMINIST CRITIQUE

A. THE PITFALLS OF MARITAL SPECIALIZATION

For feminists, perhaps the most troubling aspect of the dominant economic theory of alimony is the theory's reliance on the efficiency—and hence the desirability—of role specialization during marriage. Although modern efficiency theorists prefer to characterize alimony as compensation for decreases in human capital,⁶⁵ or as a way of removing incentives that inhibit efficient sharing behavior,⁶⁶ their arguments in favor of both concepts rest centrally on the desirability of role specialization within marriage and on the corresponding undesirability of marriages that deviate from such an optimal division of household labor. Moreover, despite recent attempts by some economic theorists to delink marital specialization from gender roles,⁶⁷ the two remain closely, perhaps inextricably, connected.

Allen Parkman is most candid about the centrality of specialization to the economic theory of alimony. He asserts early in his book that a primary problem with the current divorce regime is that it ignores the effect of marriage on the income earning capacities of the spouses and thereby "result[s] in undesirable decisions being made during marriage."⁶⁸ What are these undesirable decisions? They turn out to be inefficient attempts by married couples to share equally in the work of raising children. As

64. Herma Hill Kay, *Equality and Difference: A Perspective On No-Fault Divorce And Its Aftermath*, 56 U. CIN. L. REV. 1, 60 (1987).

65. PARKMAN, *supra* note 1, at 6-8.

66. Ellman, *supra* note 2, at 50.

67. See sources cited *supra* notes 38-40.

68. PARKMAN, *supra* note 1, at 2.

Parkman explains:

The arrival of children usually results in one party, usually the woman, increasing the emphasis that she places on household production. *The parents may be tempted to share the responsibility for child rearing*, but usually it will be less costly to the couple for just one parent to alter his or her employment than for both to alter their employment. The lower average wages available to women make the mother the lower-cost provider of child rearing.⁶⁹

Similarly, Ira Ellman asserts that using alimony to reallocate the financial consequences of divorce is desirable in order to remove distorting incentives to the *optimal allocation* of marital roles and duties.⁷⁰ Again, this optimal allocation turns out to involve a high degree of specialization, with the lower-earning spouse (generally the woman) assuming the bulk of childcare and other domestic responsibilities. Indeed, Ellman goes so far as to assert that marriages that reject this optimal division of labor—that is, marriages in which a higher earning husband and a lower earning wife attempt to share childrearing and other domestic tasks equally or attempt to switch roles—are more likely than traditional marriages to end in divorce “since, other things being equal, the level of satisfaction in such marriages will be lower.”⁷¹

This attempt to justify alimony as a mechanism for promoting efficient specialization within marriage is problematic on grounds both internal and external to economics. Internally, economic theory itself casts doubt on the efficiency of role specialization during marriage. As Margaret Brinig and June Carbone have pointed out, the standard efficiency argument for marital specialization considers only specialization between husbands and wives; it does not consider the possibility of specialization among women.⁷²

69. *Id.* at 31 (emphasis added).

70. Ellman, *supra* note 2, at 49-50.

71. *Id.* at 47. Ellman also asserts that because such an egalitarian marriage “is less profitable than a more traditional marriage, some parties might choose not to enter it in the first place, even though they would enter a traditional marriage.” *Id.* Gary Becker argues more generally that as women’s earnings increase, the likelihood of divorce also rises because such higher earnings reduce both the demand for children and the advantages of the sexual division of labor, thus reducing the gain from marriage. BECKER, FAMILY, *supra* note 28, at 54-56.

72. Brinig, *supra* note 35, at 456-57; June Carbone, *Economics, Feminism, & the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1465, 1489-90 (1990). Carbone explains that in the nineteenth century, specialization meant that married, middle-class women did not work outside the home, and husbands played little role childrearing. In the late twentieth century, by contrast, “specialization involves women specializing among themselves to provide childcare so that many mothers work outside the home, entrusting care of their children to other women paid for caring for more children than just their own.” *Id.* at 1490.

This omission is particularly striking when one considers that the most dramatic change in the latter part of the 20th century has not been a decrease in specialization within the nuclear family, but rather an increase in specialization among women in the provision of child care and other domestic services.⁷³ Yet the same economic argument that would support specialization within the family should support specialization among women as well. Thus, from a pure efficiency standpoint, the most productive household today may be one in which both spouses engage in full-time market work and the bulk of the domestic tasks, including childcare, are performed by a low-wage employee—almost certainly another woman, and quite likely a woman of color.⁷⁴ This is hardly a solution that most feminists would be inclined to endorse.

Even if one focuses solely on specialization between husband and wife, the link between specialization and efficiency may be more problematic than that suggested by the relatively simplistic theory of comparative advantage that underlies the economic justification for alimony. Margaret Brinig, for example, has suggested that the standard economic account of marital specialization fails to consider important psychic costs associated with specialization, such as the cost to women who are not working outside the home, but who would like to be, and the cost to men who are working long hours, but who would like to spend more time with their children.⁷⁵ Factoring in these psychic costs, and assuming at least some diminishing marginal returns from additional increases in productivity, suggests that, for many couples, the most “efficient” marriage is not one characterized by a high degree of specialization. Rather, an efficient union would entail both partners having significant ties to the paid labor force *and* spending significant time with their children.⁷⁶ Encouraging such “nonspecialized,” but child-centered, unions may have significant societal benefits as well, including encouraging all parents to invest more heavily in developing their children’s human capital.⁷⁷ Unfortunately, the strong commitment to specialization that underlies the economic efficiency justification for alimony may hinder the sort of workplace and other societal changes that are necessary to facilitate these nonspecialized, child-centered unions.

73. Carbone, *supra* note 72, at 1465-66; see June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 TUL. L. REV. 953, 990 n.168 (1991) (discussing the entry of women into the workforce resulting in greater specialization among women in domestic work).

74. Twila Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2498, 2509-11 (1994).

75. Brinig, *supra* note 72, at 457.

76. *Id.* at 457-58.

77. See generally Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children’s Human Capital*, 81 GEO. L. J. 1945 (1993) (examining imperfections in human capital markets).

Arlie Hochschild's documentation of married women's "second shift" also casts doubt on the efficiency of the traditional division of household labor. In her detailed study of married couples, Hochschild found that women who earn less than their husbands and who assume primary responsibility for childcare and other domestic tasks often accomplish this juggling act not by limiting their market production (as the theory of comparative advantage would predict), but by reducing their already scarce leisure time.⁷⁸ This finding also suggests a potential inefficiency in the specialized household, as the cost of reducing a husband's relatively abundant leisure time should be less than the cost of reducing by an equivalent amount either the wife's paid employment or her relatively scarce leisure time.⁷⁹ This, in turn, suggests that the tenacity of the gender-based division of labor within marriage may be less a reflection of efficiency and more a manifestation of men's continuing power over women—or, to put it in economic terms, of successful strategic and rent-seeking behavior on the part of husbands.

These arguments suggest that marital specialization may not be nearly so efficient as economic theorists such as Becker, Ellman, and Parkman maintain, if, indeed, it is efficient at all. As an advocate of—and aspiring participant in—nonspecialized marriage, I applaud this conclusion. But this conclusion devastates the dominant economic justification for alimony. If specialization within marriage is not efficient, then the economic justification for alimony evaporates. Alimony is no longer necessary to encourage "optimal role allocation" or to remove "distorting incentives" to otherwise efficient marital behavior. Of course there may well be reasons other than efficiency to want to encourage sharing behavior during marriage or to protect spouses (or parents) who, for whatever reason, have assumed primary responsibility for childcare and other domestic tasks, but normative efficiency analysis cannot provide us with those reasons.⁸⁰ Thus, feminists (and others) who would rely primarily on economic efficiency arguments to justify post-divorce income sharing may well be boarding a sinking ship.

And even if marital specialization were efficient, feminists would still be reluctant to endorse it (or to build a theory of alimony around it) because

78. ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989); see VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 76 (1988) (noting that although there has been a doubling of the women to men ratio of "money income" between 1960 and 1986, men had more and women had less leisure time); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 97 (1993) (discussing the reduction in a woman's leisure time as an inefficiency of the household).

79. Hadfield, *supra* note 78, at 97-98.

80. See Lawson, *supra* note 27, at 75 ("The normative branch of law and economics instructs decisionmakers to use social efficiency as a guide, even if not the sole guide, to conduct.").

of the link between specialization and gender inequality. Although both Ellman and Parkman assert that their endorsement of marital specialization does not constitute an endorsement of *gender-based* specialization, both concede that, in most marriages today, the lower-earning spouse is likely to be the wife. What these theorists fail to recognize, however, is that the woman is likely to be the lower-earning spouse in most marriages precisely *because* women have historically borne—and to a large extent continue to bear—a disproportionate share of household labor.⁸¹ Indeed, economists themselves have increasingly identified the sex-based division of household labor as one of the primary determinants of the persistent wage gap between men and women workers.⁸² By endorsing a theory of alimony that rests on the efficiency (and hence the desirability) of role specialization within the family, economic efficiency theorists thus risk perpetuating, perhaps unwittingly, women's economic marginalization.

The economists' endorsement of marital specialization is also problematic because it ignores the effect of such specialization on power differentials within the family. Studies of decisionmaking and conflict within marriage have consistently shown "that, on average, husbands have more power than wives, that male power is stronger when the wife is exclusively a homemaker than when she is employed outside the home, and that male power is less extreme when women have higher earnings."⁸³ Recent theoretical work suggests that such gender-based power differentials are attributable not only to disparities in market earnings, but also to the dynamic of specialization—in particular, to the fact that wives tend to invest disproportionately in relationship-specific human capital, while husbands' human capital investments during marriage are largely portable.⁸⁴ This asymmetry in portable investments affects not only the parties' relative economic positions at divorce, but also their ability to bargain during marriage. Both sociological exchange theory and game theory suggest that the better one's alternatives outside marriage, and the worse one's partner's alternatives, the more one can afford to risk the other partner leaving by bargaining harder within the marriage.⁸⁵ Focusing on the overall efficiency (or productivity) of the household unit renders invisible—and hence, unproblematic—these gender-based power differentials. Put more generally, the economist's

81. Carbone, *supra* note 72, at 1490-91; see Hadfield, *supra* note 78, at 96-97 (suggesting that the structure of household labor accounts for a large fraction of the gender gap in compensation).

82. *E.g.*, Hadfield, *supra* note 78, at 96.

83. Paula England & Barbara S. Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power*, in BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY 151, 165 (Roger Friedland & A.F. Robertson eds., 1990).

84. *See id.* at 163, 173-78 (discussing the nature of relationship-specific investments, generally attributed to women, and portable investments, generally attributed to men, and the role such investments play in a marriage).

85. *Id.* at 177.

focus on the household as an efficient, productive unit ignores both the distribution of resources within that unit and the effect of specialization on that distribution.⁸⁶

The endorsement of marital specialization that underlies the efficiency justification for alimony is also problematic because it seems designed to encourage women to abandon their careers for the sake of their marriages, in exchange for a promise to “hold them harmless” financially should the marriage dissolve.⁸⁷ Even if providing alimony in the event of a divorce provided full financial compensation, such a structure ignores other rewards, including the intellectual, emotional, and social benefits associated with participation in the paid labor market. On an aggregate level, it also ignores the increase in social and political power that accompanies a group’s widespread participation in the market.

B. ISOLATING THE MARRIED COUPLE

The economic theory of alimony is also troubling from a feminist perspective because it focuses almost exclusively on the interests of the married couple in isolation.⁸⁸ Curiously absent from the theory is any reference to societal interests that go beyond the particular married couple.⁸⁹ Similarly absent is any serious attention to the effect of various divorce compensation schemes on children, even though much empirical evidence suggests that “[w]hen couples divorce, their separation may exact a higher financial and emotional toll on their children and on the society that has to deal with their children than it does on the couple themselves.”⁹⁰ As a number of feminist scholars have pointed out, divorce compensation schemes that insist on treating non-custodial fathers’ human capital as their personal property “not only impoverish[] women, but also result[] in systematic disinvestment in children.”⁹¹ Conceptualizing the “problem” that alimony is designed to solve solely in terms of the spouses’ joint economic interests is likely to perpetuate this disinvestment.

The same criticism applies to any attempt to justify alimony as simply a set of “contractual default rules” that rational spouses entering marriage would have agreed to had they bargained explicitly about the possibility of divorce. To adopt law and economics terminology, to the extent that marriage can usefully be analyzed as a private contract, it is a contract

86. See, e.g., Diana Strassman, *Not a Free Market: The Rhetoric of Disciplinary Authority in Economics*, in *BEYOND ECONOMIC MAN*, *supra* note 22, at 54, 58-59 (criticizing standard economic model of the family for ignoring unequal distribution of resources and power among family members).

87. Carbone, *supra* note 72, at 1493.

88. See, e.g., Ellman, *supra* note 2, at 40-50; Landes, *supra* note 25, at 36, 49-51.

89. Carbone, *supra* note 72, at 1488-89.

90. *Id.*

91. Joan C. Williams, *Women and Property*, in *A PROPERTY ANTHOLOGY* 182, 185 (Richard H. Chused ed., 1993) [hereinafter Williams, *Women and Property*].

whose formation, and especially whose termination, is likely to be associated with a particularly high level of externalities.⁹² Thus, reliance on either notions of individual consent or market-based measures of efficiency to determine the unarticulated terms of the contract or the intended consequences of contract termination is likely to be problematic.

C. THE ECONOMIC JUSTIFICATION APPLIED

Another major problem with the efficiency rationale for alimony is the peculiar and seemingly unfair results it produces when applied to particular fact situations. It is useful to examine these applications, both to try to contextualize the economic notions on which these theorists rely, and because this process of application and contextualization reveals some of the troubling premises upon which the economic justification rests. A key tenet of the economic efficiency justification is that a divorcing spouse is entitled to alimony only when her activities during marriage have resulted in a decrease in her own income earning capacity. A spouse who has suffered no such postmarital reduction in earning power is not entitled to alimony, no matter how great her financial need, how significant her marital investment, or how much her husband (and children) have benefited from her caretaking and other domestic activities.

Therefore, although the efficiency justification provides substantial compensation to the high-powered corporate attorney who quits her job to stay home with children (or who switches from corporate practice to a less lucrative, but more flexible, law teaching job), it completely denies alimony to the full-time mother and homemaker who never aspired to a career outside marriage or whose market activities prior to marriage offered little opportunity for career advancement.⁹³ That these two women may have assumed identical roles during marriage (or, indeed, that the career homemaker may have invested more heavily in household production) is irrelevant to the alimony inquiry because, according to the efficiency justification, the function of alimony is to compensate for losses attributable to marriage, not to correct for what economists tend to characterize as gen-

92. One obvious type of externality involves the effect of marriage termination on children. See Carbone, *supra* note 72, at 1488-89.

93. Jane W. Ellis, *New Rules For Divorce: Transition Payments*, 32 FAM. L.J. 601, 609-10 (1994); see Carbone, *supra* note 72, at 1497 (characterizing Ellman's "lost earnings" approach to alimony as "a system that appears to be designed with only young urban professionals in mind"). Ellman's requirement that, except where children are involved, marital sharing behavior must have increased aggregate marital income in order to provide a basis for alimony also means that dependent spouses in childless marriages are unlikely to qualify for alimony, even when their domestic activities have resulted in a clear loss of career opportunities. See Ellman, *supra* note 2, at 63-66 (discussing the application of alimony rules in specific case scenarios).

eral social inequalities. As Ira Ellman explains:

We allow the wife a claim when she sacrifices her earning capacity to advance her husband's. But where one spouse enters the marriage with a great fortune or a lucrative talent, and the other has no similar asset, we have a different situation. *Divorce law cannot remedy all of life's inequalities, and it is perfectly reasonable for such a couple to leave their marriage as unequally endowed as they entered it.*⁹⁴

This statement, and the results it attempts to justify, highlight at least four significant shortcomings in the economic approach to alimony. First, the economic approach fixates on compensation for loss, and pays little attention to identifying or apportioning equitably the marriage-related gains enjoyed by many primary wage-earners. Second, the economic approach relies on the market both to identify loss and to value it, thus magnifying and perpetuating labor market discrimination against women. Third, the economic justification insists on examining the alimony claimant in isolation; it thus denies the importance of the spouses' relative economic positions. Finally, the theory's approach to compensation rests on an unpersuasive and unworkable dichotomy between losses that can be traced to a particular marriage and "tough luck" economic vulnerability for which individual husbands cannot and should not be held responsible. This purported dichotomy fails to appreciate the interdependence of the gendered division of household labor and the so-called choices that individuals make before entering into a particular marriage.⁹⁵

1. The Emphasis on Loss

The efficiency theorists' preoccupation with loss causes them to largely ignore the human capital gains that accrue during many marriages. Empirical evidence shows that marriage not only depletes a wife's stock of human capital, it also significantly enhances a husband's.⁹⁶ When economic theorists do discuss gains in human capital, it is generally for the purpose of showing why a supporting spouse should not be entitled to share in those gains, even if she provided the funding or the domestic services that made their acquisition possible. Thus, Allen Parkman asserts that even where a professional degree is earned (and financed) during marriage, it is generally inaccurate to attribute its value to the marriage, because most of the

94. Ellman, *supra* note 2, at 75 (emphasis added).

95. See Hadfield, *supra* note 78, at 95-96 (noting connection between male-female wage gap and sex-based division of labor within the home); cf. Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1815-39 (1990) (exploring the impact of workplace structure and culture on women's work-related preferences).

96. See, e.g., FUCHS, *supra* note 78, at 60 ("In contrast to women, married men earn more than unmarried men at every age."); Carbone, *supra* note 4, at 184-85 (discussing studies).

investment necessary to obtain the degree will have occurred prior to the marriage.⁹⁷ “Under normal circumstances, the investment in human capital prior to marriage will be so large and essential relative to the investment after marriage that an individual’s human capital should be treated as separate property.”⁹⁸

The economic theory’s reluctance to recognize or apportion gains flows directly from its narrow view of the purpose of divorce-related financial transfers. Remember that, for the efficiency theorist, the primary purpose of alimony is to eliminate divorce-related disincentives to economically rational sharing behavior during marriage.⁹⁹ To serve that purpose, an alimony award need only “make good” the loss incurred by a spouse who has invested primarily in her marriage, including in her partner’s education or career.¹⁰⁰ Any additional reallocation would constitute a “windfall” to the domestic specialist and would deprive the primary wage-earner of something that is rightfully his.¹⁰¹ The economic approach to alimony thus leaves unchallenged what Joan Williams has described as the key legal mechanism that updates coverture and systematically impoverishes women and their children—the maxim that “he who earns it, owns it.”¹⁰²

The efficiency justification’s inattention to marital gains, coupled with its focus on the market to measure value, also causes it to overlook one of the most important benefits that marriage bestows on a primary wage earner: the opportunity to be both a parent and what feminists have termed an “ideal worker.”¹⁰³ Thus, in both fully and partially specialized marriages,

97. PARKMAN, *supra* note 1, at 40-41; Parkman, *supra* note 50, at 447-49.

98. Parkman, *supra* note 50, at 448. Parkman would, however, reimburse a supporting spouse who had provided funding for the degree. *Id.* at 448-49.

99. See Ellman, *supra* note 2, at 56 (“This theory of alimony . . . seek[s] only to make sure that on divorce neither spouse is left with residual effects that would distort marital decisionmaking.”)

100. See Ellman, *supra* note 25, at 276.

101. See Parkman, *supra* note 50, at 447-48 (“The human capital that individuals possess at the time of marriage are separate property just as much as if they had owned portfolios of stocks and bonds.”). Some economic theorists have also suggested that permitting reallocation of human capital gains would give lower earning spouses an incentive to engage in “strategic divorce” in order to appropriate a large portion of the returns to a primary wage-earner’s “innate ability.” See Severin Borenstein & Paul N. Courant, *How to Carve A Medical Degree: Human Capital Assets in Divorce Settlements*, 79 AM. ECON. REV. 992, 1004 (1989) (“The O’Brien rule [treating a professional degree acquired during marriage as divisible marital property] with a high tax rate can induce the investing spouse to completely forgo rents that could have been generated from an invest-support relationship and can provide strong incentives for the supporting spouse to engage in strategic divorce.”); Cornell, *supra* note 55, at 123 (allowing division of marriage-related benefits “may give an incentive to the spouse losing at breakdown to end the marriage at a strategic point to collect the judgment”).

102. Williams, *Women and Property*, *supra* note 91, at 185; see Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2250, 2253 (1994).

103. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-834 (1989) [hereinafter Williams, *Deconstructing Gender*] (discussing male life patterns as they affect the structure of wage labor).

the spouse who specializes in market production generally enjoys most—if not all—of the benefits associated with parenthood. For example, the primary wage-earner generally enjoys at least an equal voice in major decisions about the children—particularly if those decisions involve the expenditure of money—and he is most often a full recipient of his children's affection.¹⁰⁴ What the economic justification fails to acknowledge is that a husband's ability to be both a parent and an ideal worker depends critically on his wife's assumption of primary childcare responsibilities—whether or not that assumption of responsibility results in a postmarital economic loss.¹⁰⁵

Moreover, the ability to be both a participating parent and an ideal worker is a benefit that divorcing husbands increasingly retain in full, at least for as long as they choose to do so. Recent reforms in child custody law have protected fathers' decisionmaking authority and access to children after divorce, without substantially reducing mothers' primary caretaking responsibilities.¹⁰⁶ Indeed, a recent study of post-divorce parenting arrangements in California reports that while most children continue to live with (and be cared for by) their mothers, joint legal custody—that is equal parental decisionmaking authority—“has now become the norm.”¹⁰⁷ In many ways, this custody arrangement reproduces precisely the dominant parenting pattern during marriage, but without the corresponding financial sharing that such an allocation of parental rights and responsibilities assumed.

Thus, at least in marriages involving children, divorce is likely to produce an imbalance of gains, as well as a one-sided loss of earning capacity. Although both ex-spouses continue to enjoy the benefits of parenthood, only the primary wage-earner continues simultaneously to reap the financial and nonfinancial rewards associated with full participation in the market. The economic justification for alimony, by focusing narrowly on

104. See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 56-59 (1983) (finding that husbands generally dominate family decisionmaking, particularly where at least one partner adheres to male-provider philosophy); SUZANNE FIELDS, *LIKE FATHER, LIKE DAUGHTER: HOW FATHER SHAPES THE WOMAN HIS DAUGHTER BECOMES* 85 (1983) (emphasizing the importance to daughters of fathers who fulfill traditional male roles); ROBERT L. GRISWALD, *FATHERHOOD IN AMERICA* 247-54, 260-69 (1993) (discussing the rise of the “nurturing father” and the importance of fathering to children and to men); SUSAN MULLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 156-59 (1989) (explaining that spouse with higher income and work status generally enjoys greater power within family, while resources such as domestic services and childrearing tend to be negatively correlated with marital power).

105. Williams, *Deconstructing Gender*, *supra* note 103, at 831; Joan C. Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 352-53 (1990).

106. See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988).

107. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 73-75, 106-07 (1992).

compensation for loss, and by ignoring nonmarket gains, renders invisible and unremediable such child-related imbalances.

The economic theory's emphasis on loss is also troubling from a feminist perspective because of the victim imagery it invokes. Under the economic approach, a woman who has specialized in household production has "forgone opportunities" and incurred losses that she and the legal system must repair. In this sense, the economic justification perpetuates the early reformers' notion of an alimony claimant as a fallen woman who must be "rehabilitated" or made whole.¹⁰⁸ Under both approaches, "[w]omen are measured in terms of a male model of full workforce participation and compensated to the extent they fall short."¹⁰⁹ Moreover, under both approaches, the expectation is that once rehabilitated, the woman will seize the economic moment and retake her rightful place as a full-time market participant—at least until she marries again and can efficiently specialize in the household sector.

2. The Market As the Exclusive Measure of Value

The dominant economic justification for alimony is also flawed because it relies exclusively on the market both to identify compensable losses and to measure the amount of compensation due. Under the economic rationale, a woman's domestic contributions justify post-divorce income sharing only if she can point to a decline in her ability to command a market wage. That same decline in market worth also determines the amount of compensation that she can expect. In essence, then, the economic efficiency approach looks exclusively to forgone market opportunities to assign a value to a woman's domestic labor. Although such an approach seems preferable to older economic theories that tended to ignore entirely the value of nonmarket labor, defining value in terms of lost market opportunities risks perpetuating labor market discrimination against women and reinforcing the market's devaluation of work traditionally associated with women. Using lost market opportunities to value a woman's domestic labor also differentiates among women along class and racial lines. It was in part to avoid these pitfalls that equitable distribution reforms often invoked notions of equal partnership, rather than attempting to assess the market value of women's domestic services, in the context of dividing marital property.¹¹⁰

108. See O'Connell, *supra* note 7, at 503-05 (discussing victim-oriented conception of rehabilitative alimony); Jane Rutherford & Barbara Tisher, *Equalizing the Cost of Divorce Under the Uniform Marriage and Divorce Act: Maintenance Awards in Illinois*, 23 LOY. U. CHI. L.J. 459, 483 (1992) ("The very concept of 'rehabilitation' implies that there is something wrong with being a homemaker.").

109. Carbone, *supra* note 4, at 196.

110. See LAWRENCE GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 262-64 & n.168 (1983 & 1993 Cumulative Supp.) (discussing cases).

Moreover, the dominant economic approach provides no basis for compensating women for what, in many cases, may be the most significant loss associated with divorce: the loss of the marital status itself. As Ira Ellman acknowledges, these gender-based losses are likely to be particularly significant for women whose talents and preferences are consistent with the traditional marriage model. Thus, the woman who either wants—or is socialized from an early age to assume—the traditional female role of homemaker, mother, nurturer, and helper has a great deal to lose from divorce that the economic justification does not consider claimworthy. At the same time, the economist's endorsement of specialization within marriage as an efficient (and therefore desirable) mode of organizing market and household production impedes efforts to change the socialization patterns that produce these gendered preferences.

The economic efficiency approach thus produces a cruel irony: In essence it is those women who “buy in” earliest and most completely to the notions of specialization and comparative advantage extolled by efficiency theorists who are most adversely affected by the economic justification for alimony. And it is those men who, by virtue of marriage, have most successfully maximized the gains from specialization who are able most effectively to monopolize those gains in the event of divorce. As Margaret Brinig and June Carbone have pointed out, whether for efficiency or other reasons, many men who have accumulated substantial market wealth or who anticipate pursuing demanding careers prefer to marry women whose income potential is less than their own, but who bring other, nonmarket assets to the marriage.¹¹¹ Under the economic theory of alimony, these men essentially get to have it both ways: they enjoy the benefits of their wives' premarital specialization while disclaiming all responsibility for remedying the disparate effects of that specialization in the event of divorce.

3. The Importance of Relative Spousal Income

The dominant economic approach to alimony is relentlessly nonrelational. Not only does it justify alimony exclusively on efficiency grounds, but it also focuses on a single spouse's change in economic position. Thus, in determining the availability of alimony, the economic approach eschews what it describes as “a simple comparison of one spouse's income to the other's” and instead compares a particular spouse's position at the time of divorce “to an alternative (if hypothetical) outcome *for that same spouse*.”¹¹² In essence, then, the economic approach attempts to erase the effects of marriage for a single spouse by placing that spouse in the position she

111. Brinig & Carbone, *supra* note 9, at 898.

112. Ellman, *supra* note 25, at 272.

would have been in had the marriage not occurred.¹¹³

Even if such an approach were feasible as a practical matter, it seems oddly inappropriate in the context of marriage and divorce. What distinguishes marriage from most other transactions—even long-term, relational ones—is that it entails a commitment to tie one's personal and economic destiny to the destiny of another person. Although divorce may undo that commitment and thereby end the joint journey, it seems futile to attempt to reorder the world as if the journey never occurred.

Perhaps another way of making this point is to suggest that what is distinctive about marriage, even in the age of no-fault divorce, is the commitment that spouses make to each other (and to society) to attend to each other's relative well-being. As Deborah Rhode and Martha Minow put it, "marriage has presented a promise—between the members of the couple and also between the couple and society—that the costs of traditional gender roles will not be borne by women alone but will be spread more broadly throughout society."¹¹⁴ To ignore such a commitment to relative well-being, as the economic justification for alimony appears to do, is to deny the distinctiveness of marriage.

4. The Link Between Premarital and Postmarital Behavior

Applying the efficiency rationale for alimony to the real world of divorce depends centrally on the ability to compare and distinguish a wife's earning capacity at the time of divorce with the lifetime earning capacity that she could have expected had the marriage not occurred.¹¹⁵ Adherents of the efficiency theory admit that these calculations may be difficult, but suggest that the law deals with similar problems of speculation and of estimating future earnings in a variety of other contexts.¹¹⁶ This response, however, underestimates both the practical and the theoretical difficulties associated with the counter-factual earnings comparison demanded by the economic approach.

It is true that current law requires courts to estimate long-term earning capacity in contexts such as wrongful death and personal injury litigation. Both courts and litigants, however, find these calculations difficult and expensive, particularly where a claimant lacks a consistent earning record

113. This approach is analogous to a reliance measure of damages for breach of contract.

114. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 14, at 191, 194.

115. See Ellman, *supra* note 2, at 78 ("The most important determination under this theory is the difference between the earning capacity the claimant would have achieved if she had invested her time in marketable skills, and her actual earning capacity upon divorce.").

116. See *id.* at 78-79 (discussing speculation in determining contract damages).

at the time the injury or death occurs. But even these difficult cases do not require courts to engage in the sort of counter-factual speculation necessary to determine what a particular divorcing spouse's lifetime earnings would have been had her life taken a fundamentally different turn some ten, fifteen, or even thirty years ago. Consider, for example, an eighteen-year-old who marries immediately after high school and who engages in minimal paid employment over the course of a thirty-year marriage. Had this woman never married, and instead invested her energies in the market, would she have obtained a college or even a graduate school degree, pursued a decent-paying trade, or worked at a series of low wage jobs?¹¹⁷ And what of the young woman who, because of marriage, forgoes the possibility of a demanding athletic or artistic career.¹¹⁸ Had she pursued her marketable talents, rather than her nurturing and homemaking skills, would she have been a successful entertainer—or even a superstar—or would she have gotten no further than second string?

The speculation necessary to answer these “what if” questions dwarfs the guess work entailed in estimating the value of a professional degree earned during marriage, and courts have repeatedly characterized the latter enterprise as far too speculative and uncertain to form the basis for a marital property award.¹¹⁹ Moreover, reliance on average earning statistics—generally the most useful tool for estimating future earning capacity—is particularly problematic for the economic justification, because average earning figures for women themselves reflect the depressing effects of marriage and child-related responsibilities, and it is precisely these marriage-related effects on earnings that the economic approach wishes to control for.

An alimony inquiry that focuses on determining what would have happened but for the marriage is also likely to engender a particularly unsavory type of divorce dialogue. It encourages the primary wage-earner to

117. At least one commentator has proposed dealing with an analogous situation by valuing such a homemaker's household services “based on the mean earnings of an average high school graduate, an average college graduate and a college graduate with 1-3 years of post-graduate work.” Thomas R. Ireland, *Valuing Homemaker Production by Implied Opportunity Cost: Using a Family Human Capital Methodology*, 1 J. LEGAL ECON. 1, 8 (1991). Ireland concedes, however, that it is not possible to know which of these alternative career tracks is the correct one. *Id.*

118. Cf. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 295-99 (1983) (discussing a marriage contract between a medical student and an aspiring dancer).

119. See, e.g., *Moss v. Moss*, 639 S.W.2d 370, 374-75 (Ky. Ct. App. 1982) (“In addition to and often used interchangeably with the degree and the license, there is the actual ‘practice’ itself . . . [that] may or may not materialize into some definite status or value. . . . The only absolute in this consideration is the cost of the degree itself.”); *Mahoney v. Mahoney*, 453 A.2d 527, 532 (N.J. 1982) (“Valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork.”).

argue that “if she hadn’t married me, she never would have amounted to anything,” and the domestic specialist to counter that “but for our ill-fated and ill-advised union, I would have been a financial star.” Moreover, the disparate estimates of lost earning capacity produced by these warring perspectives, combined with the general uncertainty inherent in estimating future earnings, are likely to inhibit the predictability of alimony awards and thereby undermine the effectiveness of the economic approach as an *ex ante* incentive device.

These enormous practical difficulties point to a larger, theoretical problem in the economic approach’s attempt to calculate the earnings loss attributable to a particular marriage. The approach assumes that it is possible to apportion economic inequality into that which results from a particular marriage and that which exists independent of the marriage. But this ignores the close connection—particularly for women—between the gendered division of household labor and the premarital decisions that individuals make in anticipation of becoming spouses and parents. The economists’ attempt to distinguish empirically between marital and nonmarital losses thus fails to acknowledge that determining whether something is “attributable to” a marriage is not fundamentally an empirical question, but rather a moral or policy judgment.¹²⁰ It is particularly ironic that efficiency theorists deploy precisely this insight in discussing human capital gains (i.e., insisting that a professional degree acquired during marriage should *not* generally be viewed as attributable to the marriage) while rigidly confining the losses that alimony may address to those that can be both temporally and causally linked to changes of position during marriage.

D. MARRIAGE AS A CASE OF MARKET FAILURE

Finally, the economic approach to alimony may fail, even on its own terms. Economic efficiency analysis, at least in its simplest form, assumes a reasonably functioning market in which participants have access to information and respond rationally to that information. But recent empirical evidence suggests that decisions about marriage and divorce—if they can be described in market terms at all—are most accurately described as a case of extreme market failure.

Consider the recent empirical study undertaken by Professors Lynn Baker and Robert Emery.¹²¹ Baker and Emery surveyed marriage license applicants and law students about their knowledge of the demographics of divorce, the content of divorce statutes, and expectations for their own marriages. The authors found that, while both groups of respondents had

120. In this sense, it may be analogized to the notion of probable cause.

121. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *LAW & HUM. BEHAV.* 439 (1993).

relatively accurate perceptions of the likelihood and the effects of divorce in the population as a whole, these same individuals had thoroughly idealistic (and statistically unrealistic) expectations about both the longevity of their own marriages and the consequences of divorce for them personally. For example, when license applicants were asked to estimate the percentage of American couples marrying today who will eventually get divorced, their median response was a statistically accurate fifty percent.¹²² When these same license applicants were asked to estimate the likelihood that they personally would divorce, however, the median response was zero.¹²³

Similarly, the applicants' predictions of the consequences of divorce for them personally were far more optimistic than their perceptions of the effects of divorce on others. For example, the median female respondent estimated (very optimistically) that forty percent of divorcing women are awarded alimony.¹²⁴ But a whopping eighty-one percent of female respondents expected that the court would award *them* alimony if *they* requested it at divorce.¹²⁵ Male responses showed a similar discrepancy. Although the median male respondent estimated (even more unrealistically) that fifty percent of all divorcing women are awarded alimony, eighty-three percent of the male respondents expected that a divorce court would award alimony to *their* wives if she requested it.¹²⁶

The greatest discrepancy between the respondents' expectations for themselves and for others concerned the likelihood that a divorced spouse would comply fully with the court's financial orders. For example, the median respondent estimated that forty percent of all spouses who are awarded alimony actually receive full payment.¹²⁷ However, one hundred percent of the respondents who expected to be awarded alimony in the event of divorce predicted that their spouse would comply fully with the court's award.¹²⁸ Similarly, although the median respondent reported (quite accurately) that only forty percent of all parents who are awarded child support receive all payments, ninety-eight percent of the license applicants predicted that their own ex-spouse would be fully compliant.¹²⁹

The law students surveyed by Baker and Emery exhibited similar discrepancies in response patterns, both before and after completing a course in family law.¹³⁰ Moreover, although the students' exposure to family law signifi-

122. *Id.* at 442.

123. *Id.* at 443.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 445.

cantly improved the accuracy of their perceptions regarding the content of divorce statutes, it had *no statistically significant effect* on the students' idealistic expectations regarding either the longevity of their own marriages or the likely financial consequences should they personally experience divorce.

What do these results tell us? I think they tell us, among other things, that prospective spouses do not approach marriage as they would approach a market transaction. They do not view themselves as rational, self-interested maximizers, nor do they expect such behavior on the part of their partners. Instead, they continue to see marriage—or at least their own marriages—as serving a more robust set of values and as governed, at least in part, by norms of distributive justice. By ignoring the effect of marriage on relative well-being, and by positing efficiency as its primary goal, the dominant economic justification for alimony denies the distinctiveness of marriage in a way that is likely to disserve the interests of the women who continue to invest disproportionately in it.

V. TOWARDS AN ALTERNATIVE JUSTIFICATION FOR ALIMONY

The economic justification for alimony is correct in assuming that, to make sense of alimony, one must make sense of marriage.¹³¹ But the vision of marriage offered by economic efficiency theory is not one that feminists are likely to embrace. Nor should they. The theory's commitment to specialization, its dismissal of marital gain, and its inattention to relative spousal well-being add up to a vision that seems designed to reinforce traditional marital roles, but then to require divorcing women to absorb a disproportionate share of the costs of such roles, while granting their primary wage-earner husbands a disproportionate share of the benefits.

An important task for feminists and others dissatisfied with this vision is to offer an alternative vision of marriage and its dissolution that incorporates the insights of economic analysis, but that avoids these gendered costs and benefits. Several of the articles in this symposium—and the spirited discussion that accompanied their presentation—represent important contributions toward that end.¹³² What follows is a brief, and necessarily tentative, discussion of one proposed alternative to the economic justification for alimony.

131. Carbone & Brinig, *supra* note 73, at 954.

132. Martha Albertson Fineman, *Comments on Twila Perry's Paper*, 82 GEO. L.J. 2521 (1994) (reviewing Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994)); Regan, *supra* note 13; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Williams, *supra* note 102.

A. INCOME SHARING AS AN ALTERNATIVE VISION

My own alternative vision of marriage would combine the equal partnership ideal that underlies current equitable division schemes with the economist's recognition of enhancements in human capital as the most valuable asset produced during most marriages. Like their community property analogues, modern equitable distribution statutes rest on the idea that marriage is (among other things) an economic partnership to which both spouses make equally important contributions—regardless of the form those contributions take.¹³³ As equal contributors to the marriage, each spouse should be presumptively entitled to benefit equally from it in the event of divorce; if divorce produces a net economic loss, each spouse should bear an equal portion of that loss.¹³⁴

This alternative vision would reject specialization as a goal and would focus instead on encouraging *both spouses* to invest substantially in their marriage. It would do so, in part, by reducing the portability of a primary wage-earner's investment in market-oriented human capital. By making such market-oriented investments less portable and more marriage-specific, this alternative vision would reduce the financial appeal of divorce for those spouses most likely to benefit from it. It would also protect and promote household investment by giving spouses who invest primarily in family care a share of the enhanced income stream that their domestic activities facilitate. Moreover, such an alternative vision of the marital community would benefit children—both by encouraging child-focused behavior during marriage and by ensuring children's continued access to the income of both parents after divorce regardless of which parent serves as their primary caretaker.¹³⁵

Describing an alternative vision of marriage and its dissolution at this level of generality leaves a number of important questions unanswered. First, how would such an equal partnership model be implemented? I have previously proposed a regime of post-divorce income-sharing, under which divorcing spouses would continue to share their joint incomes equally for a

133. See J. Thomas Oldham, *Putting Asunder In the 1990's*, 80 CAL. L. REV. 1091, 1094 (1992) (book review) ("Underlying the system of equitable division is the conception of marriage as 'partnership.' Because each 'partner' in the marriage is seen as having facilitated the other's achievements, fairness requires the partners to share all accumulated wealth if the marriage ends in divorce."); Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 198-201 (1987).

134. Singer, *supra* note 5, at 1114-15; Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L. Q. 253, 256-57 (1989).

135. June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 413-15 (1994). Such a child-centered vision of marriage is not meant to suggest that marriage is the only appropriate place to raise children, nor is it designed to minimize the need for increased public responsibility for children, particularly for children whose parents are financially unable to provide for them adequately. See Fineman, *supra* note 132; Rhode & Minow, *supra* note 114, at 204-08 (advocating both increased private and increased public responsibility for children).

set number of years after divorce.¹³⁶ Others have advanced similar income sharing proposals,¹³⁷ and the most recent Reporter's Draft of the American Law Institute's *Principles of the Law of Family Dissolution* endorses a form of post-divorce income sharing for marriages of significant duration.¹³⁸

Although the details of these various income-sharing proposals differ, the proposals share a common core that sharply distinguishes them from the compensation for lost opportunities approach favored by economic efficiency theorists. Income-sharing proposals identify the spouses' post-divorce income as jointly, rather than individually, owned for at least some period of time following divorce.¹³⁹ Such proposals thus represent a significant challenge to the "he who earns it, owns it" maxim that Joan Williams identifies as significantly responsible for the impoverishment of large numbers of divorcing women and their children.¹⁴⁰

Treating post-divorce income as jointly, rather than individually, owned is also likely to induce a number of desirable *ex ante* effects. First, a regime of post-divorce income sharing is likely to diminish existing power disparities during marriage, by removing a primary wage earner's ability to threaten his spouse with economic abandonment in the event of divorce.¹⁴¹ Second, such an income-sharing requirement is likely to encourage *husbands* to increase their investment in family care, "since the financial consequences of such an investment strategy would not be so devastating in the event of a divorce, and the benefits of investing solely in one's own career would not be so complete."¹⁴² Persuading *men* to increase their involvement in domestic life is likely, in turn, to facilitate (rather than hinder) the sort of changes in workplace structure that feminists and others have identified as essential to achieving long term gender equity *and* to nurturing the next generation.¹⁴³

136. Singer, *supra* note 5, at 1117-18. I proposed, as a starting point, that the time period for such equal postdivorce income sharing be set at one year for each two years of marriage. *Id.*

137. *E.g.*, OKIN, *supra* note 104, at 83; Regan, *supra* note 13, at 2382-2406; Rutherford, *supra* note 15, at 577-92; Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993); Williams, *supra* note 102, at 2258; *cf.* Sugarman, *supra* note 14, at 159-62 (endorsing limited degree of income sharing under "gradual merger" and "fair notice" theories). For an illuminating discussion and critique of the assumptions behind these and other income sharing proposals, see Carbone, *supra* note 135, at 372-97.

138. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 3, at § 5.06; *see* Regan, *supra* note 13, at 2333-34 (discussing ALI income sharing proposal).

139. Carbone, *supra* note 135, at 362.

140. Williams, *supra* note 102, at 2290.

141. *See supra* text accompanying notes 84-87 (discussing power differentials during marriage).

142. Singer, *supra* note 5, at 1121.

143. *See generally* OKIN, *supra* note 104; Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Nancy E. Dowd, *Work*

In addition, an alimony regime based on post-divorce income sharing is likely to be simpler and easier to implement than a regime based on compensation for lost economic opportunities.¹⁴⁴ In particular, income sharing rules will rarely require the sort of complicated speculation, and associated expert battles, invited by the economic efficiency approach. This is important from a feminist perspective for at least two reasons. First, it minimizes the opportunities for the exercise of judicial discretion.¹⁴⁵ Considerable evidence suggests that divorce doctrines that allow for substantial judicial discretion generally operate to women's disadvantage.¹⁴⁶ Second, by incorporating clear-cut legal standards, an income sharing regime is more likely than other approaches to hold down the transaction costs associated with divorce, particularly the costs of attorney time.¹⁴⁷

B. POTENTIAL OBJECTIONS TO INCOME SHARING

Of course, post-divorce-income sharing proposals, and the joint ownership principles that underlie them, are subject to a number of objections as well.¹⁴⁸ While a full discussion and response to these objections is not possible here, the following section briefly addresses three potential objections to income sharing.

First, several commentators—including some law and economics theorists—have argued that according lower earning spouses an ownership interest in their partners' future income gives those spouses too much of an incentive to engage in opportunistic behavior during marriage.¹⁴⁹ These commentators suggest that, given the availability of no-fault divorce, such an income-sharing rule may encourage lower earning spouses either to

and Family: Restructuring the Workplace, 32 ARIZ. L. REV. 431 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991). For an early and forceful statement of this position, see Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility To Working Mothers*, 59 B.U. L. REV. 55 (1979).

144. Oldham, *supra* note 133, at 1124; Singer, *supra* note 5, at 1119-20.

145. Singer, *supra* note 5, at 1119; see Williams, *supra* note 102, at 2234.

146. See, e.g., WEITZMAN, *supra* note 14, at 384 (discussing equal versus equitable distribution of property); *id.* at 242-43 (discussing the operation of the "best interests" standard for determining child custody); Jane C. Murphy, *Eroding The Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991); Starnes, *supra* note 137, at 92-95; Williams, *supra* note 102, at 2234-35.

147. See Singer, *supra* note 5, at 1119 (arguing that the lack of precise standards associated with many divorce reform proposals may drive up the costs associated with divorce and that such cost increases are likely to disproportionately disadvantage women).

148. My own experience underscores the force of these objections. Several years ago, I mentioned the idea of equal post-divorce income sharing to a group of Maryland judges, as part of a judicial education program on feminist legal theory. Several of the judges in the audience literally burst out laughing. At least one judge told me that he viewed my proposal as "ridiculous" and several others questioned whether I was serious.

149. See, e.g., Borenstein & Courant, *supra* note 101, at 1004; Cornell, *supra* note 55, at 123; Trebilcock & Keshvani, *supra* note 24, at 557; Samuel A. Rea, Jr., *Breaking Up is Hard to Do: The Economics of Spousal Support* 6 (May 19, 1993) (unpublished manuscript, on file with the *Georgetown Law Journal*).

enter marriage in anticipation of a profitable divorce or to terminate a union primarily for economic gain.

This argument strikes me as implausible for several reasons. First, the Baker and Emery data suggest that most people entering marriage do not consider the economic costs and benefits of divorce.¹⁵⁰ This is because most prospective spouses apparently believe—against the odds—that their own marriages will endure.¹⁵¹ Thus, it is unlikely that a post-divorce income-sharing rule will significantly influence a prospective spouse's choice of mate. Moreover, high wage earners who are concerned about exploitation of their current or anticipated earning capacity can protect themselves, prior to marriage, by contracting out of any income sharing regime.¹⁵² Such an opt out possibility appropriately places the burden of private contracting on those individuals who are most likely to take advantage of it: those who wish to preserve their economic individuality, rather than those who plan to merge their efforts. Indeed, despite considerable academic writing on the use of premarital contracts as a means of *enhancing* marital and divorce obligations, the case law indicates that premarital contracts are overwhelmingly used by persons who wish to *reduce* the economic consequences of marriage.¹⁵³

Income sharing principles are also unlikely to encourage opportunistic behavior during marriage. First, assuming that spouses have access to each other's income during marriage, income sharing after divorce is not likely to improve a lower wage earner's financial position. Indeed, given the added expense of maintaining two households, divorce is likely to result in a net decrease in both spouses' financial well-being, even under the most comprehensive income-sharing regime. Under the current, no-sharing system, by contrast, divorce often improves a primary wage earner's financial position, while impairing that of his former partner.¹⁵⁴ Second, a lower earning spouse who did anticipate profiting from post-divorce income sharing would have to discount the expected benefits to reflect the difficulties of enforcing divorce-related obligations.¹⁵⁵ Third, given the "dominant

150. See *supra* text accompanying notes 122-31.

151. See Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J., 2461, 2462 (1994).

152. See Singer, *supra* note 5, at 1120. Of course, these premarital agreements would have to meet applicable standards of voluntariness, disclosure, and conscionability. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 371, 376 (1983); J. Thomas Oldham, *Premarital Contracts Are Now Enforceable, Unless . . .*, 21 HOUS. L. REV. 757 (1984).

153. See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 1, 11-12 (2nd ed. 1988) (discussing antenuptial agreements).

154. See studies cited *supra* note 14.

155. For a discussion of some of the difficulties of enforcing both alimony and child support obligations, see WEITZMAN, *supra* note 14, at 160-62, 238-95. For a recent overview of the problems associated with child support enforcement, see Paula G. Roberts, *Child Support Orders: Problems with Enforcement*, in 4 *THE FUTURE OF CHILDREN* 101 (Richard E. Behrman et al. eds., 1994).

ecology” of marriage, a lower wage earning spouse is likely to have invested disproportionately in marriage-specific human capital, particularly where the marriage has produced children.¹⁵⁶ This surplus of marriage-specific investment itself reduces a spouse’s incentive to engage in opportunistic behavior during marriage.¹⁵⁷

Concerns about the link between income-sharing and opportunistic behavior are often coupled with an uneasiness about unilateral, no-fault divorce. The worst case scenario for income-sharing involves a “guilty” but lower-earning spouse who unilaterally divorces her “innocent” partner, yet is able to claim a substantial share of that partner’s future earnings.¹⁵⁸ I share the critics’ uneasiness about this scenario, although I question how often it will occur. Nonetheless, if substantial post-divorce income sharing were the background legal rule, I might be willing to suspend my feminist “fear of fault” and to create a narrow exception for lower earners who had engaged in egregious marital behavior, particularly if higher earners who engaged in similar behavior were subject to a corresponding financial penalty.¹⁵⁹ Another way of addressing concerns about the confluence of income-sharing and no-fault would be to restrict the availability of unilateral divorce and to substitute a divorce regime that required *either* the parties’ mutual consent or a traditional showing of fault on the part of the party seeking a divorce.¹⁶⁰ While further reflection and research are needed to assess the full implications of any such re-introduction of fault, I share Barbara Woodhouse’s view that we ought not let our feminist “fear of fault” preclude us from at least considering those implications.¹⁶¹

A third issue that income-sharing schemes must address is how to treat post-divorce changes in the spouses’ respective economic positions—most

156. The phrase “dominant ecology” is taken from Joan Williams’s symposium paper. See Williams, *supra* note 102, at 2236. I am indebted to Peg Brinig for suggesting this point.

157. See generally Cornell, *supra* note 55, at 112-20.

158. See Carbone & Brinig, *supra* note 73, at 1003 n.214. Carbone and Brinig sharpen their critique by reversing traditional gender roles, so that the lower wage earning spouse is a husband who “drinks heavily, works sporadically, and verbally abuses his wife and children” and the innocent higher wage earner is a beautician who “supports the family and assumes full responsibility for the house and the children.” *Id.*

159. Cf. Trebilcock & Keshvani, *supra* note 24, at 558, 589 (emphasizing the importance of baseline entitlements).

160. Cf. PARKMAN, *supra* note 1, at 137-40 (proposing mutual consent requirement for divorce). As Margaret Brinig has pointed out, a mutual consent requirement is problematic because it may trap in abusive marriages spouses who lack sufficient financial resources to purchase their partner’s consent to divorce. Brinig, *supra* note 35, at 468-69. The availability of a fault-based divorce option, in addition to divorce by mutual consent, helps alleviate this problem. Indeed, one might argue that several states have adopted precisely this sort of hybrid divorce system. These are the states, such as Maryland, which have retained fault-based grounds for divorce and which allow nonconsensual divorce only after a substantial period of separation. See MD. FAM. LAW CODE ANN. § 7-103 (1991) (enumerating grounds for absolute divorce).

161. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2529-30 (1994).

notably, changes caused by remarriage. Statistics indicate that most divorced persons eventually remarry.¹⁶² But these statistics are subject to several caveats. First, divorced men of all ages remarry at a higher rate than divorced women.¹⁶³ Second, the likelihood that a divorced woman will remarry drops dramatically as the woman's age at divorce increases;¹⁶⁴ divorced mothers are also less likely to remarry than are women who have not had children.¹⁶⁵ Finally, second and third marriages are even more likely to end in divorce than are first ones.¹⁶⁶ Despite these caveats, I agree that income-sharing proposals must respond to what one commentator has termed "this trend toward 'serial monogamy' ".¹⁶⁷

My response would distinguish two situations. One situation involves remarriage by the income-sharing recipient. Although some theorists have argued that a recipient's remarriage should have no effect on divorce obligations,¹⁶⁸ I would take a less absolutist position. Although post-divorce income sharing represents, in part, a return on investments made during marriage, it also incorporates the view that the economic effects of marriage generally endure long after the partnership is formally dissolved. A lower earning spouse who remarries likely enters into a new economic partnership and, thus, may no longer feel the full effects of investment decisions made during a first marriage. I would therefore allow an obligor to request modification of income sharing where his former partner has remarried. I would not make modification automatic, however, since not all remarriages have the same effect.¹⁶⁹ Moreover, any modification of

162. See Oldham, *supra* note 134, at 1100 & n.45 (citing statistics indicating that approximately 83% of divorcing males and 78% of divorcing females eventually remarry).

163. *Id.*

164. See Larry Bumpass et al., *Changing Patterns of Remarriage*, 52 J. MARRIAGE & FAM. 747 (1990). The authors note that "age at separation is the most important individual characteristic with respect to remarriage rates." *Id.* at 751. Eighty-nine percent of the women in the survey who were younger than 25 at the time of separation remarried, as did 79% of the women aged 25 to 29 at the time of separation. By contrast, only 59% of women aged 30 to 39 at the time of separation remarried, and this percentage dropped to 31% for women aged 40 and over at the time of separation. *Id.*; see also WEITZMAN, *supra* note 14, at 204 (reporting that women who divorce before age 30 have a 75% chance of remarriage, while women who divorce at age 40 or older have only a 28% chance of remarriage).

165. Bumpass et al., *supra* note 164, at 754.

166. See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES* 14 (1991).

167. Oldham, *supra* note 133, at 1101.

168. See Starnes, *supra* note 137, at 138 (arguing that since maintenance, properly understood, represents a return on an investment, remarriage should not trigger modification).

169. *But see* UNIF. MARRIAGE & DIVORCE ACT § 316(b), 9A U.L.A. 490 (West 1987) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.") I recognize that my approach reintroduces an element of judicial discretion into the income-sharing regime. However, I view the presence of such discretion less troubling at the modification stage than at the stage of determining the parties' initial obligations. In part, this is because the party seeking judicial intervention at

income sharing should trigger a corresponding change in the parents' relative child support obligations.¹⁷⁰

My proposed income-sharing regime would be considerably less receptive to requests for modification based on the remarriage of an obligor spouse. A spouse who has incurred financial obligations based on his participation in an initial marriage should not be able to avoid those obligations simply by acquiring a new family. To the extent that such ongoing obligations limit a higher earner's opportunities for remarriage, this is part of the cost of commitment.¹⁷¹ As several Symposium authors have pointed out, women have always known that both marriage and motherhood impede one's ability simply to wipe the slate clean and start anew.¹⁷² Income sharing merely ensures that both partners live with this realization. If the *ex ante* effect of this constraint were to shift financial and other resources away from the creation of second families, and toward the preservation or support of first ones, that would not be a bad result.

the modification stage is likely to be the economically stronger party while the party dependent on judicial remedies at the time of divorce is generally the financially weaker partner. Couples can also avoid the need to return to court by addressing the effect of remarriage on divorce obligations in a prenuptial or separation agreement.

170. Singer, *supra* note 5, at 1120-21.

171. Carbone, *supra* note 135, at 412. *But cf.* Oldham, *supra* note 133, at 1125 (arguing that divorce law should protect noncustodial fathers' ability to remarry).

172. *E.g.*, Williams, *supra* note 102, at 2282-83; Fineman, *supra* note 132, at 2522-23.