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SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 71 | Number 3

Article 3

3-1-1993

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Recommended Citation

Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993).

Available at: <http://scholarship.law.unc.edu/nclr/vol71/iss3/3>

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MAINTENANCE, ALIMONY, AND THE REHABILITATION OF FAMILY CARE

ANN LAQUER ESTIN*

With the shift from fault-based to no-fault divorce, courts and commentators have struggled to find new rationales for alimony. Professor Ann Laquer Estin argues that the value of family care has been lost in this shift. She documents how the law of alimony and maintenance takes little account of the support claims of those parents who have devoted substantial time to direct care for young children. Although there has been a trend in the law towards greater protection for older displaced homemakers and for spouses who assist their partners' education or professional training, younger caregivers have not benefitted from these shifts in doctrine and practice. After exploring the legal frameworks of alimony and maintenance law and the mechanisms by which caregivers' claims are excluded, Professor Estin argues that younger divorced caregivers are subject to a set of new legal and social norms. She concludes that the law of alimony and maintenance must rehabilitate family care values in a manner that adequately recognizes the shifting and multiple realities of family life.

I. INTRODUCTION

Contemporary divorce laws have relegated family values to a minor role. Within the law, there is a remarkable disregard for caregiving—the norms of nurturance, altruism, and mutual responsibility that are usually thought to characterize family life. Although the history of caregiving in a family may have some significance in the determination of contested custody cases, it is almost entirely irrelevant when courts resolve the financial incidents of divorce, even where it has produced substantial long-term economic effects for family members.

At the doctrinal level, the courts' failure to value caregiving is surprising. Many contemporary spousal support statutes provide expressly for caregiver support after divorce. Similarly, recent developments in the statutory and case law allow courts to compensate partners for unequal

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contributions in their marriages, and these new principles could be usefully applied to caregivers. In practice, however, these doctrines have been highly ineffective where the claims of caregivers are concerned.

At a deeper level, the disappearance of caregiving values from the law of divorce may be less surprising. Along with the nationwide shift in the grounds for divorce over the past generation has come a tendency for judges, legislators, and lawyers to divide the universe of families into two legally distinct classes. Traditional norms of mutual aid and reliance are still given effect in those families formed before the changes in divorce rules, but younger families are subject to new and different norms of family life in which self-sufficiency and autonomy are of primary importance.

This Article begins with a review of the two areas of maintenance law in which caregiving should be important. The first area involves regular spousal support, which could facilitate postdivorce caregiving in situations where the parties have young children. The second area involves maintenance as compensation, which could reimburse the financial losses incurred because of the obligations of caregiving. I argue that as courts have focused greater attention on the goal of financial independence, caregiving values have disappeared. My concern in this Article is not primarily doctrinal, however, but rather to explore why it is that family care has disappeared from the practice of family law, and to argue for its rehabilitation as an important value worthy of greater recognition in the economic management of divorce.

A general summary of current approaches to alimony or maintenance awards may be a useful starting point. Over the past two decades, as the law in all jurisdictions has shifted toward "no-fault" divorce grounds, it has also shifted to new financial policies and norms.¹ Once, courts listened to debates of marital fault and obligation, premised on the assumption that innocent wives were entitled to their husbands' permanent support. This rule protected, at least in theory, partners who had become financially dependent as a result of their commitment to family

1. These changes are well described in the legal literature. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 227-33 (1989) (discussing contemporary rules concerning the disposition of property, maintenance, and child support); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 116-25 (1988) (discussing "Reform and Rise of Marital Property Provisions"); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 7-12 (1987) (summarizing the changes in the financial aspects of divorce). The "no-fault" label seems to have been borrowed from automobile accident and workmen's compensation insurance. See JACOB, *supra*, at 46-47, 52-53. In the divorce context, the term refers to statutes that permit the dissolution of marriages without proof of traditional grounds, such as adultery, cruelty, or desertion.

care rather than to employment.² Today, courts apply a formally gender-neutral ideal of adult autonomy, which gives priority to financial self-reliance.

A significant group of modern divorce statutes, including those based on the Uniform Marriage and Divorce Act ("UMDA"), embody the new self-reliance norm by requiring that spouses seeking support awards establish need, dependence, or incapacitation.³ This type of statute permits the court to enter an order for support only if this threshold is crossed. The question of a spouse's financial need must therefore be the trial court's first and paramount consideration.⁴

2. The data suggest that only small percentages of divorces included provision for alimony, however. Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 n.1 (1988).

3. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 308(a), 9A U.L.A. 347-48 (1987) [hereinafter "UMDA"]. The UMDA requires that a spouse seeking maintenance establish both that the spouse lacks sufficient property to provide for the spouse's reasonable needs, *id.* § 308(a)(1), and that the spouse is "unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." *Id.* § 308(a)(2). This is discussed below as the "threshold requirement" for maintenance under the UMDA. As has been noted by Professor Kay, one of the reporters of the UMDA, this language is jurisdictional. Kay, *supra* note 1, at 48 & n.234.

Seven of the eight UMDA states have adopted the threshold provision. In Washington, although this language was omitted from the statute, see WASH. REV. CODE ANN. § 26.09.090 (West Supp. 1992), the state's case law already reflected a similar policy. In some UMDA jurisdictions, the original threshold language has been revised. See, e.g., ARIZ. REV. STAT. ANN. § 25-319.A. (1991) (modified in 1987 to state the test disjunctively and to add two further grounds for maintenance eligibility) (reviewed in Schroeder v. Schroeder, 161 Ariz. 316, 317-18, 778 P.2d 1212, 1213-14 (1989)); see also *infra* note 4 (discussing amendments to the Minnesota statute); *infra* notes 65-67 and accompanying text (reviewing other amendments to other alimony and maintenance statutes).

A number of non UMDA states have borrowed the threshold concept from the Act. See, e.g., DEL. CODE ANN. tit. 13, § 1512(b)(2), (3) (Supp. 1990); IDAHO CODE § 32-705.1. (Supp. 1991); N.H. REV. STAT. ANN. § 458:19 I (Supp. 1990); VT. STAT. ANN. tit. 15, § 752(a) (1989). Pennsylvania enacted a UMDA-type threshold test in its initial divorce reform legislation in 1980, but abandoned it in 1988. See generally Bold v. Bold, 524 Pa. 487, 491 n.4, 574 A.2d 552, 554 n.4 (1990) (describing change in statute).

Other statutory formulations that achieve a similar result are the requirement that a spouse seeking maintenance be found "dependent," see DEL. CODE ANN. tit. 13, § 1512(b)(1) (Supp. 1990) (test of dependence), or incapacitated, see IND. CODE § 31-1-11.5-11.(e) (Supp. 1991) (maintenance available only to "incapacitated" spouse).

The terms "alimony," "maintenance," and "spousal support" are all in active use in different jurisdictions. In this Article, the terms are used interchangeably, unless the context refers to the particular practice of a given jurisdiction, in which case the specific term is applied. For debates regarding terminology, see generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 620 (Student Ed. 1988) (discussing the terms "alimony" and "maintenance") & Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 10 n.20 (1989) (discussing debate regarding terms and explaining his choice to use the term "alimony").

4. "Need," however, is a flexible concept, varying with the parties' expectations and ex-

Once need is established, the law in most jurisdictions permits the trial judge to enter an order for support in any amount and for any duration the court deems just. The statutes and case law typically direct the court to consider a variety of factors, such as the length of the marriage, the age and physical and emotional condition of the spouse seeking maintenance, and the parties' standard of living during the marriage.⁵ The law offers little guidance as to how these factors should be evaluated or how they should be balanced when different factors suggest conflicting results. The flexibility of these factors, combined with an extremely deferential standard of review, gives the trial judge a very high level of discretion in determining support awards.⁶

perience during the marriage. Courts applying the UMDA's threshold test, *see supra* note 3, achieve flexibility through broad interpretations of the terms "reasonable needs" and "appropriate employment." In one early decision, Kentucky's highest court described the statute's reference to "appropriate employment" as meaning appropriate according to the "standard of living established during the marriage," and went on to comment that "[t]he statute, as did the law before, simply recognizes that what might be ample for a scullery maid is not necessarily sufficient for one accustomed to the lifestyle of a duchess." *Casper v. Casper*, 510 S.W.2d 253, 255 (Ky. 1974).

See also In re Marriage of Olar, 747 P.2d 676 (Colo. 1987), in which the Colorado Supreme Court rejected the trial court's interpretation of the threshold test, which it characterized as "a high threshold requiring a spouse to establish that he or she lacks the minimum resources to sustain human life." *Id.* at 681. The Colorado court instead took the position that "[t]he phrases 'reasonable needs' and 'appropriate employment' need not be viewed so narrowly." *Id.*

In some jurisdictions statutory language has been amended to achieve the same result. *See, e.g.*, MINN. STAT. ANN. § 518.552 (West 1990) (revised in 1985 to add the words "considering the standard of living established during the marriage" to both prongs of the test and stating the threshold disjunctively). *But see In re Marriage of Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (spouse receiving property division award of \$3.6 million not entitled to maintenance award despite changes in the statute). Another illustration is the 1988 amendment to the Pennsylvania statute. *See supra* note 3.

5. *E.g.*, UMDA § 308(b).

6. As Mary Ann Glendon has observed, "Family law . . . is characterized by more [judicial] discretion than any other field of private law. This fact is typically explained by a perceived need to tailor legal resolutions to the unique circumstances of each individual and family." Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167 (1986); *see also* RICHARD NEELY, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE* 9 (1984) (describing discretionary nature of divorce decisionmaking).

There has been a trend in family law in recent years toward combatting this problem by creating fixed rules governing the financial aspects of divorce. For example, in some states there is a mandatory or presumptive ratio for marital property division. *See, e.g.*, WIS. STAT. § 247.255 (1977) (discussed in *Bahr v. Bahr*, 107 Wis. 2d 72, 82, 318 N.W.2d 391, 397 (1982)). The child support "guidelines" adopted in each state in compliance with federal law are another illustration of the move toward clear and predictable rules. *See* 42 U.S.C. § 667 (1988). *See generally* Charles Brackney, *Battling Inconsistency and Inadequacy: Child Support Guidelines in the States*, 11 HARV. WOMEN'S L.J. 197, 206 (1988) (stating that good child support guidelines will make awards more consistent); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 234

The notion that all adults should be autonomous and self-supporting became quickly and deeply entrenched in domestic relations law.⁷ In service of this ideal, those who are not currently self-supporting are expected to "rehabilitate" themselves quickly and move into the world of full-time paid employment. As a result, most maintenance awards are now entered for short periods of rehabilitation.⁸ Although a court may deem a spouse incapable of rehabilitation, making permanent support appropriate, this conclusion is rare.⁹ Appellate courts reinforce this practice by reversing trial court awards that appear to violate the self-reliance

(1991) (explaining that fixed rules have led to greater predictability and have increased the number of settled child support cases); Robert G. Williams, *Should There Be Child Support and Alimony Guidelines?*, in ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE 161, 163 (Section of Family Law, American Bar Association, 1988) [hereinafter "NEW STRATEGIES"] (explaining that the guidelines must "express a quantitative formula rather than simply list the factors that are taken into consideration").

The area of alimony and maintenance has not seen the same level of legislative or judicial attention to rule-creating as have these other two areas. There is, however, some interest in developing alimony guidelines similar to those currently used in some counties of California for purposes of *pendente lite* or temporary alimony. See generally George Norton, *The Future of Alimony: A Proposal for Guidelines*, in NEW STRATEGIES, *supra*, at 176, 184 (describing the California guidelines).

7. The widespread belief that virtually all women can "build new lives for themselves" with a few years of training is well-documented. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 143-83 (1985) (describing results of an empirical study of changing alimony awards). One author has described the conceptual basis of alimony as a "Self-Sufficiency Standard." Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 581-83 (1988).

8. Until recently a rehabilitative approach was required by statute in some states. Two examples are Delaware, which until 1988 limited maintenance awards to two years unless the marriage had lasted more than twenty years, see DEL. CODE ANN. tit. 13, § 1512(a)(3) (1981), and New Hampshire, which imposed a three-year maximum on maintenance awards in dissolutions of marriages in which there were no minor children at the time of the divorce, see N.H. REV. STAT. ANN. § 458.19 (1983). The current statutes, see *supra* note 3, afford the courts more latitude in making "equitable" awards.

In some states, there is a legislatively imposed ten-year limit on maintenance awards, reflecting the view that every dependent spouse should be rehabilitated within that time. See, e.g., KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1990); OR. REV. STAT. § 107.412(2) (1991). The Kansas statute allows a spouse receiving maintenance to petition for reinstatement of the award at the end of ten years.

9. In some jurisdictions an older conception of alimony survives, as an exception to the newer approach, for marital dissolutions accompanied by egregious fault of one of the parties. See, e.g., cases cited in CLARK, *supra* note 3, at 652-53 n.6 to 12. The situation of an older housewife is also treated as an exceptional situation, in which the usual rules cannot be applied. See *infra* notes 54-75 and accompanying text. The harshest rules, however, are in Indiana, where rehabilitative maintenance is limited to two years and permanent maintenance is only available to an "incapacitated" spouse, see IND. CODE § 31-1-11.5-11.(e) (Supp. 1991), cited *supra* note 3, and Texas, where the courts have no authority to order alimony or maintenance payments at all, see CLARK, *supra* note 3, at 620 n.14.

norm.¹⁰

Within this framework, caregivers can assert two distinct types of maintenance claims. One is that maintenance should be awarded as support for a parent who has been a full or part-time caregiver and who wants to continue in that role until the children reach a specified age. In effect, this argument is that the interests of young children justify a period of spousal financial dependence, which may extend beyond the end of a marriage. In fact, this type of award is explicitly authorized by many existing divorce statutes.¹¹

The second claim is that a caregiver who has put her career on hold or on a slow track should receive financial compensation for her contributions to the family and the resulting economic losses. A caregiver making this argument can draw upon a body of statutory and case law addressing the compensatory purposes of divorce financial orders, as well as upon a significant body of favorable academic commentary.¹²

Part II of this Article discusses the argument for financial support for family care after divorce, and Part III addresses the claim for maintenance awards as compensation for a caregiver's contributions. Part IV considers the reasons why family care has been disappearing as a value recognized in the law of divorce, and Part V argues for bringing family care back into family law, as a significant consideration in entering divorce financial orders.

10. In many jurisdictions, maintenance awards are reversed if the appellate court concludes that the dependent wife is capable of providing her own support at some moderate level. *E.g.*, *Hertz v. Hertz*, 99 N.M. 320, 326, 657 P.2d 1169, 1175 (1983); *see also* cases cited *infra* note 125 (rejecting an "income equalization" approach to maintenance).

One appellate court described the unusual nature of permanent awards in this way: "Awards of permanent maintenance should be limited to cases where there is an older, dependent spouse in a lengthy 'traditional' marriage with little likelihood that the spouse will become self-sufficient." *In re Marriage of Ryan*, 383 N.W.2d 371, 373 (Minn. Ct. App. 1986) (citing *Arundel v. Arundel*, 281 N.W.2d 663, 666 (Minn. 1979), and *Abuzzahab v. Abuzzahab*, 359 N.W.2d 12, 14 (Minn. 1984)). *See also In re Marriage of Mirise*, 673 P.2d 803, 804-05 (Colo. Ct. App. 1983) ("Maintenance, unlike its predecessor, alimony, is primarily concerned with insuring that, after dissolution, the basic needs of a disadvantaged spouse are met. . . . [It] imposes a duty on the other spouse only if there is no other feasible source from which the needs can be met.").

This judicial stance toward alimony awards is apparent even where there is no statutory threshold for eligibility. *See, e.g.*, *Louise v. Louise*, 156 A.D.2d 937, 938, 549 N.Y.S.2d 238, 239 (N.Y. App. Div. 1989), discussed *infra* at text accompanying notes 120-25. *See generally* Louise B. Raggio, *Don't Men Have Rights Too?—Or Lifetime Alimony, An Idea Whose Time Has Come and Gone*, in *NEW STRATEGIES*, *supra* note 6, at 33 (arguing that permanent alimony should be abolished in favor of other remedies and expanding women's employment opportunities).

11. *See infra* notes 13-53 and accompanying text.

12. *See infra* notes 98-133 and accompanying text.

II. FINANCIAL SUPPORT FOR ONGOING FAMILY CARE

At one time, the importance of providing financial support for caregivers was widely accepted. In the 1968 edition of his treatise on domestic relations, Homer H. Clark, Jr. stated that "[t]he first and most important of all the functions of alimony relates to the care of children."¹³ On the surface of the law, this policy is still clear. Professor Clark repeated this point in the edition of his book published twenty years later and noted that this function of alimony is explicitly identified in the UMDA and a number of other divorce statutes.¹⁴

The UMDA reflects the policy of providing support for caregivers in the threshold test for maintenance eligibility. A spouse seeking maintenance must establish either that he "is unable to support himself through appropriate employment" or that he is the custodian of a child "whose condition or circumstances make it appropriate that the custodian *not be required to seek employment outside the home*."¹⁵ In at least ten states,¹⁶ alimony or maintenance statutes utilize this formulation. Professor Clark is not the only scholar to view this language as reflecting a statutory policy in favor of support for a custodial parent; one text describes the statute as "making the custodial parent of young children presumptively eligible for maintenance."¹⁷

In another substantial group of states, alimony or maintenance statutes include a parent's custodial obligations among the factors pertinent

13. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 441 (1968).

14. CLARK, *supra* note 3, at 641-42.

15. UMDA § 308(a)(2), 9A U.L.A. 347, 348 (1987) (emphasis added). This language, which will be referred to here as the "custodial exception" to the usual requirement of self-support, exists in both the 1971 and 1973 versions of the UMDA.

16. The seven UMDA states with the maintenance threshold provision include the custodial exception. See ARIZ. REV. STAT. ANN. § 25-319.A.2 (1991); COLO. REV. STAT. § 14-10-114(1)(b) (1987); ILL. REV. STAT. ch. 40, para. 504(a)(2) (1985); KY. REV. STAT. ANN. § 403.200.(1)(b) (Michie/Bobbs-Merrill 1984); MINN. STAT. § 518.552.1(b) (1990); MO. REV. STAT. § 452.335.1.(2) (Supp. 1991); MONT. CODE ANN. § 40-4-203.(1)(b) (1991).

In addition, a number of UMDA-influenced state statutes contain a comparable exception. See DEL. CODE ANN. tit. 13, § 1512(b)(3) (Supp. 1990); IND. CODE § 31-1-11.5-11.(e)(2) (Supp. 1991) (exception applies to custodian of a child "whose physical or mental incapacity requires the custodian to forego employment"); N.H. REV. STAT. ANN. § 458:19 I.C. (Supp. 1990); VT. STAT. ANN. tit. 15, § 752(a)(2) (1989).

In Washington, and in some UMDA-influenced states such as Idaho, the UMDA threshold language has been omitted or it has been adopted without the language regarding custody. See IDAHO CODE § 32-705.1 (Supp. 1991); WASH. REV. CODE ANN. § 26.09.090 (West Supp. 1992).

17. IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 282 (1986); see WEITZMAN, *supra* note 7, at 149.

to setting spousal support awards.¹⁸ Many of these statutes follow the language of the California no-fault divorce law, which requires that a court consider whether a spouse seeking ongoing support can be employed "without interfering with the interests" of any minor or dependent children in her care.¹⁹ Both the UMDA and the California-type provisions require that the trial court consider a spouse's custodial obligations in evaluating the central questions in a maintenance case: whether she has the ability to be self-supporting through employment, and the likely extent and duration of her financial need. By including the issue of custody in the provisions governing spousal support, these statutes reflect a clear intention to limit the application of the more general self-reliance norms in cases where there are young children in need of care. In practice, however, these criteria are rarely utilized.

A. *The Tension Between Family Care and Self-Reliance*

Looking beyond the language of these statutes, the evidence of published alimony and maintenance cases from around the country suggests that maintenance awarded to facilitate the care of children is unusual.²⁰

18. See CAL. CIV. CODE § 4801(a)(5) (West 1983); CONN. GEN. STAT. ANN. § 46b-82 (West 1986) ("in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment"); IOWA CODE ANN. § 598.21(3)(e) (West Supp. 1992) ("[t]he earning capacity of the party seeking maintenance, including . . . responsibilities for children under either an award of custody or physical care"); LA. CIV. CODE ANN. art. 112(A)(2)(d) (West Supp. 1992) ("[t]he effect of custody of children of the marriage upon the spouse's earning capacity"); NEB. REV. STAT. § 42-365 (1988) ("the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party"); N.Y. DOM. REL. LAW § 236[B][6][a][6] (McKinney 1986) ("the presence of children of the marriage in the respective homes of the parties"); OHIO REV. CODE ANN. § 3105.18(C)(1)(f) (Anderson Supp. 1991) ("[t]he extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home"); OR. REV. STAT. § 107.105(1)(d)(F), (G) (1991) ("[t]he extent to which the present and future earning capacity of a party is impaired due to the party's extended absence from the job market to perform the role of homemaker") ("provisions of the decree relating to custody of the children"); 23 PA. CONS. STAT. § 3701(b)(7) (1991) ("[t]he extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child"); S.C. CODE ANN. § 20-3-130 (C)(9) (Law. Co-op. 1991) (custodian of a child whose "conditions or circumstances render it appropriate that the custodian not be required to seek employment outside the home"); TENN. CODE ANN. § 36-5-101(d)(5) (1991) ("[t]he extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage"); W. VA. CODE § 48-2-16(b)(4), (13) (1992) ("[t]he income earning abilities of each of the parties, based upon such factors as . . . custodial responsibilities for children"); WIS. STAT. ANN. § 767.26(5) (West 1981) ("custodial responsibilities for children").

19. See, e.g., CAL. CIV. CODE § 4801(a)(5) (West 1983).

20. For examples of cases decided under UMDA-model statutes, cited *supra* note 16, see *In re Marriage of Lincoln*, 155 Ariz. 272, 275, 746 P.2d 13, 16 (Ariz. Ct. App.), *rev. denied* (1987); *Oppenheimer v. Oppenheimer*, 22 Ariz. App. 238, 242, 526 P.2d 762, 766 (1974); *In re*

In the more than twenty states that have statutes incorporating caregiver maintenance provisions, the record of appellate court decisions indicates that only in a few jurisdictions do courts regularly apply a policy favoring caregiver support. In most states, the self-reliance norms now override the policies of caregiving.

Published appellate decisions are a very limited sample of the millions of divorce cases filed or tried in the lower courts each year. These cases are influential, however, in forming the shape of domestic relations practice by suggesting to lawyers and judges the claims and factors that are important.²¹ In this area of maintenance law there are relatively few reported cases, and the opinions that exist offer little guidance to lower courts or encouragement to caregivers pursuing support.

Caregiver maintenance cases at the appellate level appear regularly only in Missouri, where a version of the UMDA is in effect. Applying that statute, the Missouri Court of Appeals has issued more than a dozen

Marriage of Hensley, 210 Ill. App. 3d 1043, 1048-49, 569 N.E.2d 1097, 1100, *appeal denied*, 141 Ill. 2d 541, 580 N.E.2d 114 (1991); *In re Marriage of De Bat*, 127 Ill. App. 3d 463, 470, 468 N.E.2d 1348, 1353 (1984); *In re Marriage of Lukas*, 83 Ill. App. 3d 606, 618, 404 N.E.2d 545, 554 (1980); *Chapman v. Chapman*, 498 S.W.2d 134, 135-36 (Ky. 1973); *Richie v. Richie*, 596 S.W.2d 32, 33-34 (Ky. Ct. App. 1980); *Siciliani v. Siciliani*, 552 So. 2d 560 (La. Ct. App. 1989), *writ denied* by 566 So.2d 40 (La. 1991); *Brossette v. Brossette*, 396 So. 2d 369, 371 (La. Ct. App. 1981); *In re Marriage of Justis*, 384 N.W.2d 885, 891 (Minn. Ct. App.), *rev. denied* (1986); *In re Marriage of Riley*, 369 N.W.2d 40, 44 (Minn. Ct. App. 1985); *In re Marriage of Manus*, 225 Mont. 457, 463, 733 P.2d 1275, 1279 (1987); *In re Marriage of Nicholson*, 17 Wash. App. 110, 119-20, 561 P.2d 1116, 1119-20 (1977). *See also infra* note 22 (discussing Missouri cases).

For examples of cases decided under the statutes cited *supra* note 18, see *Palazzo v. Palazzo*, 9 Conn. App. 486, 487, 519 A.2d 1230, 1231 (1987) (listing *inter alia* wife's "full care and responsibility [for] a child who was two years old at the time of the dissolution" as a factor making wife's "employment prospects bleak"); *Morris v. Morris*, 201 Neb. 479, 483, 268 N.W.2d 431, 434 (1978); *McNenney v. McNenney*, 159 A.D.2d 440, 441, 553 N.Y.S.2d 667, 668 (App. Div. 1990) (parties' child was 2 1/2 years old at time of decree; maintenance awarded for one year only "at which time [wife] is to resume full-time employment"); *Simmonds v. Simmonds*, 140 A.D.2d 934, 934, 529 N.Y.S.2d 615, 616 (App. Div. 1988) (holding that trial court erred in denying maintenance; wife had not been able to find employment and "[a]dditionally, the court failed to consider defendant's physical custody of the parties' two daughters, aged three and seven"); *Sutliff v. Sutliff*, 339 Pa. Super. 523, 556, 489 A.2d 764, 780 (1984) (approving limited working hours of emergency room physician responsible for care of older children), *aff'd and remanded*, 515 Pa. 393, 528 A.2d 1318 (1987); *Wyant v. Wyant*, 184 W. Va. 434, 439, 400 S.E.2d 869, 874 (1990) (reversing three-year maintenance award for wife who was primary caretaker for children ages 5 and 18 months; "lower court failed to assess the impact that custody of the children would have on her ability to become financially self-supporting"); *Hartung v. Hartung*, 102 Wis. 2d 58, 65, 306 N.W.2d 16, 21 (1981), discussed *infra* notes 33-37 and accompanying text.

21. To use the phrase introduced by Mnookin and Kornhauser, these opinions cast "the shadow of the law" over bargaining and allow lawyers to attempt to predict what range of judicial outcome a party could expect in the absence of a negotiated agreement. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

opinions discussing caregiver maintenance.²² Many of these decisions simply sustain maintenance awards as within the discretion of the lower court. In *P.A.A. v. S.T.A.*,²³ however, the court of appeals ruled as a matter of law that it is inappropriate for the lower courts to deny maintenance, thereby forcing the wife to seek employment, where there are children "of tender years" in her custody.²⁴ The court's language is extremely strong:

[The wife's] place is in the home with the children. Her alleged earning capacity, under such circumstances, is an illusionary financial resource, at best, and is entitled to little, if any, weight by the trial court at this time. The circumstances (two children under five who need the love, care and guidance of their mother on a day-to-day basis during their formative years) make it appropriate that she not be required to seek employment outside of the home at this time in order to pay her expenses as custodian of the children.²⁵

Although the *P.A.A.* case was decided in 1979, the Missouri Court of Appeals has reiterated this policy in more than a dozen decisions from different districts of the state extending over more than decade. In the later cases, although the court continued to sustain substantial maintenance awards for caregivers, the policies were described in far more moderate language. In 1988, the court stated in *Newport v. Newport*:²⁶

When the parties have adopted a lifestyle in which the husband works and the wife has stayed at home to care for small children, and, where it is economically feasible for the wife to continue to do so after the dissolution, it is appropriate that she not

22. See, e.g., *In re Marriage of Stuart*, 805 S.W.2d 309, 313-14 (Mo. Ct. App. 1991); *Babe v. Babe*, 784 S.W.2d 898, 900 (Mo. Ct. App. 1990); *Gaston v. Gaston*, 776 S.W.2d 465, 466 (Mo. Ct. App. 1989); *Bolling v. Bolling*, 768 S.W.2d 643, 644 (Mo. Ct. App. 1989); *Newport v. Newport*, 759 S.W.2d 630, 634-35 (Mo. Ct. App. 1988); *Witwicky v. Witwicky*, 728 S.W.2d 313, 315 (Mo. Ct. App. 1987); *Corey v. Corey*, 712 S.W.2d 708, 710 (Mo. Ct. App. 1986); *Mastin v. Mastin*, 709 S.W.2d 545, 548 (Mo. Ct. App. 1986); *Sarandos v. Sarandos*, 643 S.W.2d 854, 857 (Mo. Ct. App. 1982); *P.A.A. v. S.T.A.*, 592 S.W.2d 502, 504 (Mo. Ct. App. 1979); *Goff v. Goff*, 557 S.W.2d 55, 57 (Mo. Ct. App. 1977); *Butcher v. Butcher*, 544 S.W.2d 249, 254 (Mo. Ct. App. 1976); *In re Marriage of Vanet*, 544 S.W.2d 236, 243 (Mo. Ct. App. 1976); see also *Butler v. Butler*, 562 S.W.2d 685, 687 (Mo. Ct. App. 1977) (husband conceded that wife should not be required to work until children reached school age); cf. *In re Marriage of Tune*, 716 S.W.2d 899, 901 (Mo. Ct. App. 1986) (denying maintenance to wife who had not been a full-time caregiver). See generally Joan M. Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 281-83 (1985) (reviewing Missouri case law).

23. 592 S.W.2d 502 (Mo. Ct. App. 1979).

24. *Id.* at 504.

25. *Id.* The court found that the trial court's denial of maintenance was an abuse of discretion because it was based on the trial court's improper conclusion that the wife's "emotional disturbance" amounted to marital fault barring her from a maintenance award. *Id.*

26. 759 S.W.2d 630 (Mo. Ct. App. 1988).

be required to seek employment outside the home.²⁷

In both *P.A.A.* and *Newport*, the wives had a clear ability to be self-supporting. Each was college-educated and had worked during the marriage, although not since giving birth to the parties' children. In many jurisdictions, these facts lead to the almost automatic conclusion that the mother should return to the labor force, either immediately or within a year or two of the divorce. Yet in the Missouri cases, the maintenance awards were "permanent," subject to modification only if the paying party demonstrated a significant change of circumstances in the future.²⁸

Because the objective of this type of maintenance is to facilitate child care, it is not surprising that the age of the parties' children is a significant factor in the Missouri cases. The Missouri Court of Appeals is especially solicitous of the custodians of preschool-age children, and sometimes describes elementary school-age children as being "of tender years" as well.²⁹ In cases involving somewhat older children, however, it is harder to predict whether child care will be viewed as an obstacle to employment. By the time children reach high school age, however, the Missouri courts apparently assume that they no longer need a caregiver at home.³⁰

Outside the body of Missouri decisions, maintenance to facilitate child care appears only sporadically in the case law. A few appellate

27. *Id.* at 634-35.

28. Section 316 of the UMDA provides for modification of a prior maintenance award upon a showing of changed circumstances "so substantial and continuing as to make the terms [of the prior award] unconscionable." UMDA § 316, 9A U.L.A. 347, 489-90 (1987). "Changed circumstances" can include an increase in the recipient's income or the recipient's failure to make a good faith effort to seek employment. The burden of establishing a change of circumstances is on the party seeking the modification; in these cases, the payor would typically bear the burden of proof for termination. In *Witwicky v. Witwicky*, 728 S.W.2d 313 (Mo. Ct. App. 1987), the court held that the fact that the children were 15 months older than at the time the decree was entered (at which time they were 9, 10, and 13) was not a sufficient change of circumstances to enable the wife to seek employment. *Id.* at 315.

29. In both *Newport* and *P.A.A.*, the children were five or younger. In *Vanet* the children were 5, 9, and 11, and in *Mastin* they were "of elementary school age." *Mastin v. Martin*, 709 S.W.2d 545, 548 (Mo. Ct. App. 1977); see also *Goff v. Goff*, 557 S.W.2d 55, 56 (Mo. Ct. App. 1977) (children 6, 7, and 15); *Butcher v. Butcher*, 544 S.W.2d 249, 254 (Mo. Ct. App. 1976) (preschool-age children).

30. For example, in *In re Marriage of K.B. and R.B.*, 648 S.W.2d 201, 205 (Mo. Ct. App. 1983), the children had reached the ages of 15, 18, and 20, and the court stated that no child required the wife's presence at home. The outcome was the same in *Metts v. Metts*, 625 S.W.2d 896, 900 (Mo. Ct. App. 1981), with children ages 12 and 16, and *Gaston v. Gaston*, 776 S.W.2d 465, 466 (Mo. Ct. App. 1989), with 12 and 15 year old children. But in *Sarandos v. Sarandos*, 643 S.W.2d 854 (Mo. Ct. App. 1982), custody of a 13 year old was sufficient to trigger the custodial exception, perhaps because the wife had been a full time mother for 24 years: "She was always at home raising the two older boys, who turned out well. She desired to continue to give the youngest son the same nurture and caring." *Id.* at 857.

opinions in other jurisdictions echo the strong language in favor of caregiver maintenance found in the early Missouri decisions. For example, applying a California-type statutory maintenance provision, the Nebraska Supreme Court held in 1978 in *Morris v. Morris* that employment by the mother would interfere with her children's interests: "It cannot be realistically doubted that raising four small children is a full-time task."³¹ That court noted with evident approval "the desire of the wife to continue to care for [the children] properly."³²

The Wisconsin Supreme Court provided another strong judicial statement in favor of support for caregivers in *Hartung v. Hartung*,³³ which reversed a trial court's award of only short-term maintenance.³⁴ In *Hartung*, the caregiver had been out of the labor force for the duration of the parties' thirteen-year marriage and wished "to remain at home to take care of the children while they [were] small."³⁵ The supreme court's intervention apparently was provoked by the trial court's cavalier attitude toward caregiving, reflected in this statement made by the trial judge: "I don't think she would want to sit around the rest of her life. My God, she will turn into a vegetable if she did that anyhow. So she ought to start thinking about some kind of a retraining program."³⁶ The supreme court's response was emphatic:

We see nothing in the record that would support the trial court's conclusion that mothers of small children who remain at home and care for them will turn into vegetables. While this court recognizes equality of opportunity of the sexes and recognizes the right of women to exercise their abilities in whatever line of work they choose, basically this is a recognition of the right to make a choice; and if the circumstances dictate to a woman that the appropriate choice for her is to remain at home to care for small children, that choice, like a career choice, will be respected by this court. The trial court's pronouncement, lacking any basis in the record, cannot be deemed to be a rational determination.³⁷

31. *Morris v. Morris*, 201 Neb. 479, 483, 268 N.W.2d 431, 434 (1978) (affirming trial court's award). The case involved four children ranging from 5 to 9 years old.

32. *Id.*

33. 102 Wis. 2d 58, 306 N.W.2d 16 (1981).

34. *Id.* at 68-69, 306 N.W.2d at 22.

35. *Id.* at 61, 306 N.W.2d at 18. The initial maintenance order was just \$200 per month for a period of 18 months. *Id.* at 60, 306 N.W.2d at 17-18. In this case the children were 3, 7, and 9 years old. *Id.* at 61, 306 N.W.2d at 18.

36. *Id.* at 67, 306 N.W.2d at 19.

37. *Id.* at 67-68, 306 N.W.2d at 21. In an earlier Wisconsin case, *Johnson v. Johnson*, 78 Wis. 2d 137, 254 N.W.2d 198 (1977), the supreme court approved an alimony award of \$650 per month until the parties' children, ages 12, 13, and 15, reached majority. *Id.* at 140, 146,

For the most part, caregiver maintenance decisions in states outside Missouri balance the interest in caregiving against the self-support policies of the law. For example, courts in Kentucky and New York have approved caregiver alimony awards, but have required that payments terminate automatically at a point when it is anticipated that the caregiver will be able to begin working outside the home.³⁸ In many states, statutory caregiving policies are never treated directly in the case law; at best, a parent's custodial obligations may be recited as one factor that, along with others, justifies a maintenance award to a mother of young or school-aged children.³⁹

One reasonable conclusion from this body of case law is that the existence of a statute on point (or the nature of the statutory provision)

254 N.W.2d at 200, 202. The trial court in that case believed that the wife could find employment, and encouraged her to do so, "so as not to further depreciate her opportunities." *Id.* at 146, 254 N.W.2d at 203. In sustaining the award, the supreme court also quoted this finding of the trial court: "An important consideration is that she should be free to give primary attention to her responsibilities as a mother. The children are old enough that perhaps part-time employment is indicated." *Id.* at 145, 254 N.W.2d at 202.

38. *E.g.*, Chapman v. Chapman, 498 S.W.2d 134, 135-36 (Ky. 1973) (holding that because trial court granted maintenance on grounds that appellee, as custodian of asthmatic 6 year-old child, was prevented from seeking outside employment, order must also provide that payments cease on death or emancipation of the child or for any other reason relieving appellee of the care of the child); Richie v. Richie, 596 S.W.2d 32, 33-34 (Ky. Ct. App. 1980) ("We believe the appellee can, with necessary training, work outside her home and still care for her daughter, especially as her daughter will have entered first grade by this time."). This rule reverses the burden of proof, *see supra* note 28, requiring the recipient to establish a change of circumstances before maintenance can continue. The same concern appears in a pair of Illinois cases, approving fixed-term maintenance awards for caregivers with young children. *In re Marriage of Hensley*, 210 Ill. App. 3d 1043, 1049-62, 569 N.E.2d 1097, 1100-03, *appeal denied*, 141 Ill. 2d 541, 580 N.E.2d 114 (1991) (approving maintenance extending until children's emancipation; court may approve a caregiver's decision to work part-time in order to be "more of a homemaker" to her children); *In re Marriage of De Bat*, 127 Ill. App. 3d 463, 466, 468-70, 468 N.E.2d 1348, 1350, 1352-53 (1984) (approving maintenance ordered to continue until parties' child completed eighth grade, and noting caregiver's testimony regarding "time constraints she was under due to child care responsibilities"); *cf. In re Marriage of Lukas*, 83 Ill. App. 3d 606, 616-18, 404 N.E.2d 545, 554 (1980) (finding award of permanent alimony appropriate, but noting that the court in the future could modify the award if either spouse's circumstances changed). *But see* Gleason v. Gleason, 218 Neb. 629, 634, 357 N.W.2d 465, 468 (1984) (indicating that employment by the wife would not interfere with the interest of the parties' teenage daughter); Lemczak v. Lemczak, 105 A.D.2d 1157, 1158, 482 N.Y.S.2d 590, 590 (1984) ("In view of the age of the children, full-time employment would not involve child care costs.").

39. Courts take this approach even in jurisdictions with statutes modeled on the UMDA, in which custodial obligations represent part of the statutory threshold determination rather than one of the factors to be weighed in setting the amount or duration of an award. *E.g.*, Riley v. Riley, 369 N.W.2d 40, 44-45 (Minn. Ct. App. 1985), *appeal following remand*, 385 N.W.2d 883, 884-88 (Minn. Ct. App. 1986) (reversing trial court's denial of maintenance; case combined a number of strong justifications for short-term support, including fact that the wife was custodial parent of the parties' preschool-age children, but also noting that the husband had a substantial income, and that wife had not worked full-time for almost 20 years).

has no practical significance. Where such statutes exist, they are only erratically applied. Where the statutes are silent on caregiver maintenance, the same policy nevertheless can be implemented by the courts without statutory direction; indeed there are appellate decisions affirming caregiver maintenance awards in jurisdictions without explicit caregiver maintenance provisions.⁴⁰

For a variety of reasons, the appellate decisions in caregiver support cases are not very useful as precedent for other caregivers seeking support. In particular, those decisions resting on multiple grounds are hard to interpret: Because the cases do not make clear the independent significance of custodial obligations, they can easily be distinguished in a pure caregiver case. The situation is worse, however, in those states in which explicit statutory provisions have never been recognized or discussed by the appellate courts. The appellate courts' silence may indicate that the caregiver support statutes are rarely given effect at the trial level.⁴¹ Even

40. For examples of cases approving caregiver maintenance from jurisdictions with no statutory provision on point, see *Hutchinson v. Hutchinson*, 474 So. 2d 104, 105 (Ala. Civ. App. 1985), and *Kaufman v. Kaufman*, 7 Va. App. 488, 493-94, 375 S.E.2d 374, 377 (1988). See also *infra* notes 44-50 and accompanying text (discussing Florida cases).

41. In Colorado, which has utilized the original UMDA maintenance provision since 1972, the custodial exception has not yet been relied upon in a reported maintenance case. Occasionally, unreported cases refer to the care of children along with other compelling circumstances in sustaining awards. See, e.g., *In re Marriage of Katona*, No. 88CA1905 (Colo. Ct. App. Feb. 15, 1990); *In re Marriage of Bryan*, No. 86CA1026 (Colo. Ct. App. Oct 17, 1985).

The argument might be made that the language incorporated in the UMDA was not intended to apply to all custodians of very young children, but only those whose children had special medical or emotional needs. See *infra* note 52. But this reading should be rejected. As an initial matter, this is not what the statute says, and such a meaning could have been stated explicitly. This point is emphasized in one of the Missouri cases:

Mark reminds us that this emphasis in the law encourages self-sufficiency. He argues that there is nothing special about the condition and circumstances of these children which requires Vicki's presence at home, that there are many capable childcare alternatives available, and that any agreement which may have been reached by the parties that Vicki stay in the family home while the children were young does not demonstrate that "the condition or circumstance of the child requires the presence of the custodian in the home." This, of course, is a misstatement of the statutory standard. The statutory standard is met if the "condition or circumstances make it appropriate" that the custodian remain in the home.

Newport v. Newport, 759 S.W.2d 630, 634 (Mo. Ct. App. 1988). For further discussion of the *Newport* case, see *supra* notes 26-27 and accompanying text.

The Missouri court's analysis is supported by the history of the UMDA provision. In a monograph prepared in 1969 by Robert J. Levy, Co-Reporter for the Act, Levy stated his view that where a mother was caring for the young children of the family, child support awards should be computed to "explicitly recognize that a mother who has custody of young children requires support to be a proper custodian." ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 145 (1969). Levy continued: "Just as children need a roof over their heads, they need a mother-custodian who is fed and clothed."

those decisions affirming the trial court's discretion to award caregiver support have relatively weak precedential value in other cases. The opinions indicate that awards to caregivers are sometimes made and are permissible. Where caregiver maintenance provisions exist in the support statutes, however, this adds nothing to the inquiry. Because such opinions fail to limit the wide-open, discretionary approach to support awards, they exert very little influence on the judges and lawyers who consider and resolve maintenance cases.

The handful of decisions from around the country that take a stronger stand on caregiver issues have the potential to shift the practice of lawyers and the lower courts. Rulings that have mandated alimony against the inclinations of the trial court operate to limit the courts' discretion.⁴² But even in states in which such reversals have occurred, a judge who appears to balance the various statutory maintenance factors (and avoids gratuitous comments likening caregivers to vegetables) is not likely to be reversed.⁴³ The net effect of these practices is that where the self-reliance and caregiving policies are in tension, the choice of which to implement is left to the virtually unreviewable discretion of a trial court judge.

This situation is demonstrated by two contrasting opinions issued in a single case by a Florida District Court of Appeal and the Florida Supreme Court. On a number of occasions, Florida's District Courts of Appeal have approved trial court awards of alimony, extending until emancipation of children, for custodial parents who were "willing to re-

Id. Levy's preference to support a caretaking parent in this fashion was apparently strategic; he thought it might "neutralize" the resentment many husbands feel about paying alimony. *Id.* As eventually adopted, the UMDA allows a court to provide for a custodial parent's needs either through a more generous provision of child support, as Levy preferred, or by means of a maintenance award utilizing the custodial exception. The maintenance statute reflects the possibility that caregiver support may be included in child support: one of the factors a court is to consider in setting an appropriate maintenance award is "the extent to which a provision for support of a child living with the party includes a sum for that party as custodian." UMDA § 308(b)(1), 9A U.L.A. 347, 348 (1987).

42. Of the 23 jurisdictions with statutes on point, *see supra* notes 16 and 18, the only ones in which caregiver maintenance awards have been reversed as insufficient are Minnesota, *see Riley v. Riley*, 369 N.W.2d 40 (Minn. Ct. App. 1985), *appeal following remand*, 385 N.W.2d 883 (Minn. Ct. App. 1986), discussed *supra* note 39; Missouri, *see P.A.A. v. S.T.A.*, 592 S.W.2d 502 (Mo. Ct. App. 1979), discussed *supra* at notes 23-25 and accompanying text; New York, *see Simmonds v. Simmonds*, 140 A.D.2d 934, 529 N.Y.S.2d 615 (App. Div. 1988), discussed *supra* note 20; and Wisconsin, *see Hartung v. Hartung*, 102 Wis. 2d 58, 306 N.W.2d 16 (1981), discussed *supra* notes 33-37 and accompanying text. Except for *Hartung*, each of these cases relies upon significant grounds for reversal in addition to the caregiver issue.

43. Even in the Missouri opinions the appellate courts give great deference to the trial judge. As Joan Krauskopf notes, "Ironically, in none of these cases was the amount of maintenance and child support sufficient to support fully the custodian at a standard of living comparable to that during the marriage." Krauskopf, *supra* note 22, at 281-82.

main in the home and make a home for children of tender years, extending by precept and example the guidance so vitally needed in the early and teen years of their lives."⁴⁴ In 1982, however, in *Kuvin v. Kuvin*,⁴⁵ the District Court of Appeal went a step further, reversing a trial court's decision to award short-term alimony to a caregiver with young children.⁴⁶ According to the court:

The issue presented in this appeal is whether the wife may choose to remain at home as a full-time mother or must "rehabilitate herself" by working outside the home. In reaching our decision, we note that in order to work outside the home Mrs. Kuvin will be forced to spend a portion of her earnings for child care. We are also aware that Mr. Kuvin is financially able to support his former wife if she remains at home with their children.⁴⁷

The court mandated long-term support based on what it understood to be the policies informing the state's alimony laws, noting:

We disagree with the husband's contention that the legislature intended to apply a single standard permitting only rehabilitative alimony for all spouses. . . . It is obvious that the legislature has never enacted laws requiring mothers of young children to work outside the home, either during marriage or upon its dissolution, when a husband is able to support his family. Mr. Kuvin approved his wife's decision to fulfill her obligations at home during the marriage, and he is able to continue to provide for his family. We therefore see no reason to order Mrs. Kuvin to seek outside employment.⁴⁸

When the *Kuvin* case reached the Florida Supreme Court, however, it held that this policy statement went too far.⁴⁹ Concluding that the initial rehabilitative award was within the trial court's discretion, the

44. *Walton v. Walton*, 354 So. 2d 464, 466 (Fla. Dist. Ct. App. 1978). See also *Carrier v. Carrier*, 409 So. 2d 256, 257 (Fla. Dist. Ct. App. 1982) (approving permanent alimony of \$380 per month to the wife who had custody of the parties' minor children); *Hurtado v. Hurtado*, 407 So. 2d 627, 628-29 (Fla. Dist. Ct. App. 1981) (approving permanent alimony of \$1600 per month to wife who had custody of minor children, but noting that when the children reach majority a modification may be in order).

45. 412 So. 2d 900 (Fla. Dist. Ct. App. 1982), *quashed*, 442 So. 2d 203 (Fla. 1983).

46. *Id.* at 902.

47. *Id.* at 901. The initial award in *Kuvin* was for 3 years of rehabilitative alimony after a 12 year marriage. *Id.* The wife was 36, and the evidence suggested she could earn \$250 a week as a legal secretary, but her preference was to remain at home indefinitely with the children, ages 4 and 11. *Id.*

48. *Id.* at 902.

49. *Kuvin v. Kuvin*, 442 So. 2d 203, 205 (Fla. 1983), *quashing* 412 So. 2d 900 (Fla. Dist. Ct. App. 1982).

court reinstated it.⁵⁰ With its ruling in the *Kuvin* case, the Florida Supreme Court made explicit the doctrinal bottom line: custodial obligations may be recognized in the discretionary decision-making of trial court judges, but need not be given any weight at all.

Because of the appellate courts' interpretation of the caregiver maintenance statutes, a trial judge inclined to ignore caregiving concerns can safely do so, while a judge inclined to order support for caregivers can invoke the "authority" of these decisions to support his or her ruling. At best, the authority of the appellate cases may encourage a judge to weigh the obligations of caregiving along with myriad other factors in deciding whether—or how quickly—to enforce the self-reliance ideal.

These decisions might optimistically be characterized as marking the outlines of a common law of childrearing, defining, in the context of divorce, whether and for how long a caregiver may continue to be absent from the labor force. Practically speaking, however, without appellate authority of greater weight, these principles will continue to come into play only rarely. Faced with caregivers who might become self-supporting, judges are increasingly giving priority "to the goal of making divorced women self-sufficient over the goal of supporting the custodial parent."⁵¹ Only in an unusual case is the custodial parent's argument for post-divorce financial support likely to succeed. The ideal fact pattern is one in which the noncaregiving parent's income is substantial, the parties' behavior during the marriage has clearly demonstrated their own belief in the importance of a maintaining one parent as a full- or part-time caregiver, and at least some of the parties' children are not yet in

50. *Id.* at 206. The Court reasoned:

The trial court may have determined that although working as a legal secretary at \$250 a week would not permit the wife to enjoy her accustomed standard of living, a period of rehabilitation would allow time for her to gain skills to provide for additional income or at least attempt to do so. The record reflects that the wife is a relatively young, able, and healthy woman who has had some post-secondary education and has demonstrated her ability to hold a job. The trial court may well have reasoned that her eventual rehabilitation is far more likely if she begins now, rather than fourteen years hence, when the younger child reaches his majority. After careful review of the record, and mindful of the trial court's superior vantage point, we cannot say that no reasonable person would take the view adopted by the trial court. . . . We therefore find no abuse of discretion.

Id. at 205-06.

51. WEITZMAN, *supra* note 7, at 185-86; *see also infra* note 80 and accompanying text (reporting on the decrease in the percentage of women receiving alimony between 1968 and 1977). This is demonstrated regularly in the case law, where courts approve short-term awards even when there are very young children. *See, e.g.,* *McNenney v. McNenney*, 159 A.D.2d 440, 441, 553 N.Y.S.2d 667, 668 (1990) (granting one-year award to the custodial mother of a 2 1/2 year old child on the assumption that wife would resume full-time employment at the end of the year).

elementary school or past the early primary grades. Short of this, the likely result is no maintenance, or a short-term rehabilitative award to allow the caregiver to "get back to work."⁵²

The courts' apparent lack of concern with caregivers' maintenance claims might be understood simply as part of a general hostility toward the concept of alimony or maintenance under a regime of non-fault divorce. Yet in cases involving older displaced homemakers, appellate courts across the country have moved forcefully to mandate long-term support. Two years after the *Kuvin* decision, for example, the Florida Supreme Court adopted rules requiring that courts order permanent rather than rehabilitative alimony for older wives facing divorce with no significant employment history or prospects.⁵³

B. Counterpoint: Support for the Older Homemaker

As divorce rates have continued to rise, larger numbers of women have become "displaced homemakers"—forced to be economically self-reliant after years of economic dependence.⁵⁴ With the adoption of laws that emphasized self-reliance rather than long-term post-divorce support,

52. This is the consensus based on my informal poll of a number of Colorado divorce lawyers. In the words of the late Raymond Carey, "Judges don't get too dewey-eyed about a mother's argument that she needs to be home with older children." Carey's view is that judges are already less sympathetic once children reach the second or third grade. Telephone Interview with Raymond Carey, Practicing Attorney (June 13, 1991).

The special circumstances of a handicapped child may be one situation in which the UMDA custodial exception language still has effect. See, e.g., *In re Marriage of Tidball*, 192 Mont. 1, 4-5, 625 P.2d 1147, 1149-50 (1981) (child with hearing and speech impairments); *In re Marriage of Bryan*, No. 84CA1026 (Colo. Ct. App. 1985). In at least one state, the custodial exception is expressly limited to this circumstance. See IND. CODE § 31-1-11.5-11.(e)(2) (Supp. 1991) (quoted *supra* note 16).

53. See also *Walter v. Walter*, 464 So. 2d 538, 539 (Fla. 1985) (clarifying how courts were to apply criteria delineated in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1201-02 (Fla. 1980), when awarding permanent alimony), *quashing* 442 So. 2d 257 (Fla. Dist. Ct. App. 1983). This case is discussed in Krauskopf, *supra* note 7, at 576. Krauskopf views *Walter* as particularly significant because Florida had been "the leading jurisdiction in use and abuse of rehabilitative alimony." *Id.*

54. For discussion of the difficult circumstances of displaced homemakers, see RAE ANDRE, *HOMEMAKERS: THE FORGOTTEN WORKERS* 186-206 (1981), and NANCY C. BAKER, *NEW LIVES FOR FORMER WIVES: DISPLACED HOMEMAKERS* 201-27 (1980). The plight of displaced homemakers was described with significant sympathy by the United States Supreme Court in *Kahn v. Shevin*, 416 U.S. 351, 353-54 (1974). For current data, see Judy Mann, *The High Risks of Homemaking*, WASH. POST, June 6, 1990, at B3, and *Labor Market Problems Persist for Nation's Displaced Homemakers*, BNA DAILY LAB. REP., June 1, 1990, at A3.

Although the prospect of dramatic increases in the numbers of displaced homemakers generally was not considered at the time no-fault divorce laws were adopted, the process in Wisconsin was different, with a significant feminist lobby blocking the initial no-fault legislation until more comprehensive economic provisions were incorporated. See JACOB, *supra* note 1, at 99-101; see also MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE*

trial court judges began to demonstrate such great enthusiasm for rehabilitation that even older wives with no realistic prospect of becoming economically independent were routinely awarded only a few years of "transitional" support.⁵⁵

In many jurisdictions, appellate courts responded to this pattern by elaborating stringent standards to govern the lower courts' discretion in cases involving older wives. One of the earliest and best known of these cases is the punchy and quotable *In re Marriage of Brantner*, in which the California Court of Appeals asserted:

The new Family Law Act . . . may not be used as a handy vehicle for the summary disposal of old and used wives. A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime.⁵⁶

Another early illustration of this development is found in *Sinn v. Sinn*,⁵⁷ in which the Colorado Supreme Court considered a trial court's two-year maintenance award to a wife who had not worked full-time outside the home during the parties' twenty-four-year marriage, who had not completed high school, and who had major physical and emotional problems including difficulty communicating because of damage to her vocal cords suffered during open-heart surgery.⁵⁸ The Colorado Supreme Court, in reversing the limited award, commented that the lower court's apparent assumption that the wife would be self-sufficient after two years was unrealistic in light of the evidence presented at the hearing, and held that the order "ignores the limited job opportunities available to an unskilled middle-aged woman who has long been removed from the job market."⁵⁹

Opinions such as *Brantner* and *Sinn* served notice that the appellate courts would not sustain limited awards for older wives following long-term marriages unless specific evidence in the record supported the

RHETORIC AND REALITY OF DIVORCE REFORM 53-75 (1991) (discussing Wisconsin no-fault divorce reform as a case study).

55. The trend is discussed in WEITZMAN, *supra* note 7, at 337, and Krauskopf, *supra* note 7, at 573-74. Both Herma Hill Kay and Robert J. Levy, Reporters of the UMDA, believe that the decisions denying maintenance to older wives violated the intentions of the statute. Kay, *supra* note 1, at 67; Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 72-73.

56. 67 Cal. App. 3d 416, 419, 136 Cal. Rptr. 635, 637 (1977). This approach was affirmed by the California Supreme Court in *In re Marriage of Morrison*, 20 Cal. 3d 437, 453, 573 P.2d 41, 50-52, 143 Cal. Rptr. 139, 150 (1978).

57. 696 P.2d 333 (Colo. 1985) (en banc).

58. *Id.* at 337.

59. *Id.*

court's conclusion that the wife could reasonably be expected to be self-supporting when the termination date arrived.⁶⁰ Eventually, courts in dozens of jurisdictions moved to impose this type of limitation on rehabilitative maintenance awards for older wives who had long been out of the labor force.⁶¹

Although the various alimony and maintenance laws were open-ended enough to lend themselves to this judicial manipulation,⁶² it nonetheless marked a major exception to the self-reliance norms. In some cases, courts defended the new exception on the grounds that older housewives could not have anticipated at the start of their marriages that they would one day be expected to be self-supporting.⁶³ The justice of the new rule is treated as obvious in most of these opinions, yet it stands as a remarkable development. In the words of Joan Krauskopf: "So many reversals in the family law area where the customary standard of review is abuse of discretion sends a firm and loud message that control is being imposed by the appellate courts."⁶⁴

The trend toward protection of older wives was not solely the result

60. As the *Morrison* court stated,

A trial court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. In making its decision . . . the court must rely only on the evidence in the record and the reasonable inferences to be drawn therefrom. It must not engage in speculation.

In re Marriage of Morrison, 20 Cal. 3d at 453, 573 P.2d at 52, 143 Cal. Rptr. at 150. See generally Krauskopf, *supra* note 7, at 577-79 (discussing requirement of substantial evidence in the record). The additional requirement that there be "clear" or "substantial" evidence in the record that the recipient of maintenance will be self-supporting is one important reason for the ubiquitous "expert vocational evaluation" in maintenance cases. See *infra* note 182.

61. See Kay, *supra* note 1, at 72-75 & n.363; Krauskopf, *supra* note 7, at 577-78. Krauskopf describes the trend toward limited maintenance as having been rampant until appellate courts began to react between 1980 and 1984, *id.* at 573-74, but in some jurisdictions the reaction came more swiftly. In California, the *Brantner* and *Morrison* cases were preceded by a 1972 decision, *In re Marriage of Rosan*, 24 Cal. App. 3d 885, 892-98, 101 Cal. Rptr 295, 299-304 (Cal. Ct. App. 1972), and the 1985 Colorado Supreme Court decision in *Sinn* followed and approved a pair of intermediate appellate court decisions dating from 1975 and 1980.

62. For example, the factors to be considered in setting the amount and duration of a maintenance award under the UMDA include the length of the parties' marriage, the age of the spouse seeking maintenance, and the parties' living standard during the marriage. UMDA § 308(b), 9A U.L.A. 347, 348 (1987).

63. For the argument that it is not fair to change rules in the middle of the game, see, e.g., June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 985-87 (1991); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 314-19 (1987). This viewpoint is also reflected in some of the older homemaker decisions. *E.g.*, *In re Marriage of Grove*, 280 Or. 341, 351-52, 571 P.2d 477, 485 (1977).

64. Krauskopf, *supra* note 7, at 575-76.

of common law evolution. In a few jurisdictions in which appellate courts continued to approve very limited maintenance awards for older wives, legislatures were persuaded to amend maintenance statutes for the purpose of facilitating awards to older wives.⁶⁵ As a result, statutes in some states now refer explicitly to the "displaced homemaker" problem, or make special provisions for longer-term marriages.⁶⁶ In others, the maintenance threshold eligibility provision has been amended to require explicit consideration of the parties' standard of living during the marriage in making the determination of whether the displaced homemaker should be self-supporting.⁶⁷

One recurring difficulty in contemporary divorce law has been the problem of grounding alimony and maintenance awards in a coherent theory. With the demise of entitlement and fault notions, courts have sometimes struggled to explain why any partner's marital obligation of support should continue beyond the termination of a marriage. One justification advanced in several of the older housewife cases is that the homemaker confers benefits on her family during the marriage that should be compensated at the time of divorce.⁶⁸ Another is that the

65. The most notorious example is *Otis v. Otis*, 299 N.W.2d 114 (Minn. 1980), which provoked a prolonged conversation between the Minnesota legislature and supreme court resulting in amendments to the maintenance statute in 1982 and again in 1985. See *Kay*, *supra* note 1, at 79 n.382; *Krauskopf*, *supra* note 7, at 577; *Levy*, *supra* note 55, at 73-75; see also *Mary E. Becker, Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 220-21 (discussing the court's decision in *Otis* to award wife only \$1500 per month for four years even though she was 45 and had not worked for roughly 20 years).

66. Many state statutes, including those based on the UMDA, direct the court to consider the parties' ages and the duration of their marriage, but some go further. In Delaware, marriages of more than 20 years were specifically exempted from a two-year cap on maintenance. See DEL. CODE ANN. tit. 13, § 1512(a)(3) (1981). Under the present Delaware statute, maintenance is limited to a maximum term equal to half the length of the marriage, "with the exception that if a party is married for 20 years or longer, there shall be no time limit as to his or her eligibility." DEL. CODE ANN. tit. 13, § 1512(d) (Supp. 1990). California's statute provides that a court retains jurisdiction indefinitely in maintenance cases where the marriage is of "long duration," defined as 10 years or more. This provision allows for modification if an initial rehabilitative award proves inadequate. CAL. CIV. CODE § 4801(d) (West Supp. 1992). In Arizona, the UMDA threshold test has been altered to add as an independent basis of maintenance eligibility the case of a spouse who "[h]ad a marriage of long duration and is of an age which may preclude . . . employment." ARIZ. REV. STAT. ANN. § 25-319(A)(4) (1992).

67. Minnesota amended its law along these lines in 1985, see *supra* note 4, and Pennsylvania amended its statute in 1988, see *supra* note 3. Similar measures recently have been debated in Colorado. See *Eric Anderson, Support Measure Weakened: 'Marital Maintenance' Would Retain Standard of Living*, DENVER POST, Feb. 15, 1992, at B4.

68. *E.g., In re Marriage of LaRocque*, 139 Wis. 2d 23, 38, 406 N.W.2d 736, 742 (1987) ("The record is replete with evidence of Mrs. LaRocque's contributions to Mr. LaRocque's education and increased earning power."); see also *Krauskopf*, *supra* note 7, at 583 n.48 (listing cases and articles); *infra* notes 98-125 and accompanying text (discussing compensation for caregivers who return to the labor force).

housewife incurs an "opportunity cost" as a result of working within the family rather than outside it, and that cost should be considered in the financial aspects of divorce.⁶⁹ Although these theories overlap considerably, some courts have been willing to accept one but not the other.⁷⁰

In *In re Marriage of Franks*, an early case decided under the UMDA, the Colorado Supreme Court justified the provision for maintenance, without regard to traditional notions of fault, in terms of these new theories:

One spouse may have foregone earning potential in performing the domestic duties involved in maintaining the marital domicile, to the end that the other spouse might devote his full potential to earning the income of the family. It would be inequitable upon dissolution to saddle the former with the burden of his reduced earning potential and allow the latter spouse to continue in an advantageous position which was reached through a joint effort.⁷¹

Besides making cameo appearances in judicial opinions, these theories have gained a following in recent legal commentary.⁷² But the re-orientation of non-fault maintenance law toward greater financial protection for older wives occurred with remarkably little effect on the

69. Cases finding that economic disadvantage or foregone opportunities justify support awards for older homemakers include *In re Marriage of K.B.*, 648 S.W.2d 201, 205 (Mo. Ct. App. 1983), and *Brueggemann v. Brueggemann*, 551 S.W.2d 853, 857 (Mo. Ct. App. 1977). This position is consistent with the Missouri courts' greater protection for younger caregivers. See *supra* notes 22-30 and accompanying text; see also *In re Marriage of Williams*, 220 Mont. 232, 236-40, 714 P.2d 548, 550 (1986) (fixing the wife's "career value losses" at \$162,597 and awarding this amount as maintenance); *Kanta v. Kanta*, 479 N.W.2d 505, 508-09 (S.D. 1992) (reversing trial court's award of "career opportunity costs"); Krauskopf, *supra* note 7, at 583-84 nn.48-50 (listing cases and articles).

70. For example, the Maine Supreme Court in *Skelton v. Skelton* rejected a compensatory rationale:

Is alimony properly awarded to compensate a divorcing spouse for her "years of service" in the past, or does it look to the future, acting as a substitute for the loss of support enjoyed during the preceding years, awarded in as large an amount and for as long a term as circumstances make necessary? The answer is clearly the latter.

490 A.2d 1204, 1207 (Me. 1985). At the same time, however, the court accepted an opportunity cost theory: "[T]o the extent that [wife's] capacity to support herself is a relevant consideration, the court is not precluded from assessing the effect that spending those fifteen years in the role of spouse and homemaker had upon the opportunity for development of [her] marketable employment skills." *Id.* at 1208.

71. *In re Marriage of Franks*, 189 Colo. 499, 508, 542 P.2d 845, 852 (1975), *stay denied*, 423 U.S. 1043 (1976).

72. For example, in 1978 Elizabeth Landes proposed an economic analysis of alimony awards that defended the maintenance criteria in existing statutes as reasonable proxies for these opportunity costs. Elizabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35, 49-51 (1978); see also *infra* notes 109-10 and accompanying text (discussing opportunity cost theories).

underlying theory and doctrine. Although these rationales could be readily applied to younger caregivers, they seem to receive serious judicial consideration only when combined with the image of an older, dependent wife.⁷³ Rather than embracing new theoretical approaches to maintenance, appellate courts and legislatures insisted that the reforms to protect older housewives simply implement the true intent of the original statutes. In those states with explicit maintenance thresholds, courts achieved wider room for exercising discretion by expansive interpretation of statutory phrases such as "reasonable needs" and "appropriate employment."⁷⁴ Courts taking this approach necessarily claim that they are furthering the fundamental original purpose of the statute. But even in states in which statutes were amended, the changes were described only as being necessary to effectuate the purposes and intent of the original maintenance law.⁷⁵

The result is that while courts might decorate their opinions with discussions of opportunity cost or the benefits conferred by homemakers, these concepts have not been allowed to threaten the new norm of self-reliance. The exception to the new rules is concretely helpful to particular claimants, namely older homemakers, but it remains quite narrowly circumscribed. To benefit, a spouse seeking maintenance must establish that she fits into the exceptional class of needy, dependent, incapable women, a category that is almost by definition comprised exclusively of older wives. For younger caregivers, the implicit presumption of an ability to be self-supporting is effectively conclusive, overwhelming all other considerations.⁷⁶

73. *But see* *Major v. Major*, 277 S.C. 318, 320, 286 S.E.2d 666, 668 (1982) (finding abuse of discretion to deny alimony to homemaker spouse at the end of a 13-year marriage; wife's marketable skills were meager "while husband has established a secure career"); *infra* notes 134-59 and accompanying text (discussing cases concerning the "diploma dilemma"). In a recent article, Robert Levy argued that the "opportunity loss" and "investment in human capital" analyses are best understood as part of the need-based argument for paying support to a dependent spouse. Levy, *supra* note 55, at 70-71.

74. *See, e.g., In re Marriage of Olar*, 747 P.2d 676, 681 (Colo. 1987) (explaining that wife's sacrifice to her educational goals while supporting her spouse should be considered for maintenance, even though an educational degree is not marital property).

75. The legislative amendments in Minnesota, *see supra* note 4, were "not intended to change the intent of the statute but only to correct the interpretation." *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987). Similarly, changes in Oregon's statute were characterized as "elaborations of existing legislative policy." *In re Marriage of Grove*, 280 Or. 341, 346 n.3, 571 P.2d 477, 482 n.3 (1977).

76. The perception of women as either "dependent" or "self-reliant" is primarily generational. *See infra* notes 179-88 and accompanying text. This is reflected clearly in many of the older homemaker decisions. For example, in *In re Marriage of Grove*, the Oregon Supreme Court stated:

We will not ignore the fact that, at least until recent years, women entering marriage

Despite the general shift in divorce law away from alimony and maintenance, both the class of older wives, or "displaced homemakers," and the class of primary caregivers of young children present strong claims for spousal support following divorce.⁷⁷ Women in both of these groups often have lowered their earning potential as a result of their commitment to family care rather than employment. But the actual experiences in divorce courts of the members of these two groups, as reflected in the case law and in empirical research, have been very different. Thus, although Lenore Weitzman's data indicate an overall decline in the amount and duration of maintenance awards in California between 1968 and 1977,⁷⁸ the percentage of wives in longer-term marriages who were awarded alimony had increased,⁷⁹ while the percentage of wives with children under six who were awarded alimony had dropped.⁸⁰

were led to believe—if not expressly by their husbands-to-be, certainly implicitly by the entire culture within which they had come to maturity—that they need not develop any special skills or abilities beyond those necessary to homemaking and child care, because their husbands, if they married, would provide their financial support and security.

280 Or. at 351-52, 571 P.2d at 485.

The split between "dependence" and "self-reliance" is also reflected in feminist theory. June Carbone and Margaret Brinig discuss these two paradigms. In the "equality" model, which they describe as characteristic of a liberal feminist position, a commitment to homemaking is minimized as a "lifestyle choice," and women who are not financially self-supporting are viewed as victims. From a cultural feminist perspective, however, caregiving is celebrated, and the practice of viewing housewives as victims is objectionable because it implies that they are socially inadequate or deviant in their financial dependence. Carbone & Brinig, *supra* note 63, at 996 (citing O'Connell, *supra* note 2, at 500, 506-08).

77. This is widely acknowledged in the literature. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 93-99 (1987); WEITZMAN, *supra* note 7, at xiii-xiv, 149-50, 154-58, and 380-81; Kay, *supra* note 1, at 70-74 (citing Helen B. Shafer, *No-Fault Divorce*, 2 EDITORIAL RES. REP. 779, 795 (Cong. Quarterly, Inc., Oct. 10, 1973)); Krauskopf, *supra* note 22, at 281-82. This position is also implicit in the work of theorists such as Ira Ellman, June Carbone, and Margaret Brinig. See *infra* notes 126-33 and accompanying text.

78. WEITZMAN, *supra* note 7, at 169 (Table 13). Although Weitzman's work has been criticized, see, e.g., Jed D. Abraham, *The Divorce Revolution Revisited: A Counter-Revolutionary Critique*, 3 AM. J. FAM. L. 87 (Summer 1989) & Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter DIVORCE REFORM], other researchers have found similar, though less dramatic, results. Studies other than Weitzman's, reviewing the same economic issues, are discussed in Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM, *supra*, at 75, 76 n.6. Garrison's research indicates that the drop in maintenance awards these studies demonstrate is not the result of the shift to nonfault-based divorce grounds, but rather the shift in the law of alimony and maintenance toward short-term, "rehabilitative" awards and a self-reliance norm. *Id.* at 90-94.

79. WEITZMAN, *supra* note 7, at 168-71. Although the percentage of older wives who received some maintenance increased, the likelihood of permanent awards dropped significantly. *Id.* at 164-65 (noting that 62% of alimony awards in 1968 were permanent, compared with 32% in 1977).

80. *Id.* at 34, 185. The data indicated that in 1968, 20% of these wives received alimony,

Weitzman also tested public opinion on the financial issues of divorce by surveying lawyers, judges, and lay people regarding a number of hypothetical divorce cases. One of her hypotheticals presented a displaced homemaker scenario: the divorce of a senior executive husband and a homemaker wife in their mid-fifties, after a twenty-seven-year marriage. Another described the hypothetical divorce of a "young couple with two young children." During their seven-year marriage, the husband had been an accountant, eventually earning \$1000 (net) a month, and the wife had been a full-time housewife and mother since shortly after receiving her college degree. The couple was said to be in their late twenties or early thirties, with children under six. The wife wanted to remain at home to take care of their preschool age child.⁸¹ Although Weitzman's survey indicated strong popular support for alimony awards in both cases, a larger percentage of the lay respondents thought alimony should be awarded to the hypothetical older wife.⁸² The judges surveyed also indicated their belief that she would be much more likely to receive a substantial award.⁸³

Today, most divorce lawyers and judges recognize the older wife/displaced homemaker fact pattern as a clear "maintenance case,"⁸⁴ although they find the amount and duration of any possible award diffi-

but by 1977, only 13% were awarded any spousal support. This is apparently true despite the fact that the California divorce reform law has since its inception provided that caregiving responsibilities should be considered in determining a spouse's support claim. See CAL. CIV. CODE § 4801(a)(5) (West 1983).

81. The cases are described in WEITZMAN, *supra* note 7, at 414.

82. Of the divorced men and women Weitzman surveyed, 87% of men and 94% of women approved of alimony for an older housewife who was disabled and unable to support herself, and 66% of men and 87% of women approved of alimony if a housewife was not disabled but was "too old to get a good job." *Id.* at 151. In popular opinion, however, the self-reliance ideal seems to have almost equal support. When told that the wife "can go to work and support herself," the percentages reverse, with only 15% of men and 35% of women answering that alimony was deserved. *Id.*

83. Of the California judges Weitzman questioned about the older homemaker fact pattern, 63% thought the wife would be likely to receive permanent support "for the rest of her life," while just over a third of the judges predicted "that the courts would put some pressure on her to find work and share the responsibility for her own support." *Id.* Judges and lawyers surveyed about the young caregiver's claim predicted only short-term, transitional support: \$150 to \$200 per month, for less than two years. *Id.* at 195.

84. In my experience, this term is widely used by lawyers to reflect a sort of *gestalt* judgment that the case is one in which an award of significant maintenance is likely. See also Levy, *supra* note 55, at 76 n.116 (utilizing this term). The consensus is clearest where there is a long-term marriage, a husband with significant earnings, and a wife who has never been employed outside the home. The strength of the conclusion that an older homemaker should get alimony is apparently growing. See *supra* notes 56-67 and accompanying text; see also CLARK, *supra* note 3, at 642 (explaining that older homemakers without employment qualifications commonly receive substantial alimony awards).

cult to predict with any precision.⁸⁵ By contrast, the younger homemaker does not present a "maintenance case," even though she may also be "devoting her life to her family."

The difference in the courts' treatment of these two groups cannot be explained in formal doctrinal terms. The special circumstances of caregivers with young children are more frequently recognized by explicit statutory provisions, and yet there has been far less judicial support and recognition for their claims. Although the theories offered to justify greater protection for older wives are equally applicable to younger caregivers, those theories have not been applied to them. Apparently, where younger caregivers are concerned, family values are accorded much less importance.

III. COMPENSATION FOR A CAREGIVER'S CONTRIBUTIONS

Given the modern social realities of high levels of divorce and maternal employment, courts trying to look into the parties' futures usually will find it both reasonable and just to require a parent who has been a caregiver to enter or return to the labor force at some point in the future. This transition is not unique to divorced families; it is also a decision faced in many "intact" families as children outgrow the need for full-time caregiving. Even those decisions that treat custodial obligations seriously recognize that caregiving will not be permanently required, and thus that some transition, or "rehabilitation," will be necessary.⁸⁶

When a married couple decides to invest one partner's effort in family care, there are two significant costs. One is the short-term loss of the caregiving parent's income during the time that she—or he—reduces or eliminates her—or his—commitment to employment. In addition, the caregiver's absence from the labor force may subject her to long-term economic and career costs after she returns to full-time work. These costs can be substantial: one study estimated that the loss in lifetime earning potential that results from a caregiver's absences from the labor force averages 1.5% per year of absence.⁸⁷

85. One approach to the difficulty of applying current maintenance statutes is to search for simplified mathematical formulas that dictate both the amount and the duration of an award, based on a method of sharing the parties' post-divorce incomes. See Norton, *supra* note 6; see also Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-21 (1989) (proposing formula for equal sharing of post-divorce income); Sugarman, *supra* note 78, at 149-53 (discussing the "equal living standards principle").

86. See *supra* note 28 (regarding the modification of caregiver maintenance awards as children grow up).

87. See Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, in *ECONOMICS OF THE FAMILY* 397 (Theodore W. Schultz ed., 1974); see also Mann, *supra* note 54, at B3 (discussing the possibilities of being forced from homemaker status

In a divorced family, caregiver support addresses the first type of cost, the short-term loss of earnings. But because there are also long-term costs, the problem is more complex than can be remedied by even a careful determination of when or how quickly a divorced caregiver should move into the labor force. Long-term costs of caregiving are effectively ignored in the present system. The usual response to long-term costs is a rehabilitative maintenance award that subsidizes the costs of retraining, but is not designed to compensate fully the long-term losses that result from a period of caregiving.⁸⁸

To the extent that long-term costs of caregiving go unacknowledged under the present maintenance system, they fall by default upon the caregiver. For couples that remain together, the caregiver's long-term costs are subsidized by long-term sharing of the other partner's earnings. It is not at all clear why, when a couple has decided during their marriage that parental caregiving is important, their decision to divorce should shift the full long-term cost of caregiving to the partner who has cared for the children.⁸⁹

This result is surely not required by the law, and it presents a serious conflict with the purposes of family law. The divorce laws are intended to minimize the injury to families that results from divorce.⁹⁰ Moreover,

into the working world). A recent study indicates that 85% of those who interrupt careers do so for family reasons, and whether the interruption is for one year or for as long as seven or eight, the typical "wage gap" is 33% in the first year back. Over time, the study indicates, "career gappers" make up some, but not all, of the wage differential. Laura Myers, *Women Who Interrupt Careers Fall Into Pay Gap*, BOULDER DAILY CAMERA, Jan. 11, 1992, at 1A & 11A (discussing study by Laurence Levin and Joyce Jacobsen).

88. "Rehabilitative" or "limited term" alimony is premised on the theory that a spouse who has not been employed requires a period of education or training in order to become financially self-sufficient, and that support during that time will permit the spouse eventually to obtain appropriate employment. Krauskopf, *supra* note 7, at 573, 581-83; *see also* CLARK, *supra* note 3, at 650-51 (discussing the duration of rehabilitative alimony); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, in *NEW STRATEGIES*, *supra* note 6, at 45 (discussing rehabilitative alimony).

89. While working on this article, I heard a number of times the argument that the breadwinner role has its opportunity costs as well, reflected in the reduced opportunity for a close relationship with a child. Certainly, a breadwinner bears significant burdens within a traditionally structured marriage. *See* Jessie Bernard, *The Good-Provider Role: Its Rise and Fall*, in *FAMILY IN TRANSITION* 122-23 (Arlene S. Skolnick & Jerome H. Skolnick eds., 7th ed. 1992). At times, however, this position is extended into a suggestion that the breadwinner's intangible costs might be balanced against the financial losses of a caregiver. While I agree that this is a factor that both parents of a child should consider carefully in making their decisions about the appropriate balance of work and nurture, I think it supports the argument for compensation of a caregiver's economic losses. If the goal is to encourage men to embrace their opportunities to nurture, divorce rules that make caregiving costly and wage labor cost-free will very likely have the opposite effect.

90. *See* UMDA § 102(4) & (5), 9A U.L.A. 158 (1987) (describing various purposes of the Act as "mitigat[ing] the potential harm to the spouses and their children caused by the process

in their financial aspects, modern divorce laws embody the principle that homemaking and wage earning contributions to family life are to be treated equivalently on dissolution of the marriage.⁹¹

Under this norm, married life is sometimes analogized to a partnership, and it is the basis for property division rules under both community property systems and "equitable distribution" statutes.⁹² Division of assets accumulated during the marriage is intended to "compensate" both parties to a marriage for their respective contributions. This is clear in the UMDA, which states a preference for property division awards in the hope that adequate property division can prevent the need for ongoing spousal support payments.⁹³ In contrast to property division awards, maintenance payments have no compensatory purpose, however, either as initially conceived in the UMDA⁹⁴ or under community property

of legal dissolution of marriage," and "mak[ing] reasonable provision for spouse and minor children during and after litigation").

91. See generally LEVY, *supra* note 41, at 164-70 (discussing property distribution at divorce). Both alternative versions of the UMDA property division provision direct the court to consider the "contribution of a spouse as a homemaker." The Comment to this section describes this as a "new concept in Anglo-American law." UMDA § 307, 9A U.L.A. 239 (1987). But see Kay, *supra* note 1, at 50 (suggesting that this language reflects a misunderstanding of community property principles).

92. The partnership notion represents a radical shift from the principles built into the common law "title" theory of marital property rights, as it requires that the link between a wage earner and the monetary fruits of his labor be unhooked. With the advent of equitable distribution rules, there are very few, if any, pure common law "title" states. See Elizabeth A. Cheadle, Comment, *The Development of Sharing Principles in Common Law Property States*, 28 UCLA L. REV. 1269, 1280-81 (1981). In most former "title" jurisdictions, however, the link between an earner and the wages and property accumulated from those wages remains intact until a divorce petition is filed. The UNIFORM MARITAL PROPERTY ACT, 9A U.L.A. 97 (1987), alters this rule as well, enacting sharing rules for marital property applicable during the marriage. At this time, the Act is in effect only in Wisconsin. WIS. STAT. ANN. § 766.001-.971 (West 1986); see also SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 180-82 (1989) ("[Economic] dependence [created by gender-structured marriage] can be avoided if both partners have equal legal entitlement to all earnings coming into the household.").

93. UMDA § 307 directs the court to consider "all relevant factors" in dividing property, including specifically the "contributions of a spouse as homemaker." 9A U.L.A. 238-39 (1987).

Early property division cases under the no-fault laws discussed the necessity of viewing the uncompensated work of homemakers as a real and significant contribution to the marriage in order to give meaning to the ideal of marriage as a partnership. See, e.g., *Wilberscheid v. Wilberscheid*, 77 Wis. 2d 40, 44-45, 252 N.W.2d 76, 80-81 (1977) (rejecting Wisconsin's pre-1970 common-law presumption that one-third of the net marital estate should be awarded to a homemaker spouse); *Bussewitz v. Bussewitz*, 75 Wis. 2d 78, 85, 248 N.W.2d 417, 422 (1977) (same).

The Commissioners' Comments to § 308 indicate that the drafters intended generous property division to prevent the need for maintenance awards. 9A U.L.A. 348 (1987). Of course, many divorcing families do not have sufficient marital property to accomplish either support or compensation goals through a property division.

94. The listing in UMDA § 308 of factors relevant in determining the amount and dura-

systems.⁹⁵

Whatever clarity the original boundary between the two remedies may have had, it has over time been increasingly difficult to maintain.⁹⁶ The goal of effecting compensation through property division can only be accomplished if the benefits that have accumulated during the marriage are recognized by the courts as "property." This has caused enormous conceptual and practical difficulty where the primary accumulations of wealth during the marriage are less tangible economic rights and benefits, such as pension plans, academic degrees, professional licenses and goodwill, and even fame and "celebrity value."⁹⁷ Accordingly, notions of what constitutes marital or community property have expanded over time to include many new types of "assets" subject to valuation and equitable division. Additionally, in cases in which no property can be found or created, alimony and maintenance awards may be pressed into service to achieve compensatory goals in the place of property division remedies.

A. Compensation for a Caregiver Who Returns to the Labor Force

Compensation theories are sometimes articulated as the basis for maintenance awards for older displaced homemakers.⁹⁸ In many states, including a number with California- and UMDA-based statutes, spousal contributions have been added to the list of factors relevant to setting maintenance awards.⁹⁹ For similar reasons, some states have added pro-

tion of a maintenance award does not include "contributions" of either spouse. The UMDA language has been amended in several states to add contribution factors. *See infra* notes 99-100 and accompanying text.

In Professor Levy's original conception of the UMDA, alimony awards were justified only if, among other criteria, the property awarded a spouse did "not fairly reflect her economic and/or other contributions to the marriage." LEVY, *supra* note 41, at 144.

95. In California, the new law moved away from discretionary division of community property toward a mandate that community property be equally divided without regard to fault. *See Kay, supra* note 1, at 42-43. The spousal support sections of the California statute enacted in 1969 do not refer to contribution factors. *See In re Marriage of Morrisson*, 20 Cal. 3d 437, 441-43, 448-49, 573 P.2d 41, 44-45, 49, 143 Cal. Rptr. 139, 142-43, 147 (1978). The current California spousal support statute does include as factors to be considered both the effect of "periods of unemployment" as a result of performing "domestic duties," CAL. CIV. CODE § 4801(a)(1)(B) (West Supp. 1992), and one spouse's contributions to the other's education, career position, or license. *Id.* § 4801(a)(2).

96. *See generally* Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989) (discussing the relationship between property division and alimony).

97. *See infra* note 138.

98. *See supra* notes 68-71 and accompanying text.

99. Many maintenance and alimony statutes include contribution factors. ARIZ. REV. STAT. ANN. § 25-319.B.6 (1991); FLA. STAT. ANN. § 61.075(1)(a) (West 1992); GA. CODE ANN. § 19-6-5(a)(6) (1991); ME. REV. STAT. ANN. tit. 19, § 721 (West 1992); MINN. STAT. ANN. § 518.58 (West 1992); N.H. REV. STAT. ANN. § 458:19 IV (1992); N.J. STAT. ANN.

visions requiring courts to consider a homemaker spouse's loss of earnings or earning capacity in setting the amount and duration of a maintenance award.¹⁰⁰

The compensatory ideal slowly emerging in this body of statutes suggests that maintenance should be awarded to younger caregivers whenever their contributions are not adequately compensated by marital property division. A number of these provisions refer to a spouse's "impaired present or future earning capacity" or "lost income production capacity,"¹⁰¹ formulations that reflect the problem of long-term costs of caregiving. Other provisions refer directly to a spouse's contributions to "child care," "the care and education of children," "the well-being of the family," or "the family unit."¹⁰² Nothing in these statutes suggests that the compensation policy applies only to older wives.

Although it may be a function of their relatively recent incorporation into these statutes, only a few of the contribution provisions have been construed in appellate decisions. Further, the existing decisions only hint at how the statutes might be given effect.¹⁰³ So far, however, it

§ 2A:34-23.b.(8) (West 1992); OHIO REV. CODE ANN. § 3105.18(C)(1)(j) (Anderson 1991); OR. REV. STAT. § 107.105(1)(d)(C), (F) (1991); 23 PA. CONS. STAT. ANN. § 3701(b)(6), (12) (1991); TENN. CODE ANN. § 36-5-101(d)(10) (1992); VA. CODE ANN. § 20-107.1 (1992) (factor number 6); WIS. STAT. ANN. § 767.26(8), (9) (1991); *see also* MASS. ANN. LAWS ch. 208, § 34 (1991) (combined property division and alimony statute considering "contributions as a homemaker"); NEB. REV. STAT. § 42-365 (West 1991) (combined property division and alimony statute).

In Arizona, the statute was also modified so that proof of contributions "to the educational opportunities of the other spouse" satisfies the threshold test for maintenance awards. ARIZ. REV. STAT. ANN. § 25-319.A.3 (1991); *see also* DEL. CODE ANN. tit. 13, § 1512(c)(6) (1991) (requiring any contribution made by either party to the education of the other party to be considered in determining alimony award). This type of change was not universal; the original UMDA threshold language remains on the books in Colorado, Illinois, Kentucky, Missouri, Montana, and Washington.

100. *E.g.*, ARIZ. REV. STAT. ANN. § 25-319.B.7 (1991); CAL. CIV. CODE § 4801(a)(1)(B) (West Supp. 1992); IND. CODE ANN. § 31-1-11.5-11.(e)(3)(B), (C) (Burns Supp. 1992) (interruption of education, training, or employment); MINN. STAT. ANN. § 518.552.2(d), (e) (West 1989); N.J. STAT. ANN. § 2A:34-23.b.(6) (West Supp. 1992); OHIO REV. CODE ANN. § 3801(c)(1)(m) (Anderson Supp. 1990) ("lost income production capacity of either party that resulted from that party's marital responsibilities"); OR. REV. STAT. § 107.105(1)(d)(F) (1991).

101. *E.g.*, CAL. CIV. CODE § 4801 (a)(1)(B) (West Supp. 1992); OHIO REV. CODE ANN. § 3105.18 (c)(1)(m) (Anderson Supp. 1990).

102. *E.g.*, FLA. STAT. ANN. § 61.08(2)(f) (West 1985 & Supp. 1992); N.H. REV. STAT. ANN. § 459.19 IV (Supp. 1990); VA. CODE ANN. § 20-107.1 (Michie 1990) (factor number 6); *see also* MASS. ANN. LAWS, ch. 208, § 34 (Law. Co-op. 1981) ("contributions as a homemaker"; combined property division and alimony statute); NEB. REV. STAT. § 42-365 (1988) (combined property division and alimony statute).

103. In addition to the Oregon cases discussed in the text, there are a number of examples from Georgia and Wisconsin. *E.g.*, *Lowery v. Lowery*, 262 Ga. 20, 413 S.E.2d 731 (1992) (noting that wife's contributions included helping husband obtain medical degree and license);

appears that the compensatory ideal is not given effect where the contributions of younger caregivers are involved. The best illustration of how these principles might be applied is a pair of recent rulings from the Oregon Court of Appeals.

In *In re Marriage of Helm*,¹⁰⁴ the court required an increase in the spousal support awarded to a forty-six year old former teacher, in order to compensate for her contributions during a twenty-three year marriage which had produced two children, ages twelve and twenty.¹⁰⁵ The Helms had very similar employment qualifications: Both were teachers, and both had commenced their teaching careers in the same year and in the same school district. Except for their division of labor during the marriage, both might have been expected to have comparable earnings potential.¹⁰⁶ Although Mrs. Helm possessed the same initial qualifications to teach, the court found that her extended absence from the job market had limited her current employability, concluding: "There will likely be a permanent gap between the parties' earning abilities."¹⁰⁷ Because of Mrs. Helm's loss of earning capacity, the appellate court found that a five-year rehabilitative award was insufficient and therefore made the award permanent.¹⁰⁸

In most cases, of course, it is much more difficult to quantify the opportunity costs of homemaking, or to allocate the parties' earnings differential among its different causes.¹⁰⁹ For example, in many cases the

Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (holding wife's contributions to husband's career sufficient to permit jury to consider husband's pension benefits in setting alimony award); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984) (considering wife's contributions to husband's medical degree); Lundberg v. Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918, 923-24 (1982) (same).

Writing before *In re Marriage of Helm* and *In re Marriage of Graf* were decided, see *infra* notes 104-19 and accompanying text, Margaret Brinig and June Carbone argued that the Oregon Supreme Court had "in effect" applied a compensatory theory in *In re Marriage of Grove*, 280 Or. 341, 352-53, 571 P. 2d 477, 485 (1977). See Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 890-93 (1988). But the *Grove* decision fits the pattern of the older homemaker cases. See *supra* notes 54-63 and accompanying text. The parties had been married for 23 years, the wife was in her mid-forties and had been a homemaker for 15 years, and the support ordered was extremely modest, decreasing significantly after 5 years. *Grove*, 280 Or. at 356-59, 571 P.2d at 487-89.

104. 107 Or. App. 556, 813 P.2d 52 (1991).

105. *Id.* at 558, 813 P.2d at 53.

106. *Id.* at 558, 561, 813 P.2d at 54-55.

107. *Id.* at 561, 813 P.2d at 55.

108. *Id.* Though relatively modest, the amount of permanent support ordered in the case was sufficient, based on the husband's income at the time of trial, to give the wife a projected income from earnings and support payments comparable to the husband's income after support payments. *Id.*

109. For a general treatment of proof of a homemaker's opportunity costs, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 177-78 (3d ed. 1986) (discussing damages for loss of

gap between a husband's and a wife's post-divorce earnings is substantially the result of labor markets that value men's work more than women's.¹¹⁰ The *Helm* case is unusual in that the parties were very similarly situated, allowing Mr. Helm's economic position to serve as a measure of his wife's lost opportunities. In *In re Marriage of Graf*,¹¹¹ an earlier case without such a clear measure, the same appellate court applied the same statute to a very similarly situated wife and reduced the maintenance award. Mrs. Graf was forty-two years old, and she had worked "only occasionally" during the marriage. At the time of the divorce hearing, she was looking for a teaching position, and had custody of the parties' two children, ages five and twelve. There was no question that she could work, although it was also clear that the earning capacity of her husband, as a hospital administrator, was significantly greater than hers.¹¹²

Recognizing the importance of using "the spousal support award [to] compensate [the] wife for the disparity in earning capacities,"¹¹³ the Oregon court faced a difficult task. The evidence established that Mr. Graf was in a "substantially more advantageous economic position," due in part to the fact that he had gotten a "head start" during the marriage.¹¹⁴ The court acknowledged that this was due in part to Mrs. Graf's "willingness to perform the role of homemaker" during the marriage.¹¹⁵ The court also noted, however, another cause of the disparity:

earning capacity in tort cases); Robert A. Wolf, *Assessing the Value of Householder Services*, 22 TRIAL 81 (Oct. 1986) (reviewing three basic approaches to estimating the value of household services and recommending the market-cost approach as the most realistic); Frances J. Pottick, Comment, *Tort Damages for the Injured Homemaker: Opportunity Cost or Replacement Cost?*, 50 U. COLO. L. REV. 59, 68-74 (1978) (arguing that courts should consider evidence of opportunity costs in valuing a homemaker's loss). This analysis tends to be made in the context of tort claims, following injury or death of a caregiver.

110. The commentators dispute whether gender-based pay discrimination is appropriately considered part of a wife's losses due to marriage. In theory, even issues such as a spouse's career choice may trace primarily to actual or anticipated obligations of caregiving. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 60-64 (1988). For the view that this is a societal problem that should not be made the responsibility of ex-husbands, see Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law On Divorce Outcomes*, 57 BROOK. L. REV. 621, 726-27 (1991) ("Divorce law cannot serve as a panacea for curing the feminization of poverty, but it can and should protect divorced wives whose disadvantage has been reinforced by the marital relationship."); Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM*, *supra* note 78, at 6, 30; Sugarman, *supra* note 78, at 152.

111. 97 Or. App. 425, 776 P.2d 46 (1989).

112. *Id.* at 427, 776 P.2d at 46.

113. *Id.* at 427, 776 P.2d at 47.

114. *Id.* at 427, 776 P.2d at 46-47.

115. *Id.* at 427, 776 P.2d at 47.

Mr. Graf was employed in a higher-paying field.¹¹⁶ How much, then, of the earning disparity could be traced to Mrs. Graf's work in the home?

The court reasoned: "It is not necessary that support be awarded in an amount that will equalize the parties' incomes, nor is it just and equitable to allow a former spouse to look to the other for support indefinitely if self-support at a reasonable level is or will be possible."¹¹⁷ Concluding that a lesser award would constitute sufficient compensation, the court reduced both the amount and duration of the award.¹¹⁸

The Oregon cases demonstrate that it is often difficult to quantify the losses or contributions of a homemaker. To the extent the court is even attempting this task, its approach is unusual. In many states, the contribution factors in maintenance statutes are either ignored, or used only to bolster the case for older displaced homemakers.¹¹⁹

In contrast to the Oregon cases is *Louise v. Louise*,¹²⁰ a case decided in 1989, in which the Appellate Division of the New York Supreme Court rejected this approach entirely. The facts are very similar to those of *Helm*: Charles and Yvonne Louise, both teachers, were married in

116. *Id.* at 427, 776 P.2d at 46-47.

117. *Id.* at 428, 776 P.2d at 47. The trial court had awarded the wife \$1000 per month for two years, \$800 per month for six years, and \$500 per month for an additional 69 months. *Id.* at 427, 776 P.2d at 46. On appeal, the award was modified to provide the initial \$1000 per month for two years, and then \$700 per month for four years and \$500 per month for an additional four years. *Id.* at 428, 776 P.2d at 47.

118. *Id.* The Oregon statute requires that the court consider these factors: "The contribution by one spouse to the education, training and earning power of the other spouse," OR. REV. STAT. § 107.105(1)(d)(C) (1991), and

[t]he extent to which the present and future earning capacity of a party is impaired due to the party's extended absence from the job market to perform the role of homemaker In a case of a party's extended absence from the job market to perform the role of homemaker, where it is likely that the party will never substantially recover from the loss of economic position due to the extended absence, and where the other party has, during the marriage, achieved a substantially advantageous economic position through the joint efforts of the parties, the court may award the disadvantaged party support as compensation therefor, so that the standard of living for the disadvantaged party will not be overly disproportionate to that enjoyed during the marriage, to the extent that that is practicable.

Id. § 107.105(1)(d)(F).

119. As noted above, compensatory language is regularly used in the older homemaker maintenance cases even in jurisdictions with no statute mandating such consideration. *See supra* notes 68-71 and accompanying text. It is possible that the crucial difference between the wives in the two Oregon cases traces to the older homemaker pattern. Although both Mrs. Graf and Mrs. Helm were in their mid-forties, the Helm marriage had lasted 23 rather than 18 years, and the Helm children were 12 and 20 rather than 5 and 12. Mrs. Helm is a better fit with the "older homemaker" pattern. Interestingly, although the Graf children were still young enough to require substantial care and supervision, this factor was apparently not taken into account.

120. 156 A.D.2d 937, 549 N.Y.S.2d 238 (App. Div. 1989).

1962, and although Charles taught throughout the parties' twenty-three year marriage, Yvonne stayed home for ten of those years to raise the parties' children.¹²¹ At the time of the divorce trial, both Charles and Yvonne were teaching, but Charles's gross salary was \$40,000 a year, and Yvonne's was \$28,000. There was "uncontroverted evidence . . . that, if [Yvonne] had remained in teaching throughout the marriage, the salaries would have been approximately the same."¹²²

The trial court took the earning disparity into account, noting:

[T]he parties' difference in income was traceable to the ten-year hiatus in [Yvonne's] teaching career and that "the adjustment in the standard of living of these parties to achieve some parity (after a long-term marriage) can only be achieved by an award of maintenance that will result in comparable incomes."¹²³

Although the New York maintenance statute confers broad discretion on the trial court, the Appellate Division reversed the court's maintenance award to Yvonne Louise, ostensibly because the court had not discussed the factors enumerated in the statute.¹²⁴ Rather than remanding the case for that consideration, the appellate court made its own analysis of the wife's financial situation and concluded as a matter of law that the income inequality between Charles and Yvonne was irrelevant. Because Yvonne was able to support herself at a reasonable level, she was not awarded any maintenance at all.¹²⁵

121. *Id.* at 937, 549 N.Y.S.2d at 239.

122. *Id.*

123. *Id.* at 938, 549 N.Y.S.2d at 239 (citation omitted). In this case, Yvonne Louise's 10 years out of the labor force apparently resulted in a 30% drop in her earning power, substantially more than the average figure of 1.5% per year quoted above. See *supra* note 87 and accompanying text.

124. *Louise*, 156 A.D.2d at 938, 549 N.Y.S.2d at 239. The New York statute has no maintenance threshold, which should make it easier for a trial court's discretionary award to be upheld on appeal. N.Y. DOM. REL. LAW § 236 (McKinney 1986).

Not all New York decisions are so begrudging. In an earlier New York case, in which the parties' incomes were more disparate (\$20,800 and \$100,000 per year), the court not only approved but increased the trial court's maintenance award from \$200 to \$400 per week. As modified, the award still left the husband with an annual income roughly twice the wife's. *Delaney v. Delaney*, 111 A.D.2d 111, 489 N.Y.S.2d 487 (App. Div. 1985).

125. *Louise*, 156 A.D.2d at 938, 549 N.Y.S.2d at 239. The court may have been acting primarily in response to the trial court's suggestion that the parties should have comparable post-divorce incomes; this would explain the difference between the approach taken in *Louise* and the approach in *Delaney*. See *supra* note 124. Income equalization approaches to maintenance have been urged in the literature, e.g., O'Connell, *supra* note 2, at 506-08, and Singer, *supra* note 85, at 1117-21, but they have not gained wide acceptance in appellate courts.

In some jurisdictions, the income-equalization idea has been adopted on a limited basis. Compare *R.E.T. v. A.L.T.*, 410 A.2d 166, 167 (Del. 1979) (holding income equalization appropriate because of parties' "true partnership in every sense of the word" during a 20-year marriage) with *Cathleen C.Q. v. Norman J.Q.*, 452 A.2d 951, 953 (Del. 1982) (holding that despite

Legal commentators have shifted much more quickly than the courts toward a full embrace of reimbursement theories of maintenance.¹²⁶ There is remarkable consensus on this point among writers with otherwise divergent approaches, including Herma Hill Kay, Ira Ellman, and June Carbone and Margaret Brinig. Dean Kay, one of the Reporters of the UMDA, supports the argument for reimbursement of the losses incurred by a spouse who accepts the traditional roles of full-time homemaker and mother, including losses for what she calls the "opportunity cost of child rearing."¹²⁷ Her stance on this issue is significant in part because she has also indicated her general opposition to policies that would "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."¹²⁸

Professor Ellman goes further, arguing that all of the more traditional justifications for spousal support payments after divorce are invalid in a no-fault jurisdiction. In his view, the only legitimate reason to require such payments is to create economic incentives that encourage the efficient specialization and division of labor within a family.¹²⁹ In

30-year marriage, equalization not required where there was no career sacrifice or "active promotion" of spouse's career). Other jurisdictions permit income equalization awards following long-term marriages without mandating such an approach to maintenance. *See, e.g.,* Hall v. Hall, 445 So. 2d 304, 307 (Ala. Civ. App. 1984) (allowing equalization after 22-year marriage and three children); Gardner v. Gardner, 748 P.2d 1076, 1078-80 (Utah 1988) (granting equalization after over 30 years of marriage); Howell v. Howell, 806 P.2d 1209, 1212 (Utah Ct. App. 1991) (permitting equalization after 30-year marriage). In Wisconsin, income equalization is described as the starting point for maintenance awards following long-term marriages. *See, e.g.,* Gerth v. Gerth, 159 Wis. 2d 678, 681, 465 N.W.2d 507, 509 (Wis. Ct. App. 1990). There are also decisions in a number of jurisdictions reversing awards based on this type of approach. *See* Brueggemann v. Brueggemann, 551 S.W.2d 853 (Mo. Ct. App. 1977) (en banc); Hertz v. Hertz, 99 N.M. 320, 657 P.2d 1169 (1983); Gerth v. Gerth, 159 Wis. 2d 678, 465 N.W.2d 507 (Wis. Ct. App. 1990).

Carbone and Brinig characterize the income equalization approaches as "partnership" based. *See* Carbone & Brinig, *supra* note 63, at 1001-04. But they note that one drawback to an income splitting formula is that it does little to foster self-reliance after the divorce. *Id.* at 1004.

126. The argument is particularly strong in cases in which a spouse has suffered measurable career losses. The *Louise* case is remarkable in part because, as in the *Helm* case, the husband's salary was a near-perfect proxy for the wife's caregiver opportunity costs.

127. Kay, *supra* note 63, at 314-19.

128. Kay, *supra* note 1, at 80; *see* discussion *infra* note 215.

129. Ellman, *supra* note 3, at 40-48. Ellman calls this "economically rational sharing behavior," and his article outlines a series of rules designed to identify whether a wife's reduced or eliminated labor force participation is economically efficient and therefore worthy of compensation.

Ellman purports to reject traditional domestic relations principles, as well as the entire corpus of contract, partnership, and restitution law, in favor of his own solution, which seems

many cases, one partner's assumption of traditional domestic roles is efficient in this sense, and in Ellman's theory only those spouses should be compensated for their contributions.¹³⁰

A third illustration comes from recent writing by June Carbone and Margaret Brinig, which draws heavily on the law of contract remedies.¹³¹ Professors Carbone and Brinig describe as "the emerging model" of maintenance a restitution-based system, that "justifies spousal support as compensation for the career sacrifices mothers make in the interests of their children or their husband's career."¹³²

as a result to be a remedy without a right. He criticizes efforts to borrow doctrine from other areas on the basis that those doctrines would require a definition of what behavior is "unjust" in the context of marriage. His own theory might be criticized because it implicitly adopts a different definition of "justice" in the context of marriage, a definition which privileges those who conduct their marriages consistently with the normative world view of Ellman's microeconomic principles.

For a review of Ellman's theory, see Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, in which Professor Schneider argues that Ellman's solution has two defects. One is that "it relies so heavily on economic reasoning, while people do not view marriage entirely in terms of economic advantage, and we do not want them to." *Id.* at 202. The other is that Ellman's "effort to create a manageable justification for alimony forces him to ignore too many concerns that are as much economic as those the theory relies on." *Id.* at 202-03.

Professor Ellman responds to these arguments in a companion piece, Ira M. Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?* 1991 B.Y.U. L. REV. 259, 261 (agreeing with the principle that "a more perfect theory would consider the parties' nonfinancial relations"). By compensating a caregiving spouse for the losses she would incur on divorce, Ellman intends his approach to encourage efficient choices that would otherwise be economically risky.

130. Ellman also considers circumstances in which it is not economically efficient for a mother to step out of the wage labor force and occupy herself with her children, for example, where she could earn more in the labor force than it costs to provide substitute child care. He uses the example of a parent who is an associate in a large metropolitan law firm, but who chooses nevertheless to sacrifice a career in favor of caregiving. Even here, Professor Ellman supports compensatory alimony awards as an incentive for caregiving, on the following theory:

Specific policy rather than broad theory justifies distinguishing this case from the earlier ones The couple's decision to have children is financially irrational in the first place; no matter what arrangement they make for their child care, they would have been financially better off without children. But society relies for its continued existence on couples who make just this financially irrational choice. Moreover, society has an interest in ensuring that children, once born, are properly cared for. Parental care is valued in our culture; it is not merely a lifestyle preference but a traditional ideal.

Ellman, *supra* note 3, at 71-72. This position appears to put Professor Ellman at odds with Dean Kay, who does not favor incentives to encourage traditional economic dependencies. See *infra* note 215.

131. Brinig & Carbone, *supra* note 103, at 890-93; Carbone & Brinig, *supra* note 63, at 986; June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1468-85 (1990).

132. Carbone & Brinig, *supra* note 63, at 986. Carbone and Brinig footnote this statement with the comment that "[t]he courts have been ahead of the scholars in embracing this type of

For the most part, this vision remains a matter of theory and not practice. These writers acknowledge that their views of maintenance or alimony as a vehicle for encouraging certain behaviors in marriage, or for adjusting the parties' "economic equities" on dissolution of their marriage, are fundamentally different from the conception of maintenance reflected in most of the current statutes and the vast body of current case law.¹³³ Although in most circumstances the doctrine continues to limit spousal support remedies to those who are unable to be self-supporting at some approximation of their married lifestyle, the compensatory approach has taken root in one particular setting where it has generated a substantial growth of new rules and practices.

B. Counterpoint: The "Diploma Dilemma"

The argument for a compensatory approach to maintenance law builds on a group of cases in which one partner acquires an economic advantage during the marriage that cannot readily be analyzed or divided as marital or community property. The paradigmatic example is a graduate degree in some lucrative professional field, such as law or medicine. In these "diploma dilemma" cases, courts and legislatures have shifted significantly toward implementation of a compensatory theory.¹³⁴

In these cases, one spouse can claim substantial contributions to the other's career, typically by having worked to support her partner while he completed his education or professional training.¹³⁵ This scenario inspires significant judicial sympathy, particularly in those cases that reso-

thinking," citing two decisions from the mid-1970s, *In re Marriage of Grove*, 280 Or. 341, 351-52, 571 P.2d 477, 484-85 (1977), and *Lash v. Lash*, 307 So. 2d 241, 243 (Fla. Dist. Ct. App. 1975). *Carbone & Brinig*, *supra* note 63, at 986 n.151. Both of these cases, however, involved older housewives and illustrate the principles discussed *supra* at text accompanying notes 56-71. *Lash* is also discussed *infra* at note 180; *Grove* is also discussed *supra* at notes 63, 76 and 103. See also *Carbone & Brinig*, *supra* note 63, at 961 (noting that "divorce system has largely rejected contract and tort, expectation and reliance, in favor of restitution").

133. *E.g.*, *Ellman*, *supra* note 3, at 52 ("This conception of alimony differs fundamentally from prevailing law. It casts alimony as an entitlement earned through marital investment, and as a tool to eliminate distorting financial incentives, and not as a way of relieving need.").

134. *E.g.*, *Stevens v. Stevens*, 23 Ohio St. 3d 115, 116, 492 N.E.2d 131, 132 (1986); *Downs v. Downs*, 574 A.2d 156, 157 (Vt. 1990). Other courts have coined other phrases to describe this fact pattern. For example, the Wisconsin Supreme Court describes these as "university degree-divorce decree" cases. See *Haugan v. Haugan*, 117 Wis. 2d 200, 206, 343 N.W.2d 796, 799-800 (1984).

135. The circumstances reflect a modern twist on what was once celebrated as a wife who had earned a Ph.T., for "Putting Hubby Through." See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 16 (1974 ed.); *Kay*, *supra* note 1, at 74. In these cases, it is still vastly more common to find a wife seeking compensation from a husband who acquired his degree or professional license with her support, but occasionally the claim is made with respect to a wife's

nate with the overtones of fault.¹³⁶ The supporting partner's argument for compensation begins with the economic concept that the advanced degree or professional license represents a valuable type of "human capital."¹³⁷ The dilemma arises because, despite its obvious economic significance, a degree or license is not generally considered to be "property" subject to division in divorce.¹³⁸

The dilemma is sharpest when the supporting partner finds herself in divorce court just as her spouse has arrived at the threshold of a promising career. Because the degree is not valued and "divided," the parties' joint investment in one partner's human capital allows that spouse to leave the marriage in a significantly improved financial position. Moreover, when a divorce occurs at the career threshold, there are rarely any other significant marital assets to be divided to compensate the support-

career enhancement during the marriage. See, e.g., *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250, 259-62 (S.D. 1984).

136. For example, Justice Larsen's dissenting opinion in *Hodge v. Hodge* began by quoting the parties' wedding vows and telling this story:

Reciting these vows on July 15, 1967, appellant . . . married a reluctant bride Appellant had only recently begun his medical training when he made his proposal of marriage, and appellee knew from her experience as a clinical instructor in a hospital that divorce is a plague among physicians upon completion of their education. Appellant assured members of his own family and his in-laws that a goal of his medical education was to provide his wife and family with a decent life. Yet, in August of 1977, with the ink still wet on his license to practice medicine in the Commonwealth, appellant left his wife and three children (then aged 11 months, 2, and 8) to begin his lucrative career as a physician to live in the company of a nurse he had met during his residency program in internal medicine. So much for the promise to be a loving and faithful husband *in plenty* and in want.

513 Pa. 264, 282, 520 A.2d 15, 24 (1986) (Larsen, J., dissenting). The dilemma is recognized, however, in both pure no-fault jurisdictions and those in which fault plays a role. See *Kay*, *supra* note 1, at 74-77 n. 368.

137. Professor Joan Krauskopf was an early proponent of viewing human capital investments as worthy of consideration on divorce. See Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 381-82 (1980). These issues are also reviewed in *Kay*, *supra* note 63, at 312-13.

138. Most jurisdictions have reached this conclusion, many of them citing the Colorado Supreme Court's 1978 decision in *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978). The Colorado court revisited the issue in *In re Marriage of Olar*, 747 P.2d 676 (Colo. 1987), and that opinion cites many cases decided in other jurisdictions during the intervening period. *Id.* at 679. The New York Court of Appeals reached the opposite conclusion in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985), and now treats advanced degrees, professional licenses, and even "celebrity goodwill" as divisible marital property. *Id.* at 583-87, 498 N.Y.S.2d at 746-48, 489 N.E.2d at 715-17. No other state's highest court has followed the New York lead, but some panels of the Michigan Court of Appeals have taken the view that a degree may be marital property. Compare *Krause v. Krause*, 177 Mich. App. 184, 441 N.W.2d 66 (1989) (holding that degree is not property) and *Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359 (1984) (same) with *Postema v. Postema*, 189 Mich. App. 89, 471 N.W.2d 912 (1991) (holding that law degree is property) and *Woodworth v. Woodworth*, 125 Mich. App. 258, 337 N.W.2d 332 (1983) (same).

ing spouse for her contributions.¹³⁹

The "diploma dilemma" is created by the fact that the supporting spouse is also unlikely to receive maintenance. Typically, the parties' standard of living during this type of marriage is fairly minimal, due to the expenses of education and the fact that one partner had minimal earnings.¹⁴⁰ When the marriage ends, the court cannot award conventional, need-based alimony because the supporting spouse has amply demonstrated her ability to be self-reliant by working while her partner acquired his degree.¹⁴¹

In dozens of cases addressing the "diploma dilemma," courts in different jurisdictions have invented new remedies, labeled with titles such as "property division alimony,"¹⁴² "reimbursement alimony,"¹⁴³ "equitable restitution,"¹⁴⁴ or "equitable redemption alimony."¹⁴⁵ In some states, reimbursement approaches directed to the diploma problem have been incorporated in maintenance and property division statutes.¹⁴⁶

Unlike the shifts in case law that have begun to protect older

139. Many cases note that an unequal division of other marital assets may be used to compensate the supporting spouse, at least where such assets have been accumulated. *See, e.g., Graham*, 194 Colo. at 433, 574 P.2d at 78 (finding that contributions to the education of the other spouse should be considered in dividing marital property).

140. In cases in which the parties have remained married long enough to enjoy the increased earnings and lifestyle that accompany professional success, conventional maintenance awards may be possible because of the parties' increased standard of living. *But see Sweeney v. Sweeney*, 534 A.2d 1290, 1292 (Me. 1987) (holding reimbursement alimony inappropriate where parties had enjoyed benefits of increased earnings during marriage).

141. The dilemma sharpens under statutes with a strict threshold test for maintenance eligibility. *See supra* notes 3-4 and accompanying text. This is noted in *Mahoney v. Mahoney*, 91 N.J. 488, 506 n.6, 453 A.2d 527, 536 n.6 (1982), and *Petersen v. Petersen*, 737 P.2d 237, 241-42 (Utah Ct. App. 1987). *But see infra* note 157 (noting that courts have approved awards to pay the supporting spouse's educational costs through "expansive" statutory interpretations).

142. *See infra* notes 148-51 and accompanying text.

143. *See infra* note 152 and accompanying text.

144. This remedy existed briefly in Utah following the Court of Appeals decision in *Martinez v. Martinez*, 754 P.2d 69 (Utah Ct. App. 1988), *rev'd*, 818 P.2d 538 (Utah 1991). In a nondegree case, a superior court in Pennsylvania described an award, intended to compensate the wife for her assumption of \$34,000 in marital debt, as "equitable reimbursement" of the husband's share of that debt. *Zullo v. Zullo*, 395 Pa. Super. 113, 123, 576 A.2d 1070, 1075 (1990), *aff'd*, 613 A.2d 544 (Pa. 1992).

145. *E.g., Stevens v. Stevens*, 23 Ohio St. 3d 115, 125 n.12, 492 N.E.2d 131, 139 n.12 (1986) (Douglas, J., dissenting).

146. California led the field in this category with enactment in 1984 of CAL. CIV. CODE § 4800.3 (Supp. 1992), which requires that the marital community be reimbursed for "community contributions to education or training of a party that substantially enhances the earning capacity of the party." *Id.* Indiana has also addressed the problem with a statute. *See IND. CODE* § 31-1-11.5-11 (Supp. 1991).

wives,¹⁴⁷ movement in this area has required courts to confront the basic theoretical position of modern maintenance statutes. The concern for reimbursement has nothing to do with the dichotomy between dependence and self-reliance that characterizes most maintenance decisions. The courts' dilemma arises precisely because the supporting partner is not in need.

One of the earliest cases approving special compensation for a supporting spouse is *Hubbard v. Hubbard*,¹⁴⁸ decided in Oklahoma in 1979. After determining that Dr. Hubbard's medical degree and license were not divisible as property, the court stated: "This determination does not mean, however, that Ms. Hubbard is thereby precluded from receiving an award in lieu of property division, for this case presents broad questions of equity and natural justice which cannot be avoided on such narrow grounds."¹⁴⁹

The Oklahoma court based its solution on restitution concepts; it held that the wife had "an equitable claim to repayment for the investment she made in [her husband's] education and training," because "to hold otherwise would result in the unjust enrichment of Dr. Hubbard."¹⁵⁰ The court remanded for a determination of the amount of the wife's contributions to her husband's "direct support and school and professional training expenses, plus reasonable interest and adjustments for inflation as and for property division alimony."¹⁵¹

Rather than adopting restitution-based theories, some jurisdictions have turned to the "reimbursement alimony" concept developed by the New Jersey Supreme Court:

To provide a fair and effective means of compensating a

147. See *supra* notes 56-71 and accompanying text.

148. 603 P.2d 747 (Okla. 1979).

149. *Id.* at 750.

150. *Id.*

151. *Id.* at 752. Jurisdictions adopting an unjust enrichment approach vary widely on the types of benefits that are subject to reimbursement on divorce. In some, direct contributions (to educational costs) are distinguished from indirect contributions (for living expenses), and only direct contributions are held to require reimbursement. The California statute, see *supra* note 146, has been construed narrowly in this manner. *In re Marriage of Sullivan*, 37 Cal. 3d 762, 767, 691 P.2d 1020, 1023, 209 Cal. Rptr. 354, 356 (1984) (construing statute to permit only compensation to the marital community for out-of-pocket expenditures for a spouse's education). The majority's narrow reading of the statute is criticized in the concurring and dissenting opinion, *id.* at 770-71, 691 P.2d at 1025, 209 Cal. Rptr. at 359 (Mosk, J., concurring in part and dissenting in part), and in *Kay*, *supra* note 63, at 314-15. Professor Kay argues that the better approach would be to compensate the loss incurred by the supporting spouse. *Id.* at 315-16. In another group of states, however, the educated spouse may be required to reimburse all educational and living expenses paid by the supporting spouse. *E.g.*, *DeLaRosa v. DeLaRosa*, 309 N.W.2d 755, 759 (Minn. 1981); *Mahoney v. Mahoney*, 91 N.J. 488, 501, 453 A.2d 527, 534 (1982).

supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony into divorce proceedings. . . . Such reimbursement alimony should cover all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.¹⁵²

Although the restitution and reimbursement cases reflect more willingness to grant compensation to one marital partner, they also reflect deep tension between the economically rooted notion of restitution and the courts' ideal of marriage. Courts determined to compensate the supporting spouse in diploma dilemma cases have come up with theories that allow reimbursement, but they have also wrestled with restitution and family law principles in an effort to identify what types of losses or

152. *Mahoney*, 91 N.J. at 501, 453 A.2d at 534; *see also* *Hill v. Hill*, 91 N.J. 506, 453 A.2d 537 (1982); *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982) (companion cases). A number of other states have followed New Jersey's lead and created a similar new equitable remedy. *See, e.g.*, *Hoak v. Hoak*, 179 W. Va. 509, 370 S.E.2d 473 (1988).

In a number of these cases, the practical effects of how a compensatory award is characterized have received significant attention. The distinction between alimony and property division has important consequences within family law and under the federal bankruptcy and tax codes. Because of these difficulties, neither remedy is completely satisfactory in resolving the dilemma. Some judges have urged creation of entirely new remedies, *see, e.g.*, *Stevens v. Stevens*, 23 Ohio St. 3d 115, 125 n.12, 492 N.E.2d 131, 139 n.12 (1986) (Douglas, J., dissenting) (suggesting "equitable redemption alimony"), while others have suggested that "reimbursement alimony" may have different legal attributes from conventional alimony. The need to identify these consequences is clear in the New Jersey Supreme Court's opinion in *Mahoney*, which left for future cases the resolution of whether and when a "reimbursement" award may be modified. *Mahoney*, 91 N.J. at 503 n.5, 453 A.2d at 535 n.5; *see* *Reiss v. Reiss*, 205 N.J. Super. 41, 47, 500 A.2d 24, 27 (N.J. Super. Ct. App. Div. 1985) (holding reimbursement alimony not terminable on remarriage); *see also* *Washburn v. Washburn*, 101 Wash. 2d 168, 183, 677 P.2d 152, 160 (1984) (holding maintenance award not terminable on death or remarriage).

Another approach is to enter awards with two separate components, one that is rehabilitative and the other as reimbursement. *See In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989). *Francis* is interesting because it reflects the intersection of the caretaking problem, the diploma dilemma, and the concern for rehabilitation. The court noted that the husband proposed marriage on the day he was admitted to medical school, and that the parties were married six years, during which time they had two children and the husband completed medical school and his two year residency. *Id.* at 61. Finding that the husband's increased earning potential was a factor properly considered in awarding a combination of reimbursement and rehabilitative alimony, the court also noted:

Diana may have a master's degree, but she has devoted the last six years of her life to raising her own children and caring for three others at the rate of \$230 per week. It is not fair to expect that she support herself in this way indefinitely, nor is it realistic to assume that she will become immediately marketable in some more lucrative endeavor.

Id. at 66-67.

contributions should be reimbursed. As a result, the cases vary significantly in their definitions of the types of marital support for which compensation may be ordered. At a minimum, reimbursement remedies cover the actual costs of a partner's education and professional training: tuition, books, and fees.¹⁵³ Some remedies extend further to include payments for the educated partner's living expenses.¹⁵⁴ Most courts specify that compensation is not appropriate for homemaking rather than financial support.¹⁵⁵

In some jurisdictions, courts compute restitution awards or reimbursement alimony far more broadly, including the lost earnings of the spouse who was educated during the marriage.¹⁵⁶ In others, courts have computed their awards based on the lost opportunities of the spouse who worked instead of attending school. This leads in some cases to an award intended to cover the costs of an "equal educational opportunity" for the supporting spouse.¹⁵⁷ In the most extreme cases, courts have authorized reimbursement remedies based on the present value of the educated spouse's increased future earnings. This method renders the "reimbursement" award indistinguishable from a property division award valuing and "dividing" the degree or license itself.¹⁵⁸

These distinctions echo familiar doctrines from the law of restitution, which has traditionally denied recovery for benefits conferred within the family, a setting in which parties act with presumably gratuitous intent or out of legal obligation.¹⁵⁹ Because of the lingering influ-

153. See *supra* note 151 (discussing California statute).

154. *Id.* (discussing cases addressing reimbursement of living expenses).

155. *E.g.*, *Wisner v. Wisner*, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ariz. Ct. App. 1981).

156. *E.g.*, *Haugan v. Haugan*, 117 Wis. 2d 200, 211-15, 343 N.W.2d 796, 802-03 (1984) (providing four alternate approaches to computing an award).

157. This result can be achieved even in states with a strict threshold test for maintenance through expansive reading of the term "appropriate employment." See, *e.g.*, *In re Marriage of Olar*, 747 P.2d 676, 681-83 (Colo. 1987). This type of award has been approved in Arizona, with the further requirement that the spouse demonstrate an agreement during the marriage that each would have an opportunity to be supported through further education. Compare *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196 (Ariz. Ct. App. 1982) (finding restitution award appropriate based on evidence of parties' agreement), *reh'g denied, rev. denied* (1983) with *McDermott v. McDermott*, 129 Ariz. 76, 628 P.2d 959 (Ariz. Ct. App.) (finding restitution inappropriate in light of statutory constraints), *reh'g denied, rev. denied* (1981).

158. *E.g.*, *Haugan*, 117 Wis. 2d at 214-15, 343 N.W.2d at 803. Justice Callow, concurring, disagreed that this was an appropriate method of computing an award. *Id.* at 221-23, 343 N.W.2d at 806-07 (Callow, J., concurring).

159. See Carol S. Bruch, *Property Rights of DeFacto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 109-10 (1976); Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 52-54 (1978); Harold C. Havighurst, *Services in the Home—A Study of Contractual Concepts in Domestic Relations*, 41 YALE L.J. 386, 402 (1932); see also Carbone, *supra* note 131, at 1477-80; Jane Messey Draper, Annotation, *Recovery For Services Rendered By Persons*

ence of this law, the diploma dilemma cases may be almost useless as authority for a caregiver seeking recognition and compensation for her contributions.

Restitution principles have had success in the diploma context primarily because courts can identify an academic degree or a professional license as something of clear economic value, a "benefit" akin to those recognized in commercial settings. Because a bright line has traditionally excluded family work from these principles, it is much harder to conclude that well cared-for children are valuable in this sense, or to recognize as a significant benefit the freedom to pursue an education or career without the pull of conflicting family demands.

The distinctions made in restitution law correspond with deeply held beliefs. Popular attitudes about what really "counts" as a benefit are roughly congruent with the definition of benefit emerging in the maintenance law. Lenore Weitzman's surveys included a hypothetical diploma dilemma case: wife, age twenty-nine, is a nurse who provided primary support for the parties for ten of the eleven years of their marriage while her husband, now age thirty-one, went through college, medical school, and his internship and residency years. A majority of the survey respondents thought alimony was appropriate for a wife who had helped her husband get ahead "because they are really partners in his work."¹⁶⁰ But very few agreed that a spouse should be awarded alimony in return for years of work as a homemaker or mother, or as compensation for the opportunities she may have missed to have her own career.¹⁶¹

Both courts and public opinion seem to favor post-marital compensation only for marital financial support, the type that can be provided by a self-reliant, economically independent partner. The only enrichment

Living in Apparent Relation of Husband and Wife Without Express Agreement for Compensation, 94 A.L.R.3D 552, 559 (1979) (concerning recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation); Jane Messey Draper, Annotation, *Establishment of "Family" Relationship to Raise Presumption that Services Were Rendered Gratuitously, As Between Persons Living in Same Household But Not Related By Blood or Affinity*, 92 A.L.R.3D 726, 733 (1979) (concerning the establishment of a "family" relationship to raise the presumption that services were rendered gratuitously as between members of the same household).

160. See WEITZMAN, *supra* note 7, at 151. Fifty-four percent of the men and sixty-eight percent of the women surveyed subscribed to this view. *Id.* The awards predicted by the lawyers and judges surveyed were quite modest, however. Seventy percent of the lawyers and judges predicted that the wife would get some support, but most thought it would be for a short term. Their average prediction was \$338 per month for three years. *Id.* at 166.

161. In the first category, 19% of men and 25% of women approved of alimony, and in the second, only 4% of men and 20% of women found alimony justified. WEITZMAN, *supra* note 7, at 152-53.

that seems unjust is enrichment with a tangible economic result.¹⁶² But what is it that makes the personal contribution and sacrifice involved in caregiving so different from working to put a spouse through medical school? Why is it that popular and judicial opinion approve of compensating one, but not the other?

The real dilemma in the diploma cases is the tension between traditional restitution principles and traditional views of the family.¹⁶³ This is reflected in a running debate among the members of the appellate courts of Pennsylvania regarding whether one spouse's general financial support can ever be deemed to have "unjustly enriched" the other spouse, given that the spouses have a legal obligation to support each other.¹⁶⁴ It is also reflected in other jurisdictions, in opinions questioning whether restitution doctrines can ever properly be applied in the context of marriage, given that fault-based principles have been abandoned in the law of divorce.¹⁶⁵

162. Although some of the statutes cited *supra* note 99 direct consideration of intangible, nonmonetary, or noneconomic contributions, there are no published decisions construing this language. See N.H. REV. STAT. ANN. § 458:19 IV (Supp. 1992) ("non-economic contribution of each spouse to the family unit"); TENN. CODE ANN. § 36-5-101(d)(10) (Supp. 1990) ("tangible and intangible contributions"); VA. CODE ANN. § 20-107.1 (Michie 1990) (Factor no. 6: "monetary and nonmonetary contributions to the well-being of the family").

163. A related argument is presented at some length in Carbone, *supra* note 131, at 1468-71.

164. In one case, a Pennsylvania Superior Court reversed an "equitable reimbursement" award to a supporting wife, concluding that she had not shown she contributed any more than was legally due, and noting that "[m]arriage is not a business enterprise which requires a strict economic accounting for all financial aid rendered during its course." *Bold v. Bold*, 374 Pa. Super. 317, 328, 542 A.2d 1374, 1379 (1988), *rev'd*, 524 Pa. 487, 574 A.2d 552 (1990). Wife's award was \$33,000, defined as the greater amount she had invested in the parties' marriage. The court went on to state that "each party owes the other a duty of support . . . [E]quity will intervene only when one party has been unjustly enriched by financial contributions rendered which exceed that imposed by law." *Id.*; see also *Lehmicke v. Lehmicke*, 339 Pa. Super. 559, 574, 489 A.2d 782, 790 (1985) (Wieand, J., concurring in part and dissenting in part) (arguing that restitutionary remedy appropriate only for "sums advanced in excess of the legal duty of support"). The Pennsylvania Supreme Court in *Bold* reinstated the original award, rejecting the strict restitutionary approach of the intermediate court: "Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, 'jettisoned' as soon as the need for their sacrifice, in part a legal obligation, comes to an end." *Bold*, 524 Pa. at 495, 574 A.2d at 556. Justice Zappala filed a dissenting opinion, adhering to the view that only contributions to direct educational expenses should be reimbursed. *Id.* at 499, 574 A.2d at 557-58 (Zappala, J., dissenting).

165. For example, in a pair of cases decided in Washington in 1984, the supreme court rejected the use of unjust enrichment principles for this reason: "To require trial courts to determine whether the student spouse had been *unjustly* enriched by the efforts of the supporting spouse would invite the introduction of evidence as to who was at fault in the termination of the marriage before the fruits of the degree could be realized." *Washburn v. Washburn*, 101 Wash. 2d 168, 176, 677 P.2d 152, 157 (1984). The court nonetheless allowed compensation, in the form of maintenance, under the "extremely flexible provisions" of the state's maintenance

These cases articulate a deep concern that the courts should not demean the institution of marriage by "commercializing" it.¹⁶⁶ Even as their opinions demonstrate a struggle to expand the territory in which contributions to a marriage may be measured and reimbursed, their language reveals a deep discomfort with the entire project of compensation. Many of these decisions include disclaimers, insisting that the new remedy is not equivalent to treating marriage as a "business arrangement,"¹⁶⁷ a "strictly financial undertaking,"¹⁶⁸ or a "closely held

statute. *Id.* at 178, 677 P.2d at 158. In determining the amount of such an award, the trial courts were directed to consider not only the community funds expended for direct educational costs, but also the educated spouse's lost earnings, the educational or career opportunities the supporting spouse gave up, and the future earning prospects of each spouse. *Id.* at 179-80, 677 P.2d at 159.

166. This is one rationale for the traditional rule that obligations between the parties to an ongoing marriage cannot be varied by contract. *E.g.*, *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940); see RESTATEMENT OF THE LAW OF CONTRACTS § 587 (1932). For a recent illustration, see *Mathiasen v. Naughton*, 268 Cal. Rptr. 895 (Cal. Ct. App.), *rev. denied and ordered not to be officially published* (Cal. 1990), which denied enforcement of a prenuptial agreement providing that the parties would contribute equally to their shared support, and that any excess contributions of one party would be reimbursed in the event of divorce.

167. According to the New Jersey Supreme Court:

This court does not support reimbursement between former spouses in alimony proceedings as a general principle. Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather as we have said, "marriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership." . . . But every joint undertaking has its bounds of fairness.

Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) (citations omitted). This paragraph is widely quoted in opinions that have borrowed the reimbursement alimony concept. *See, e.g.*, *Washburn*, 101 Wash. 2d at 181-82, 677 P.2d at 159-60; *Hoak v. Hoak*, 179 W. Va. 509, 514, 370 S.E.2d 473, 478 (1988). As stated by the West Virginia Supreme Court: "Marriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household." *Id.* In the words of the Pennsylvania Supreme Court: "While we agree with the Superior Court that marriage is not a business enterprise in which strict accountings are to be had for moneys spent by one spouse for the benefit of the other, it appears to us that this case does not involve strict accountings, but gross accountings." *Bold*, 524 Pa. at 495, 574 A.2d at 556. In Wisconsin, the supreme court has objected to "treat[ing] the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of another's professional training, expecting a dollar for dollar return." *In re Marriage of Lundberg*, 107 Wis. 2d 1, 7-8, 318 N.W.2d 918, 921 (1982) (quoting *DeWitt v. DeWitt*, 98 Wis. 2d 44, 57, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980)).

168. The Arizona Court of Appeals stated:

By our decision herein, we reject the view that the economic element necessarily inherent in the marital institution (and particularly apparent in its dissolution) requires us to treat marriage as a strictly financial undertaking upon the dissolution of which each party will be fully compensated for the investment of his various contributions. When the parties have been married for a number of years, the courts cannot and will not strike a balance regarding the contributions of each to the marriage and then translate that into a monetary award. To do so would diminish the individ-

corporation."¹⁶⁹

Some commentators also reject restitution-based principles. Drawing from the experience of his own marriage, Robert Levy calls the suggestion that a supporting spouse is "investing" in his partner's "human capital" offensive, because it violates the "proper moral norm" governing marital rights and obligations.¹⁷⁰ And although Ira Ellman supports a type of compensatory remedy on a different theoretical ground, he argues that to apply the law of unjust enrichment to divorce requires consideration of marital fault.¹⁷¹

Although the doctrine developing around marital reimbursement or restitutionary alimony awards demonstrates a predominant concern with traditionally "valuable" services or benefits, the goal of recognizing contributions and lost opportunities within the family does not require the application of a commercial or economic value system. As Herma Hill Kay points out, the restitutionary approach to compensation, which requires some valuation in monetary terms, is different from traditional community property law, which draws its justice from the norms of sharing and family life and views the value of a wife's services as entirely immaterial to her claim.¹⁷² Many property division statutes are based on the notion that the economic quality or quantity of each party's contribu-

ual personalities of the husband and wife to economic entities and reduce the institution of marriage to that of a closely held corporation.

Pyeatte v. Pyeatte, 135 Ariz. 346, 347, 661 P.2d 196, 207 (Ariz. Ct. App. 1982).

169. *Id.*

170. Professor Levy writes:

[O]ur marriage, and the commitment it entailed, signaled an undertaking to do all that we could, individually and together, to satisfy both our collective and our individual ambitions. . . . I would no more want a return on her tuition expenditure than my wife would be likely to demand recompense for money or time spent on my physical care if I had suffered poor health during the course of our marriage.

Levy, *supra* note 55, at 64. Levy also offers an account verging on a parody of how a judge might come up with an appropriate compensatory award. *Id.* at 67.

Although it may be cynical, I would suggest that the "idealized, even . . . romantic, view of marital rights and obligations" Levy holds is of significantly greater pecuniary benefit to the "post-dissolution financial condition of divorced male professionals" than it is to the "non-degreed, non-professional (currently mostly female) spouses." *Id.* at 63, 64.

171. Ellman, *supra* note 3, at 24-28; see also Sugarman, *supra* note 78, at 156-59 (arguing that "unjust enrichment is the wrong way to think about divorce"). Carbone and Brinig believe that Ellman's theory is in fact restitution-based. Carbone & Brinig, *supra* note 63, at 998 & n.200. Ellman, on the other hand, has emphasized the "reliance" nature of the losses his theory would compensate. Ellman, *supra* note 129, at 271-77, 287-88.

172. Kay points out that the two successive versions of the UMDA reflect these two distinct approaches, and she believes that the shift toward a restitutionary theory in the redrafted comments to the 1973 version demonstrates a misunderstanding of traditional community property law. Kay, *supra* note 1, at 49-50.

tions is irrelevant to the division of marital property.¹⁷³ If these sharing principles could be brought into the reimbursement theories, the theories would have significantly greater potential for caregivers.

Lawyers encounter difficulty in conceptualizing marriage as a financial relationship, and the difficulty is greatest in those areas of family life defined by tangles of love and obligation: raising children, preparing family meals, working to be a "good provider"—keeping groceries on the table and a roof overhead. These contributions transcend everyday economic life, and the narrow reach of restitution rules. But to set them aside as beyond the grasp of concepts like "justice" is to abandon the family law policy of valuing all of the contributions a husband and wife make during their life together. The real dilemma is how to understand a relationship in both moral and economic terms, and in the case law this dilemma goes entirely unaddressed.¹⁷⁴ The doctrine isolates the degree cases as a narrow, exceptional class, rather than acknowledging the enormity of the conceptual problem they create.

IV. THE DISAPPEARANCE OF FAMILY CARE

Parts II and III of this Article have demonstrated that courts give little weight to caregiving values in the financial aspects of contemporary divorce. In light of the dominant paradigm of family life, this is surprising. Popular and sociological thought views the family as an institution serving two essential functions: accommodating the care, nurture, and socialization of children, and providing adults with a place of refuge from the rigors of public social and economic life.¹⁷⁵ Both of these functions place caregiving at the heart of family life.

Karl Llewellyn and others have argued that we cannot know what marriage means in a society until we understand the causes and conditions of divorce.¹⁷⁶ Our law of divorce suggests that contemporary mar-

173. This is common even in jurisdictions with statutes directing a court to consider each party's respective contributions in dividing marital property. See, e.g., *In re Marriage of Palanjian*, 725 P.2d 1167, 1169 (Colo. Ct. App. 1986) (sustaining award to wife of almost half of all marital property despite fact that wife made little contribution to marriage because of her mental illness).

174. See Schneider, *supra* note 129, at 235-43 (arguing that it is difficult and perhaps impossible to find a "morally neutral basis for the law of alimony"); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809-11 (1985) (describing a trend of "diminished moral discourse" in divorce law).

175. See Talcott Parsons, *The Kinship System of the Contemporary United States*, in *ESSAYS IN SOCIOLOGICAL THEORY* 177 (Talcott Parsons ed., rev. ed. 1954). For criticism and analysis of Parsons's theories, see CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 108-09 (1988) and CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* *passim* (1977).

176. See Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 *pas-*

riage is not about family life, but about individual self-interest.¹⁷⁷ Viewed through the lens of alimony and maintenance law, the deeper values of family life disappear from the picture. Apparently, family values are important only as far, and as long, as each individual is interested in sharing a household. When that interest fades, all that remains is a framework of legal rights, in which fairness is only a matter of autonomy and self-interest.

Many writers have explored the process by which the norms of self-interest have displaced the moral underpinnings of family life.¹⁷⁸ In the discussion that follows, this Article suggests that two intellectual mistakes have facilitated a similar transformation in the law of maintenance and alimony. One mistake is the conclusion that family care exists only in a "traditional" homemaker/breadwinner marriage, and that those families have become obsolete. A second mistake is the assumption that because family care is sustained by love, it has no legal, economic, or political significance.

A. *Generation Gaps*

In both judicial thought and public opinion, the central difference between those who seem to deserve maintenance and those who do not lies in whether or not the self-reliance norm is applied. For younger women, self-support simply has come to be expected; for older housewives, it is not. Financial dependence within the family is misunderstood as a simple and transient problem, the result of a time-lag or generation gap during which some women's behavior and life choices are out of sync with modern norms. In this view, the problem of dependence will disappear once older social expectations are replaced by more contemporary

sim (1932) [hereinafter Llewellyn I]; Karl N. Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249 *passim* (1933) [hereinafter Llewellyn II]; Carbone & Brinig, *supra* note 63, at 954.

177. Compare Justice Douglas's description of marriage in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.") with Justice Brennan's reinterpretation of *Griswold* in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

178. *E.g.*, ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). In the legal literature, see, for example, Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, and Schneider, *supra* note 174. Schneider draws significantly from the wider literature in the field, including works by Christopher Lasch, Philip Rieff, and Robert Bellah. *Id.* at 1807 n.5, 1843-45.

values. Thus the law recognizes the completed caregiving of older wives, but not the ongoing efforts of younger caregivers.

Judicial attitudes toward women who became homemakers before 1970 are vastly different than attitudes towards those women who made that choice after 1980.¹⁷⁹ Sensibly enough, judges accept the view that it is not fair to "change the rules in the middle of the game" by subjecting women who were married before the spread of new divorce rules to the stringency of the law's new self-reliance policy. But the generation gap approach to dependence allows the norms of self-reliance to displace all other values, including family care. The courts ignore the possibility that caregiving still creates economic dependence within the family.

Under maintenance laws that emphasize financial need due to an inability to be self-supporting, the claim of a young caregiver, perhaps well educated, with at most a few years' absence from the labor force, is not particularly compelling. With relatively recent credentials and work experience, she is unlikely to be able to cast herself in the role of the needy and dependent spouse. The short duration of her marriage seems to suggest that her circumstances cannot have changed very much from her position as a single woman, and that postmarital financial support would therefore be a windfall, undeserved and unseemly.¹⁸⁰

On the other hand, the fact that the caregiver has had children during the marriage changes her circumstances enormously, a change that divorce aggravates rather than cures. Through the lens of divorce law, however, her commitment to family care rather than employment appears to have been an individual lifestyle choice, one she was privileged to make by virtue of her partner's consent. Once the marriage ends,

179. The wave of divorce reform legislation across the country began in California in 1969, with legislation that became effective the following year, and in Iowa in 1970. See JACOB, *supra* note 1, at 59, 92, 94-96. Weitzman's data provide some additional evidence that 1970 was a watershed year. Her study found that the key variable in predicting which women with children were awarded support in 1977 was not the age of the children or the age of the wife, but whether the wife had been married for ten years or more. WEITZMAN, *supra* note 7, at 185-86.

180. See, for example, *Lash v. Lash*, 307 So. 2d 241 (Fla. Dist. Ct. App. 1975), in which the court reversed a limited term alimony award. The court stated:

Where the parties are still quite young and have only been married a short period of time, a judge is understandingly reluctant to saddle the husband with the obligation of making permanent alimony payments for the rest of his life. At this point the wife is hardly in any different position than she was before she was married. However, in those cases where the dissolution comes about after many years of marriage, there are different circumstances to be considered.

Id. at 243. Although the wife in *Lash* was only 44, the parties had been married for 26 years, and the court emphasized her limited opportunities compared to her husband's. *Id.* at 242-43.

however, that choice and its consequences are no longer seen as significant.

As noted above, a spouse seeking maintenance often must establish initially that she is unable to be self-supporting.¹⁸¹ By their terms, the statutes allow proof of custodial obligations to satisfy this burden. But a caregiver parent loses for another reason: there is a second threshold, created not by statute but by the norms of self-reliance, that is far more difficult to cross.

The burden of persuasion against the normative bias of the law is extremely difficult to carry. The statistics on women's labor force participation, whether considered implicitly or explicitly, are virtually sufficient to defeat the maintenance claims of women under forty-five.¹⁸² As of 1990, fifty-eight percent of preschool children and sixty-five percent of children ages six to thirteen had mothers who were employed or looking for work outside the home.¹⁸³ Faced with such data, it is much harder for a court to conclude that the "condition or circumstances" of even young children meets the statutory test: is it appropriate that this child continue to have a full- or part-time caregiver in the home?¹⁸⁴

The language of the caregiver decisions, and the changes in that language over the past fifteen years, demonstrate this shift in perception. In 1978 or 1979, courts could assert flatly that a mother's "place is in the home with her children," "that raising four small children is a full-time task," that a mother's choice to remain at home with children was made to "care for them properly," or that a mother's guidance is "vitaly needed in the early and teen years" of her children's lives.¹⁸⁵ Within a few years, however, their language changed unmistakably. Continuing in the caregiver role after divorce may be acceptable if it is an "appropriate

181. See *supra* notes 3-4 and accompanying text.

182. Litigation of maintenance claims typically focuses heavily on proof directed to the question of a spouse's employment prospects and earning potential. These matters are often established by means of a rehabilitation expert's vocational evaluation, which may include interest testing and research into particular employment opportunities in the relevant labor markets. For an outline of proof, without the aid of expert testimony, that a wife has the ability to support herself, see George A. Locke, *Wife's Ability to Support Herself*, 2 AM. JUR. PROOF OF FACTS 2D 99 (1974).

183. Judith T. Younger, *Light Thoughts and Night Thoughts on the American Family*, 76 MINN. L. REV. 891, 892 (1992) (citing NATIONAL COMM'N ON CHILDREN, FINAL REPORT, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 21-22 (1991)). Of the employed mothers, almost 70% of those whose youngest child is a preschooler and more than 74% of mothers whose youngest child is school-age work full-time. *Id.*; see also ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 2 (1989) (citing data on working women as of 1986).

184. *But see supra* note 41 (discussing argument that only children with special needs require a caregiver in the home).

185. See *supra* notes 23-25, 31, and 44 and accompanying text.

choice . . . like a career choice," if it reflects "a lifestyle" the parties have adopted, or if it is "economically feasible." Working part time may be approved because it allows a mother to be "more of a homemaker" while her children are young, and accommodates the "time constraints" of child care responsibilities.¹⁸⁶

Here again, empirical findings bear out the inference from the case law. The judges surveyed by Weitzman explained their preference that young divorced mothers return to the labor force on several grounds: because work was seen as healthy, and remaining dependent was not; because of pure economic necessity; and because "the combination of work and motherhood was viewed as normal and thus a reasonable expectation of a divorced mother."¹⁸⁷ Recent family law legislation suggests that state legislatures have also come to share this view. Child support guidelines in some jurisdictions now virtually require that both parents of a child will be in the labor force, often as early as the child's second birthday.¹⁸⁸

These legal developments track popular stereotypes of family life. In the period since the advent of no-fault divorce laws, the "new working mother" has made her debut in academia and the media, often in an idealized glow.¹⁸⁹ This literature has also swung to the other extreme,

186. See *supra* notes 27, 37, & 38 and accompanying text.

187. WEITZMAN, *supra* note 7, at 187.

188. For example, the Colorado guidelines require a determination of potential income for a "voluntarily unemployed" parent, unless that parent is "physically or mentally incapacitated or is caring for a child two years of age or younger for whom the parents owe a joint legal responsibility." COLO. REV. STAT. § 14-10-115(7)(b)(I) (Supp. 1992). As interpreted by the state's court of appeals, however, there may be some flexibility to this test: The court has held that a caretaking parent who is going to school in order to return more productively to the labor force need not be deemed "voluntarily unemployed" for purposes of the statute. *In re Marriage of Nordahl*, 834 P.2d 838, 843 (Colo. Ct. App. 1992).

The predominant model for state child support guidelines is the "income shares" approach. This is based on data reflecting direct expenditures for child-rearing. Ironically, given Professor Levy's original conception of support for a caretaking parent as properly included within child support payments, see *supra* note 41, the formula makes no allowance for the caregiver's support. See David L. Chambers, *Commentary: Meeting the Financial Needs of Children*, 57 BROOK. L. REV. 770, 772-73 (1991); Williams, *supra* note 6, at 163-64 (referring to THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES* (1984)).

189. *E.g.*, Anita Shreve, *The Working Mother as Role Model*, N.Y. TIMES, Sept. 9, 1984, § 6 (Magazine), at 38. As described by Arlie Hochschild:

She is not the same woman in each magazine advertisement, but she is the same idea. She has that working-mother look as she strides forward, briefcase in one hand, smiling child in the other. Literally and figuratively, she is moving ahead. Her hair, if long, tosses behind her; if it is short, it sweeps back at the sides, suggesting mobility and progress. There is nothing shy or passive about her. She is confident, active, "liberated." She wears a dark tailored suit, but with a silk bow or colorful frill that says, "I'm really feminine underneath." She has made it in a man's world without

however, pitting the character of "superwoman" in mortal combat against another idealized character, the "traditional homemaker."¹⁹⁰ The housewives portrayed in this writing border on caricature, evoking the world of 1950s television comedies.¹⁹¹ Describing homemakers in these anachronistic terms subtly reinforces the message that real caregiving is now obsolete. At the same time, this suggests that the domain of work is entirely incompatible with taking proper care of a family.¹⁹² Many media reports present vivid accounts of the ragged underside of the "superwoman" phenomenon, particularly in the stories of women who had chosen to leave their jobs after the birth of a first or second child.¹⁹³

sacrificing her femininity. And she has done this on her own. By some personal miracle, this image suggests, she has managed to combine what 150 years of industrialization have split apart—child and job, frill and suit, female culture and male.

HOCHSCHILD, *supra* note 183, at 1.

Media attention was built upon a significant body of more sociological writing. *See, e.g.*, CAROLINE BIRD, *THE TWO-PAYCHECK MARRIAGE: HOW WOMEN AT WORK ARE CHANGING LIFE IN AMERICA* (1979); LOIS W. HOFFMAN & F. IVAN NYE, *WORKING MOTHERS* (1974); LYNDA L. HOLSTRUM, *THE TWO-CAREER FAMILY* (1972); JOSEPH H. PLECK, *WORKING WIVES/WORKING HUSBANDS* (1985); RHONA & ROBERT N. RAPAPORT, *DUAL-CAREER FAMILIES* (1976).

The upbeat approach to a working mother as superwoman has not disappeared from popular or academic writing. *See, e.g.*, FAYE J. CROSBY, *JUGGLING: THE UNEXPECTED ADVANTAGES OF BALANCING CAREER AND HOME FOR WOMEN AND THEIR FAMILIES* (1991); Harriet B. Braiker, *Does Superwoman Have It the Worst?*, *WORKING WOMAN*, Aug. 1988, at 65.

190. A number of articles reported as news a growing struggle between two hostile camps comprised of housewives and career women. *E.g.*, Carol Pogash, *The War Between Women*, *CHI. TRIB.*, Oct. 8, 1989, at 1. Having declared a "war" for a period, some in the media later announced a truce. *See, e.g.*, Barbara Mathias, *The Choices Mothers Make: A Truce Between Women Who Work and Those Who Stay at Home*, *WASH. POST*, Mar. 6, 1990, at C5.

191. Regarding this cultural icon, see STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 190-94* (1988).

192. *E.g.*, ARLENE ROSSEN CARDOZO, *SEQUENCING* (1986); DEBORAH FALLOWS, *A MOTHER'S WORK* (1985); Cal Thomas, *It's the Children Who Pay for the Mothers Who Work*, *L.A. TIMES*, Feb. 4, 1985, at II 5.

193. *E.g.*, Sherry Angel, *Relationships: Super-Stressed Super Moms Learn to Juggle Lives*, *L.A. TIMES*, Mar. 27, 1991, at E3; Beverly Beyette, *New Minority Mom*, *L.A. TIMES*, Dec. 3, 1989, at E1 ("Stay-at-Home Mothers Once Were the Majority. Now They're Rare. But Janis Kerker, Former Career Woman, Decided Full-Time Motherhood Made Sense"); Marilyn Gardner, *For Many Women, Success Has Its Bittersweet Side*, *CHRISTIAN SCI. MONITOR*, Mar. 31, 1987, at 27; Judy Klemsrud, *Mothers Who Shift Back From Jobs to Homemaking*, *N.Y. TIMES*, Jan. 19, 1983, at C1; Thomas F. O'Boyle, *Fast-Track Kids Exhaust Their Parents*, *WALL ST. J.*, Aug. 7, 1991, at B1; Michelle Osborn, *Women Change Career Paths; More Choose to Stay Home With Children*, *USA TODAY*, May 10, 1991, at 1B. Additional examples, cited in Deborah Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1757 n.126 (1991), include: Sandra Evans, *Mothers Making Themselves More at Home; Many Women Forgo Return to Working World Despite Pressures*, *WASH. POST*, Oct. 2, 1989, at A1; David Finkel, *The Last Housewife in America: A Profile of the Endangered Species*, *ESQUIRE*, June 1990, at 102; and Arlene Fischer, *"I Want to Stay*

These are exaggerated and polarized depictions of women's work and family roles. Implicitly, these accounts reduce important and difficult decisions to a simple matter of a personal "lifestyle" choice.¹⁹⁴ But the emphasis on women's choices also obscures another important fact: these are matters of family, not merely individual, significance, and the reality for all families is that life must somehow accommodate both caregiving and employment.¹⁹⁵

Certainly, patterns of women's labor force participation have shifted dramatically during the last two decades.¹⁹⁶ But it does not necessarily follow that caregiving and family life have lost their significance. The dramatic statistics on maternal employment also reflect another social reality: a large number of married mothers with young children are not employed, either full or part time, and many of those who are employed have reduced their labor force commitment to accommodate the needs of their families. Moreover, the employment figures say nothing to ac-

Home—Where I Belong", REDBOOK, Apr. 1986, at 96. A number of these articles discussed women who decided to abandon high-power careers even without the pull of parenthood. See Laurie Larson, *I Was a Career Junkie*, WORKING WOMAN, June 1986, at 48; Stephanie Mansfield, *Hittin' It Big and Kissin' It Goodbye*, WASH. POST, Feb. 26, 1985, at C1.

Some stories on this issue approach the question from a demographic perspective, noting that in 1990 women's increasing labor force participation rates began to level off. See Scott Pendleton, *Rise of Women Jobholders Slows*, CHRISTIAN SCI. MONITOR, Nov. 23, 1990, at 8; Louis Uchitelle, *Women's Push into Work Force Seems to Have Reached Plateau*, N.Y. TIMES, Nov. 24, 1990, at 1.

194. For a rare example of more probing analysis, see Tamar Lewin, *Child Care in Conflict With a Job*, N.Y. TIMES, Mar. 2, 1991, at 8 (describing struggles of a family with a seriously ill child). There are signs that this may be the new direction in mass media reporting on family life. A group of eight articles on family and work issues appeared in the New York Times in October, 1992, emphasizing the complexities of these problems. See Felicity Barringer, *Americans Ambivalent About Family Leave Laws*; Susan Chira, *Ideal of Mom Collides with Reality of '90s: Home-care vs. Work a Hard Decision*; Maureen Downer, *Pregnant Workers Becoming Targets in Efforts to Cut Payroll*; Erik Eckholm, *Scientists Study Day Care's Impact on Children*; *Single Mom's Top Woe? Money*; Alice Kahn, *Stay-home Moms on the Rise*; Tamar Lewin, *Single, a Parent and Proud*; *Moms' Self-image Crucial to Kids*, reprinted in DENVER POST, Oct. 11, 1992, at 31A-43A.

Joan Williams has described the ways in which the rhetoric of individual choice deflects attention from the systematic constraints on women's choices. In particular, she argues that the work/family conflict is used in both employment and family law to depict discrimination and subordination as a matter of women's personal priorities. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1608-12 (1991).

195. As a number of academic writers have pointed out, both the full-time homemaker and the career woman are fairly elite groups of women, and the ability to choose either "lifestyle" is rare. See, e.g., Myra Marx Ferree, *Family and Job for Working-Class Women: Gender and Class Systems Seen from Below*, in FAMILIES AND WORK 289, 298 (Naomi Gerstel & Harriet Engel Gross eds., 1987).

196. See *supra* note 183 and accompanying text; see also BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 25 (1986) (comparing statistics on labor force participation from 1970 and 1985).

knowledge the sacrifices and contributions of those caregivers who simultaneously maintain a full-time commitment to the workplace.

Although the doctrines of divorce law appear on the surface to address the claims of caregivers, courts and lawyers have not applied or interpreted the law in this manner. The doctrine has effectively disappeared into a conceptual generation gap, a great divide between the romanticized image of the "traditional" family on one side and the rapidly evolving "new" family on the other. These forms of family life look very different, and it is easy to assume that caregiving has disappeared along with the old-fashioned nuclear family. But this conclusion is wrong; as a matter of choice, and of necessity, caregiving is still a significant attribute of family life.

B. *The Invisibility Problem*

The "generation gap" in contemporary attitudes toward caregiving is also a manifestation of a greater conceptual problem, one with deep roots. In legal analysis, and in the political and economic theory that form its foundation, family care activities are irrelevant—noneconomic, nonpolitical, and legally unimportant.¹⁹⁷ This theoretical gap is in part responsible for the disappearance of caregiver support from the surface of divorce law.

In an earlier era, although family care was not compensated, and usually not legally recognized, it was clearly understood to be central to the family's functioning and it was structurally supported through a variety of legal and social devices—devices which have eroded over the past generation.¹⁹⁸ Caregiving is even less recognized today. Despite the language of modern divorce statutes, caregiving is perceived not as an in-

197. This attitude is reflected in the divorce rules discussed above, and in tort, contract, and restitution rules that treat homemaking services as implicitly less valuable than other kinds of work. See *supra* notes 109, 161-62 and accompanying text; see also Gail D. Cox, *Juries Place Less Value on Homemakers*, NAT'L L.J., Sept. 14, 1992, at 1, 38-39 (noting that wrongful death awards are higher for employed wives than for homemaker wives). There are similar biases in the social sciences. For example, economists do not consider housework and bearing and caring for children as productive activity for purposes of computing the gross national product (GNP), despite evidence that if unpaid housework were included it would constitute 25-40% of GNP in the industrialized countries. See OKIN, *supra* note 92, at 204 n.48; see also MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* 36-43, 187-223 (1988) (discussing how economists value women's time); Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 192 n.4 (1989) (giving references for estimates of value of housework).

198. Caregiving is more readily achieved and secured where marriage is committed and permanent, where there is sufficient income from a breadwinner to support a household, and where family care is viewed as a socially legitimate occupation. All of these factors are increasingly rare. See KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 70-78, 111, 130-32, 190, 204-16 (1985); *infra* notes 302-

dependent contribution to the family, but only as one half of a traditional gender-structured marriage pattern.

This narrow recognition of caregiving is made explicit in *In re Marriage of Patus*,¹⁹⁹ a property division case in which the court was asked to evaluate the respective contributions of husband and wife. Mrs. Patus worked full time and was also the primary caregiver for children.²⁰⁰ Her dual contributions were disregarded, however, despite the fact that the property division statute expressly directed the court to evaluate homemaking contributions. The court read the statute as if it provided that caregiving is only relevant in a traditional homemaker/breadwinner marriage.²⁰¹

When asked to recognize and accord value to caregiving, the courts resist, expressing their fears of commercializing marriage. This concern seems paradoxical: marriage is, already, a significantly economic venture. Its financial character is apparent throughout its duration, and par-

06 and accompanying text. In the world outside the family, however, even in its heyday, caregiving was legally and socially invisible. See *infra* notes 204-10 and accompanying text.

199. *In re Marriage of Patus*, 175 Ind. App. 459, 372 N.E.2d 493 (1978).

200. *Id.* at 461, 372 N.E.2d at 495.

201. The appellate court upheld a roughly equal property division, despite evidence that wife had made equal financial contributions, in addition to taking responsibility for most of the homemaking work. The court described the purpose of mandating consideration of "the contribution of a spouse as homemaker" as "to allow for the circumstance wherein (1) one spouse is not employed outside the home, (2) that the unemployed spouse is solely a homemaker, and (3) that the unemployed, homemaking spouse is the primary homemaker." *Id.* The Court was unwilling to consider evidence of the parties' respective efforts, stating:

We do not believe that in situations such as the Patus home, where both partners worked, the Legislature intended, through the "homemaker contribution" language in [the statute], to stimulate detailed inquiry into the private activities of the home. When each marital partner brings earnings into the marriage, and those earnings are substantially equal, we do not believe that an exhaustive examination of who washed dishes, who took out the trash, who painted the house, who changed the oil in the car, who changed the diapers, who paid the bills, and who mowed the lawn is constructive. Of course, there may be extreme circumstances in which one partner makes virtually no homemaking contribution, but that was not the case in the Patus home.

Id. at 462, 372 N.E.2d at 495-96. A similar logic may have led a Wisconsin court to discount the testimony that the wife was both the breadwinner and primary homemaker. *Wilberscheid v. Wilberscheid*, 75 Wis. 2d 40, 45-48, 252 N.W.2d 76, 78-81 (1977) (affirming the trial court's decision awarding wife two-thirds of the marital property, an amount historically considered appropriate for the breadwinner; but denying wife's appeal that her husband's contributions were so meager that he should receive less than the one-third share traditionally awarded to a homemaker).

Although Fineman does not discuss *Patus* or *Wilberscheid*, she raises the problem of "cases where a spouse [has] made 'dual contributions' by both working and caring for the home and children." FINEMAN, *supra* note 54, at 68. This is the typical pattern in many two-job families. See *infra* notes 255-57 and 261-65 and accompanying text.

ticularly on death or divorce.²⁰² Perhaps the judges' true concerns are not so much the risk that divorce rules will commercialize marriage itself, but the risk that if the law inquires into caregiving it will be forced to expose the traditionally private aspects of family life.²⁰³ This clearly goes against the grain of contemporary family law; since the advent of no-fault divorce laws, the courts have moved in the opposite direction, away from judicial inquiries into marital and family matters.

Despite its economic, social, and familial importance, the work of caregiving remains invisible to lawyers and judges because the law construes family care as a matter of love and obligation, not a matter of personal choice or arm's-length bargaining. This is characteristic of attitudes even within the family, where caregiving is largely invisible.²⁰⁴ By its very nature, nurturance is supposed to be silent, hidden, selfless, and self-effacing—"something different" from work.²⁰⁵

There is a growing literature examining the content of family care responsibilities and reviewing the wide range of activities that comprise caregiving work. One study, considering the work of "feeding a family," demonstrates that although feeding is a very complex project,²⁰⁶ if it is done properly it goes unnoticed: It is taken for granted if meals appear

202. As a legal matter, marriage imposes support obligations on each party, see CLARK, *supra* note 3, at 250-58, and it has significant implications for purposes of public benefits and tax laws. For a summary of the legal and economic effects of death and divorce, see GLENDON, *supra* note 1, at 227-33, 242-46. At a theoretical level, economists have begun to analyze a wide range of marital and reproductive behavior using economic principles. The leading figure in this field is Gary Becker, who was awarded the 1992 Nobel Prize in Economics for his work. See GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981).

203. This idea has been developed in nonlegal literature. See, e.g., William J. Goode, *Why Men Resist*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 131-50 (Barrie Thorne & Marilyn Yalom eds., 1982) [hereinafter *RETHINKING THE FAMILY*]; Janet G. Hunt & Larry L. Hunt, *Male Resistance to Role Symmetry in Dual-Earner Households: Three Alternative Explanations*, in *FAMILIES AND WORK*, *supra* note 195, at 192-203.

204. This is not surprising, since many issues of particular concern to women are routinely ignored in conventional research. See generally Judith Stacey & Barrie Thorne, *The Missing Feminist Revolution in Sociology*, 32 *SOC. PROBS.* 301 (1985) (criticizing the lack of feminist thinking in the sociology field).

205. Caregiving work, when well done, is substantially invisible, seen not as work but as love, instinct, or the natural order of things. See, e.g., Marjorie L. DeVault, *Doing Housework: Feeding and Family Life*, in *FAMILIES AND WORK*, *supra* note 195, at 178-91; see also Nel Noddings, *Ethics from the Standpoint of Women*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCES* 160, 168-69 (Deborah L. Rhode ed., 1990) ("To consider work as an economic concept seems right, but to consider it only an economic concept misses a large part of human experience."). For a broad look at the concepts of family care, see Paula L. Dressel & Ann Clark, *A Critical Look at Family Care*, 52 *J. MARRIAGE & FAM.* 769 (1990) (detailing a study designed to explore how family members understand and express care).

206. DeVault, *supra* note 205, at 182-88. DeVault describes in some detail the activities that go into planning, preparing, and managing family meals, both at the level of nutrition and in terms of family interaction and conversation. *Id.*

on the table on schedule, and draws notice only when it is not done, or done badly. Meals are valued in the family not in instrumental terms, but as organizers of family life. Those who do the work of feeding families view their efforts not as work but as something different, because their contribution to family life would be spoiled if their caregiving was seen as a matter of work rather than love.²⁰⁷ In a similar vein, other writers have explored the work involved in mothering,²⁰⁸ in maintaining kinship systems,²⁰⁹ and in activities that preserve the social status of family units.²¹⁰ Although easily overlooked, these tasks are at the heart of what made the traditional family a source of rewarding human relationships, adequate child development, and the creation and maintenance of functioning adults. Even in less traditional settings, these activities continue to be an important component of caregiving and a source of the satisfaction children and adults draw from family life.

Recent years have seen a dramatic polarization of views about family policy issues,²¹¹ and as these issues have become increasingly politicized, the significance of caregiving is further obscured. Women's traditional caregiving roles are either glorified and described as imminently in danger, or treated as the fundamental obstacle to full gender equality. In this debate, private choices around the organization of work and family life take on an added burden of moral and political significance. Those who glorify caregiving have seemed blind to its hazards, and those who demean it have seemed blind to its value.

Across the political spectrum, it is difficult to talk about issues of caregiving, economic dependence, and divorce. Mary Becker has described a split she perceives between the expressed political and economic interests of "women who expect to spend most of their lives economically

207. *Id.* at 179-80.

208. *E.g.*, Sara Ruddick, *Maternal Thinking*, in *RETHINKING THE FAMILY*, *supra* note 203, at 86-88, 91 (describing "the work of attentive love").

209. *See, e.g.*, CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974); Micaela di Leonardo, *The Female World of Cards and Holidays: Women, Families, and the Work of Kinship*, 12 *SIGNS* 440 (1987).

210. *See, e.g.*, Hanna Papanek, *Family Status Production: The 'Work' and 'Non-Work' of Women*, 4 *SIGNS* 775, 775-81 (1979); Dorothy E. Smith, *Women's Inequality and the Family*, in *FAMILIES AND WORK*, *supra* note 195, at 23, 35-36.

211. *See generally* BRIGITTE BERGER & PETER L. BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* (1983) (characterizing the family as an "ideological battleground" and proposing that policies seek a middle ground); LETTY COTTIN POGREBIN, *FAMILY POLITICS: LOVE AND POWER ON AN INTIMATE FRONTIER* 2-19 (1983) (arguing for a broader understanding of the family); *see also* REBECCA E. KLATCH, *WOMEN OF THE NEW RIGHT* 122-39 (1987) (discussing views of social conservative women with respect to the family and feminism); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (summarizing the relationship between various views on abortion and ideals of family life).

dependent on men, and women who do not."²¹² Professor Becker points out that choosing to be economically dependent is reasonable if a woman wants to have children. She argues, however, that a variety of factors lead economically dependent women to suppress the possibility that their interests may conflict with their partners' and to disregard information suggesting that their choice of a traditional role involves continuing risks.²¹³ Further, Becker suggests that a woman whose economic interests require preserving a man's support is likely not to endorse the kind of reforms that advance the interests of economically independent women. This is reflected in treatment of caregiving in the media; there is a great deal of discussion of traditional female roles, but rarely any consideration of the risks of divorce for a young homemaker.²¹⁴

Although Professor Becker does not discuss the attitudes of economically independent women toward caregiving and family roles, a similar process operates here.²¹⁵ Many writers have described feminist ideals as in opposition to family life, at times unfairly.²¹⁶ The possibility

212. Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 186; see also GERSON, *supra* note 198, at 187-90.

213. Becker, *supra* note 212, at 183-88; see GERSON, *supra* note 198, at 183-85.

214. For example, none of the magazine or newspaper articles cited *supra* notes 189-93 raises this issue. It is acknowledged in several of the book-length contributions. See ANDRE, *supra* note 54, at 13, 117 (recommending "independence insurance" as protection for a homemaker in the event of divorce); CARDOZO, *supra* note 192, at 108 (recommending a contract in advance of career interruption with provisions to protect the caregiver in the event of divorce); FALLOWS, *supra* note 192, at 194 (recognizing that a divorced homemaker will face hard economic times).

215. For feminist writers, there is a long tradition of viewing housework in highly political terms. CHARLOTTE PERKINS STETSON [GILMAN], *WOMEN AND ECONOMICS* 225-47 (1898). For a more recent example, see Heidi Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS 366, 388 (1981).

For the argument that policies should not be formulated to allow women to choose economic dependence, see Kay, *supra* note 1, at 80. After wrestling with the issue, Dean Kay concluded that "we should [not] encourage future couples entering marriage to make choices that will be economically disabling for women." *Id.* But see Kay, *supra* note 110, at 31 (suggesting the need for divorce law reforms that will "safeguard those who do not maximize their separate interests, but instead engage in unselfish, sharing behavior"). Carbone and Brinig characterize Kay's position in her earlier writing as a "liberal feminist" approach. Carbone & Brinig, *supra* note 63, at 956, 992-96. In response to Carbone and Brinig, Dean Kay has emphasized her view that the time has not yet arrived when women's choices of traditional roles need not be recognized and compensated, and that she "envision[s] a long and arduous period of fundamental social change before women can fairly be held fully responsible for the financial consequences of their choices concerning intimate relationships and childrearing." Herma Hill Kay, *Commentary: Toward a Theory of Fair Distribution*, 57 BROOK. L. REV. 755, 763-65 (1991).

216. This is implicit in many books and articles that characterize an interest in caregiving as "post-feminist." See, e.g., Anita Shreve, *Careers and the Lure of Motherhood*, N.Y. TIMES, Nov. 21, 1982, § 6 (Magazine), at 38; Susan Bolotin, *Voices From the Post-Feminist Generation*, N.Y. TIMES, Oct. 17, 1982, § 6 (Magazine), at 29. See generally SYLVIA ANN HEW-

of such a split has been seriously debated in feminist circles: are the leaders of the women's movement too often silent on the value of women's more traditional roles, roles that are deeply significant to many women?²¹⁷

Taken at face value, the silence of "traditional," economically dependent women on the financial hazards of caregiving, and the silence of "liberated," economically independent women on its value, reveal a deep social ambivalence towards these questions.²¹⁸ The polarities of public debate on family issues make it difficult to affirm the value of caregiving without seeming to reject or denigrate the many other roles women play, and make it equally difficult to affirm the importance of work and financial contribution without seeming to reject the human values of family care.²¹⁹

LETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986) (asserting that feminism has failed modern women by ignoring family policy and denigrating motherhood). Hewlett's criticisms have themselves been challenged. See Deborah Rosenfelt & Judith Stacy, *Review Essay: Second Thoughts on the Second Wave*, 13 *FEMINIST STUD.* 341 (1987).

217. A number of writers have made this suggestion. See BETTY FRIEDAN, *THE SECOND STAGE* *passim* (rev. ed. 1986); Rosenfelt & Stacy, *supra* note 216 *passim*. Rosenfelt and Stacy agree that "few [feminists] have made the needs of working mothers a central focus of our theory or politics." *Id.* at 351-52; see also E.J. Dionne, Jr., *Struggle for Work and Family Fueling Women's Movement*, N.Y. TIMES, Aug. 22, 1989, at 1 (describing the emphasis on the work and family agenda as the "most striking change in direction in the women's movement" in recent years).

Within feminist writing, the theoretical divide over the values of caregiving seems to have deepened in recent years. On one side, there are "relational" or "cultural" feminists who stress an "ethic of care." See *infra* note 225. On the other, there are outspoken feminist critics of this school. *E.g.*, SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 312-32 (1991) (characterizing writers including Betty Friedan, Sylvia Ann Hewlett and Carol Gilligan as part of the "counterassault" on women's rights); see Suzanne Gordon, *Feminism and Caregiving*, AM. PROSPECT, Summer 1992, at 119 (supporting the feminist goal of making visible women's traditional, invisible work).

218. See also Ferree, *supra* note 195, at 299 (observing that policy goals that would be useful to women struggling to combine work and family are made difficult to achieve when women "are divided from each other into housewives and working women, traditionalists and feminists. These divisions between women may be the most damaging results of a dual-career model that places job and family—and the women who supposedly value each—at opposite ends of a single continuum."). Joan Williams suggests that

[t]he impoverishment of women upon divorce, and in particular its impact upon children, is a potentially revolutionary force for gender equality. It is powerful because it aligns demand for gender equality with the mandates of domesticity: women must demand equality to protect their children. This alignment could help diffuse the long-standing divide between feminist and nonfeminist women.

Williams, *supra* note 194, at 1607 (1991).

219. A number of writers describe this in terms of cognitive dissonance. See, *e.g.*, FUCHS, *supra* note 110, at 29-31; see also GERSON, *supra* note 198, at 176-84, 187-90; Becker, *supra* note 212, at 186.

C. *Caregiving and the Risk of Divorce*

Although a full social consensus on family values will necessarily be elusive, there are points on which it should be possible to agree.²²⁰ The structures and practices of family care have changed significantly, and caregiving has become increasingly risky. Parents today who compromise their career or work status in favor of caregiving roles face both a decrease in their earning power and a fifty percent chance of divorce, a risk that is greatest in the early years of marriage when their children are quite young.²²¹ In the unfortunate event of divorce, the previous decision to leave the labor force may prove to have serious adverse financial consequences for caregivers and their children.²²² It is here, in the legal and economic dissolution of marriage, that our narrow and obsolete understanding of family care is the most misguided and pernicious.

Whatever the rhetoric of change, the reality is that in our society the costs of caregiving are still borne primarily by women.²²³ The

220. See BERGER & BERGER, *supra* note 211, for an argument of this sort. In view of recent political debate, their observation on the prospect of "family values" as a subject of governmental policy is especially interesting:

The democratic state is not and should not be the fountainhead of morality in society, and just about the last thing we would suggest is that government at any level engage in a propaganda campaign to promote family values - a notion as objectionable in theory as, in all likelihood, it would be ridiculous in practice.

Id. at 204-05.

221. In 1980 the U.S. National Center for Health Statistics predicted that if divorce rates remained constant through the 1980s and 1990s, 48% of those couples who married in 1970 would eventually divorce. More than half this number divorce in the early years of marriage: by 1977, 25% of those married in 1970 had already divorced. ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 24-25 (1981). According to Mary Ann Glendon, "almost three-fifths of all divorces in the United States involve couples with minor children." GLENDON, *supra* note 77, at 93 (citing 1979 population data).

Divorce rates stated in the aggregate actually understate the prospects of divorce for younger women. Although there is some speculation that divorce rates may be stabilizing, the peak divorce rates have been experienced by the older cohort of the "baby boom" generation. For this group, 1985 data suggest that 55.5% have been or will eventually be divorced following a first marriage. By contrast, for the generation born 20 years earlier, only 24% have been divorced or are projected to divorce eventually. Arthur J. Norton & Jeanne E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 *J. MARRIAGE & FAM.* 3, 12 (1987).

222. The adverse financial consequences are discussed generally in WEITZMAN, *supra* note 7, at 344; see also *supra* note 78 (discussing research similar to Weitzman's).

223. In divorced families, the vast majority of children remain in their mother's primary custody. See generally WEITZMAN, *supra* note 7, at 216 (asserting that legal reforms have had little effect on the traditional presumption that children should remain with the mother). In "intact" families, as of 1985, 49% of married mothers with children under three, and 39% of married mothers with children under 18, were not in the labor force. BERGMANN, *supra* note 196, at 24-25 (1986). Among those mothers who work, as of 1980, 29% worked only part time. *Id.* Even in families in which both parents are employed full time, caretaking continues

superwoman ideal has not altered the fact that married women are still largely financially dependent on their husbands, particularly after bearing children.²²⁴ It is not my intention here to enter the debate over women's difference and concepts like the "ethic of care,"²²⁵ or to argue that caregiving is a transcendent feminine virtue. We know empirically, however, that women continue to be responsible for most caregiving work in our society, and in the context of divorce, that difference generates substantial, unrecognized economic consequences. Can we not agree that this is an unfair approach to family life, or, at least, to divorce?

IV. TOWARD THE REHABILITATION OF FAMILY CARE

In maintenance and alimony law, all adults are measured against a standard of self-sufficiency, and those found lacking are required to rehabilitate themselves. When family law is measured against the standard of caregiving values, it is notably lacking. It is time to rehabilitate the idea of family care, and restore it to a working role among the policies recognized in the law of divorce.

Such a rehabilitation requires two steps. First, caregiving must be taken more seriously and identified in all its varying forms—not merely its expression in pre-1970 nuclear families. As a second step, it will be necessary to construct a popular and legal consensus that caregiving is an important and valuable aspect of family life that should be supported in the context of family law.

A. *Recognizing Family Care*

This section explores several of the many different approaches to

to be primarily the domain of women. See generally HOCHSCHILD, *supra* note 183 *passim* (documenting the lives of working mothers who remain the primary caretakers of children).

224. See generally FUCHS, *supra* note 110, at 58-67 (showing that bearing children causes a decrease in women's job earnings).

225. Within the circles of feminist legal analysis, there have been many pages and hours devoted to the debate over women's difference and concepts like the "ethic of care." See, e.g., Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 36-47 (1990); see also Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 408 (1988) (discussing "cultural feminism" as represented in writings such as those of Mary Daly and Adrienne Rich). See generally DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 32-34, 111-31, 305-21 (1989) (discussing "difference"). For discussions of cultural feminism in the feminist legal literature, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); and Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). Following a course Deborah Rhode has suggested, my objective is "neither [to] glorify nor discount difference, but [to] challenge its adverse consequences." Rhode, *supra* note 193, at 1789.

caregiving that exist in families today, in order to illustrate what should, perhaps, be obvious: that family care in its varied forms is still important, and that caregiving still entails economic dependence and other personal risks for a caregiver. Although family care is substantially ignored in the current maintenance and alimony law, there have been efforts to grapple with the reality of caregiving in child custody law. In disputed custody cases, courts often focus on the extent of each parent's daily care activities with a child. For this reason, some courts have developed a body of case law attempting to define the content of family care.

In the series of "primary caretaker" custody opinions issued by the West Virginia Supreme Court of Appeals beginning in 1978,²²⁶ the court suggested the following list of the "caring and nurturing duties of a parent":

- (1) preparing and planning of meals;
- (2) bathing, grooming and dressing;
- (3) purchasing, cleaning, and care of clothes;
- (4) medical care, including nursing and trips to physicians;
- (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
- (6) arranging alternative care, i.e. babysitting, day care, etc.;
- (7) putting child to bed at night, attending to child in the middle of the night, waking the child in the morning;
- (8) disciplining, i.e. teaching general manners and toilet training;
- (9) educating, i.e. religious, cultural, social, etc.; and
- (10) teaching elementary skills, i.e. reading, writing and arithmetic.²²⁷

As the court noted, it will not ordinarily be difficult to determine which parent has been the primary caretaker of a child, and it is especially clear where one parent is a permanent, full-time homemaker. The emphasis is on care for children, and not other types of housework.

The custody cases suggest that we might begin to value caregiving in

226. The court asks, as a threshold question in contested custody cases, which parent was the primary caretaker of the children before the onset of domestic strife and uses the enumerated factors to guide this inquiry. *E.g.*, *David M. v. Margaret M.*, 182 W. Va. 57, 67-72, 385 S.E.2d 912, 923-28 (1989); *Garska v. McCoy*, 167 W. Va. 59, 68-70, 278 S.E.2d 357, 363-64 (1981); *see also* *J.B. v. A.B.*, 161 W. Va. 332, 336-40, 242 S.E.2d 248, 252-53 (1978) (stating that the mother is rebuttably presumed to be the primary caretaker). All of these opinions were authored by Chief Justice Richard Neely, who elaborated on his thinking in his 1984 book, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE*.

227. *Garska*, 167 W. Va. at 69-70, 278 S.E.2d at 363.

the maintenance context by considering the nature of caregiving work and the diverse ways in which families accommodate it. Some contemporary families still operate on the traditional model eulogized in the displaced homemaker cases.²²⁸ An alternative model, reflecting a compromise between the traditional ideal and the economic pressures of contemporary life, is a new species of homemaker: the temporary, full-time homemaker—someone whose years as a housewife are a hiatus from another career or work in the wage labor market. Some of the women who attained prominence during the 1980s followed this pattern earlier in their lives, including Justice Sandra Day O'Connor,²²⁹ and vice-presidential candidate Geraldine Ferraro.²³⁰

Another newer image of caretaking is the "Mommy Track."²³¹ Although the term conjures an image of highly-paid professional women, variations on the "mommy track" career strategy are also common among parents who have jobs rather than "careers,"²³² and who limit their commitment to the workplace for a time in order to accommodate the needs of their children and family.²³³ Because very few among the list of tasks performed by a primary caretaker are typically performed by

228. See *supra* notes 54-85 and accompanying text for a discussion of the displaced homemaker maintenance cases.

229. See Joan S. Marie, *Her Honor: The Rancher's Daughter*, SAT. EVE. POST, Sept. 1985, at 42. Justice O'Connor stopped working outside the home for about five years while her children were small, and returned to "a job with flexible hours" as an assistant attorney general in Arizona. *Id.* at 44-45, 46.

230. GERALDINE FERRARO, FERRARO: MY STORY 44 (1985) (describing reentering the work force in the district attorney's office after years of child-raising as not "easy, even with a lot of [financial] back-up"). Of course, most women whose lives follow this pattern do not have the opportunity to reenter the labor force and achieve the success these prominent women have had. Many cannot find work of the sort they were once trained to perform.

231. This was debated extensively in the media following publication of an article by Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65. See also Felice N. Schwartz, *The "Mommy Track" Isn't Anti-Woman*, N.Y. TIMES, Mar. 22, 1989, at A27 (answering criticisms that employing women is more expensive than employing men). References to the "mommy track" idea appeared before Schwartz's article. See Judith S. Kaye, *Mommy Track in Practice*, NAT'L L.J., May 22, 1989, at 13; Jennifer A. Kingson, *Women in the Law Say Path is Limited By "Mommy Track"*, N.Y. TIMES, Aug. 8, 1988, at A1; Geneva Overholser, *So Where's the Daddy Track?*, N.Y. TIMES, Aug. 25, 1988, at A26.

232. As one commentator has stated:

Most women do not have careers; they have jobs. Careers involve employment in which some realistic expectation of upward occupational and financial mobility is expected and available. . . . In contrast, jobs offer limited opportunities for advancement, responsibility, and authority, are paid by the hour, and promise little significant increase in financial reward for achievement or for longevity of employment.

ROSANNA HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES 5 (1986).

233. See Ferree, *supra* note 195, at 292-301.

an elementary school, day care center, home day care provider, or housekeeper/nanny, the chief advantage of a parent working part time is that it provides more time for parents to carry out important primary caregiving functions.

In families where both parents elect a career fast track or full-time work in any job, over the mommy or daddy track, there is caregiving work to be done that cannot be fully delegated or eliminated. Couples with elite careers may be able afford the services of a full-time housekeeper or nanny to take over a substantial portion of the daily child watching and housework routines. Even in these families, however, once children are born there are additional demands and many caregiving roles that cannot be delegated.²³⁴ For middle and working class families, who cannot afford the cost of a paid substitute in the home, there may be enormous tension between the demands of caregiving and the workplace. In these families, the pressures of a "double day" or "divided life" are often not equally shared, although some of the families with the most egalitarian divisions of household labor are those with two parents working split shifts.²³⁵ Even where both parents have demanding work lives, one parent may be practically and emotionally the primary caretaker in their child's life. A number of the custody cases acknowledge this reality, cautioning that a parent who works outside the home, even one with a demanding career, may still be a primary caretaker. "We would expect that, as between any two parents, one will be the primary parent even if neither conforms to the more traditional pattern of one parent working outside the home and one parent within it."²³⁶

Finally, single parents who are also working full time perform both tasks under more pressure than any other group of families or workers. For most single parents, poverty is an enormous problem, but even beyond the obvious financial difficulties single parents face, there are extraordinary time pressures, and no regular source of the supports that marriage typically offers, such as the relief or sharing of household tasks

234. HERTZ, *supra* note 232, at 131-39. Sara Ruddick notes that, despite the wide range of experts and assistants who participate in shaping a child's growth, a mother typically holds herself, and is held by others, to be responsible for her child's development. Ruddick, *supra* note 208, at 78.

235. As of 1982, in a substantial percentage of families with mothers employed full or part time, the form of child care utilized was care at home by the child's father. BERGMANN, *supra* note 196, at 284.

236. *Pikula v. Pikula*, 374 N.W.2d 705, 714 (Minn. 1985) (*en banc*). See also *Brown v. Brown*, 184 W. Va. 627, 631, 403 S.E.2d 29, 33 (1991) (granting custody to mother who worked "for a large law firm and will rely on a baby sitter to care for her children while she is at work"); *Wagoner v. Wagoner*, 172 W. Va. 687, 688-89, 310 S.E.2d 204, 205-06 (1983) (finding that primary caretaker was mother who worked as a nurse).

and emotional burdens.²³⁷

In each of these family types, caregiving functions are essential to the life of the family. In each, the practices of caregiving are shaped by a set of fundamental parental responsibilities: preserving the child's life and health; fostering the child's physical, emotional, and intellectual growth; and shaping the child's behavior to produce an acceptable adult member of the social group.²³⁸ And family care in any form is economically and personally risky for the caregiver. However family work is organized, caregiving has both immediate and long-term costs. Some of these costs, such as the loss of all or part of the caregiver's potential wages, are readily visible to the family.²³⁹ Others are more hidden. The nature and extent of the risks vary from family to family, depending in part on the nature of each family's division of caretaking and paid labor.

1. The Permanent Homemaker

The permanent, full-time homemaker in a household with a traditional breadwinner/homemaker labor division incurs the most significant and the most hidden costs of caregiving. For a lifetime homemaker, lack of career skills and experience in the labor force create the prospect of very serious economic dislocation in the event of the loss of the breadwinner's income through death, disability, unemployment, retirement, or divorce.²⁴⁰ Of these risks, however, the specter of divorce is the most dangerous for a homemaker. It is the only one of these that is not routinely insured against,²⁴¹ and it is statistically quite significant during the

237. See BERGMANN, *supra* note 196, at 230-32 (discussing the pressures faced by single-parent workers).

238. Ruddick, *supra* note 208, at 77-91. Ruddick points out that these tasks are especially difficult when they must be carried out in circumstances defined by the oppressions of gender, race, and class. *Id.* at 88.

239. See generally POSNER, *supra* note 109, at 127-30 (analyzing the economic "theory of household production"); Tamar Lewin, *For Some Two-Paycheck Families, the Economics Don't Add Up*, N.Y. TIMES, Apr. 21, 1991, § 4, at E18 (analyzing the net gain in family income for two different hypothetical families if husband and wife both hold full-time jobs).

240. The difficult situation of a homemaker in these circumstances is sometimes described in economic terms as a function of her failure to invest in her "human capital," or as the result of her investment in "household" capital rather than "market" capital. See generally POSNER, *supra* note 109, at 127-30, 134-37 (examining the reasons homemakers should receive a type of "severance pay" after divorce). These economic concepts are elaborated upon in the context of the family in BECKER, *supra* note 202, at 9-12, 15-21, 119-22.

241. It has become commonplace to insure families, publicly or privately, against death, disability, unemployment, and retirement; all four areas are covered by the federal social security law. Divorce insurance, however, has not yet arrived on the scene. *But see* Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 412 (1971) (proposing a scheme of divorce insurance).

early years of marriage.²⁴²

Legal commentators have discussed the risk to a homemaker from divorce. Herma Hill Kay, acknowledging that a relationship in which a wife and children are dependent on a husband and father for support "may be satisfying while the marriage is a functioning one," points out that "if the marriage ends in divorce, the former spouses may discover that their choice of a traditional relationship has disabled the woman . . . and that it has created an unwanted ongoing support obligation for the man."²⁴³ In his analysis of alimony, Ira Ellman points out that while a traditional family labor division may be economically efficient—making a couple better off during their marriage—it may cause problems when the "mutual commitment to share" breaks down. If that occurs, "the spouse who has specialized in domestic aspects of the marriage—who has invested in the marriage rather than the market—suffers a disproportionate loss." In Ellman's view, therefore, marriage "poses unavoidable risks for the wife, risks that are different and greater than those assumed by her husband," and risks that "are realized only on divorce."²⁴⁴

Within the ongoing family, the traditional breadwinner/homemaker system has obvious advantages. It allows the family member who has specialized in family care, and the children, to share in the economic success of the family member who has specialized in market labor. Another advantage of a homemaker role, often cited by women who have chosen it, is the freedom it brings from the pressures and obligations that accompany paid work in the marketplace.²⁴⁵ In addition, some studies indicate that a full-time homemaker on the average works fewer hours per week than her breadwinning partner.²⁴⁶

Although in the short run a caregiver occupies an economically advantageous position,²⁴⁷ there are disadvantages to working in the home rather than the market. A homemaker's hours are unpredictable, extend throughout the week, and often involve very boring and repetitive tasks. Because a housewife's labor is unpaid, it is accorded less value and respect both within the home and in the wider community, and the fact that the housewife is financially at risk in the event of divorce reduces her

242. For younger couples, the odds are now worse than 50-50. *See supra* note 221.

243. Kay, *supra* note 1, at 78.

244. Ellman, *supra* note 3, at 49.

245. GERSON, *supra* note 198, at 103-10. In those sectors of the labor market readily available to women, work is especially likely to be underpaid and unrewarding. *See infra* note 254 and accompanying text.

246. OKIN, *supra* note 92, at 150-52. *But see infra* notes 247-51 and accompanying text.

247. Some writers describe the position of a full-time homemaker as one of privilege, reflecting in part the fact that only relatively wealthy husbands can afford to support a full-time housewife. HERTZ, *supra* note 232, at 6; Ferree, *supra* note 195, at 290-91.

power within the marriage.²⁴⁸ In some families, the traditional "wife" role is understood to be a subordinate position;²⁴⁹ indeed, some feminist writers argue that subordination inheres in the gender structure of marriage itself.²⁵⁰ Housewives' lack of power and respect are reflected in the findings of empirical research, which have historically indicated married women are significantly less happy than married men.²⁵¹

2. Temporary Homemakers and the Mommy Track

These risks of a homemaker orientation are altered for those caregivers who maintain a labor force attachment even while viewing their domestic roles as of primary importance. The most common strategies for achieving this are "sequencing" periods of work and caretaking responsibility and assuming the full-time homemaker role only temporarily,²⁵² and by working part time or on a mommy track.²⁵³

The part-time or temporary homemaker has the advantage of employment experience and training to draw on in the event she loses access to a breadwinner's income. There are still costs, however; her limited labor force commitment means she is often employed in a "pink collar" ghetto, or lower status professional or managerial position, with correspondingly limited career and earning potential.²⁵⁴ Similarly, while con-

248. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 109 (1983); OKIN, *supra* note 92, at 151-52.

249. FUCHS, *supra* note 110, at 73 (discussing the traditional "wife" role's subordinate position in a hierarchically constructed marriage). For descriptions of ways that subordination accompanies a "wife" role, see BLUMSTEIN & SCHWARTZ, *supra* note 248.

250. *E.g.*, CAROLE PATEMAN, *THE SEXUAL CONTRACT* 154-88 (1988) (tracing the development of feminist critique of the marriage contract).

251. Married women have historically ranked lowest among all adults in relative happiness and satisfaction with their lives. When sociologist Jessie Bernard described marriage in 1972, she observed that married men fare consistently better than never-married men in almost every index of well-being. JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 16-27 (1973). For women, however, the opposite is true. *Id.* at 28-58. More recent studies suggest that the situation of unmarried men relative to married men has improved somewhat over the past two decades, and current data point in somewhat different directions. See Gary R. Lee et al., *Marital Status and Personal Happiness: An Analysis of Trend Data*, 53 *J. MARRIAGE & FAM.* 839, 842 (1991) (tracing differences in personal happiness by year between 1972 and 1989). *But see also* Sandra C. Stanley et al., *The Relative Deprivation of Husbands in Dual Earner Households*, 7 *J. FAM. ISSUES* 3, 3-5 (1986) (suggesting that men in "conventional breadwinner" roles are more satisfied with their work, marriages, and personal lives than men in dual earner marriages); Dana Vannoy & William W. Philliber, *Wife's Employment and Quality of Marriage*, 54 *J. MARRIAGE & FAM.* 387, 397 (1992) (noting that gender role attitudes are more important than wife's employment in determining perceptions of marital quality).

252. *E.g.*, CARDOZO, *supra* note 192, at 93-97 (describing the economic factors associated with "sequencing").

253. See *supra* note 231 and accompanying text.

254. See BERGMANN, *supra* note 196, at 87-118 (describing the reasons why women are

trol of an income and earning ability may decrease her economic and career risk, it may not greatly reduce the risks of subordination and personal dissatisfaction within marriage itself.

An additional cost for homemakers who are also employed is that they can expect to work a substantially larger number of hours each week than their primary breadwinning partners. Sociologist Arlie Hochschild, summarizing a number of studies of this issue, writes that such women work a "second shift" that amounts to an additional month's full-time labor every year.²⁵⁵ The unequal division of labor within these families raises substantial additional questions of fairness and economic efficiency.²⁵⁶ It is also part of the explanation for the popularly recognized difficulties of "superwomen" who have responsibility for both homemaking and wage or career labor.²⁵⁷

kept out of "good jobs"); FUCHS, *supra* note 110, at 32-57 (analyzing occupational segregation and the sex gap in wages); LOUISE KAPP HOWE, *PINK COLLAR WORKERS* 11-232 (1977) (depicting work lives of beauticians, waitresses, and those in other low paid female occupations); cf. Jacqueline Shaheen, *Women Confront Blue Collar Barriers*, N.Y. TIMES, Jan. 6, 1991, § 12NJ, at 1 (discussing experiences of women in typically male trades).

255. HOCHSCHILD, *supra* note 183, at 3-4. This double burden is part of the reason that women's turn toward paid labor has been accompanied by a decline rather than an improvement in women's economic well-being relative to men. FUCHS, *supra* note 110, at 75-94.

256. Political scientist Susan Moller Okin asks if there is anything unjust about an unequal division of marital labor. She answers her own question as follows:

First, the uneven distribution of labor within the family is strongly correlated with an innate characteristic, which appears to make it the kind of issue with which theorists of justice have been most concerned. . . . Second, though it is by no means always absolute, the division of labor in a traditional or quasi-traditional marriage is often quite complete and usually long-standing. It lasts in many cases at least through the lengthy years of child-rearing, and is by no means confined to the preschool years. Third, partly as a result of this, and of the structure and demands of paid work, the household division of labor has a lasting impact on the lives of married women, especially those who become mothers. It affects every sphere of their lives, from the dynamics of their marital relationship to their opportunities in the many spheres outside the household.

OKIN, *supra* note 92, at 149.

For Marxist feminists, the tension between women's domestic and wage labor reflects a larger tension within the advanced capitalist economy. As Dorothy Smith argues, capital is "indifferent to the sex of those who do its work." Smith, *supra* note 210, at 49. She goes on to note that work opportunities for women in the market are increasing, drawing women away from family work. Smith points out that as the domestic economy loses its power to compete with paid employment, its "traditional relationship of dependence on the market" through the family wage paid to a single breadwinner, has itself ceased to be fully viable. *Id.* at 49-50.

Heidi Hartmann starts with the observation that as the percentages of women in the labor force have increased, the percentages of women in the labor force who work part time have also increased. Hartmann argues that this demonstrates that "[i]t is necessary . . . that a substantial proportion of women's collective work hours be retained in the home if the patriarchal requirement that women continue to do housework and provide child care is to be fulfilled." Hartmann, *supra* note 215, at 392.

257. See *supra* note 189.

When compared to two-job families, one disadvantage of the mommy track strategy may be financial. In the short run, the costs of slowing down one career are easily measured in lost income, although this may be balanced against savings in the costs of such items as day care, taxes, and commuting. Couples in which both partners are oriented to the workplace do not lightly make the decision that one of them will leave the labor force to care for children.²⁵⁸ In large part, they balance a set of financial tradeoffs against the potential for significant nonfinancial gains to the family.²⁵⁹ In this setting, more than in any other caregiving type, an analysis of the opportunity costs of family care seems to match the calculation a couple makes.²⁶⁰

3. Two Job/Two Career Couples

For those marriages in which both partners remain fully committed to paid work, whether for reasons of economic pressure or personal satisfaction,²⁶¹ the decision to bear and raise children imposes different personal and career costs. Because only the most routine daily care is typically delegable to a substitute caregiver, caregiving will continue to affect the work lives of one or both parents, limiting to some extent their ability to develop fully their individual market capital.²⁶² Empirical research suggests that the wife/mother is overwhelmingly more likely to absorb the greater share of these responsibilities and the accompanying career costs.²⁶³

258. See generally GERSON, *supra* note 198, at 121-22 (describing the decision-making process that leads some to choose to leave the workplace in favor of "domesticity").

259. E.g., Lewin, *supra* note 239, at 18.

260. In her review of Ira Ellman's *Theory of Alimony*, June Carbone makes the point that his measures of compensation encourage only those accommodations of caregiving that would be necessary in a two-career family, and thus discourages a wife from "overreliance" on marriage in the place of her own career development. Carbone, *supra* note 131, at 1471, 1482 n.82, 1491-94.

261. Compare BERGMANN, *supra* note 196, at 30-34 (asserting that economic "need" was invented "as a smokescreen") with FUCHS, *supra* note 110, at 11 (noting that real wages of men under 40 have fallen). See also Jane Riblett Wilkie, *The Decline in Men's Labor Force Participation and Income and the Changing Structure of Family Economic Support*, 53 J. MARRIAGE & FAM. 111 (1991) (examining possible causes of increased employment among women).

262. See, e.g., HERTZ, *supra* note 232, at 136-38, 186 (noting that at least one parent's schedule must be flexible enough to oversee the substitute caregiver and handle emergencies). See generally EDWARD F. ZIGLER & MARY E. LANG, CHILD CARE CHOICES: BALANCING THE NEEDS OF CHILDREN, FAMILIES, AND SOCIETY 24-25 (1991) (arguing that nonparental child care is a supplement, not a substitute, for parental child rearing).

263. In the professions, one strategy is to reduce the number of hours devoted to practice. See David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 268 (1989); Linda Grant et al., *Gender, Parenthood, and Work Hours of Physicians*, 52 J. MARRIAGE & FAM. 39, 45-47 (1990). Although this might be viewed as a variation on the mommy track strategy, the aver-

Parents who feel committed to maintaining a balance between their work and family roles utilize a number of common strategies. Some may stop short of the temporary homemaker/mommy track approach discussed above, but nonetheless make job choices that allow greater flexibility for meeting family needs. For those with elite careers—doctors, lawyers, business executives—it may be possible to reduce slightly the number of hours worked, or to seek assignment to a specialty or department with fewer requirements for on-call time or out-of-town travel.²⁶⁴ For working-class families, strategies may include a husband and wife working split shifts, or working in jobs in which overtime hours are not required.²⁶⁵ Although the costs associated with the decision to scale back a career may be relatively small, they are still costs.

The difficulty that working parents experience in harmonizing their roles is one reason that women with demanding careers or jobs are increasingly choosing to remain childless.²⁶⁶ This is particularly common for women whose partners are noncommittal or opposed to the idea of having children and unwilling to contribute substantially to the caregiving work children will require.²⁶⁷ In economic terms, this decision is a rational one, but in personal terms, it may be a considerable sacrifice.

4. Single Parent Caregiving

The hazards of family care are greatest for single parents, who must be both breadwinner and caregiver. Work is essential, not a matter of choice or a matter of the financial benefit of an additional income.²⁶⁸ Even those single parents who have secured child support orders often find they rarely receive the ordered payments.²⁶⁹ In addition to the risk of poverty, single parents bear the full burden of family care tasks and must manage both spheres without a partner to share decision-making

age reduction in hours for full-time working mothers in Chambers's survey was only a drop from 52 to 49 hours per week. Chambers, *supra*, at 269. There were no differences between the working hours of men with children and men without children. *Id.* at 279.

264. See Chambers, *supra* note 263, at 268; Grant et al., *supra* note 263, at 45-47; see also HERTZ, *supra* note 232, at 139-46 (detailing various options for integrating children into a dual-career family).

265. Some of the disadvantages of the split shift approach are described in DIANE EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN 8-9; 174, 255 (1987).

266. See GERSON, *supra* note 198, at 138-57; see also FUCHS, *supra* note 110, at 94-116 (discussing the choice to remain childless).

267. This is discussed at length in GERSON, *supra* note 198, at 144-47.

268. The difficult financial circumstances of single parents are described in CHERLIN, *supra* note 221, at 80-84.

269. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in DIVORCE REFORM, *supra* note 78, at 166, 174.

responsibility or to give adult emotional support.²⁷⁰ Single parents after divorce suffer from all of these difficulties and in addition from the emotional and financial dislocations of a divorce, which often require many years for children and parents to overcome.²⁷¹

B. *Valuing Family Care*

Family policy and divorce law should recognize that essential caregiving work goes on in each of these family types, both before and after divorce. There are strong public policy reasons to support and facilitate the choice of caregiving in all types of families. The importance of this policy lies in the particular best interests of children who receive this care, and the larger best interests of adults and society. These interests are far less controversial than the rhetoric of family policy would suggest.

Although this discussion is primarily directed toward the needs of children, social and legal support for caregiving in the family also serves the interests of adults. Adult couples without children also have household tasks to be accomplished and emotional needs to be met, and this process may be facilitated when one partner assumes a homemaker role. Caring for children often fulfills deep human needs for caregivers themselves.²⁷² In some families, the caregiver's work includes direct support for the breadwinning function, such as in the case of a "Mom and Pop" family business or a "two-person" professional career.²⁷³

270. See generally ROBERT S. WEISS, *GOING IT ALONE: THE FAMILY LIFE AND SOCIAL SITUATION OF THE SINGLE PARENT* 265-76 (1979) (discussing the responsibility, task, and emotional overload of single parents and noting that "[t]he fundamental problem in the single parent's situation is the insufficiency of immediately available support").

271. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989) (describing the effects of divorce on family members over a ten-year period).

272. To look at responsibility for children only as a burden to be allocated is to miss the primary significance of children and of parenthood in many adult lives. See LOUIS GENEVIE & EVA MARGOLIES, *THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS* (1987). The pleasures of caregiving have become a common topic for newspaper columnists. See, e.g., PHYLLIS CHESLER, *WITH CHILD: A DIARY OF MOTHERHOOD* (1979) (providing a daily journal of pregnancy and first year of parenthood); BOB GREENE, *GOOD MORNING MERRY SUNSHINE* (1984) (describing the first year of parenthood in daily journal form); Anna Quindlen, *Mother's Choice*, *Ms.*, Feb. 1988, at 55. The same deep pleasure in parenthood is depicted even in those first person accounts that emphasize the hectic and pressured quality of life for parents with multiple roles. E.g., Sara Davidson, *Having it All*, *Esquire*, June 1984, at 54, 60 ("All my time is spent on three things: baby, work, and keeping the marriage going. I find I can handle two beautifully. . . . But three pushes me to the edge.").

273. See, e.g., MARTHA R. FOWLKES, *BEHIND EVERY SUCCESSFUL MAN: WIVES OF MEDICINE AND ACADEME* 67-78 (1980) (describing the working relationships between physicians and academics and their wives). This seems to be the point recognized in the Delaware

No one seriously disputes the deep importance for children of strong emotional bonds with a primary care provider, traditionally, but not necessarily, the child's biological mother.²⁷⁴ The standard references in developmental psychology²⁷⁵ explore extensively the importance for infants and young children of a sensitive, responsive caregiver with whom the child can develop a secure attachment, and the risk of serious developmental consequences where those early bonds are not achieved and protected. In several decades of research since publication of the early attachment studies, psychological and psychiatric data has accumulated to support these points.²⁷⁶ Attachment theory came into currency in legal circles with the publication of Goldstein, Freud, and Solnit's *Beyond the Best Interests of the Child* in 1973, which highlighted the need for recognizing and protecting these bonds in the context of custody and placement decisions.²⁷⁷ Another body of developmental literature, based on theories that focus on parental interactions with young children, also suggests that the nature of a child's early care is a significant predictor of antisocial behavior later in life.²⁷⁸

In the developmental literature, the risk of attachment failure is viewed as a risk of extreme social pathology. As described by the psychotherapist Selma Fraiberg, "[i]t is because the loved person is valued

cases allowing income equalization maintenance awards for a spouse who functioned as a "true partner in every sense of the word." See *supra* note 125.

274. Historically, there has been debate over how completely responsible mothers are for the healthy psychological development of their children. See generally Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY*, *supra* note 203, at 54-75 (discussing feminist writing on motherhood); David M. Spiegel, *Mothering, Fathering and Mental Illness*, in *RETHINKING THE FAMILY*, *supra* note 203, at 95-110 (discussing relationship of families to mental illness). There is a growing literature on fathers as primary caregivers. See, e.g., EHRENSAFT, *supra* note 265, at 57-75 (1987) (describing how the fathers' perspectives on caregiving differ from those of the mothers); KYLE D. PRUETT, *THE NURTURING FATHER* (1987) (focusing on the effects of the relationship on the father as well as the children); Frank F. Furstenberg, Jr., *Good Dads—Bad Dads: Two Faces of Fatherhood*, in *THE CHANGING AMERICAN FAMILY* (Andrew Cherlin ed., 1988), reprinted in *FAMILY IN TRANSITION* 342 (Arlene S. Skolnick & Jerome Skolnick eds., 7th ed. 1992) (surveying history and recent trends in fathers' involvement with their children).

275. See, e.g., JOHN BOWLBY, *ATTACHMENT AND LOSS passim* (2d ed. 1982) (examining in a three-volume series the effects on personality development of the child-mother relationship).

276. For a review of the additions to this literature over the past decades, see Jay Belsky, *Parental and Nonparental Child Care and Children's Socioemotional Development: A Decade in Review*, 52 J. MARRIAGE & FAM. 885, 888-93 (1990).

277. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). For a more contemporary and encyclopedic analysis of these issues in the context of custody and visitation decisions, see WILLIAM F. HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS AND PSYCHOTHERAPY* (2d ed. 1991).

278. This is described by Belsky as "social learning theory." See Belsky, *supra* note 276, at 891-92.

above all other things that the child gradually modifies his aggressive impulses and finds alternative modes of expression that are sanctioned by love."²⁷⁹ Fraiberg argues that a child who has not had an adequate bond to a caretaker during the earliest years of life might experience a lifetime of serious difficulty both in forming other human bonds and in controlling aggression. She depicts "diseases of nonattachment" that, in extreme cases, produce serious mental illness and the potential for chilling, sexualized forms of violence, and suggests that less extreme versions of the same difficulties may accompany less extreme attachment problems.²⁸⁰

Substantial research has been conducted assessing the effects of maternal employment and day care on healthy early childhood development.²⁸¹ Because of the importance of protecting a child's primary attachments, this research reflects significant concern with the effects of day care on infants, toddlers, and preschool age children. These studies do not suggest that young children generally benefit from day care, except in the rare case in which children form more successful bonds in the child care setting than in the family itself.²⁸² The studies also do not indicate that day care is always harmful. The evidence indicates that the developmental risks vary greatly with other factors, and increasingly the emphasis of researchers is on identifying those factors.²⁸³ As a result, we are beginning to learn how best to protect the child's primary attachments despite the need for day care, and what care situations offer the best possible substitute for care in the home.

Some feminist writers find the day care research troubling, particularly because it has been used to blame women who work for abandoning their children.²⁸⁴ It is not sensible to imagine that all or even most children who experience day care as infants will grow up incapable of forming human bonds and prone to aggressive, violent behavior. But there is some level of risk, suggested by both empirical research,²⁸⁵ and the hesitations of child development experts to embrace enthusiastically the idea

279. SELMA FRAIBERG, *EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING* 46 (1977).

280. *Id.* at 45-51.

281. See generally Belsky, *supra* note 276, at 893-99 (summarizing the research in this area since the 1970s).

282. *Id.*

283. *Id.* at 896-98.

284. See, e.g., BERGMANN, *supra* note 196, at 285-86 (mocking the extrapolations from 1960s monkey research); BETTY FREIDAN, *THE FEMININE MYSTIQUE* 194-96 (10th anniv. ed. 1974) (noting that many of the reported studies were misinterpreted in the press).

285. See Belsky, *supra* note 276, at 893-99.

of full-time wage employment for mothers of small children.²⁸⁶ Individual families should be free to make their own assessment of these risks. Similarly, in designing public policies, some level of caution is appropriate.

At the level of public policy debate, these principles have led to specific recommendations. Harvard pediatrician T. Berry Brazelton, together with U.S. Representative Patricia Schroeder, lobbied around the country in 1988 for legislation guaranteeing one parent a minimum of four months of parental leave whenever a child is born or adopted.²⁸⁷ Under the current law, many families of young children cannot commit even this period of time to giving their child an ideal start, either because of financial pressures or the risks of loss of a job or employment benefits. The most recent version of the family leave legislation to reach a vote in the U.S. Congress only partially addresses this problem, requiring that some workers be granted up to twelve weeks of unpaid leave.²⁸⁸

Other advocates argue for much longer early "bonding periods." For example, Selma Fraiberg argued emphatically that the forms of child care available in the marketplace are highly inadequate for the needs of a child under three. For three to six year-olds, she argued that a half day of care in a high-quality preschool should be the maximum acceptable level.²⁸⁹ U.S. Senator Orrin Hatch proposed something more along these lines as a substitute to the Senate's 1991 family leave bill, urging employers to provide up to six years of unpaid leave for parents to bond

286. See, e.g., T. BERRY BRAZELTON, *WORKING AND CARING* (1985); ZIGLER & LANG, *supra* note 262; Barbara Kantrowitz, *The Clamor to Save the Family*, NEWSWEEK, Feb. 29, 1988, at 60; see also Penelope Leach, *Are We Shortchanging Our Kids?*, PARENTING, Apr. 1991, at 86 (asserting that parents focus too much on material well-being and not enough on what is best for their children); Penelope Leach, *Daycare Centers Are Fine for Preschoolers, But What About Babies?*, PARENTING, June/July 1991, at 58 (arguing that infants and toddlers should spend more time with parents). Various authors have noted the turnaround on this issue made by Dr. Benjamin Spock, who was once firmly opposed to maternal employment. See BERGMANN, *supra* note 196, at 285; GERSON, *supra* note 198, at 183.

287. See Kantrowitz, *supra* note 286, at 60 (describing the "political roadshow" featuring Schroeder, Brazelton, and "Family Ties" television producer Gary David Goldberg); see also ZIGLER & LANG, *supra* note 262, at 77-87, 217 (finding that the needs of infants and toddlers suggest a minimum of three to four months parental leave to give child a "firm foundation"). See generally BRAZELTON, *supra* note 286 *passim* (providing guidelines for balancing the demands of child care and the demands of a career).

288. Clifford Krauss, *Senate Passes Bill Setting Up Leaves for Family Needs*, N.Y. TIMES, Oct. 3, 1991, at A1. The bill was vetoed on September 22, 1992. Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES, Sept. 23, 1992, at A1.

289. FRAIBERG, *supra* note 279, at 84-88. Fraiberg's viewpoint is disparaged by Bergmann as "rearguard agitation against purchased child care," BERGMANN, *supra* note 196, at 286, by Betty Friedan as elitist, FRIEDAN, *supra* note 217, at 118-19, and by Chodorow and Contratto as blaming women who work for depriving their children, Chodorow & Contratto, *supra* note 274, at 64-65.

with new children, and imposing less demanding requirements for the rehiring of workers returning from such a leave.²⁹⁰

Beyond the concern with early childhood development, caregiving is important for older children as well. Throughout the 1980s, popular and academic writing described a long list of social pathologies that can result when children and teenagers spend significant periods of time without the regular care and supervision of a parent.²⁹¹ Christopher Lasch's *Haven in a Heartless World* describes the damage from these trends as going beyond their effects on individuals, arguing that as children become increasingly autonomous of parental control, vital social and moral values are lost. The data on children's well-being confirm this sense that something has gone wrong.²⁹²

Moreover, these writers do not occupy a single position on the political spectrum. As Barbara Bergmann, a feminist economist, writes:

One does not have to be a devotee of Old Testament attitudes to recognize that valuable things have been lost in women's transition to a place in the market economy. Children no longer spend their first years in a quiet and protected environment basking in the attention of a person lovingly and entirely devoted to their well being.²⁹³

Many writers have deplored the tendency, often described as peculiarly American, to ignore and neglect children of all classes.²⁹⁴ Public spending for the needs of children is relatively low in this country, dramatically lower than spending for older Americans, and the trend shows

290. Krauss, *supra* note 288, at A1.

291. *E.g.*, NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD passim* (1982); MARIE WINN, *CHILDREN WITHOUT CHILDHOOD passim* (1983); *see also* BERGER & BERGER, *supra* note 211, at 146, 151-56 (describing the importance of parents' role in child's socialization). These issues have drawn significant attention in the popular media in recent months. *See, e.g.*, *Children in Crisis: The Struggle to Save America's Kids*, FORTUNE, Aug. 10, 1992, at 34 (devoting the entire issue to children's problems).

292. LASCH, *supra* note 175, at 178-89. For data on children's well-being, see FUCHS, *supra* note 110, at 104-16. Moreover, the demographics of declining birth rates and the failure to invest in the health and education of children have already created labor supply problems for many employers that are projected to grow steadily worse. *See* SYLVIA HEWLETT, *WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN* 195-232 (1991). Both factors have already resulted in increased demand for skilled labor in some fields, where jobs are increasingly filled by women with children, whose employers must be more willing to accommodate the demands of their workers dual lives. *Id.*

293. BERGMANN, *supra* note 196, at 11.

294. *See, e.g.*, HEWLETT, *supra* note 292. *See generally* William A. Galston, *Home Alone, THE NEW REPUBLIC*, Dec. 2, 1991, at 40 (reviewing seven recent books on this theme); Sheila B. Kamerman, *Doing Better By Children: Focus on Families*, 8 J.L. & POL. 75, 87-88 (1991) (proposing family policy agenda).

every sign of growing worse.²⁹⁵ In the private sector, even with the institution in recent years of fairly draconian child support enforcement measures, many children living with a divorced or unmarried single parent do not receive any regular financial support.²⁹⁶ Barbara Bergmann vividly observes that: "the two-parent method of child support probably evolved millennia ago from the single-parent method of our primate ancestors. We seem to be in the process of change back to the single-parent method."²⁹⁷

Of course, even those who agree that rearing healthy adults is an important social good disagree on the best means to achieve that goal. Some writers and politicians have focused on measures intended to return the structural supports for domesticity in the form of the "traditional" nuclear family.²⁹⁸ Other writers suggest various means of bringing caregiving into the public and market spheres, many of which involve legislating reforms in the workplace.²⁹⁹

Whatever our views on the importance of children in general and in particular,³⁰⁰ whatever the issues that determine appropriate public poli-

295. HEWLETT, *supra* note 292, at 138-67.

296. Krause, *supra* note 269, at 174-76.

297. BERGMANN, *supra* note 196, at 232. Bergmann uses another animal metaphor to argue that this would not be a good development for fathers: "It is hard to believe that the happiness of men would best be served by the conversion of a high proportion of adult males to rogue elephant status, living only fitfully with females and the young, of use to them only at mating time." *Id.* at 12.

298. Conservative support for a return to "traditional" family is reflected in a 1986 report to the President, which argues in part for "reversing the recent trend toward automatic divorce." White House Working Group on the Family, *The Family: Preserving the Future* 14 (1986).

299. *E.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1220-47 (1989) (discussing means to transform ideology of work and to redefine gender roles in the workplace); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 488-99 (1990) (arguing that to achieve any useful change regarding gender roles in the workplace, we must view the family "functionally" and value family work equally with wage work); *see also* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, *passim* (1979) (considering ways to restructure the workplace to make it more accommodating for parents and parental responsibilities).

All of these policies would have the primary effect of benefitting those adults who choose to have children and might, for that reason, tend to encourage the choice to have children. FUCHS, *supra* note 110, at 96-104; Posner, *supra* note 197, at 198. Not surprisingly, these policies are more common in countries with expressed national concerns about increasing fertility.

300. Karl Llewellyn, describing the social functions of the family, had this to say with respect to assuring a supply of children: "[M]arriage offers assurance that the new supply will arrive under circumstances which halfway guarantee its being taken care of—and this equally though particular small squallers be none too hopeful, none too nice, and none too welcome." Llewellyn I, *supra* note 176, at 1289-90.

cies for children and families, the policy issues are much narrower in the context of family law. Once a married couple has made the choice to have a child, their responsibilities are established. Creating structures of moral and financial support to encourage and permit families to make caregiving a priority can only help parents and children caught in the dilemma of the family generation gap.³⁰¹

Our social and legal institutions have lagged behind the changes in family caregiving. Patterns of family care in all family situations remain strongly influenced by the traditions of the gender-based division of labor, with men bearing primary responsibility for labor in the marketplace and women absorbing the greater share of work within the family. Despite the dramatic changes in marriage, fertility, and women's employment that have marked the past twenty years, these social roles have remained remarkably resilient.

The work of sociologist Kathleen Gerson, who has studied the decisions of individual women to emphasize either domestic or non-domestic roles, suggests that the choice to devote one's energy to family care is heavily influenced by a woman's actual experience and circumstances through a series of life stages.³⁰² Regardless of a woman's initial orientation toward homemaking or a career, the structural context of family and work opportunities largely determines the choices she will make.³⁰³

As Gerson's work describes, part of the difficulty women face is that work and family are presently structured to be mutually exclusive. Domestically oriented women attempt to define work as of secondary im-

301. There are arguments from a strict equality perspective against a system of maintenance awards for caregivers on the basis that it would inappropriately "facilitate the conventional practice of designating a single primary caretaker for children, rather than foster[ing] the nonsexist practice of shared parenting for infants and children." Kay, *supra* note 110, at 35; see also Kay, *supra* note 1, at 80-89 (arguing that maintenance awards encourage traditional gender and parenting roles).

Although I believe that current divorce laws unfairly ignore the sacrifices that parents, primarily mothers, make in the interests of their children, it is not my view that children's needs should be defined to take priority over women's autonomy. Cf. Williams, *supra* note 194, at 1627-29.

302. GERSON, *supra* note 198, at 53-59. Fifty-five percent of Gerson's sample population were women who started adult life with an orientation toward marriage, children, and domestic life, yet ten years later only one-third of this group retained a domestic orientation. Of the 45% who did not start out oriented toward domestic life, almost two-thirds veered toward domesticity rather than their initial career goals. *Id.* at 59-69.

303. Gerson argues that the desire to have children is not abstract and generalized, but that it comes in the context of a specific relationship. Women who "veer toward domesticity" do so primarily because they become committed to traditional marriages that both undermine their efforts at career building and allow them to implement domestic choices. *Id.* at 92-121. Conversely, for women who experience fragile and impermanent relationships, there are often rising work aspirations and ambivalence about taking on family roles. *Id.* at 70-91, 115-21.

portance in their lives, thereby managing the conflict they feel between the two realms.³⁰⁴ This strategy guarantees that the commitment to family care comes at a personal financial and economic cost. "Non-domestic" women, who by choice or necessity do not give domestic work primary importance, face a different conflict: the choice between motherhood or childlessness. In resolving this dilemma, the presence of a male partner committed to participating in parenting is of central importance, as are various strategies to reduce the costs of children, such as limiting family size.³⁰⁵

Gerson also explores ways in which the social and economic supports that previously existed for domestic roles have eroded.³⁰⁶ These supports once included the protection afforded, however imperfectly, by legal rules governing the grounds and financial consequences of divorce. As the traditional structures have disappeared, they have not been replaced by any new supports, in the world of work or the law of divorce, either for traditional caregiving or mixed caretaking and work roles.

Creating new structures of support for caregiving has proven difficult. Some writers have suggested we need to attribute economic values to services within the family and require payment for the services as rendered.³⁰⁷ Yet, the strategy of "making the family more like the market"³⁰⁸ could have serious drawbacks in terms of the very activity we wish to protect. Part of the value of the family, for adults and for children, has been its quality of being a refuge from the larger world.

The lack of social supports for caregiving, and the factors that place caregiving burdens primarily on women, impose a troubling choice upon families. Few families can invest parental time equally in caregiving work, and the project of attempting to assure equality may itself be destructive to family life.³⁰⁹ The choice to invest one parent's time in

304. *Id.* at 127-132.

305. *Id.* at 138-57 (choosing to stay childless); *id.* at 158-90 (combining work and motherhood).

306. *Id.* at 204-12.

307. Payment of wages for housework has been advocated by feminists dating back at least to Charlotte Perkins Gilman. See GILMAN, *supra* note 215, at 6-22. More recently, Susan Moller Okin made similar suggestions in her book. See *supra* note 92 and accompanying text. This is also a subject of apparently serious consideration by economically oriented writers like Richard Posner. See Posner, *supra* note 197, at 192-95.

308. See generally Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1518-20, 1528, 1530-39 (1983) (discussing efforts to reform family life based on market values). Olsen argues that such reforms fail because of the destructive effect of the market/family dichotomy itself. *Id.* at 1560-61.

309. For illustrations of some of these difficulties, see EHRENSAFT, *supra* note 265, at 57-75, and GERSON, *supra* note 198, at 169-76.

Although the courts and commentators have indicated their opposition to tallying the

caregiving work still creates economic and personal risks of dependence, risks that are greater now that they go substantially unrecognized in divorce court. If a family chooses to adhere during marriage to the self-reliance ideal that the law imposes on divorce—with every adult family member responsible for maximizing his or her individual autonomy, human (market) capital, and personal happiness—it may be impossible to find an accommodation of caregiving and family values.

C. Family Care and the Reality of Divorce

Despite our often polarized and politicized views of the family, there should be little dispute that caregiving is an essential attribute of family life, worthy of recognition in the law of divorce. Arguments have been made from both ends of the political spectrum that divorces should be more difficult to obtain where there are children.³¹⁰ Mary Ann Glendon has recommended a less extreme measure, which would assess fewer costs to the liberty and happiness of unhappily married adults. Rather than restricting access to divorce, Glendon has argued that divorce rules should place children's needs first in resolving the financial aspects of divorce.³¹¹ Within the legal scholarship on alimony and maintenance issues, there are many writers who argue for restoring respect for traditional roles in marriage or, at least, for making childrearing "less perilous."³¹²

Glendon's analysis does not confront the question of alimony or maintenance laws, but her view is consistent with the argument for caregiver support. Support payments to caregivers would have two benefits: facilitating the care of children in the difficult period after divorce, and allocating to both parents the costs of putting children first *during* marriage.³¹³ The literature in this area of family law suggests only one

parties' "respective debits and credits" on divorce, *see supra* note 167, it would likely be far more harmful to the institution of marriage to apply legal rules that require a husband and wife to maintain perfectly equal accounts throughout its duration.

310. *See generally* Elizabeth S. Scott, *Rational Decision Making About Marriage and Divorce*, 76 VA. L. REV. 9, 91 (1990) (advocating stricter laws for divorce when minor children are involved); Younger, *supra* note 183, at 900-11 (discussing proposal for mandatory "marriage for the benefit of minor children" that would be governed by stricter divorce laws); Christopher Lasch, *Who Owes What to Whom?*, HARPER'S, Feb. 1991, at 47-50 (arguing for stricter divorce laws to promote family cohesion). *But see* Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1442 (1992) (summarizing her critique of Scott's proposals).

311. GLENDON, *supra* note 77, at 93-99; *see also* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law On Divorce Outcomes*, 57 BROOK. L. REV. 621, 726 (1991) (endorsing Glendon's "children first" principle).

312. *See* Carbone & Brinig, *supra* note 63, at 956, 987 n.155.

313. Okin argues for alimony in these circumstances. OKIN, *supra* note 92, at 180-86.

disadvantage to caregiver support remedies: the risk that they will foster traditional family roles, economic dependence, and the corresponding gender roles that many men and women find oppressive.³¹⁴

Although the argument against mandating traditional family roles may be strong, the argument against tolerating those roles is not. Divorce law is not an appropriate lever for producing change in the nature of family life. There is no social consensus about the wisdom or value of moving toward gender-neutral marriage, in which family care and market labor are equally allocated. Even if most Americans agreed with this as a policy goal, it would be in the greater interests of our society to continue to support family life in all its varied forms.³¹⁵ It is particularly unfair for the law to impose penalties on one partner, in the name of social reform, for a way of life both have chosen.³¹⁶

Susan Moller Okin puts the argument for social tolerance in these terms:

The pluralism of beliefs and modes of life is fundamental to our society, and the genderless society I have just outlined would certainly not be agreed upon by all as desirable. Thus when we think about constructing relations between the sexes that could be agreed upon in the original position, and are therefore just from all points of view, we must also design institutions and practices acceptable to those with more traditional beliefs about

314. *E.g.*, DAVID L. KIRP ET AL., GENDER JUSTICE 182-83 (1986) (asserting that a "liberty-enhancing" government should not make traditional marriage attractive by subsidizing dependency with alimony); *see also supra* notes 215 & 301 (discussing writing of Herma Hill Kay concerning encouraging dependence).

Proponents of formal or abstract equality as a solution for gender inequality tend to dismiss the risk that new legal rules designed to achieve equality may cause substantial hardship. These solutions are premised on the theory that changes in law or governmental policy in fact change people's behavior; for a critique of this premise, see Becker, *supra* note 65, at 235-37 ("Formal equality is not capable of producing enough change in the status quo, and is likely to impose significant costs on those women most in need of change because most unlike men.").

315. The law of family regulation is already dual, to the extent we accommodate and defer to parental religious belief. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (holding that secondary education could not be compulsory where it violated parents' religious beliefs); COLO. REV. STAT. ANN. § 18-6-401(6) (West 1992) (creating exception to criminal child abuse statute for failure to provide medical treatment for a child in cases in which a parent provides treatment by spiritual means). Religious doctrine in many faiths still places great importance on procreation and family life. *See generally* Steven Bayme, *The Jewish Family in American Culture*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY, 149-59 (discussing role of Jewish family both in Jewish culture and the broader society); Gilbert Meilaender, *A Christian View of the Family*, in REBUILDING THE NEST, *supra*, at 133-48 (David Blankenhorn et al. eds., 1990) (discussing Christian perspective on nature and role of the family).

316. This conclusion seems to echo the more recent position taken by Kay, although her original stance was that divorce rules should be used to discourage traditional marital roles. *See supra* notes 215 & 301.

the characteristics of men and women, and the appropriate division of labor between them.³¹⁷

Although Professor Okin's belief in pluralism leads her to conclude that traditional, gender-structured marriage is a necessary institution, she also sees it as "socially problematic" because of the asymmetrical vulnerabilities it creates, particularly in the context of divorce.³¹⁸ As she concludes, "There can be no reason consistent with principles of justice that some should suffer economically vastly more than others from the breakup of a relationship whose asymmetric division of labor was mutually agreed on."³¹⁹

Okin's proposal is that when a family characterized by a traditional labor division arrives in divorce court, the courts should award alimony and child support at a level sufficient for both post-divorce households to enjoy the same standard of living. In her view, this support should continue "for at least as long as the traditional division of labor in the marriage did and, in the case of short-term marriages that produced children, until the youngest child enters first grade and the custodial parent has a real chance of making his or her own living."³²⁰

A rehabilitation of family care proceeds from three principles. First, although the costs and benefits of caregiving are most evident in households with a "traditional" division of labor, they appear in different forms in virtually every family. Second, the burdens and rewards of family life are not limited in time to the duration of a marriage. Third, what is valuable within a family is not autonomy and self-reliance, but interdependence and support.

317. OKIN, *supra* note 92, at 180.

Victor Fuchs has also made this point, arguing that family policies must respect diverse value systems, including those in which more traditional choices are made. In musing about the future of the family, Fuchs suggests the possibility that the United States might divide into two groups: "secular modern" families, comprising about 75% of the population, with an average of one to one and a half children per family, and "orthodox religious" families, including Catholics, Mormons, Fundamentalist Protestants, and Orthodox Jews, with an average of three or four children per family. As he envisions it, this could be a stable and long-standing division. FUCHS, *supra* note 110, at 142-44.

318. Okin writes:

Under current divorce laws . . . the terms of exit from marriage are disadvantageous for almost all women in traditional or quasi-traditional marriages. Regardless of the consensus that existed about the division of family labor, these women lose most of the income that has supported them and the social status that attached to them because of their husband's income and employment, often at the same time as suddenly becoming single parents, and prospective wage workers for the first time in many years.

OKIN, *supra* note 92, at 182.

319. *Id.* at 183.

320. *Id.*

If we believe in children, "the family," and in marriage itself, we have no choice but to recognize these realities of family life. Thus, caregiver support remedies have a place in all family types, whether the claim is made by a younger homemaker who has been financially dependent on a breadwinning spouse, by a career gapper or mommy track parent who has moderated his or her commitment to the work place in favor of family needs, or even by a fully self-reliant, employed parent who has and will continue to shoulder primary responsibility for child rearing. Moreover, caregiver support remedies should look both to the short-term needs of young children and the long-term consequences of family care. And finally, because caregiving transcends economic life, these remedies must be implemented with recognition that a couple's shared decisions about family life lie at the heart of what is most significant about their marriage itself.

V. CONCLUSION

Many writers have called for changes in family law so that it will provide greater support for the qualities that foster meaningful family life: responsibility, connection, caring.³²¹ The present alimony and maintenance laws, which look primarily for circumstances of financial need due to an inability to be self-supporting, have substantially ignored the issues of caregiving that are central to family life.

In this Article, I have argued that a deep social ambivalence about caregiving and the rapid changes in patterns of family life have led to a generation gap in the law of alimony and maintenance. On the near side of the gap, family care has disappeared from sight. Despite clear statutory language in many jurisdictions providing for financial protections for caregivers, courts give priority to making spouses self-reliant over protecting and facilitating family care. Although many contemporary families struggle to find an accommodation of both values, the courts only recognize or compensate the caregiving contributions of older homemakers.

Divorce law has also seen an elaboration of new remedies, based on principles of compensation and restitution, but these have been applied almost exclusively to financial, nonfamilial contributions. Courts, and

321. Several of these authors are referred to throughout this article. See, e.g., GLENDON, *supra* note 77; see also Katharine T. Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 293, 296 (1988) (suggesting that law of parental rights emphasizes norms of benevolence and responsibility); Martha Minow, "Forming Underneath Everything that Grows: Toward a History of Family Law," 1985 WIS. L. REV. 819, 893-94 (1985) (arguing that family law history is more than a story of progressive individualism, and that family roles and legal rights have also been used by women to promote connection and caretaking).

perhaps lawyers, have not readily perceived the contributions of family care as creating a similarly compelling demand for legal or equitable relief.

It would not be difficult for trial and appellate courts to implement financial protections for caregivers who have made family contributions at significant personal costs. While every marriage is not the same, neither is every marriage unique. As Glendon has observed, within the vast body of divorce cases there are regularly recurring factual patterns that could be identified and recognized as requiring distinct legal treatment.³²² To do this requires only that appellate courts begin to recognize caregiving, and to take seriously their traditional obligation to review lower court rulings and elaborate appropriate standards to guide the lower courts' discretion.

The primary obstacles are not doctrinal, but rooted in perceptions and attitudes that have remained unacknowledged and unexpressed. Caregiving, particularly in its modern expressions, is not easily addressed within our legal traditions. Our most difficult task may also be the simplest: to affirm that family life is still a matter of deep personal importance and valid legal concern.

322. Glendon, *supra* note 6, at 1167-70.

