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REASKING THE WOMAN QUESTION AT DIVORCE

PENELOPE E. BRYAN*

Feminists have said much about women's experiences at divorce.¹ They also have developed theories and proposed changes in legal standards and procedures that would benefit divorcing women. Yet women remain disadvantaged during divorce and face numerous hardships after their marriages dissolve. The disconnect between feminist contributions and what women continue to experience at divorce raises questions about feminism's relevance to divorce. This Essay explores those questions. Part I outlines the problems women face at divorce. Part II describes various feminist solutions to the problems noted in Part I. Finally, Part III examines barriers to the implementation of feminist proposals and suggests strategies for overcoming these impediments.

I. EXPOSING THE PROBLEM

The assertion that many divorced women and their dependent children suffer financial hardship no longer sparks controversy. Many feminists and others have done much to expose and establish that the standards of living of many women decline precipitously at divorce.²

* I gratefully acknowledge Nancy Ehrenreich for her helpful comments on an earlier draft of this Essay.

1. See, e.g., Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 477-87 (1999) (discussing some of the feminist contributions to divorce).

2. See, e.g., TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS* 154-56 (1986); REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 19 (1989) [hereinafter MASSACHUSETTS GENDER BIAS REPORT]; LESLIE A. MORGAN, *AFTER MARRIAGE ENDS: ECONOMIC CONSEQUENCES FOR MIDLIFE WOMEN* 24-28, 72, 74-76, 79-83 (1991); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323-56 (1985); Ruth A. Brandwein et al., *Women and Children Last: The Social Situation of Divorced Mothers and Their Families*, 36 J. MARRIAGE & FAM. 498, 500 (1974); Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 SIGNS 232, 240-41, 244, 247 (1984); Peggy S. Draughn, *Divorcees' Economic Well-Being and Financial Adequacy as Related to Interfamily Grants*, 22 J. DIVORCE & REMARRIAGE 23, 24-25 (1994); Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 157-59 & nn.1-16 (1999) [hereinafter Garrison, *Child Support Policy*]; Marsha Garrison, *Equitable Distribution in New York: Results and Reform*, 57 BROOK. L. REV. 621, 720 tbl.55 (1991) [hereinafter Garrison, *Equitable Distribution in New York*] (noting that the average postdivorce per capita income of wives and children

Moreover, many divorced women experience difficulty finding work, remain trapped in low-paying jobs, and/or work two jobs to survive.³ Financial problems compromise the physical and psychological health of divorced women,⁴ as well as that of their children.⁵

Discrimination against women in the workplace helps explain women's financial vulnerability at divorce,⁶ but many other factors contribute as well. Wives generally become financially dependent upon their husbands.⁷ At divorce, a time when wives have little access to their husbands' earnings,⁸ many wives cannot afford, and

approximates 68% of their before-divorce per capita income, whereas the per capita income of husbands increases by 182% after divorce); James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 351-52 (1987); Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 TEX. J. WOMEN & L. 135, 137 (1998) (noting that the households of divorced women and children now have replaced the elderly as the most likely households to live at or below the poverty level); Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAM. 115, 116-17 (1984). The postdivorce decline in standard of living affects women at all socioeconomic levels and impacts women of upper socioeconomic status most severely. See MORGAN, *supra*, at 25-62; Paul R. Amato, *The Impact of Divorce on Men and Women in India and the United States*, 25 J. COMP. FAM. STUD. 207, 211 (1994). Moreover, the economic decline of divorced women usually remains constant, unless remarriage occurs. See MORGAN, *supra*, at 27; Grace Ganz Blumberg, *Balancing the Interests: The American Law Institute's Treatment of Child Support*, 33 FAM. L.Q. 39, 42 n.5 (1999).

3. See Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1165-67 & nn.48-54 (1999).

4. See *id.* at 1167 & n.55.

5. See *id.* at 1157-65 & nn.19-45; Garrison, *Child Support Policy*, *supra* note 2, at 157-58 & nn.2-4.

6. See, e.g., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS: FINAL REPORT 121 (Gay Danforth & Bobbie L. Welling eds., 1996) [hereinafter CALIFORNIA GENDER BIAS REPORT]; ARENDELL, *supra* note 2, at 53-61; NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 22 (1997); DAVID L. KIRP ET AL., GENDER JUSTICE 171 (1986); MORGAN, *supra* note 2, at 10-12; Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 129-30 (1987); Bryan, *supra* note 3, at 1206-08; M. M. Slaughter, *The Legal Construction of Mother, in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 73, 82, 84 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Joan Williams, *Towards a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 113-14 (1998); see also Marta Elliott, *The Determinants of Young Women's Wages: Comparing the Effects of Individual and Occupational Labor Market Characteristics*, 25 SOC. SCI. RES. 240, 256 (1996) (discussing her findings that suggest that employers discriminate against white women on the basis of their motherhood).

7. See MORGAN, *supra* note 2, at 7-10; Bryan, *supra* note 3, at 1172-73; Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 802-04 (1999); Garrison, *Equitable Distribution in New York*, *supra* note 2, at 652 (finding that in contested custody cases husbands' incomes averaged approximately three times those of wives); Slaughter, *supra* note 6, at 73, 82-83.

8. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 192-93; OHIO JOINT TASK FORCE ON GENDER FAIRNESS: A FINAL REPORT 72 (1995) [hereinafter OHIO GENDER BIAS REPORT]; Bryan, *supra* note 3, at 1173-74.

proceed without, adequate legal representation.⁹ Even if a wife initially can afford to hire a lawyer, the funds she can expend on attorney's fees lessens as her husband and his attorney employ adversarial tactics that enhance the cost of divorce, prolong resolution,¹⁰ and force her to accept an inadequate settlement.¹¹ Sometimes the wife's lawyer abandons her in the middle of the divorce proceeding, leaving her without representation.¹² Even if a wife can afford attorney's fees, her funds may not be sufficient to hire necessary experts¹³ or conduct formal discovery.¹⁴ The presentation

9. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 193-94; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 20-21; OHIO GENDER BIAS REPORT, *supra* note 8, at 72-74; REPORT OF THE OREGON SUPREME COURT/OREGON STATE BAR TASK FORCE ON GENDER FAIRNESS 55 (1998) [hereinafter OREGON GENDER BIAS REPORT]; KAREN WINNER, *DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES xviii-xxxix* (1996); Bryan, *supra* note 3, at 1174-75; Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 250 n.11 (1993). Judges exacerbate this problem by their frequent refusal to award attorney fees during and/or after the divorce proceeding. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 201-02; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 21; OHIO GENDER BIAS REPORT, *supra* note 8, at 72-74; Czapanskiy, *supra*, at 250 n.11; *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 804-05 (1990) [hereinafter *Florida Gender Bias Report*]; *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 528, 550-51 (1993) [hereinafter *Missouri Gender Bias Report*].

10. See Bryan, *supra* note 3, at 1175-76 & nn.96-98.

11. See OHIO GENDER BIAS REPORT, *supra* note 8, at 74. On the streets, attorneys call this well-known tactic "starving her out." See WEITZMAN, *supra* note 2, at 161-62; *Florida Gender Bias Report*, *supra* note 9, at 810; *Missouri Gender Bias Report*, *supra* note 9, at 535. As Winner notes:

In divorce court, some lawyers use so-called scorched earth tactics against wives in a campaign to wear them down and starve them out. They attempt to outspend the wife by legally obstructing the proceedings and delaying an agreement until she finally runs out of money and patience and gives up.

WINNER, *supra* note 9, at 58. Cases challenging settlement agreements frequently reflect the circumstances that Winner describes and that courts largely ignore. See generally Bryan, *supra* note 3, at 1243-70; Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 177-88 (1994).

12. See WINNER, *supra* note 9, at xix, 17; *Florida Gender Bias Report*, *supra* note 9, at 809.

13. See, e.g., CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 192; OHIO GENDER BIAS REPORT, *supra* note 8, at 72-73 (1995); WINNER, *supra* note 9, at 40-41; Bryan, *supra* note 3, at 1178; *Florida Gender Bias Report*, *supra* note 9, at 810.

14. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 157-58, 193. Husbands generally control the marital financial resources and sometimes conceal assets. See, e.g., FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 58 (1989) [hereinafter MICHIGAN GENDER BIAS REPORT]; PATRICIA PHILLIPS, *DIVORCE: A WOMAN'S GUIDE TO GETTING A FAIR SHARE* 94, 101-09 (1995). Others deliberately misrepresent the value of marital assets. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 22-23; WINNER, *supra* note 9, at 64-65. If the wife cannot afford discovery, she will lack the information she needs to negotiate effectively and to assess the fairness of a settlement offer. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 22-23; *Florida Gender Bias Report*, *supra* note 9, at 810; Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1146-47 (1988). Courts frequently exacerbate the wife's discovery problems by

of her case, then, suffers.¹⁵

If the wife does have sufficient funds to retain a lawyer throughout and to prepare her case adequately, her lawyer may represent her interests poorly.¹⁶ Many lawyers retain sexually discriminatory attitudes toward women.¹⁷ They also frequently encourage their women clients to accept poor settlements.¹⁸ Even if the lawyer apprehends her client's financial vulnerability and prepares the case well, a biased and/or incompetent judge may undermine the lawyer's efforts.¹⁹ A wife also may prove vulnerable to her husband's threat to pursue custody if she does not accept his inadequate financial proposal.²⁰ For good reason, battered wives are

refusing to enforce her discovery requests. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 22-23; *Missouri Gender Bias Report*, *supra* note 9, at 531.

15. See WISCONSIN EQUAL JUSTICE TASK FORCE: FINAL REPORT 237-38 (1991) [hereinafter WISCONSIN GENDER BIAS REPORT]; Bryan, *supra* note 3, at 1177-78; *Missouri Gender Bias Report*, *supra* note 9, at 528-30.

16. See Bryan, *supra* note 3, at 1234-38 & nn.378-403; Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 676 (1999). For a scathing portrayal of how lawyers represent wives, see generally WINNER, *supra* note 9.

17. See, e.g., CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 145, 165; PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 198-208 (1987) (describing lawyer gender bias against women in custody cases); Bryan, *supra* note 11, at 177-88 (revealing the gender bias of a woman lawyer against her woman divorce client); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 814 (1993) (noting that many lawyers disbelieve women's allegations of domestic violence or consider the violence insignificant); Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 462-64, 467 n.342 (1989) (noting that divorce settlements negotiated by lawyers reflected the same gendered decisionmaking found in judicial decisions).

18. See WINNER, *supra* note 9, at 69, 91; Bryan, *supra* note 3, at 1237; see also Melli et al., *supra* note 14, at 1158-59; Joan M. Krauskopf, *A Pilot Study on Marital Power as an Influence in Division of Pension Benefits at Divorce of Long Term Marriages*, 1996 J. DISP. RESOL. 169, 184-85 (discussing the variability in attorney representation).

19. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 119-21, 140-43, 161; CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS 124 (1991) [hereinafter CONNECTICUT GENDER BIAS REPORT] (noting that one Connecticut judge refuses to award alimony because he believes that women should be married and an alimony award may encourage women not to remarry); MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 35-36; Bryan, *supra* note 3, at 1195-98 & nn.194-209, 1213-16 & nn.270-74, 285-86, 288, 1226-33 & nn.335, 337-38, 346, 348-49, 353-58; Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2273-75 (1994).

20. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 25 (noting that in divorce mediation women bargain away their economic rights in order to retain custody of the children); OHIO GENDER BIAS REPORT, *supra* note 8, at 80-81 (finding that 83% of surveyed attorneys believed that fathers seek custody for negotiation leverage on financial issues); Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 493, 496-504 (1995); Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 28-29 (1995) [hereinafter Becker, *Double Binds*]; Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 REV. L. & WOMEN'S STUD. 133, 138 (1992) [hereinafter Becker, *Maternal Feelings*]; Bryan, *supra* note 3, at 1178-79; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761 (1988); *Florida*

particularly threatened by this tactic.²¹

Formal divorce laws also enhance the wife's problems. For instance, indeterminate spousal maintenance²² and property distribution²³ laws fail to provide wives with firm legal entitlements, making it difficult for them to secure fair settlements or judicial

Gender Bias Report, *supra* note 9, at 819-901; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1550; Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 336 n.177 (1997); Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 101 (1986) (finding that a significant number of interviewed women admitted bargaining away property or support rights in return for child custody). To curb this practice, Altman suggests that a rule should require parties to submit settlement agreements in stages. A court should refuse to accept any financial agreement until sometime after it has approved the custody/visitation agreement. Once approved by the court, the custody/visitation agreement becomes nonmodifiable. Even if one party agreed to financial terms in order to protect custody, that party could change their mind in the time between court approval of the custody/visitation agreement and court acceptance of the financial agreement. Attorneys would advise their clients not to actually enter financial agreements until the court had approved the custody/visitation agreement. See Altman, *supra*, at 527-29.

21. See, e.g., Bryan, *supra* note 3, at 1225-34 & nn.329-77 (describing the severe disadvantages facing battered women in contested custody cases); see also CHESLER, *supra* note 17, at 79 tbl.6 (finding that 59% of fathers in her study who won custody in litigation had abused their wives, and that 50% of the fathers who obtained custody through private negotiations had abused their wives); Becker, *Double Binds*, *supra* note 20; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence in Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44 n.199 (1991) (discussing studies confirming high percentages of custody awards to fathers who battered their wives).

22. Illinois law, for example, provides that a court may grant maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; is unable to support herself through appropriate employment; or is otherwise without sufficient income. Maintenance is to be awarded in such amounts and for such periods of time as the court deems just, after consideration of various factors, including the following: the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the standard of living established during the marriage; the age and the physical and emotional condition of both parties; and the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.

In re Marriage of Harding, 545 N.E.2d 459, 469 (Ill. App. Ct. 1989) (citations omitted); see also *In re Marriage of Frederick*, 578 N.E.2d 612, 620 (Ill. App. Ct. 1991) (finding that a court also should consider the tax consequences to each party of a maintenance award); MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 52-53 (reporting similar criteria in Michigan).

23. Illinois law, for example, directs courts to consider each spouse's contribution to or dissipation of the marital property, the value of the property set apart to each spouse; the duration of the marriage; the relative economic circumstances of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; the custodial provisions for any children; whether the apportionment is in lieu of or in addition to maintenance; the opportunity of each spouse for future acquisition of capital assets and income; and the tax consequences of the property division upon the respective economic circumstances of the parties.

In re Marriage of Harding, 545 N.E.2d at 465.

decrees.²⁴ When a wife does obtain spousal maintenance, the award likely will be insufficient in amount and duration²⁵ and frequently the husband refuses to pay.²⁶ Moreover, property distribution laws still fail to capture as property the husband's post-divorce income stream²⁷ or his enhanced earning capacity,²⁸ many times the most significant,²⁹ or only, marital asset.³⁰ Typically, wives continue to receive fewer of the marital assets than do their husbands.³¹

24. See Bryan, *supra* note 3, at 1212-19; Smith, *supra* note 2, at 137 (noting that every study of divorce concludes that distribution of marital property inadequately responds to the harsh economic consequences of divorce for women and children). Community property laws provide no better outcomes for women than equitable distribution regimes. See Smith, *supra* note 2, at 136. The American Law Institute (the "ALI") has proposed more determinate property distribution laws; more specifically, an equal distribution of marital property, see PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION § 4.15 (Proposed Final Draft 1997), as well as more determinate spousal maintenance laws. While I favor the move toward determinacy, I disagree with the proposed equal distribution of marital property. The ALI's classification of property and its maintenance provisions prove problematic and insensitive to women's concerns. A feminist critique of the ALI's recommendations, however, is beyond the scope of this Essay.

25. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 138-39; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 53-55; OREGON GENDER BIAS REPORT, *supra* note 9, at 52; Bryan, *supra* note 3, at 1201-04 & nn.226-33. The unavailability of maintenance likely strikes Black women harder than white women because fewer Black men than white men earn incomes that make maintenance awards feasible. See Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 465 (1999).

26. See CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 144-45; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 31 (noting 1981 nationwide statistics that indicate that only 43% of women awarded maintenance received full payment and that 33% of women awarded maintenance received no payment at all); MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 55.

27. See *Florida Gender Bias Report*, *supra* note 9, at 818.

28. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 56; ARENDELL, *supra* note 2, at 131-32; Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 751-53, 757 (1988); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2361-62 (1994); Smith, *supra* note 2, at 144-45.

29. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 56; see also Garrison, *Equitable Distribution in New York*, *supra* note 2, at 663-64 (finding that the low value of marital property found in her study contrasted dramatically with the high value of family income); Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 384 (1994) (noting that the human capital of the husband represents the chief asset of most divorcing couples).

30. See SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE* 125-26 (1997); WEITZMAN, *supra* note 2, at 110-11, 388 (noting that failure to include "career assets" in the marital estate skews the property distribution in favor of the primary working spouse and assures an inequitable division of marital property); Smith, *supra* note 2, at 145.

31. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 33-36; OREGON GENDER BIAS REPORT, *supra* note 9, at 52-53; *Florida Gender Bias Report*, *supra* note 9, at 816-18; Marcus, *supra* note 17, at 462-67 & n.342 (finding that appellate cases reveal that wives receive fewer marital assets than do husbands and that settlements reflect this pattern); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 188 (1990); Krauskopf, *supra* note 18, at 183, 186, 188. Williams argues that the unspoken "he who earns it owns it" rule governs property distribution in equitable distribution states. Williams, *supra* note

The rhetoric surrounding divorce enhances a wife's financial vulnerability. For instance, the law now favors a clean financial break between divorced spouses,³² supporting the judicial reluctance to award spousal maintenance.³³ If judges do not award spousal maintenance, the wife's lawyer also may have difficulty obtaining maintenance in negotiations. She cannot, for instance, credibly threaten that she will litigate the issue of maintenance if the other side proves unreasonable, when all involved know of the judicial reluctance to award maintenance.³⁴

19, at 2251. Ellman notes that some equitable distribution states employ a presumption in favor of the equal division of marital property, but that in practice wives still receive less than one-half of the marital assets. See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 234 (2d ed. 1991); see also WINNER, *supra* note 9, at 41-42.

32. See, e.g., Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 *FAM. L.Q.* 93, 107 & n.76 (1997); Garrison, *Equitable Distribution in New York*, *supra* note 2, at 623, 629; Regan, *supra* note 28, at 2314-15 & n.39; Williams, *supra* note 19, at 2232-33. Courts use this rationale to disfavor maintenance even when spouses undoubtedly will remain related because they share children. Moreover, the implicit contradiction between conceptualizing ex-spouses as strangers for purposes of financial issues and simultaneously demanding that ex-spouses remain cooperative parents generally lacks acknowledgement in the law. Scott suggests that the "clean break" policy also may discourage some parents from supporting their children after divorce. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *VA. L. REV.* 9, 36 (1990).

33. In the words of one judge:

Alimony was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent young women into an army of alimony drones, who neither toil nor spin, and become a drain on society and a menace to themselves.

Samuel H. Hofstadter & Shirley R. Levittan, *Alimony-A Reformulation*, 7 *J. FAM. L.* 51, 55 (1967). As Weitzman notes, judges typically view the husband's income as rightfully his. See WEITZMAN, *supra* note 2, at 163, 183; see also Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 *FAM. L.Q.* 119, 124 (1997); Williams, *supra* note 19, at 2234, 2250-52. This judicial attitude persists despite statutory provisions that encourage consideration of the wife's contributions as homemaker. See Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 *N.C. L. REV.* 721, 748 & n.93, 749-54 (1993); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 *U. CHI. L. REV.* 67, 95-96 (1993); see also Bryan, *supra* note 3, at 1201-04 & nn.227-33 (discussing studies supporting the infrequency and inadequacy of maintenance awards).

34. Anticipation of what the court will do is a bargaining chip in negotiation. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268, 268-69 (1984). As one lawyer stated to his male divorce client:

We ought not to be offering too much. Precedent seems to be more generous than judges are in paying spousal support. As much as you are concerned right now about what she might be getting, the judges are really not generous at all. This is a somewhat conservative county and there's a backlash for a woman to go out and do whatever a man can. So why not? Why can't she go and take care of herself? You take care of yourself.

AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 125 (1995); see also Melli et al., *supra* note 14, at 1143-44. See Bryan, *supra* note 3, at 1201-15, for a more thorough discussion of the difficulties wives encounter when they seek spousal maintenance.

The ideology of formal equality³⁵ currently pervades divorce law and ignores the wife's financial dependence upon her husband that stems from her marginal workforce participation³⁶ and her responsibilities for family care.³⁷ Encouraged to perceive wives as the formal equals of their husbands,³⁸ judges and lawyers fashion outcomes that fail to address the wife's financial needs at divorce.³⁹

35. Bartlett and Harris explain formal equality as follows:

Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them. It is a principle that can be applied either to a single individual, whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group whose members seek the same treatment as members of other, similarly situated groups. What makes an issue one of *formal* equality is that the claim is limited to treatment *in relation* to another, similarly situated individual or group and does not extend beyond same-treatment claims to any demands for some particular, *substantive* treatment.

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36. Marriage may severely compromise a wife's ability to participate in the labor market. Wives tend to subordinate their careers to those of their husbands and to assume the bulk of homemaking and childcare responsibilities. See Williams, *supra* note 19, at 2245-47 & n.91. Williams describes how wives tend to sacrifice their own market participation in order to facilitate the ideal worker status of their husbands. See *id.* at 2236-67. Wives also lose income for each year they remain out of the workforce. Williams notes that wives who interrupt their careers lose an average of 1.5% of income for each year they do not participate in market labor, with college-educated wives losing as much as 4.3%. See *id.* at 2257 & n.148 (citing 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 Elizabeth Smith Beninger & Jeanne Wielage Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 *FAM. L.Q.* 201, 207 (1982); Jacob Mincer & Solomon Polachek, *Family Investment in Human Capital: Earnings of Women*, 82 *J. POL. ECON.* 576, 583 (1974). Moreover, the wife's market work during marriage has little to no effect on her financial well being after divorce. See Pamela J. Smock, *The Economic Costs of Marital Disruption for Young Women over the Past Two Decades*, 30 *DEMOGRAPHY* 353, 367 (1993). Unless the wife remarries, she will suffer long-term economic costs attributable to divorce. See *id.* at 366-67; see also Williams, *supra* note 19, at 2256-57 (1994) (noting that a mother's decreased earning capacity due to child care responsibilities extends beyond the children's majority).

37. See Bryan, *supra* note 3, at 1206-09 & nn.239-51 (1999); Slaughter, *supra* note 6, at 73, 78-82. Williams explains that even in two career families, couples commonly engage in a game of "chicken" over who will provide housekeeping and childcare services. Due to her socialization that accords high priority to homemaking and childcare, the wife typically loses this game and performs most of these functions. See Williams, *supra* note 19, at 2240-41.

38. Williams explains that the current ideal in family law is the self-reliance of all adults. See *id.* at 2232. Estin argues that many courts refuse to award caregivers maintenance in order to encourage self-reliance. See Estin, *supra* note 33, at 721-22, 728-30.

39. See, e.g., CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 137; OHIO GENDER BIAS REPORT, *supra* note 8, at 72; *Florida Gender Bias Report*, *supra* note 9, at 814-16; *Missouri Gender Bias Report*, *supra* note 9, at 546-50 (reporting that many attorneys believe that many judges have an unrealistic view of the dependent spouse's ability to become self-sufficient); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 *FORDHAM L. REV.* 827, 854-57, 861-64 (1988) (observing that courts rarely distribute property to address financial need, despite statutory authorization to do so). Stark argues that family law's expectation that the "unitary family" will continue to operate in its traditional manner after divorce places inordinate burdens on women. See Stark, *supra* note 20, at 312. She explains:

Mothers still tend to have physical custody of the children after divorce.⁴⁰ All states require noncustodial parents to pay custodial parents child support in accordance with statutory guidelines.⁴¹ The amount of child support prescribed by such guidelines does not cover the true costs of raising a child.⁴² Guidelines also link the amount of child support to the custodial arrangement,⁴³ decreasing the amount the mother receives if the children spend a minimum number of overnights with the father.⁴⁴ Fathers typically bargain for more

The story of the unitary family imposes similarly impractical responsibilities on the mother at divorce. She is supposed to continue as caregiver, although her task is much more complicated, and she typically receives much less support. . . . Many divorced women do not trust their former husbands with their children. At visitation, the divorced mother is required to relinquish control over her children to a man she may no longer trust at a time when the children are most at risk. Moreover, this temporary relinquishment rarely provides the mother with any real respite. Because she usually retains primary custodial responsibility, it is left to her to deal with the logistics, as well as the consequences, of visitation. Even so, mothers report that the major problem with visitation by fathers is that fathers do not visit as often as mothers would like them to. The post-divorce mother is also expected to continue as household manager while taking a substantial cut in her budget. . . . The practical demands of maintaining a household on a reduced budget force women to assume greater bread-winning responsibilities than ever before. Six months or a year of what is euphemistically known as "rehabilitative alimony" rarely enables her to overcome the "sticky floor" as well as the "glass ceiling" of workplace discrimination.

Id. at 312-13. Divorce, of course, is not the only context in which courts use formal equality to produce unequal financial results for women. See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987).

40. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 121; CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 128; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 49-50.

41. See Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7, 7 (1999); Laura W. Morgan & Mark C. Lino, *A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines with Expenditures on Children Calculated by the U.S. Department of Agriculture*, 33 FAM. L.Q. 191, 191-92 (1999).

42. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 123, 126-27, 128-31; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 59-60; Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479 (1994) (reviewing ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* (1993), and DONALD J. HERNANDEZ, *AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT AND THE ECONOMY* (1993)); Morgan & Lino, *supra* note 41, at 204, 214-18 & Graph IV-VI (1999); see also Garrison, *Child Support Policy*, *supra* note 2, at 159-61 (finding that guidelines continue to produce awards that result in a lower standard of living for the child and a higher standard of living for the noncustodial obligor parent). But see R. Mark Rogers, *Wisconsin-Style and Income Shares Child Support Guidelines: Excessive Burdens and Flawed Economic Foundation*, 33 FAM. L.Q. 135 (1999).

43. See, e.g., CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 133-34; Marygold S. Melli, *Guideline Review: Child Support and Time Sharing by Parents*, 33 FAM. L.Q. 219, 224-25 (1999); Venohr & Williams, *supra* note 41, at 21, 32-33.

44. The California child support statute, for instance, authorizes courts to reduce the child support award if the noncustodial parent has 30% or more custodial or visitation time. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 33; see also Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1446-48 (1991)

custody in order to reduce their child support obligation.⁴⁵ Subsequently, many fathers allow the children to spend most of their time with their mothers,⁴⁶ leaving her with even less child support than the guidelines would allow under the new custody situation.⁴⁷

Some custodial mothers do not obtain child support, and even more cannot collect what fathers owe.⁴⁸ Enforcement procedures remain notoriously ineffective, despite state and federal efforts to combat noncompliance.⁴⁹ Nearly all guidelines fail to provide support for college education,⁵⁰ leaving only the custodial mother to provide whatever financial assistance she can to her children.⁵¹

(discussing similar provisions in the states of Colorado and Washington). Moreover, many child support statutes assume that the noncustodial parent visits 20% of the time, but provide for no upward adjustment in child support if that amount of visitation does not occur. *See id.* at 1448-49.

45. *See, e.g.*, CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 133-35; OHIO GENDER BIAS REPORT, *supra* note 8, at 80-81; Altman, *supra* note 20, at 502-03.

46. *See* CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 134-35; *see also* Melli, *supra* note 43, at 229 (recognizing this possibility but claiming the possibility lacks empirical verification).

47. *See* Czapanskiy, *supra* note 44, at 1447-48. The mother could, of course, petition to modify child support. Financial constraints, however, prevent many mothers from doing so. *See* CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 135.

48. *See id.* at 133, 136; CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 143; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 50, 60; OREGON GENDER BIAS REPORT, *supra* note 9, at 47, 51-52; David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2588-89 (1995); Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes upon Academics and Advocates*, 33 FAM. L.Q. 235, 238 (1999); Paula G. Roberts, *Child Support Orders: Problems with Enforcement*, in 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 101, 110 (1994).

49. *See generally* Henry, *supra* note 48, at 237, 239, 246-47. Fathers' refusals to support their children have caused states problems for nearly 100 years. In the early twentieth century, for instance, states passed legislation that criminalized desertion and nonsupport. *See* MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 94-95* (1994). Then, as now, however, these laws largely proved ineffective at providing children with needed funds, and courts sent few deserting fathers to jail. *See id.* at 95-96. Mason argues that poor mothers likely would have fared better without these tougher laws. Widows became almost the exclusive recipients of mother's pensions, because the toughened laws encouraged the belief that deserting fathers, not the state, should provide for their families. *See id.* at 96. Rather than provide aid to deserted mothers and their children, state agencies unsuccessfully pursued the deserting father. *See id.* By the mid-1930s, courts no longer proved reluctant to jail deserting, nonsupporting fathers. *See id.* at 115. Judges, however, responded ambivalently to a divorced father's obligation to support his children over whom he no longer had custody. Some courts reasoned that the father's obligation to support his children arose from the father's right to complete custody and control of the children. If the father no longer had this right to custody, perhaps, he also should no longer have the obligation of support. *See id.* at 115-16. Most courts, however, created new rationales to justify a father's continuing obligation to support children over whom he had lost custody at divorce. *See id.* at 116. Some courts found that "divine law" supported the father's obligation; others reasoned that fathers could fulfill the duty of support better than mothers. *See id.*

50. *See* CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 131-32.

51. Most of the youngsters in Wallerstein and Blakeslee's study came from middle-class

While most mothers still receive physical custody of the children,⁵² gender bias reports and empirical research challenge the myth that divorcing mothers always receive custody of their children.⁵³ Rather, when fathers actually pursue custody of the children, they more likely than not will succeed.⁵⁴ This insight should not be shocking. Custody law has changed dramatically over the past forty years, becoming increasingly hostile to mothers.⁵⁵

A wave of progressive reform during the early 1900s ended in the

families where one or both parents had college degrees, where most of the children attended high schools, and where 85% of all students went to college. Yet, at ten-year follow-up interviews, only one-half of the divorced children were attending or had completed a two-year or four-year college. One-third of them, including many highly intelligent children, had dropped out of high school or college. Of the children attending college, only one in ten received full financial support from one or both parents. Others received no help at all or only limited financial help—even from wealthy fathers who could afford to help much more. Among the fathers in the study who could afford to help with college expenses, only one-third assisted their children. Two-thirds provided no help. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN: A DECADE AFTER DIVORCE* 25, 44 (1989); WEITZMAN, *supra* note 2, at 353; Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 269 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)); Barbara Grissett & L. Allen Furr, *Effects of Parental Divorce on Children's Financial Support for College*, 22 J. DIVORCE & REMARRIAGE 155, 159-61 (1994) (finding that divorced children attending college received significantly less parental financial support than children from intact families and that the custodial parent likely provided whatever support they did receive).

52. See, e.g., CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 121; CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 128; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 49-50.

53. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 63; OHIO GENDER BIAS REPORT, *supra* note 8, at 81.

54. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 59, 62-63 (noting that when Massachusetts fathers seek custody they obtain either primary or joint physical custody in more than 70% of the cases); WISCONSIN GENDER BIAS REPORT, *supra* note 15, at 197 (noting that judges reported that they "about equally" awarded custody to men and women in contested custody cases); *Florida Gender Bias Report*, *supra* note 9, at 821-22 & n.101; Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236-37 (1982); see also CHESLER, *supra* note 17, at 80 tbl.5 (finding that in 70% of disputed custody cases fathers won custody); *Id.* at 66 (noting that many studies, including her own, indicate that fathers who contest custody are more likely than their wives to win); WEITZMAN, *supra* note 2, at 233 tbl.22; Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determination at Divorce*, 1987 WIS. L. REV. 107, 120 & n.37; Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471, 502-04 (1979) (finding that in 63% of disputed custody cases in Los Angeles in 1977 fathers won custody). *But see* Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 37, 53 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (finding that when mothers' and fathers' requests for custody conflicted, mothers' requests were granted approximately twice as often as fathers requests). Yet, when both parents requested sole custody, mothers received what they requested in only 46.2% of the cases. See *id.* at 54 tbl.2.6.

55. See MASON, *supra* note 49, at 83 (recognizing that fathers have gained ground in recent years).

1930s with most states granting mothers custody rights equal to those of fathers.⁵⁶ The courts used their discretion in applying these new custody laws, premised upon the best interests of the children, to create a presumption that mothers should receive custody of children of tender years.⁵⁷ By the latter third of the twentieth century, however, new custody reforms began to once again shift the balance of power between mothers and fathers.⁵⁸ The rhetoric of formal equality invaded the custody as well as the financial realm of divorce.⁵⁹ Fathers demanded equal consideration as custodial parents, despite their minimal child care responsibilities during the marriage. The Tender Years Presumption itself fell to political pressures and equal protection challenges,⁶⁰ leaving behind only the vague and indeterminate "best interests" standard.⁶¹ State courts and legislatures also developed other principles to guide a best interests determination that have proven detrimental to mothers.⁶² Presumptions in favor of joint legal and/or physical custody, friendly

56. By 1936, 42 states had legislation recognizing that mothers had rights equal to those of fathers to the custody and control of their children. *See id.* at 114. Prior to this time, the father's common law right to custody and control over his children prevailed. *See id.* at 6, 59-61, 114.

57. At the start of the nineteenth century, American courts began to recognize a mother's special capacity to care for young children and sometimes would favor the mother's natural right over the father's common law right to custody of the child. *See id.* at 60-61. Eventually the "Tender Years Doctrine" prevailed and courts more routinely awarded custody of infants and young children to mothers. *See id.* at 61; *see also* Czapanskiy, *supra* note 44, at 1423-24. Exceptions, however, existed. Courts seemed to favor placing older children with the same-sex parent and the relative wealth of the mother and father influenced courts. *See* MASON, *supra* note 49, at 62. Moreover, the nineteenth-century presumption of a mother's superior moral character quickly crumbled at any sign of immoral behavior. *See id.* at 63. Courts considered the mother's adultery and/or the mother's leaving the father without "just cause" particularly reprehensible. *See id.* at 63-64.

58. MASON, *supra* note 49, at 121-22.

59. *See, e.g.,* Fineman, *supra* note 20, at 758-59. MacKinnon warns that the law "actively engages in sex inequality by apparently prohibiting abuses it largely permits, like rape, and by hiding the deprivations it imposes beneath ostensibly gender-neutral terms, like abortion." Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1300 (1991). That laws operate similarly in the divorce arena should not surprise.

60. *See* Stark, *supra* note 20, at 307 & n.49; Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 776. Fineman argues that egalitarian ideology has helped to neuter motherhood by devaluing and making invisible the caretaking function that mothers typically perform. *See* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 68 (1995); *see also* Estin, *supra* note 33, at 721-22, 728-30.

61. *See* MASON, *supra* note 49, at 122; *see also* Becker, *Maternal Feelings*, *supra* note 20, at 168-69; Stark, *supra* note 20, at 307. West Virginia adopted the primary caretaker standard, and Minnesota experimented with it. All other states have their own version of the best interests standard. *See* Becker, *Maternal Feelings*, *supra* note 20, at 138. In recent years, however, both Minnesota and West Virginia have abandoned the primary caretaker standard.

62. Becker also criticizes the many jurisdictions that give weight to children's preferences regarding custody arrangements. *See id.* at 188-90.

parent provisions, and the assumption that all divorced children will fare best if they have frequent and continuing contact with both parents all disadvantage mothers,⁶³ despite their gender neutral language. Effective use of formal equality rhetoric and political pressure by fathers' rights groups⁶⁴ have produced custody law that places fathers on better than equal legal footing with mothers⁶⁵ and fails to honor the caretaking mothers typically provide for their children.

The vague and indeterminate best interests standard disadvantages mothers because it grants trial courts tremendous discretion while providing little guidance.⁶⁶ Trial courts, then, can discriminate against mothers with impunity.⁶⁷ Unsurprisingly, trial

63. See John DeWitt Gregory, *Interdependency Theory—Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 SANTA CLARA L. REV. 1037, 1042-43 (1999).

64. See, e.g., Fineman, *supra* note 20, at 758-59; John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L.Q. 565, 568-69 (1999) (describing the lobbying efforts of fathers' rights groups in Texas for a joint custody statute). *But see id.* at 569-70 (describing how a woman's effort succeeded where fathers' rights groups had failed in securing the needed political support for a Texas joint custody statute).

65. See Fineman, *supra* note 20, at 739; Polikoff, *supra* note 54, at 240.

66. See David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 197, 203 (1989) (explaining that in a survey of lawyers, judges, and mental health professions, over 70% thought the best interests standard was unclear); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); see also Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1533 (1994); Gregory, *supra* note 63, at 1040-41; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

67. See, e.g., CHESLER, *supra* note 17, at 210-34; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 62-66, 69-73; GENDER BIAS TASK FORCE REPORT OF SOUTH DAKOTA 4 (1994) (finding that those surveyed perceived gender bias against women as most prevalent in four areas: rape, custody, sentencing, and child support); WINNER, *supra* note 9, at 46-49; Becker, *Maternal Feelings*, *supra* note 20, at 138, 175-83; *Florida Gender Bias Report*, *supra* note 9, at 819-23; Christopher P. Gilkerson, *Theoretic of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 880-81 (1992); Susan Beth Jacobs, Note & Comment, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 868 (1997); Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 412 (1985). Martha Fineman argues that patriarchal ideology remains the most determinative factor in the creation and acceptance of the discourses pertaining to motherhood in our society. See Martha A. Fineman, *Images of Mothers in Poverty Discourse*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 205, 207, 217-22 (Martha Albertson Fineman & Isabel Karpin eds., 1995). Under patriarchal ideology the dominant family form consists of a male-headed reproductive unit with defined gender role divisions. Motherhood remains a colonized concept—an event women live but men occupy and define, and to which men give content and value. See *id.* at 217. Can we wonder, then, why judges, still mostly men, use their patriarchal assumptions about motherhood, that seem discriminatory to mothers, in determining custody? Fineman also argues, and I agree, that single motherhood challenges and threatens the grip of patriarchal ideology. See *id.* at 217-18. Might we not then expect judicial hostility

courts hold mothers to higher moral⁶⁸ and parenting standards than fathers.⁶⁹ Courts also sometimes punish a mother who has limited financial resources.⁷⁰ Yet if the mother works outside the home, courts perceive her work as in conflict with the children's best interests.⁷¹ In contrast, judges see the father's employment as beneficial to the children.⁷² Courts credit the father's higher income and his ability to provide a more stable environment, while ignoring that the instability of the mother's home necessarily results from the

towards women who seek to become single mothers through divorce? Fineman further notes that "paradigmatic intimate associational bond" under patriarchal ideology remains the sexual affiliation between man and woman, *id.* at 217, and that traditionally this bond is realized through marriage. *See id.* at 218. She acknowledges that "[d]eviance from this paradigm has brought with it social and occasionally legal sanctions, as well as the potential for condemnation in the discourses of psychology, social work, and medicine." *Id.*; *see also* FINEMAN, *supra* note 60, at 101-44. Perhaps, then, we can better understand the growing hostility of all divorce laws to women who break this paradigm by divorcing. Perhaps current divorce laws also are designed to force women to re-affiliate with men for survival and protection, ultimately reinforcing this paradigm.

68. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 65; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 63; Becker, *Maternal Feelings*, *supra* note 20, at 175-77 (explaining how many courts find a mother's sexual activity outside marriage inconsistent with her children's best interests); Jacobs, *supra* note 67, at 857-58; Schafran, *supra* note 31, at 192. This attitude has historical roots. In nineteenth-century America, the mother's presumed superior moral character and her capacity to care for young children led to the adoption of the Tender Years Presumption. *See* MASON, *supra* note 49, at 60-61. If a mother, however, behaved inconsistently with the expectation of her superior morality, courts routinely deprived her of custody. Frequently courts denied adulterous mothers visitation with their children as well as support from their ex-husbands. *See id.* at 63-64. In contrast, courts would deny a father custody of his children only for clear abuse, usually physical, of the mother and child, or for desertion and non-support. *See id.* at 64. Courts usually did not consider a father's adultery sufficiently immoral to deprive the father of custody. *See id.* By the mid-1930s, however, many judges seemed less willing to impose this double standard of morality upon mothers. *See id.* at 113.

69. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 63-64; *Florida Gender Bias Report*, *supra* note 9, at 822; Jacobs, *supra* note 67, at 857, 867-68, 887; Schafran, *supra* note 31, at 192.

70. *See* CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 148; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 63; Jacobs, *supra* note 67, at 858-61, 883-84.

71. *See, e.g.*, CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 148; DOWD, *supra* note 6, at 6-8; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 63; MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 63; WINNER, *supra* note 9, at 46-47; Becker, *Maternal Feelings*, *supra* note 20, at 177 & nn.171-72; Jacobs, *supra* note 67, at 863-65, 868-71, 890; Polikoff, *supra* note 54, at 237-39; Carol Sanger, *Mother from Child: Perspectives on Separation and Abandonment*, in *MOTHERS IN LAW*, *supra* note 67, at 27, 39-40; Stark, *supra* note 20, at 342. This judicial attitude seems rooted in early-twentieth-century perceptions of motherhood. During the early 1900s, states limited financial aid to single mothers to those who proved "worthy." A "worthy" mother devoted full time to her children, did not work outside the home, and lived a life of conspicuous virtue without male companionship. *See* MASON, *supra* note 49, at 93.

72. *See* Becker, *Maternal Feelings*, *supra* note 20, at 177 & n.172; Jacobs, *supra* note 67, at 857; Polikoff, *supra* note 54, at 237-39; *see also* MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 63 (noting that judges sometimes perceive mothers who emphasize their careers more negatively than fathers who emphasize their careers).

divorce.⁷³ Courts change custody from mothers to remarried fathers, particularly if their new wives are homemakers.⁷⁴ In so doing, they ignore the extremely difficult nature of stepparent relationships,⁷⁵ believing rather that mothers are fungible.⁷⁶ Negative stereotypes about women encourage trial judges to disbelieve or minimize women's allegations of abuse against them and/or their children.⁷⁷ Judges sometimes deprive battered women of custody when they flee the marital home without the children.⁷⁸ Judges have reasoned that the mother has abandoned the children,⁷⁹ proving her parental unfitness.

Appellate review provides little control against judicial abuse because appellate courts will not overturn a trial court custody determination absent an abuse of discretion.⁸⁰ Moreover, appellate courts have difficulty determining when a trial court has impermissibly deviated from the law because of the indeterminacy of the best interests standard. Finally, when appellate courts do find an abuse of discretion, typically they remand the case to the same biased trial judge, who then can draw on a variety of acceptable rationales to support his/her prior decision. Wide discretion and little oversight

73. See Becker, *Maternal Feelings*, *supra* note 20, at 178.

74. See *id.* at 181.

75. See, e.g., Marilyn Ihinger-Tallman & Kay Pasley, *Stepfamilies in 1984 and Today—A Scholarly Perspective*, 26 MARRIAGE & FAM. REV. 19, 22-23, 26-27, 30-32 (1997) (reviewing research on stepfamilies); Marilyn Coleman & Lawrence H. Ganong, *Stepfamilies from the Stepfamily's Perspective*, 26 MARRIAGE & FAM. REV. 107 (1997); Jean Giles-Sims, *Current Knowledge About Child Abuse in Stepfamilies*, 26 MARRIAGE & FAM. REV. 215 (1997) (discussing research that indicates a higher risk of child physical and sexual abuse in stepfamilies than in natal families). Many of the problems confronting stepfamilies appear most intense in stepmother/stepchild relationships. See Ihinger-Tallman & Pasley, *supra*, at 22-23; Coleman & Ganong, *supra*, at 109-14.

76. See Becker, *Maternal Feelings*, *supra* note 20, at 181; Jacobs, *supra* note 67, at 857, 871, 890-92.

77. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 150-55 (noting that negative stereotypes about women encourage judges to disbelieve women's allegations of child sexual abuse); OHIO GENDER BIAS REPORT, *supra* note 8, at 81; OREGON GENDER BIAS REPORT, *supra* note 9, at 53-54; FINEMAN, *supra* note 60, at 119-22; Becker, *Maternal Feelings*, *supra* note 20, at 183 (discussing a North Carolina study finding that allegations of paternal abuse of wives or children seldom affected judicial custody decisions); Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 NW. U. L. REV. 1415, 1437 (1998) (noting that courts commonly believe that women fabricate charges of abuse in order to gain an advantage in divorce).

78. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 64, 69.

79. See, e.g., Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1310 (1993). Carol Sanger argues that our society perceives a mother's separation from her child, whatever the reason, as abandonment. Sanger, *supra* note 71, at 27. She also notes that law often punishes a mother's voluntary separation from her child. See *id.* at 27, 39.

80. See Jacobs, *supra* note 67, at 855 & n.85.

allow judges to use their individual subjective attitudes about women generally, and mothers specifically, in resolving custody disputes.

Many custody statutes favor the parent who shows the greater willingness to foster a relationship between the child and the non-custodial parent.⁸¹ Courts use these “friendly parent” provisions⁸² to deprive mothers of custody if they allege abuse of themselves or their children.⁸³ Despite evidence to the contrary,⁸⁴ courts reason that hysterical and vindictive women make such allegations simply to gain an advantage in negotiation or at trial.⁸⁵ Because wife beating often has occurred in a fractured marriage,⁸⁶ this judicial attitude severely disadvantages many divorcing women who seek escape from their abusers. This judicial misperception also compromises a mother’s ability to protect her children from ongoing abuse by the father.⁸⁷ Even mothers who only “speak” ill, albeit truthfully, of fathers do so at their own peril.⁸⁸

81. See Eleanor E. Maccoby et al., *Coparenting in the Second Year After Divorce*, 52 J. MARRIAGE & FAM. 141, 141 (1990); see also Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 554-56 (1982) (discussing friendly parent provisions).

82. Friendly parent provisions can create rather perverse situations. One gender bias study revealed that the wife, advised by her counsel to be “friendly” to the children’s father, allowed her husband frequent contact with the children. At the final divorce hearing, the court granted the father primary residential custody of the children, reasoning that the mother did not really want them because she allowed the father to see them so often. See *Florida Gender Bias Report*, *supra* note 9, at 819-23.

83. See Becker, *Double Binds*, *supra* note 20, at 26-27; see also Czapanskiy, *supra* note 9, at 256, 268-69 & n.65.

84. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 151-56 (discussing evidence regarding mothers’ allegations of child sexual abuse during contested custody disputes); Mertz & Lonsway, *supra* note 77, at 1454; Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 293-95 (1993); see also Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes, Getting to the Truth of the Matter*, 25 FAM. L.Q. 193, 194, 202 (1991).

85. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 69-70; CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 151 (acknowledging that some judges hold this belief about mothers who allege child sexual abuse in contested custody disputes); Meier, *supra* note 79, at 1307-08; Mertz & Lonsway, *supra* note 77, at 1437, 1453-54 (noting that courts commonly believe that women fabricate allegations of abuse in order to gain an advantage in divorce).

86. See, e.g., Bryan, *supra* note 3, at 1219 & n.299; Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CANADIAN J. WOMEN & L. 134, 138 n.19 (1988) (citing a Canadian study that found that 50-75% of divorcing women gave domestic violence as their reason for marital separation); Christine A. Littleton, *Women’s Experiences and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 27-28 (noting that most experts accept that domestic violence has occurred in 50% of divorce cases); Mahoney, *supra* note 21, at 10-11, 14; Singer, *supra* note 20, at 1548.

87. See OREGON GENDER BIAS REPORT, *supra* note 9, at 49-50 (noting that mothers frequently testified that lawyers and judges misunderstood safety issues concerning their children).

88. Friendly parent provisions reflect an old judicial attitude. For instance, in an 1881 Iowa case the court took a six-year-old boy away from the mother and gave custody to the father, because the mother had been “imprudent” in conversations with her son about the father’s

Presumptions in favor of joint custody disadvantage the caretaking mother and reward the father, despite the father's prior non-involvement with the child.⁸⁹ The mother who seeks sole custody in a state with a joint custody presumption may seem hostile to the father and may risk losing custody because of friendly parent provisions.⁹⁰ Presumptions in favor of joint custody severely disadvantage battered mothers who seek custody and visitation orders that provide protection for them and their children.⁹¹

Custody statutes typically assume that divorced children benefit from frequent contact with both parents.⁹² This assumption ignores the social science research suggesting otherwise.⁹³ It also ignores the negative effect on children of frequent and continuing contact between highly conflicted parents,⁹⁴ as well as the negative effect on

proven adultery and the father's criminal conduct. See MASON, *supra* note 49, at 64.

89. Nancy Illman Meyers, *Power (Im)Balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 878 (1996).

90. See Becker, *Maternal Feelings*, *supra* note 20, at 170, 187.

91. See Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM L.Q. 719, 732-36 (1999).

92. Maccoby et al., *supra* note 81, at 141; Melli, *supra* note 43, at 219 & n.1; Gregory, *supra* note 63, at 1042.

93. See e.g., Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 557 (1999) (citing several studies that find father contact has no significant effect on divorced children's well-being); Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE & FAM. 23 (1993) (summarizing 32 studies of divorce in which 15 found that father contact significantly and positively affected divorced children's well-being, seven found that father contact significantly and negatively affected divorced children's well-being, and 10 found that father contact had no significant association with divorced children's well-being); Maccoby et al., *supra* note 81, at 142 (noting studies that indicate that the well-being of divorced children who live with their mothers is unrelated to the amount of contact the children have with their fathers); Valarie King & Holly E. Heard, *Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being?*, 61 J. MARRIAGE & FAM. 385, 387, 392 (1999); Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANN. REV. SOC. 235, 256 (1994) (noting that large nationally representative surveys indicate that frequent father contact has no detectable benefits for divorced children); see also Czapanskiy, *supra* note 44, at 1438 n.83.

94. See, e.g., Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895 (1995); Becker, *Maternal Feelings*, *supra* note 20, at 185-87; Christy M. Buchanan et al., *Adolescents and Their Families after Divorce: Three Residential Arrangements Compared*, 2 J. RES. ADOLESCENCE 261, 287-88 (1992); Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 204 (1984); Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangements Improve the Parent-Child Relationship?*, 54 J. MARRIAGE & FAM. 837, 843-44 (1992); E. Mavis Hetherington et al., *Marital Transitions: A Child's Perspective*, 44 AM. PSYCHOL. 303, 307 (1989); Marsha Kline et al., *The Long Shadow of Marital Conflict: A Model of Children's Postdivorce Adjustment*, 53 J. MARRIAGE & FAM. 297 (1991); Maccoby et al., *supra* note 81, at 152; Donna Ruane Morrison & Mary Jo Coiro, *Parental Conflict and Marital Disruption: Do Children Benefit When High-Conflict Marriages Are Dissolved*, 61 J. MARRIAGE & FAM. 626, 626-28, 635-36 (1999); Seltzer, *supra* note 93, at 253-54.

the harassed parent, usually the mother.⁹⁵ Such a provision also invites the erroneous assumption that a child benefits from frequent contact with an abusive father,⁹⁶ despite social science evidence that spouse and child abuse severely harm children.⁹⁷ If the mother attempts to restrict the abusive father's access to the children, perhaps by seeking supervised visitation, this assumption creates a roadblock. Worse, any attempt to restrict visitation invites the label of the "unfriendly parent," which may jeopardize her custody of the child.

Within the hostile legal world they face, mothers must prepare their custody cases carefully and thoroughly. Limited financial resources can severely constrain a mother's ability to build a solid custody case. She may not have the resources to hire a lawyer or employ the expert witnesses necessary to present her case effectively.⁹⁸ Even if she can employ a lawyer and experts, or a court

95. See Becker, *Maternal Feelings*, *supra* note 20, at 137 (noting that joint custody is particularly painful for mothers who have been abused, because it forces them to interact more frequently with their abusers).

96. Unsurprisingly many divorced children are forced to visit with those who have abused them. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 69-70; *Florida Gender Bias Report*, *supra* note 9, at 867; *Missouri Gender Bias Report*, *supra* note 9, at 513, 567. Court cases provide numerous examples. In a Massachusetts case, for instance, the court granted visitation rights to a father who fired a gun into the home of his ex-girlfriend, killed her friend, and was charged with attempted murder of his child. In another Massachusetts case, the court asked a man who pled guilty to raping a woman whether he wanted visitation rights to the child conceived as a result of the rape. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 69. In a Florida case, a father, uncle, and grandfather sexually assaulted a five-year-old girl in front of her eight-year-old brother. The past president of the Board of Women in Distress stated:

[I]t took us 18 months—this happened in the last two years—18 months to be able to stop the man from visitation rights[,] during which time he continued to abuse the child. . . . But the judge said to me: "Do you as a counselor, do you as a professional, believe that this child [has been abused]"—"Yes, absolutely." She said "[O]kay, thank you," and went ahead and let him visit her alone.

Florida Gender Bias Report, *supra* note 9, at 867. For many reasons, negotiated settlements reflect this pattern. An abused mother, for instance, may agree to a custody or visitation arrangement that fails to protect her and her child because she fears losing custody altogether. See Bryan, *supra* note 3, at 1219-34 & nn.298-408. Moreover, guardians ad litem and custody evaluators frequently disbelieve or minimize a mother's allegations of abuse. See *id.* at 1232-33 & nn.365-73. They consequently may recommend that the alleged perpetrator receive custody. With no support from these professionals, the mother may agree to generous visitation in order to avoid losing custody altogether.

97. See, e.g., Buel, *supra* note 91, at 734; Vangie A. Foshee et al., *Family Violence and the Perpetration of Adolescent Dating Violence: Examining Social Learning and Social Control Processes*, 61 J. MARRIAGE & FAM. 331, 338-40 (1999) (finding adolescent dating violence associated with exposure to and experience of family violence); Meier, *supra* note 79, at 1307-09.

98. Partially due to their lack of competence regarding custody issues, courts have relied more and more on recommendations by experts. The parties themselves may introduce opposing expert testimony, the court may appoint a mental health professional to evaluate the custody dispute, or the court may appoint a guardian ad litem or special advocate to assist in determining the child's best interests. Unfortunately, these experts provide little competent guidance to courts. For instance, if the parties introduce opposing expert testimony, the court

appoints them at state expense, frequently these individuals prove as biased against women as do judges.⁹⁹ Understandably, a mother's

frequently experiences difficulty determining which expert to believe. If the court appoints a mental health expert to evaluate the custody dispute, the expert frequently harbors biases against women and/or lacks competence in a relevant area, such as domestic violence or child sexual abuse. The same limitations attach to court appointed guardians ad litem and special advocates. Experts, thus, do not necessarily protect a deserving mother's interests in the custody of her children. Nevertheless, without a supporting expert, a mother easily may lose custody of the children.

99. See Bryan, *supra* note 3, at 1198-200 & nn.210-18. Mertz and Lonsway begin their thoughtful article on denial of child sexual abuse with the following representative story:

A court-approved psychologist in a California custody case asked Jeannette, 14, whether she wanted to live with her father or her mother. When Jeanette picked her father, her mother . . . expressed alarm, telling the court that her former husband's drinking and physical abuse caused the family's breakup. Despite [the mother's] warning, the psychologist declared that Jeannette would be safe with her father. A week later, Jeannette's arm was twisted so severely that the girl's school reported her father to the state's child protective service agency. . . . The father told an investigator they were just "playing rough". . . . No charges were filed. In this case, the court psychologist was also the father's private therapist . . . Jeannette and her mother say that in their case, the psychologist's decision almost had tragic consequences. While the custody arrangement set up by [the psychologist] was still in effect, Jeannette tried to kill herself. . . . Only after the girl was hospitalized for an attempted overdose of prescription medicine was she returned to her mother's care.

Mertz & Lonsway, *supra* note 77, at 1416. They present another representative case:

In one [case involving a battered wife], a psychiatrist with 18 years experience in his field became very disturbed at the victim's unfeeling response to her tearful husband. On the basis of that and the fact that she had been sexually molested as a child . . . he determined that she was incapable of an emotionally healthy relationship with a man and recommended that the two-year-old twin daughters be given to the father. The psychiatrist . . . became so emotionally involved in the case that he defended the husband's abuse as a justified response to an hysterical wife and refused to investigate her allegations by calling her friends and neighbors who had witnessed the abuse. His reason for refusing to do so was "based on the malignancy of her imagination, I can't depend on what she has put in her lady friends' minds."

Id. at 1437-38 (quoting Laura Crites & Donna Coker, *What Therapists See that Judges May Miss*, 27 JUDGES' J. 9, 40-41 (1988)). Mertz and Lonsway also note that psychologists who use "systems" approaches may presume that all parties in an abusive family system bear some responsibility for the violence. See *id.* at 1438; see also Meier, *supra* note 79, at 1301-02. The mental health profession's recent focus and insistence upon the value of fathers to children's well-being, reflected in its bias in favor of joint custody, also seems puzzling when no credible evidence indicates that joint custody serves the best interests of most, or even many, children. See Maccoby et al., *supra* note 81, at 152-54. Some suspect that this bias provides one more example of the psychological profession serving as an instrument of social control over women, helping to preserve preexisting hierarchy. See Scarlet Pollock & Jo Sutton, *Father's Rights, Women's Losses*, 8 WOMEN'S STUD. INT'L F. 593 (1985). This suspicion receives historical support. Until recent years, the male dominated psychological profession marginalized women's concerns, portrayed women as inferior hysterical human beings, and urged women to happily assume their proper subordinate position to men. Sanity in women often meant little more than proper accommodation to male dominance. See generally PHYLLIS CHESLER, *WOMEN AND MADNESS* (1972); SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 152-53, 283 n.42 (1989); Jeri Dawn Wine, *Models of Human Functioning: A Feminist Perspective*, 8 INT'L J. WOMEN'S STUD. 183, 189 (1985). Moreover, mental health professionals long have blamed mothers for children's developmental problems. See Becker, *Double Binds*, *supra* note 20, at 13; Fineman, *supra* note 20, at 767 n.161; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43

fear of losing custody may lead her to agree to a poor custody/visitation arrangement and/or to accept a poor financial settlement, cementing her disadvantaged position after divorce.¹⁰⁰

Increasingly, courts encourage or order divorcing spouses to mediate their divorce disputes.¹⁰¹ Mediators, however, prove to be as gender biased as attorneys and judges.¹⁰² In mediation, the wife must negotiate directly with her husband. Only indeterminate laws support her claims, and even those laws lack relevance in mediation.¹⁰³ Moreover, many lawyers do not attend mediation with their clients,¹⁰⁴ thus failing to insulate women from their husbands' powerful manipulations. Unsurprisingly, the wife typically fares poorly in mediation,¹⁰⁵ especially if she has experienced abuse by her husband.¹⁰⁶

VAND. L. REV. 1665, 1682 (1990); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 110-11 & n.81 (1993); see also Catherine McBride-Chang et al., *Mother-Blaming, Psychology and the Law*, 1 S. CAL. REV. L. & WOMEN'S STUD. 69 (1992).

100. See Fineman, *supra* note 20, at 761. Even worse, mothers may choose to endure physical and emotional abuse rather than risk losing custody of their children at divorce. See Danaya C. Wright, *DeManneville v. DeManneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 L. & HIST. REV. 247, 250 (1999) (noting that during the nineteenth century in England, when patriarchal laws firmly protected men's interests in their children, "[m]any women tolerated physical abuse, infidelity, and impoverishment from husbands who threatened to cut off access to children if they complained"). Brinig and Buckley make a counter-historical argument. Their research indicates that jurisdictions with joint custody laws have lower divorce rates. See Margaret F. Brinig & F. H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 403, 417 (1998). They assert that their research also supports their explanatory hypothesis: joint custody laws encourage fathers to bond more with their children because fathers need not anticipate a complete loss of custody at divorce, and these enhanced emotional ties make divorce less likely. See *id.* at 393, 423. They do mention as an alternative explanation, however, that women might remain in an abusive marriage rather than risk joint custody, see *id.* at 423, and suggest that further research should address this question. See *id.* For thoughtful critiques on Brinig and Buckley's research and conclusions, see Ann Laquer Estin, *Bonding After Divorce: Comments on Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 441 (1998), and Saul Levmore, *Joint Custody and Strategic Behavior*, 73 IND. L.J. 429 (1998).

101. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 145, 170.

102. See, e.g., *id.* at 145, 168, 172-73, 175; Bryan, *supra* note 11, at 189 n.9; Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 508-509 & n.276 (1992); Fineman, *supra* note 20, at 761; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555, 1584-90, 1594-96 (1991).

103. See Bryan, *supra* note 102, at 506 & n.271.

104. See Bryan, *supra* note 11, at 183-88; Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351 (1995). However, the lawyer's presence does not necessarily protect the wife from her husband's or from the mediator's manipulations. See Bryan, *supra* note 11, at 186.

105. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 175-77; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 2, at 23-27; Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 8 INT'L J.L. & FAM. 106, 119 (1988); Bryan, *supra* note 11, at 177-88; Bryan, *supra* note 102; Grillo, *supra* note 102, at 1561-63 & n.73.

106. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 242-45. For a comprehensive

II. FEMINIST WORK ON DIVORCE

Feminists have attempted to remedy many of the problems women face in divorce.¹⁰⁷ Some recognize that the ideology of formal equality advocated by liberal feminists disadvantages divorcing women in financial and custody disputes. They advocate a different type of feminism that emphasizes the value that caretaking women provides, and accepts women's financial dependency that typically derives from that caretaking and marginal workforce participation.¹⁰⁸ They advocate substantive,¹⁰⁹ rather than formal, equality for women. Other feminist theorists have worked to dissolve the perceptual barrier between the family and the market,¹¹⁰ a barrier that devalues the labor that women perform in the home and denies the economic partnership aspect of marriage.¹¹¹ Still others note that feminist theorists, generally, have ignored the strength and importance to women of the mother-child bond.¹¹² They encourage the acceptance

assessment of the disadvantages wives face in divorce mediation, see Bryan, *supra* note 102.

107. Many believe that feminists also played a critical role in the no-fault divorce movement during the 1960s and 1970s. See Bartlett, *supra* note 1, at 477-78. The history of the no-fault movement, however, does not support this belief. See *id.* Rather, feminists did not actively participate in the campaign that focused primarily on corruption and fraud in the courts and the excessive alimony that allegedly burdened men. See *id.* at 78-79 (citing DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 147 (1989)).

108. See Martha A. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789; Williams, *supra* note 6. Williams also notes a recent study by Jane Waldfogel that finds that women's family status accounts for 45% of the gender gap in wages at age 30 and that women's lower levels of work experience explains another 19% of the gap. See Williams, *supra* note 6, at 99 & nn.40-41 (citing Jane Waldfogel, *The Family Gap for Young Women in the United States and Britain*, 16 J. LAB. ECON. 505, 519 (1998)). Williams concludes that women's family responsibilities explain a full two-thirds of the wage gap between men and women. See *id.*; see also Smith, *supra* note 2, at 146-47.

109. See, e.g., Fineman, *supra* note 108, at 791. Bartlett & Harris compare substantive and formal equality as follows:

While formal sex equality judges the form of a rule, requiring that it treat women and men on the same terms without special barriers or favors on account of their sex, substantive equality looks to the rule's results because of significant differences in the characteristics and circumstances of women and men. Advocates of substantive equality demand that rules take account of these differences to avoid gender-related outcomes that are considered unfair.

GENDER AND THE LAW, *supra* note 35, at 261. Joan Williams goes farther and advocates a "destructive feminism" that seeks to eliminate the ideal-worker norm in market work and in family entitlements, because that ideal-worker norm discriminates against women, especially mothers. Williams, *supra* note 6, at 95-97.

110. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Williams, for instance, argues that the invisible work of women in the home supports the ideal worker status of husbands in the market. See Williams, *supra* note 6, at 118-19; Williams, *supra* note 19; see also BURGGRAF, *supra* note 30; Slaughter, *supra* note 6.

111. See generally BURGGRAF, *supra* note 30.

112. See Becker, *Maternal Feelings*, *supra* note 20, at 136-37. The reluctance of feminists to

of and the development of feminist theory acknowledging that bond.

Many feminists expose that our society in general fails to adequately value a woman's work in the home¹¹³ and her contribution to her husband's workforce participation.¹¹⁴ Nor do legal decision-makers recognize how a mother's caretaking responsibilities compromise her workforce participation before and after divorce.¹¹⁵ They illustrate how these oversights weaken a wife's claim for spousal maintenance. Seeking to provide justification for a wife's claim to her husband's postdivorce income stream,¹¹⁶ they emphasize how wives contribute to their husbands' workforce success and how the necessary labors wives perform at home compromise their own income capacity.¹¹⁷ They then propose specific formulas to allocate equitably the postdivorce income of spouses.¹¹⁸

Feminist groups have fought for, and in some instances, have obtained, more equitable property distribution laws.¹¹⁹ Twenty to thirty years ago, if the husband titled property in his name, the law awarded him that property upon divorce.¹²⁰ Today, with the exception of property acquired by gift, bequest, or inheritance, all property acquired during the marriage, irrespective of title, becomes part of the marital estate.¹²¹ Moreover, courts now recognize certain

focus on family issues as opposed to individual equality with men has deep historical roots. During the nineteenth century, the first wave of feminism in America advocated for individual property and civil rights for middle-class women. In contrast, social feminists led the second wave of feminism at the end of the nineteenth and the beginning of the twentieth century and shifted the feminist agenda to a concern for poor children and their families. Historians and modern-day feminists have criticized social feminists for compromising women's struggle for equality with men by reinforcing nineteenth-century stereotypes about proper roles for men and women: women's sphere remained the home, while men's sphere remained the world. See MASON, *supra* note 49, at 88-89.

113. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 55; Williams, *supra* note 6, at 119.

114. See Williams, *supra* note 6, at 110.

115. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 50.

116. See Slaughter, *supra* note 6, at 95 (describing spousal maintenance as delayed wages for mothering).

117. See MICHIGAN GENDER BIAS REPORT, *supra* note 14, at 50.

118. See Bartlett, *supra* note 1, at 479-80; Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Starnes, *supra* note 33; Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 656-64 (1998); Williams, *supra* note 19.

119. See Bartlett, *supra* note 1, at 479-80.

120. See Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2533 (1994).

121. See Doris Jones Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 522-24 (1990); Bartlett, *supra* note 1, at 479. Some jurisdictions

assets as property that they failed to recognize in the past.¹²²

Regarding custody issues, feminists have exposed the limitations and potential dangers for women and children of the best interests standard,¹²³ presumptions in favor of joint custody,¹²⁴ friendly parent provisions,¹²⁵ and assumptions that divorced children fare best with frequent and continuing contact with both parents.¹²⁶ They have explained the extreme disadvantage of abused women at divorce¹²⁷ and have lobbied successfully for custody laws that address domestic violence.¹²⁸ Many feminists propose custody standards that honor the caretaking parent and simultaneously encourage the involvement of both parents in the lives of their children.¹²⁹ In an attempt to curb

even allow distribution of nonmarital property, *see, e.g.*, Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 156 (1989), or the increase in the value of non-marital assets. *See* Bryan, *supra* note 102, at 443 n.2 (citing COLO. REV. STAT. § 14-10-113(4) (1974)).

122. Bryan, *supra* note 102, at 443 n.2.

123. *See* Becker, *Maternal Feelings*, *supra* note 20, at 138; Bryan, *supra* note 3, at 1192-201; Jacobs, *supra* note 67; Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 616-17 (1992).

124. *See, e.g.*, Dawn M. Bourque, "Reconstructing" the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada, 10 CANADIAN J.L. & SOC. 1, 3 & n.5 (1995); Buel, *supra* note 91, at 732-36; Becker, *Maternal Feelings*, *supra* note 20, at 184-88; Bryan, *supra* note 3, at 1192-93; Czapanskiy, *supra* note 44, at 1438 (noting how joint legal custody restricts the autonomy of the primary custodian, usually the mother); Schulman & Pitt, *supra* note 81; Scott, *supra* note 123, at 616-17; Stark, *supra* note 20, at 356 & n.313.

125. *See* Bryan, *supra* note 3, at 1192-94; Schulman & Pitt, *supra* note 81, at 554-56.

126. *See* Bryan, *supra* note 3, at 1192-94.

127. *See id.* at 1219-34 & nn.300-77.

128. *See* Bartlett, *supra* note 1, at 497 (noting that at least two-thirds of states require courts to consider domestic violence in custody cases); Keenan, *supra* note 67; Meier, *supra* note 79, at 1303, 1309. Many state statutes now contain provisions that (1) exempt battered wives from mandatory mediation of custody disputes, *see* Bartlett, *supra* note 1, at 497 & n.106; (2) create a presumption against joint legal or physical custody when domestic violence exists, *see id.* at 497 & n.104; (3) recognize that abusive parents presumptively should not have custody of the children, *see id.*; (4) instruct courts not to hold the battered spouse's departure from the marital home against him/her in a custody proceeding; (5) specifically acknowledge that domestic violence between spouses harms children; and (6) allow battered spouses to obtain ex parte temporary restraining orders. *See id.* at 495-96; *see also id.* at 494-99 (discussing a broad range of feminist contributions to domestic violence issues).

129. *See, e.g.*, MARTHA ALBERTSON FINEMAN: THE ILLUSION OF EQUALITY, THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) (advocating abandonment of abstract equality standards in custody cases in favor of standards that honor nurturing of children); Bartlett, *supra* note 1, at 483 n.34; Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75 (1994); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999); Czapanskiy, *supra* note 44, at 1462; Becker, *Double Binds*, *supra* note 20, at 28-29; Fineman, *supra* note 20, at 768-74; Polikoff, *supra* note 54, at 237, 241-43; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1278-79 (1998); Scott, *supra* note 123; *see also* Becker, *Maternal Feelings*, *supra* note 20, at 192-224 (discussing the limitations of the primary caretaker standard and advocating a maternal deference standard).

bias and promote more equitable outcomes, feminists urge judicial and lawyer education regarding all divorce issues.¹³⁰

Other feminists have critiqued the procedures used to resolve divorce disputes, seeking to level the playing field between husbands and wives and encourage more equitable outcomes. Many, for instance, insist, and explain why, judges should not require spouses, especially abused spouses,¹³¹ to participate in divorce mediation.¹³² Some expose the disadvantages facing wives in all settlement negotiations.¹³³

Despite considerable feminist effort, however, wives continue to fair poorly at divorce. Divorce law grows increasingly hostile to women's financial and custody interests.¹³⁴ Women's meager financial resources continue to compromise their cases. Uneducated judges and lawyers persistently discriminate against women. And, the legal procedures used to resolve divorce disputes remain substantially the

130. See CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 160, 164-66, 201-02; OHIO GENDER BIAS REPORT, *supra* note 8, at 76, 78, 81-82; Jacobs, *supra* note 67, at 898-900; Klein & Orloff, *supra* note 17, at 810, 812-13 & n.16-17.

131. See, e.g., Buel, *supra* note 91, at 731-32; Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151 (1990); Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175 (1985); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); see also Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

132. See, e.g., Bruch, *supra* note 105; Bryan, *supra* note 102; Bryan, *supra* note 11; Girdner, *supra* note 86; Fineman, *supra* note 20; Grillo, *supra* note 102; Meyers, *supra* note 89; Singer, *supra* note 20, at 1540-43; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985); see also Polikoff, *Gender and Child Custody Determinations: Exploding the Myths*, in FAMILIES, POLITICS, AND PUBLIC POLICIES: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 183 (Irene Diamond ed., 1983); Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993).

133. See generally Bryan, *supra* note 3; see also Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517, 519-27 (1998) (questioning women's "freedom" of choice in negotiating marital contracts).

134. For instance, the primary caretaker presumption custody standard, favored by many feminists, originated in West Virginia with Justice Neely's decision in *Garska v. McCoy*, 278 S.E.2d 357 (1981). During its last session, the West Virginia legislature revised the West Virginia custody statute, rejecting the primary caretaker presumption and creating a presumption in favor of joint decisionmaking. See W. VA. CODE §§ 48-2-1, 48-11-201 (1999). Minnesota, the only other state to adopt the primary caretaker presumption, also abandoned that standard in 1990. See Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine*, 33 FAM. L.Q. 543, 546 (1999). Some states, however, do include the primary caretaker as a factor to consider in determining the best interests of the child. See OHIO GENDER BIAS REPORT, *supra* note 8, at 80; Bartlett, *supra* note 1, at 483 & n.36.

same,¹³⁵ perpetuating women's vulnerability at divorce. In Catharine MacKinnon's words, "This is what inequality looks like."¹³⁶

III. THE BARRIERS

A. *Division Within Feminist Ranks*

Certainly all feminists do not think alike. In analyzing the data collected in the 1992 National Election Studies, for instance, researchers found that of the 1171 women responding, 319 or 27.2% labeled themselves as feminist.¹³⁷ These 319 women showed great diversity in beliefs and attitudes. For instance, 32.7% of the self-identified feminists agreed that "We have gone too far in pushing equal rights in this country," and 37.9% agreed that "This country would be better off if we worried less about how equal people are."¹³⁸ Feminists have struggled to promote the understanding that for women the "personal is political"¹³⁹ and to teach women the necessity of collective action.¹⁴⁰ Yet when the responding women were asked the relative effectiveness of individual versus collective action, 23.5% of the self-identified feminists believed that individual effort alone was sufficient to improve women's position in society.¹⁴¹ Forty-four percent of the self-identified feminists strongly agreed that "This country would have many fewer problems if there were more emphasis on traditional family ties," and 29.7% strongly agreed that "The newer lifestyles are contributing to the breakdown of our society."¹⁴² One of ten feminists agreed that "by law, abortion should never be permitted."¹⁴³ One of three feminists opposed a state law

135. See ELLMAN ET AL., *supra* note 31, at 688-93 (explaining that mediation and negotiation remain the process of choice in family law); Leonard L. Loeb, *New Forms of Resolving Disputes-ADR*, 33 FAM. L.Q. 581, 582-85 (1999) (noting the growing popularity of divorce mediation); Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 621-22 (1999) (noting the growing popularity of divorce mediation).

136. MacKinnon, *supra* note 59, at 1313.

137. See Nancy Felipe Russo, *Measuring Feminist Attitudes: Just What Does It Mean to Be a Feminist?*, 22 PSYCHOL. WOMEN Q. 313, 313 (1998).

138. *Id.*

139. *Id.* at 314. Collins explains that the personal becomes political because of the role political, social, and cultural contexts play in influencing individual behavior. See Lynn H. Collins, *Illustrating Feminist Theory: Power and Psychopathology*, 22 PSYCHOL. WOMEN Q. 97, 98 (1998); see also Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 864 & n.143 (1990).

140. See Russo, *supra* note 137, at 314.

141. See *id.*

142. *Id.*

143. *Id.*

that would allocate government funds to assist poor women in obtaining abortions,¹⁴⁴ 63.1% favored a state law requiring parental consent for a teenager under age eighteen to obtain an abortion,¹⁴⁵ and 51.4% of the feminists favored a law that required a married woman to notify her husband before obtaining an abortion.¹⁴⁶

Liberal feminists continue to focus on women's equality to men,¹⁴⁷ while cultural feminists point to and value women's differences from men.¹⁴⁸ Despite strong criticism within feminist ranks,¹⁴⁹ liberal feminists remain hesitant to acknowledge how women differ from men, fearing that such acknowledgement will lead to more laws that discriminate against women based on those same differences.¹⁵⁰ Radical feminists perceive women's perceptions,¹⁵¹

144. *Id.*

145. *Id.*

146. *Id.* Greater consensus existed among feminists on some issues. For example, 75.1% reported very frequent anger at the treatment women receive, and 90.4% found sexual harassment a "very serious" or "somewhat serious" problem in the workplace. *See id.* Approximately nine of 10 feminists agreed that men and women should have equal influence in government, business, and industry, and the family. *See id.* This leaves, however, approximately 10% of self-proclaimed feminists believing that men should have greater power in these realms. *See id.* at 314-15.

147. *See* Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 21 n.28 (1991).

148. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); *see also* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-21 (1988). The debate between feminists on the importance and value of women's domestic roles as wife and mother began during the woman's suffrage movement. Some women active in the movement opposed more radical suffragettes who sought to make divorce more readily available. They argued that easier divorce would result in men casting off women beyond their primes, making remarriage beyond their reach. *See* Bartlett, *supra* note 1, at 477-78.

149. *See* ARENDELL, *supra* note 2, at 152-54; FINEMAN, *supra* note 129, at 176; FINEMAN, *supra* note 60, at 12; MARY ANN MASON, THE EQUALITY TRAP 22 (1988); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 204; Littleton, *supra* note 39, at 1279 n.2. *See generally* MacKinnon, *supra* note 59 (discussing the ineffectiveness of formal sex equality in eliminating many disadvantages women face in the law and in society).

150. Williams, for instance, notes that many feminists remain reluctant to acknowledge that women's family responsibilities compromise women's workforce participation. They fear that employers will use this information to justify not hiring women. *See* Williams, *supra* note 6, at 100. *See generally* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (discussing how stereotyping women as relationship-centered can produce and perpetuate women's economic marginalization); West, *supra* note 148, at 21 (noting Wendy Williams' argument that most of the disadvantages imposed on women derive from women's capacity to become pregnant and from the real and imagined implications of pregnancy). Catharine MacKinnon, often labeled a radical, or dominance feminist, also argues that "[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987).

151. Andrea Dworkin, for instance, explains that women delude themselves about heterosexual intercourse:

In the experience of intercourse, she loses the capacity for integrity because her

choices,¹⁵² and position in society as by-products of the repressive patriarchal context in which women survive.¹⁵³ Acceptance feminists argue that, whatever the reason for women's roles and choices, political and legal strategies and policies should accept and respond to women's reality.¹⁵⁴ Critical race feminists point to the failure of elite

body—the basis of privacy and freedom in the material world for all human beings—is entered and occupied: the boundaries of her physical body are—neutrally speaking—violated. What is taken from her in that act is not recoverable, and she spends her life—wanting, after all to have something—pretending that pleasure is in being reduced through intercourse to insignificance. . . . She learns to eroticize powerlessness and self-annihilation. The very boundaries of her own body become meaningless to her, and even worse, useless to her. The transgression of those boundaries comes to signify a sexually charged degradation into which she throws herself, having been told, convinced, that identity, for a female, is there—somewhere beyond privacy and self-respect.

ANDREA DWORKIN, INTERCOURSE 137-38 (1987).

152. For radical feminists, even “wanted” heterosexual intercourse is intrusive:

[I]t preempts, challenges, negates, and renders impossible the maintenance of physical integrity and the formation of a unified self. The deepest unofficial story of radical feminism may be that intimacy—the official value of cultural feminism—is itself oppressive. Women secretly, unofficially, and surreptitiously long for the very individuation that cultural feminism insists women fear: the freedom, the independence, the individuality, the sense of wholeness, the confidence, the self-esteem, and the security of identity which can only come from a life, a history, a path, a voice, a sexuality, a womb, and a body of one's own.

West, *supra* note 148, at 35. Worse, women's high regard for physical heterosexual intimacy constitutes collaboration with patriarchy. See DWORKIN, *supra* note 151, at 141-42. But see West, *supra* note 148, at 46-47, for a critique of Dworkin's view equating women's regard for heterosexual intimacy as collaboration with patriarchy.

153. See MACKINNON, *supra* note 99, at 37-80, 99-100, 205. West finds a connection between cultural and radical feminism in that both theories conceptualize women's existential state as grounded in women's potential for physical connection to human life, in other words, in women's fundamental difference from men. See West, *supra* note 148, at 14. She explains the division between cultural and radical feminists:

[W]hile radical and cultural feminists agree that women's lives are distinctive in their potential for material connection to others, they provide sharply contrasting accounts of the subjective experience of the material and existential state of connection. According to cultural feminist accounts of women's subjectivity, women value intimacy, develop a capacity for nurturance, and an ethic of care for the “other” with which we are connected, just as we learn to dread and fear separation from the other. . . . According to radical feminism, women's connection with the “other” is above all else invasive and intrusive: women's potential for material “connection” invites invasion into the physical integrity of our bodies, and intrusion into the existential integrity of our lives. Although women may “officially” value the intimacy of connection, we “unofficially” dread the intrusion it inevitably entails, and long for the individuation and independence that deliverance from that state of connection would permit.

Id. at 15. West concludes that both strands of feminism offer a truth of women's experience. She notes the experiential rather than logical contradiction between them, arguing that women may value intimacy and simultaneously dread the intrusion and invasion intimacy implies. Women also may fear separation while they simultaneously long for the individualization that separation can bring. See *id.* at 53.

154. Fineman explains:

[A]cceptance arguments . . . encompass both biological and cultural sexual differences and seek to ensure “symmetry” in the ultimate positions of women and men by taking account of those differences. In this way, acceptance arguments are similar to the

white feminists to address the different needs and interests of minority women.¹⁵⁵ All feminists fret about essentialism,¹⁵⁶ wondering whether any collective feminist voice can capture the differences among women. While the theoretical angst and diversity in feminist thought¹⁵⁷ can spark intellectual growth, it also can undermine feminist political power.¹⁵⁸

The different theoretical leanings of feminists lead to conflicting proposals on divorce issues.¹⁵⁹ Some feminists dislike custody laws that openly favor mothers over fathers.¹⁶⁰ While today most feminists perceive joint custody as detrimental to women's interests,¹⁶¹ some feminists favor joint custody.¹⁶² They reason that joint custody might

earlier attempts to fashion different types of equality to gain equality of results.

FINEMAN, *supra* note 60, at 42 (citations omitted); *see also* Littleton, *supra* note 39 (setting forth a theory of equality based on acceptance).

155. *See* Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW*, *supra* note 67, at 224.

156. *See, e.g.*, FINEMAN, *supra* note 60, at 48; ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 172-75 (2000); Becker, *Maternal Feelings*, *supra* note 20, at 165-66; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1245-51 (1991); Anne C. Dailey, *Feminism's Return to Liberalism*, 102 *YALE L.J.* 1265, 1265-66 (1993) (reviewing *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991)); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585, 588 (1990); Littleton, *supra* note 144; MacKinnon, *supra* note 59, at 1291-97; Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 *HARV. L. REV.* 1973, 1974 (1995).

157. *See* Bartlett, *supra* note 1, at 476-77, 484-87 (acknowledging tensions in feminist thought and practice regarding family and divorce issues).

158. *See* Russo, *supra* note 137, at 314. In supporting California's statute that guaranteed job-protected leave during any disability due to pregnancy, Littleton tells of having to argue against the very feminists she had chosen as role models. *See* Littleton, *supra* note 147, at 26. She also notes, however, that those feminists helped sensitize her to feminist arguments against the statute. *See id.*; *see also* Bryan, *supra* note 3, at 1170 & n.72.

159. *See* Bartlett, *supra* note 1, at 483. West locates women's support of potentially conflicting legal reforms in the contradictions embedded in women's subjective lives. "It explains why women insist upon and embrace an ethic of care and the right to have children without economic hardship, while at the same time fighting for rights of individuation, physical privacy, and freedom." West, *supra* note 148, at 54-55.

160. *See* Bartlett, *supra* note 1, at 483.

161. *See* Becker, *Maternal Feelings*, *supra* note 20, at 184-88; Czapanskiy, *supra* note 44, at 1468; Fineman, *supra* note 67, at 221 ("[J]oint custody and the ideal of shared parenting have ensured continued male control over children and, through them, over their mothers even as divorce has become available virtually on demand.")

162. *See* Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 *BERKELEY WOMEN'S L.J.* 9, 10 (1986); *see also* Becker, *Maternal Feelings*, *supra* note 20, at 165 (noting that some feminists favor joint custody). *But see* Bartlett, *supra* note 1, at 483 n.34 (noting that she no longer favors joint custody, but rather a standard based upon the percentage of caretaking each parent performs during the marriage). *See generally* Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 *HARV. WOMEN'S L.J.* 107, 109 (1978) ("Feminists of both sexes correctly perceive that unless the daily concerns of child rearing become the shared responsibility of both father and mother,

encourage divorced fathers to share more in the burdens and joys of caretaking and allow mothers more work¹⁶³ and/or leisure time.¹⁶⁴ Most feminists currently favor some version of the primary caretaker standard,¹⁶⁵ while others argue that only a maternal deference custody standard can truly protect a mother's interest in her children and minimize the likelihood that a mother will trade economic security for custody.¹⁶⁶ Some feminists favor spousal maintenance or a property

there is little chance that women with children will achieve equality outside the home.”).

163. Liberal feminists seem to believe that women's equal participation in the workforce will lead eventually to women's equality with men. Interestingly, social science research suggests that women's participation in the workforce does not alter the power relations in marriages. See Veronica Jaris Tichenor, *Status and Income as Gendered Resources: The Case of Marital Power*, 61 J. MARRIAGE & FAM. 638, 638-39 (1999). Rather, even when the wife earns more than the husband, he retains the lion's share of marital power. See *id.* at 638; see also Sanjiv Gupta, *The Effects of Transitions in Marital Status on Men's Performance of Housework*, 61 J. MARRIAGE & FAM. 700, 701 (1999). Division of unpaid household labor between men and women explains some of the difference in marital power. Twiggs et al. explain:

The gender perspective offers one explanation for the continuing lopsided division of household labor. From this perspective, performing housework certainly produces material results such as clean clothes and hot meals, but the gendered division of household labor also produces proper gender relations and social identities. Researchers in this perspective argue that all work, including work done at home without pay, is “dual aspect activity” and takes on symbolic meaning, part of which is gendered meaning. From this perspective, both labor-market work and household work are divided less from considerations of skill, time, or talent, than from efforts to establish boundaries between men's and women's work. Such boundaries affirm and reproduce masculinity and femininity, and doing the sort of work defined as inappropriate for one's gender produces demands for accountability or justifications for why such a transgression of normative expectations is warranted.

Joan E. Twiggs et al., *Meaning and Measurement: Reconceptualizing Measures of the Division of Household Labor*, 61 J. MARRIAGE & FAM. 712, 713 (1999) (citations omitted).

164. See Becker, *Maternal Feelings*, *supra* note 20, at 165, 184 (noting these arguments in favor of joint custody); Czapanskiy, *supra* note 44, at 1468. Bartlett also notes:

Still, there are substantive differences between feminists that explain why one equality solution to a particular problem seems superior to another. Joan Williams puts her finger on one substantive difference when she distinguishes between *equal parenting* advocates and *maternalists*. Advocates of equal roles in the home and at work put a high priority on men sharing the burdens (and joys) of childrearing and family and women obtaining the opportunities of paid employment, viewing this shared role ideal as necessitating the elimination of not only barriers to women, but favored treatment as well. Maternalists believe the goal should not be to change women by directing them away from motherhood and women's work, but rather to support them when they take these traditional paths.

Bartlett, *supra* note 1, at 486 (footnotes omitted). Lorber et al., however, question the feasibility of joint parenting: “If most men have developed nonaffective personalities and strong ego boundaries, where are you going to find enough men with psychological capabilities to parent well and thus break the general pattern of the emotional primacy of the mothers?” Judith Lorber et al., *On the Reproduction of Mothering: A Methodological Debate*, 6 SIGNS 482, 485 (1981).

165. See, e.g., Bartlett, *supra* note 1, at 483 n.34; Becker, *Double Binds*, *supra* note 20, at 28-29; Fineman, *supra* note 20, at 768-74; Polikoff, *supra* note 54, at 237, 241-43; Sack, *supra* note 129; Scott, *supra* note 123.

166. See Becker, *Maternal Feelings*, *supra* note 20, at 205-24. Becker recognizes that her proposed standard might result in occasional unfairness to the atypical father. See *id.* at 217. She also acknowledges that the standard, when applied by biased judges, may produce no better

distribution scheme that presumptively awards the wife a portion of her husband's post-divorce income.¹⁶⁷ Others express concern that such laws might encourage wives to perpetuate the cult of domesticity that keeps them financially dependent upon their husbands.¹⁶⁸ Many feminists criticize divorce mediation as a process of choice, yet others continue to believe in mediation's potential.¹⁶⁹

While I respect the intellectual fertility that the different strands of feminism represent, I urge all feminists to work to set aside their theoretical and policy differences and develop a cohesive political agenda regarding women's issues in divorce. Although we may want to deny it,¹⁷⁰ we are engaged in an intense struggle with men, a

outcomes for mothers. *See id.* at 218. The standard also could reinforce traditional stereotypes about proper maternal behavior and about the essential nature of women as mothers, retarding social change. *See id.* at 218. She concludes, however, that some potential costs likely are exaggerated, *see id.* at 220-21, and that the standard's ability to protect most women from the economic and emotional consequences of fathers' threats to pursue custody outweighs its potential costs. *See id.* at 219-20; *see also* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 23-28 (1990) (discussing the advantages of a maternal presumption). Wax also argues for a maternal preference standard in order to strengthen the wife's bargaining position during marriage and to remove the husband's bargaining chip at divorce. *See Wax, supra* note 118, at 641-42.

167. *See, e.g.,* Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1102, 1117 (1989) (advocating a continuation of the couple's joint financial status for a set period after divorce); Williams, *supra* note 19, at 2260-61 (advocating income equalization between divorced spouses during the dependency of the children and for a set time thereafter).

168. *See* Slaughter, *supra* note 6, at 95-96; Williams, *supra* note 19, at 2285 & n.299. Slaughter notes that liberal feminists disfavor spousal maintenance because its unavailability will encourage women to develop and maintain ties to the labor market. *See* Slaughter, *supra* note 6, at 95-96. Slaughter argues, however, that

[t]his argument [of liberal feminists], however, only works against two background assumptions. One is that men will take up the slack in childrearing, a dubious assumption given the unequal distribution of market power between men and women. The other is that women will participate in the market because opportunity is unlimited. Structural asymmetries in the market, however, put a brake on whatever shifts women may make from family to market. The combination is lethal: marital ties are destabilized by no-fault, leaving Mothers without the protection of lifelong marriage, but earning power is still constrained, leaving them without the means to support themselves and their children fully and adequately. The legal regime constructs women as Mothers but requires them to function as potential Breadwinners, which they cannot do because they are Mothers.

Id. at 96; *see also* Bartlett, *supra* note 1, at 482 (noting that, for symbolic reasons, feminists generally disfavored alimony).

169. *See* Stark, *supra* note 20, at 354-55.

170. As Adrienne Rich notes:

[K]aren Horney . . . says that "it is in the interest of men to obscure [the fact that there is a struggle between the sexes]; and the emphasis they place on their ideologies has caused women, also, to adopt these theories." In her delicately worded essay, "The Distrust Between the Sexes," Horney speaks of the resentment and anxiety harbored by all men toward women—even, she says, by "men who consciously have a very positive relationship with women and hold them in high esteem as human beings."

ADRIENNE RICH, *OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 111 (2d ed. 1987) (quoting KAREN HORNEY, *FEMININE PSYCHOLOGY* 106-18 (1967)).

struggle with strong implications for our future. I argue here that no issues prove more central to the future of the feminist movement than those presented in divorce.

Please take just a moment to imagine what women and their children currently learn from their divorce experiences. Think of Helen, a thirty-five-year-old mother of two children, one a boy, the other a girl. Helen finally marshals the courage to leave an abusive marriage of twelve years duration.¹⁷¹ Although she earned a college degree in English and a certificate to teach in high school before the marriage, throughout the marriage her husband had forbidden her to work and tightly has controlled her access to all financial resources. She has managed, however, to hide some money, and her family and friends offer to help her financially.

Helen hires a lawyer. The lawyer files a Motion for Temporary Support, Attorney Fees Pendente Lite, asking also for exclusive use and possession of the marital home. The court denies the motion,¹⁷² leaving Helen without access to her husband's income and forcing her and the children to seek temporary and unfamiliar shelter. The children lose contact with friends, school, and community. Helen becomes acutely distressed about her financial situation and feels guilty about her inability to provide adequately for her children. Her lawyer accurately tells her that the law does not guarantee her spousal maintenance or an equal share of the marital assets. He will do what he can, but the judge ultimately can do whatever he thinks is fair. In addition to her mounting financial concerns, Helen continually fears for her safety and for that of her children. The quality of her parenting declines as her stress increases.

Her lawyer informs Helen that her husband intends to contest custody. She grows increasingly fearful. She unconsciously transmits that fear to her children.¹⁷³ Her lawyer begins to prepare her custody

171. Many divorcing women have experienced violence in their marriages. See *supra* note 86.

172. See CONNECTICUT GENDER BIAS REPORT, *supra* note 19, at 138 (acknowledging that judges do not award attorney fees pendente lite); CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 194 (noting that judges typically refuse to award attorney fees at the time of temporary orders).

173. See Reed W. Larson & Sally Gillman, *Transmission of Emotions in the Daily Interactions of Single-Mother Families*, 61 J. MARRIAGE & FAM. 21 (1999) (finding that the anxiety and anger of single mothers produced anxiety and anger in their adolescent children); see also Amato, *supra* note 93 (finding a strong link between the well-being of divorced children and the well-being and stress of their custodial parents). Cummings and Davies explain:

The stress, frustration, and hopelessness of marital conflict can carry over into parents' interactions with their children. Marital conflict, parenting impairments, and child behavior problems have been shown to be interrelated. There is increasing evidence

case, but Helen cannot afford the experts she needs to explain how the abuse she has suffered has affected her and the children. Moreover, the lawyer knows only a little about domestic violence¹⁷⁴ and does not understand the necessity for corroboration of the wife's allegations and for expert testimony.¹⁷⁵ Nonetheless, the lawyer files a motion requesting supervised visitation for the father pending final hearing, alleging that the father's violence against Helen endangers the children. The judge denies the motion¹⁷⁶ and chastises Helen for making groundless claims of abuse against the father.¹⁷⁷ The children frequently visit their father and witness his continued emotional and psychological abuse of Helen.¹⁷⁸

During preparation for the final hearing, the lawyer explains to Helen that the law favors joint custody and assumes that divorced children fare best with frequent and substantial contact with both parents. He also informs her that custody law makes spouse abuse relevant in custody disputes, but that, having previously lost on that issue, they risk judicial backlash if they continue to mention it.

The father has Helen examined by a psychologist who finds her unstable and perhaps paranoid.¹⁷⁹ The psychologist fails to consider that Helen may be suffering from posttraumatic stress disorder as a result of the abuse.¹⁸⁰ Another psychologist hired by the father examines the children. The psychologist ignores the abuse the father has inflicted on Helen and concludes that Helen is alienating the

that negative changes in parent-child relations due to marital conflict are an important pathway through which family discord contributes to psychopathology in children. . . . One implication is that the emotional climate in the house is contagious, moving across relatively permeable boundaries between the various family subsystems.

E. MARK CUMMINGS & PATRICK DAVIES, CHILDREN AND MARITAL CONFLICT: THE IMPACT OF FAMILY DISPUTE AND RESOLUTION 107 (1994).

174. See Buel, *supra* note 91, at 720-22 (noting attorney ignorance about domestic violence); see also Bryan, *supra* note 3, at 1223, 1226 & nn.322-26.

175. See Meier, *supra* note 79, at 1313-14 (illustrating the importance of expert testimony in cases involving domestic violence against women).

176. Typically judges do not consider the father's violence against the mother relevant to the father's ability to parent. See Bryan, *supra* note 3, at 1228 & n.349; Buel, *supra* note 91, at 735.

177. See Bryan, *supra* note 3, at 1226 & n.338; Meier, *supra* note 79, at 1310 (noting that courts continue to treat allegations of domestic violence with disdain, disbelief and dismissiveness).

178. Batterers commonly continue to harass their former battered wives. See Buel, *supra* note 91, at 736.

179. Meier notes: "Although Freudian concepts of 'female masochism' are less in favor today, modern psychiatric evaluations still frequently diagnose battered women as 'paranoid,' or having any of a number of character disorders such as 'Schizoid Personality Disorder,' 'Borderline Personality,' 'Dependent Personality Disorder,' etc." Meier, *supra* note 79, at 1301.

180. See Buel, *supra* note 91, at 737 (noting that psychologists making child custody recommendations frequently ignore domestic violence issues); Meier, *supra* note 79, at 1312-14.

children from their father.¹⁸¹ Moreover, Helen's insufficient income has resulted in frequent moves, depriving the children of the residential stability they need. The court-appointed guardian ad litem agrees with the father's psychologist.

Helen's lawyer then tells her that the father has an excellent chance of winning the custody dispute.¹⁸² At first she remains incredulous that the law might award custody of the children to the man who has abused her and the children. Her prior experiences with the judge, however, persuade her to accept her lawyer's insight. At this point, in order to insure her custody of the children,¹⁸³ Helen agrees to accept the father's poor financial offer and his proposed custody and visitation plan that offers inadequate protection for her and the children.

After the divorce, Helen cannot return to school to reactivate her teaching license because she must work two jobs to keep the family's income above the poverty line. The children now do without the extras they had grown accustomed to in their pre-divorce family, and sometimes the necessities as well. Helen's dual employment in menial jobs restricts her time for parenting and exhausts her mental and emotional reserves.¹⁸⁴ The father continually harasses Helen verbally and sometimes physically during visitation transitions.¹⁸⁵ He continues to live in the marital home and maintains a standard of living higher than during the marriage.

I wish the above scenario were rare. One only need consult the

181. See Buel, *supra* note 91, at 737-38 (noting that evaluating psychologists may perceive a battered mother's attempts to protect herself and her child as "alienating" the child from the father, despite the American Psychological Association's determination that the parental alienation theory lacks scientific verification).

182. For numerous complex reasons, battered women frequently lose custody of their children to the perpetrator. See Bryan, *supra* note 3, at 1219-34; Buel, *supra* note 91, at 735; see also CHESLER, *supra* note 17, at 81 (finding that 59% of the fathers who won custody in litigation and 50% of the fathers who obtained custody through private negotiations had abused their wives).

183. Women frequently enter into poor settlement agreements in order to preserve custody of their children. See *supra* notes 20, 100.

184. Many divorced children live with financially and logistically stressed single parents who become less available to the children than before the divorce. See, e.g., ARENDELL, *supra* note 2, at 61-68, 155-56; DOWD, *supra* note 6, at 26; Paul R. Amato & Sonia Partridge, *Widows and Divorcees with Dependent Children: Material, Personal, Family, and Social Well-Being*, 36 FAM. RELATIONS 316, 316 (1987).

185. One abused mother who had a joint custody arrangement with her abuser stated: [C]ustody orders . . . expose you to harm at all times. You're at the child's school, he's there. You're at extracurricular activities, he's there. You're at the doctor appointments . . . and he will be there. Do you know what it's like, to be standing next to the guy who beat your face purple, and you can't protect yourself?

CALIFORNIA GENDER BIAS REPORT, *supra* note 6, at 254; see also Buel, *supra* note 91, at 734.

gender bias reports and empirical studies cited throughout this Essay to confirm its frequency. Nor do I think it takes an expert to determine what lessons wives and children must draw from their divorce experiences. Adrift in a masculine and biased legal system, mothers cannot protect their children or themselves from men's legal assaults. Women's courage in challenging their husbands' patriarchal authority meets with punishment from those whose help they seek. Experts pervert the truth of women's worlds and cast them as incompetent, and perhaps mentally ill.¹⁸⁶ The bottom line on the power ledger: women challenge the patriarchal order at their own—and their children's—peril.

Will these lessons encourage women to become feminists and seek to right these and other injustices perpetrated against women? Or do these lessons disillusion and exhaust them, making them unlikely recruits? Even more problematic, will these lessons send them back into marriages with men and reinforce patriarchy¹⁸⁷—the very paradigm feminists seek to dismantle?¹⁸⁸

Moreover, will divorced women perceive that feminists have done little for them and resent feminist inaction? And the children, will they grow up fighting for equality between men and women, or will they quake before male power? Can feminists continue to allow the vast numbers of divorced women and forty to fifty percent of America's children to live these powerful socializing experiences and expect present and future generations to challenge patriarchal

186. See, e.g., FINEMAN, *supra* note 60, at 119-22; Buel, *supra* note 91, at 737-38.

187. Ihinger-Tallman & Pasley, *supra* note 75, at 24 (noting evidence suggesting that divorced women with fewer economic resources remarry sooner than more financially secure women and that divorced men show the opposite trend); see also ARENDELL, *supra* note 2, at 143; MORGAN, *supra* note 2, at 35-38; Paul C. Glick & Sung-Ling Lin, *Recent Changes in Divorce and Remarriage*, 48 J. MARRIAGE & FAM. 737, 743 (1986) (speculating that the greater financial needs of divorced women with children likely encourage them to remarry more quickly than their childless counterparts). Some divorced women also enter into poor relationships with men who abuse them and/or their children.

188. As Robin West argues, "The virtual abolition of patriarchy—a political structure that values men more than women—is the political precondition of a truly ungendered jurisprudence." West, *supra* note 145, at 4. Divorce laws more favorable to women do risk encouraging women to invest in the traditional family form that perpetuates their dependence on men. See generally ABRAMS, *supra* note 133. On the other hand, divorce laws unfavorable to women risk placing divorced women in financially vulnerable states that also encourage their dependence on men. Moreover, women who do not remarry, and there are many such women, risk a significant loss of autonomy because financial hardship severely constricts their life choices and their ability to maximize their potential. Patriarchy cannot survive if women truly can choose the terms of their lives. See RICH, *supra* note 170, at 42-43. Consequently, enhancing women's autonomy through more favorable divorce laws promotes the ultimate goal of the feminist movement.

power?¹⁸⁹ Personally, I think not. I suspect that divorced women may feel betrayed, rather than assisted, by the feminist movement, making them unlikely recruits.¹⁹⁰ Without being overly dramatic, I question how a movement can survive when it allows its intellectual diversity to divert its attention from the screaming “real world” needs of so many of those whom it purports to serve.¹⁹¹

B. Failure to Acknowledge Women as Mothers

Mary Becker notes, I think rightly, that the legal academy largely refuses to acknowledge that mothers generally are closer to their children than fathers¹⁹² and to explore the importance to women of the mother-child bond.¹⁹³ She posits several strategic reasons for this silence.¹⁹⁴ Acknowledging and exploring the differences between paternal and maternal relationships with children threaten to

189. See Czapanskiy, *supra* note 44, at 1456 (noting how parental modeling affects children). I, as I am certain many family law professors, have male and female students who show great sensitivity to the divorce hardships they and their mothers have endured. They credit their mothers' strength and show great respect for their mothers' survival skills. But they do not want to repeat her experience. Nor do they want their children to live what they as divorced children have experienced. Some indicate a reluctance to marry. Others want to marry, but abhor divorce. Others resent, but recognize, their fathers' unfair treatment of their mothers and the legal system's complicity in that treatment. Indeed, many of my women students truly worry about their vulnerability in marriage, particularly if their parents have divorced.

190. Roberts argues that Black women also may avoid joining the feminist movement because they fear that Black men may perceive them as disloyal to Black people generally. See Roberts, *supra* note 155, at 245.

191. Wishik would describe “necessary” feminist inquiries in family law as: (1) What experiences of women does family law address?; (2) What assumptions does family law make about women's experiences?; (3) How does family law distort women's experiences?; (4) How do the distortions of women's experiences in family law serve patriarchal interests?; (5) How will proposed reforms affect women practically and ideologically?; (6) How would women's experiences of family law look in an ideal world?; (7) What can feminists do to get from here to that ideal world? See Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 72-75 (1985); see also Bartlett, *supra* note 139. While certainly feminists have struggled to address these inquiries in family law, divisions within feminist ranks and the “conspiracy of silence” among legal feminists regarding women's motherhood have hampered their political effectiveness.

192. See Becker, *Maternal Feelings*, *supra* note 20, at 137. But see Mahoney, *supra* note 21, at 19-24 (exploring the meaning of motherhood for battered women).

193. See Becker, *Maternal Feelings*, *supra* note 20, at 159; see also Stephanie M. Wildman, *The Power of Women*, 2 YALE J.L. & FEMINISM 435, 446-52 (1990) (reviewing CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989), and arguing that a feminist theory must address women's experiences, including motherhood); Sanger, *supra* note 71, at 37 (noting critiques of feminist writers and theorists for their insensitivity to a maternal perspective). But see Littleton, *supra* note 39, 1310-11 (discussing breast-feeding in a restaurant).

194. Becker also posits several barriers that might encourage individual women to remain silent about their feelings regarding motherhood. See Becker, *Maternal Feelings*, *supra* note 20, at 162-65. These barriers, of course, make it difficult for feminists to access and explore those feelings.

reinforce traditional stereotypes about appropriate behavior for women.¹⁹⁵ These differences also suggest that biology, once again, controls one's parental destiny, as opposed to the actual caregiving parents provide for their children.¹⁹⁶

If people see biology as destiny, the actual subordination of women who fulfill those domestic destinies remains obscure.¹⁹⁷ Moreover, stereotypical beliefs about the essential domestic nature of women¹⁹⁸ may support rules, based on such assumptions, that discriminate against working women.¹⁹⁹ If the husband and wife ascribe to such beliefs, the wife may find it difficult to negotiate with her husband anything other than the traditional patriarchal allocation of family responsibilities.²⁰⁰

If most people believe that women are better caretakers than men, the assumption soon follows that women "should" be primary caretakers.²⁰¹ Women who lose custody in a society steeped in this belief risk public branding as failures.²⁰² All women would experience societal pressure, despite their contrary desires, to have children and

195. *See id.* at 159. Sanger describes the dominant model of motherhood during the 20th century as "something closer to 'housewife'—a married, nonworking, inherently selfless, largely nonsexual, white woman with children." Carol Sanger, *M Is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 18 (1992). Assuming Sanger is correct, one can understand why modern feminists only reluctantly address motherhood.

196. *See* Becker, *Maternal Feelings*, *supra* note 20, at 159.

197. *See id.* Adrienne Rich notes: "Patriarchy could not survive without motherhood and heterosexuality in their institutional forms; therefore they have to be treated as axioms, as "nature" itself, not open to question except where, from time to time and place to place, "alternative life-styles" for certain individuals are tolerated." RICH, *supra* note 170, at 43. West acknowledges that compulsory motherhood and heterosexuality undoubtedly constrain, damage, and oppress women. It does not follow for West that "either motherhood or intercourse themselves will be, need to be, or ought to be destroyed." West, *supra* note 148, at 47. Rather these compulsory institutions must be released into the realm of free choice. *See id.* She continues:

Now, it is also true—emphatically true—that neither motherhood nor intercourse have been "released" from patriarchy. Until they are, there is no project more vital to our understanding of women's present oppression than the description of the subjective experience of motherhood, and of intercourse, within the patriarchal institutions that render those activities compulsory.

Id. She encourages feminists to strive to envision motherhood within a nonpatriarchal culture, a culture in which women have full possession of their bodies, released from compulsory motherhood and heterosexuality. *See id.* at 47-48.

198. These beliefs also suggest the sameness of all women, obscuring their individual differences. *See* Becker, *Maternal Feelings*, *supra* note 20, at 160.

199. *See id.* at 159; *see also* BURGGRAF, *supra* note 30, at 31-35; MacKinnon, *supra* note 59, at 1311-12.

200. *See* Becker, *Maternal Feelings*, *supra* note 20, at 159.

201. *See id.* at 159-60; *see also* BURGGRAF, *supra* note 30, at 30-31.

202. *See* CHESLER, *supra* note 17, at 176-82; Becker, *Maternal Feelings*, *supra* note 20, at 160.

to establish a better relationship with the children than the fathers.²⁰³

Becker also suggests that legal feminists fail to explore the pleasures and pains of women's lives, because insights gained from such an exploration might cause significant stress.²⁰⁴ Becker bases this assertion on the unpleasant nature of what feminists might discover. For instance, she notes that women have lower self-esteem than men and that many women consider competitive success inconsistent with successful relationships with men.²⁰⁵ Many women who wish to pursue competitive success, then, might have to face their own deep psychic ambivalence about their career aspirations—no doubt a stressful confrontation.²⁰⁶ Becker argues, however, that if women avoid stress by refusing to explore their emotional lives, women may accept the status quo rather than struggle for reform.²⁰⁷

Becker concludes her exploration of strategic reasons why legal feminists might avoid exploring women's motherhood experiences by noting that such discussions would fail to meet traditional standards for legal scholarship.²⁰⁸ An untenured woman law professor engaging in such a dialogue likely would risk her academic employment.²⁰⁹ Even a tenured woman law professor engaging in such a dialogue would risk a negative assessment of her scholarship.²¹⁰

Despite Becker's insights regarding the strategic reasons for silence, she urges legal feminists to break that silence. She argues, and I agree, that our failure to explore the differences between the positions of men and women and our fear of essentialism cause us to ignore women's experiences and constrain our ability to develop legal changes sensitive to most women's needs.²¹¹

Becker's arguments regarding our need to explore how women feel about motherhood in order to develop custody standards that support women's investment in children have application in other areas of divorce law.²¹² Building on the foregoing, I suggest that

203. See Becker, *Maternal Feelings*, *supra* note 20, at 160.

204. See *id.* at 161.

205. See *id.*; see also Bryan, *supra* note 3, at 1188-91; Bryan, *supra* note 102, at 477-81.

206. See Becker, *Maternal Feelings*, *supra* note 20, at 161.

207. See *id.*

208. See *id.*

209. See *id.* at 161-62.

210. See *id.* at 162.

211. See *id.* at 165. Wildman also explores how avoiding motherhood can distort the development of feminist theory. See Wildman, *supra* note 193, at 446-52.

212. MacKinnon implicitly recognizes the importance of allowing women's voices to fashion laws that govern women's lives:

Grounding a sex equality approach to reproductive control requires situating

feminist methodology²¹³ should shape the feminist political agenda on divorce issues.²¹⁴ The future feminist political agenda should respond to the voices of divorced women.²¹⁵ The decision to support or oppose joint custody should emanate from the stories divorced women tell of that custody arrangement.²¹⁶ The decision to or not to support spousal maintenance should spring from the stories divorced women tell of their financial experiences subsequent to divorce. The procedures the legal system should use to resolve contested divorce issues should respond to women's experiences in those procedures.²¹⁷ Perhaps, too, developing an agenda based on divorced women's narratives might broaden the political power of the feminist movement.²¹⁸ More women might perceive and experience feminism

pregnancy in the legal and social context of sex inequality and capturing the unique relationship between the pregnant woman and her fetus. The legal system has not adequately conceptualized pregnancy, hence the relationship between the fetus and the pregnant woman. This may be because the interests, perceptions, and experiences that have shaped the law have not included those of women. The social conception of pregnancy that has formed the basis for its legal treatment has not been from the point of view of the pregnant woman, but rather from the point of view of the observing outsider, gendered male.

MacKinnon, *supra* note 59, at 1309.

213. Littleton describes feminist methodology's primary questions as "What has been women's concrete experience?" and "What has been left out?" Littleton, *supra* note 39, at 1282; *see also* Bartlett, *supra* note 139.

214. This approach also proves consistent with what Dailey terms "empathetic liberalism"—a commitment to individual diversity within community. Dailey, *supra* note 156, at 1266.

215. Joan Williams recently employed this strategy by examining Deborah Fallows' book to decipher why and how women make the work-related decisions that they do. *See* Williams, *supra* note 6, at 100-36 (citing DEBORAH FALLOWS, *A MOTHER'S WORK* (1985)).

216. Encouraging feminists to listen to the voices of divorced women and fashion responsive legal reforms also should appeal to feminists who promote the empathetic infusion of human experience into law. *See, e.g.*, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). Feminists scholars who promote narratives as a way of understanding also should prove sympathetic.

217. MacKinnon claims that the contemporary movement among women for civil equality operates in this fashion:

In recent years, the contemporary movement among women for civil equality has created a new political practice and form of theory with major implications for law. The distinctive theory forged by this collective movement is a form of action carried out through words. It is deeply of the world: raw with women's blood, ragged with women's pain, shrill with women's screams. It does not elaborate yet more arcane abstractions of ideas building on ideas. It participates in reality: the reality of a fist in the face, not the concept of a fist in the face. It does not exist to mediate women's reality for male consumption. It exists to bear witness, to create consciousness, to make change. It is not, in a word, academic.

MacKinnon, *supra* note 59, at 1285 (footnotes omitted). While I quibble somewhat with MacKinnon's categorization of this political approach as nonacademic, I do suggest here that legal academic feminists should reconstruct divorce laws and procedures responsive to the pain and degradation experienced by divorced women.

218. Joan Williams urges feminists to shift their strategy from seeking to improve women's access to the meaningful work enjoyed only by the privileged to advocating for restructured market work that better accommodates parental care. She suggests that this strategy might

as relevant to their lives and come to support the movement.

Divorced women's stories of loss, pain, and humiliation that attend their downward financial spiral command feminist attention.²¹⁹ I encourage feminists to continue their theoretical debates, but to recognize that theory cannot substitute for political action—if feminism is to have meaning in divorced women's lives. Effective political action requires, at minimum, a unified front. Divorced women's narratives provide a situational truth²²⁰ grounded in their lives that help us to bridge our theoretical differences. All we need to do is listen.²²¹ Divorced women tell us they need more resources to

dissipate some of the resentment that women of color and working-class women feel toward feminists because this strategy, if successful, would give working-class women and women of color greater access to the social ideal of parental care. See WILLIAMS, *supra* note 156, at 174. William's strategy also requires feminists to respect the family and openly embrace the value of caretaking in order to achieve the goal that Williams urges. See *id.* Stated somewhat differently, women of color and working class women might find feminism more attractive if feminist work worked for them and acknowledged their values.

219. In her study of 60 divorced mothers, Terry Arendell found that only 10 mothers did not experience serious depression or despair after divorce. She comments:

But the reasons they gave simply reemphasize the central importance of economic loss in the lives of divorced women. Four of these ten had various sources of income that protected them from poverty and enabled them to work actively toward improving their situation. Two of them were using income from the divorce property settlement to attend graduate school, and they hoped to regain their former standard of living by pursuing professional careers. Two were receiving financial support from their parents while they sought employment and planned for the possible sale of their homes as part of the property settlement. The remaining six said they were generally optimistic in spite of their poor economic positions. Like the others, they found the financial hardships imposed by divorce surprising and difficult to handle; they simply found these hardships easier to cope with than the despair they had known in their marriages.

ARENDELL, *supra* note 2, at 51. Seventy-eight percent of the single-parent mothers studied by Richards and Schmiede identified financial difficulties as a major problem. All of these mothers came from middle-class backgrounds. One mother who remarried quickly noted “[f]inancially it got pretty bad towards the end. It was like I was just selling a lot of our stuff like the freezer, and whatever else we had, just to keep going. It was a trying time.” Leslie N. Richards & Cynthia J. Schmiede, *Problems and Strengths of Single-Parent Families: Implications for Practice and Policy*, 42 FAM. REL. 277, 280 (1993); see also WINNER, *supra* note 9 (quoting the voices of numerous divorced women throughout). Weitzman notes that divorced women, disproportionately to divorced men, experience disruptions in their mental and physical health and that women's economic decline and single parenthood contribute significantly to these effects. See WEITZMAN, *supra* note 2, at 349-50.

220. I use the term “situational” truth because I want to acknowledge the provisional nature of women's experience and to the need to remain sensitive to changes. What works for women today may not tomorrow.

221. I do not suggest that all women will tell the same story. One mother may enjoy the freedom that joint physical custody affords her. Another may find the arrangement a nightmare. What I suggest here is feminist support for reforms that maximize women's choices. A custody standard that honors caretaking, for instance, expands a mother's choice regarding custody. She may choose under such a standard to maximize her custodial time with the children, or she may choose to share custody with the father, if sharing enhances her ability to fulfill other goals. A standard that mandates joint custody provides her no choice.

live full and autonomous lives.²²² They tell us the importance of their children. Can we not coalesce around procedural and substantive reforms that enhance divorced women's choices and their financial and parental circumstances?

When we listen, spousal maintenance or property law that captures and equitably divides the post-divorce income stream of both spouses deserves unified feminist support. This reform will not help all divorced women because many couples do not accumulate significant marital assets, and some husbands have little human capital.²²³ But it will help many women—and when we help many woman, we potentially help all women.²²⁴

When we listen, a custody standard that honors the caretaking that mothers provide²²⁵ deserves unified feminist support. Divorced mothers inform us that children remain their primary concern.²²⁶ And, lacking a standard favoring mothers, they will continue to trade away whatever is necessary to obtain custody—their financial security, and sometimes their safety. While I prefer a maternal deference standard, it seems unrealistic in the current political climate. A standard honoring caretaking would make mothers the primary custodians in most cases and simultaneously risk compromising their workforce participation. Such a standard, moreover, would not prevent mothers from choosing to relinquish or share custody.

When we listen, support for children throughout college deserves unified feminist support. Custodial mothers suffer when they alone provide college support for their children.²²⁷ They also suffer when their children cannot attend college, because mothers cannot afford to assist.

When we listen, we learn that feminists should strive for a post-divorce reality that honors women's interest in their children and that

222. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7, 22-23 (1989) (recognizing the usually implicit, sometimes explicit, relationship between property and autonomy).

223. See Perry, *supra* note 25.

224. Whenever the circumstances of some women improve, they occupy a position of greater personal, social, and political power. Feminists encourage such women to exercise their power responsibly and to turn and help those women less fortunate than themselves. The knowledge that academic feminists have mobilized to advance their interests might inspire those less fortunate women to do the same.

225. See Scott, *supra* note 123 (advocating an approximation standard).

226. See West, *supra* note 148, at 22-27 (discussing cultural feminism's view of the centrality of motherhood to women).

227. See *supra* note 51 for discussion.

promotes women's ability to live with as much dignity and autonomy²²⁸ as possible. When women can choose to raise children without deprivation, without fear, without humiliation, and most of all without men, the institution of motherhood becomes a radical force that challenges the patriarchal order.²²⁹ Robin West asks:

What would it mean to mother in a society where women were deeply valued and respected, in a culture which was woman-affirming? What would it mean to bear children in the fullness of our power to care for them, provide for them, in dignity and pride? . . . What would it mean to mother in a society which was making full use of the spiritual, intellectual, emotional, physical gifts of women, in all our difference and diversity? What would it mean to mother in a society which laid no stigma upon lesbians, so that women grew up with real emotional and erotic options in the choice of life companions and lovers? What would it mean to live and die in a culture which affirmed both life and death, in which both the living world and the bodies of women were released at last from centuries of violation and control? This is the quantum leap of the radical feminist vision.²³⁰

C. Legislatures and Judges

While feminists might coalesce around divorce reforms, external factors present formidable obstacles. State legislatures constantly tinker with the statutes governing divorce.²³¹ Feminists cannot ignore the male composition of those legislatures. Can it surprise that feminist divorce reforms, justified by their ability to enhance women's

228. By autonomy I do not mean the male liberal concept of the alienated, self-centered, disconnected self. Rather, I refer to the rich understanding of autonomy developing in feminist theory, including the awareness (1) that patriarchy and traditional liberalism have skewed, and perhaps perverted, the definition of autonomy—especially for women; (2) that supportive relations with others foster, rather than squelch, the development of an autonomous self; (3) and that a feminist definition of autonomy must incorporate women's relatedness to others. See generally Nedelsky, *supra* note 222; West, *supra* note 148.

229. The political and social importance of the struggle for control over children extends beyond any single mother/father dispute over custody. To the extent that custodial parents have a better opportunity than noncustodial parents to implant values in the hearts and minds of their children, the ten million single mothers raising children pose a distinct threat to the hegemony of patriarchy. See Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2211 n.74 (1995) (citing that ten million women are single mothers living with children under 21 years of age). One readily can understand attempts to stigmatize single mothers and to reinsert fathers into the families of custodial mothers. See Bryan, *supra* note 102, at 495-96 & n.237. See generally DOWD, *supra* note 6; Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995); FINEMAN, *supra* note 60, at 68, 118-19; Fineman, *supra*, at 2206-07.

230. West, *supra* note 148, at 57-58.

231. See Levy, *supra* note 134, at 545-49. See Sampson, *supra* note 64, for a rather humorous, and sometimes frightening, account of the development of divorce legislation in Texas.

equality at men's expense, prove unpopular?²³² Do they not threaten to upset the patriarchal subordination of women from which these very men benefit?

In nineteenth-century America, male legislatures considered women's claims for equal rights to custody of their children too disruptive of family stability²³³ because such rights might encourage women to leave their husbands.²³⁴ Divorce laws that promote substantive equality between wives and husbands raise the same, not always unconscious, fear. No longer would anticipation of financial ruin or loss of custody necessarily keep women trapped in poor marriages. Perhaps an even more important concern to men, these laws would relieve men of assets and income they now consider theirs.

Despite the fears of nineteenth-century legislatures, by the mid-1930s, forty-two states had legislation granting mothers custody rights equal to those of fathers.²³⁵ A change in feminist rhetoric helped accomplish this. The second wave of feminism, headed by social feminists, abandoned the "rights" rhetoric of the first wave of feminism. Instead, poor children and their families became the focus,²³⁶ and feminists presented legislative reform in terms of child welfare.²³⁷ In making children their concern, social feminists did reinforce nineteenth-century stereotypes about the proper roles of women and men: the family remained women's sphere, whereas the world belonged to men.²³⁸ Although this strategy may have done little to change the sources of women's inequality to men,²³⁹ the social

232. As MacKinnon notes, when Abigail Adams pled with John Adams to "remember the ladies" in founding the United States, he replied, "We know better than to repeal our Masculine systems." MacKinnon, *supra* note 59, at 1281 (citing ADAMS FAMILY CORRESPONDENCE 370, 382 (L. Butterfield ed., 1963)). Levy notes that divorce issues have become highly politicized and that law review writings exert precious little influence in political marketplaces. Levy, *supra* note 134, at 551.

233. See MASON, *supra* note 49, at 82.

234. See *id.* at 90.

235. See *id.* at 114.

236. See *id.* at 89.

237. See *id.* at 115.

238. See *id.* at 89.

239. See *id.* Limiting women to traditional gender roles can retard their personal as well as political progress. Some argue that the masculine gender role results from the privileges and benefits that attend a dominant social position, maintains men's dominant status, and justifies male exploitation of others. See Collins, *supra* note 139, at 99. In contrast, the feminine gender role contains adaptive behaviors that develop in response to women's efforts to cope and/or survive their subordinate life position. See *id.* Consequently, if women frame their political arguments in a manner consistent with their traditional gender roles, they may encourage their own and others' continued acceptance of their subordinate position.

feminists did make important political gains for women, including suffrage and equal custodial rights for mothers.²⁴⁰

Learning from the above example, perhaps a feminist rhetoric more appealing to male legislatures might prove helpful in implementing feminist proposals. Few can disagree that children represent our collective future. If feminists emphasized how their reforms would benefit divorced children, perhaps male legislators would find the reforms more palatable, even morally compelling. The case is easy to make. I provide only a few of the many arguments.

The rate of poverty among U.S. children is one-third higher than two decades ago and 1.5 to 4 times as high as the rates for children in Canada and Western Europe.²⁴¹ Events like divorce sometimes permanently alter a family's economic and social position,²⁴² with divorce contributing significantly to the rise in poverty among children.²⁴³ By the time they reach the age of sixteen, approximately

240. See MASON, *supra* note 49, at 89, 114-15.

241. See Greg J. Duncan et al., *How Much Does Childhood Poverty Affect the Life Chances of Children*, 63 AM. SOC. REV. 406, 406 (1998); see also Jeanne Brooks-Gunn et al., *Poor Families, Poor Outcomes: The Well-Being of Children and Youth*, in CONSEQUENCES OF GROWING UP POOR 1, 1 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997). By 1993, researchers estimate that 29% of children in the United States lived in poverty. See Donald J. Hernandez, *Poverty Trends*, in CONSEQUENCES OF GROWING UP POOR, *supra*, at 18, 20. Black and Hispanic children are more likely than white children to experience poverty and for longer periods of time. See Brooks-Gunn et al., *supra*, at 4-5.

242. Beginning in 1983, Suzanne Bianchi and Edith McArthur used Census Bureau data to track 20,000 households for 32 months, interviewing members at four-month intervals. Within 16 months of divorce, after adjusting for the decrease in family size, the income of the family in which the child lived declined by 29%. See Jason DeParle, *Child Poverty Twice as Likely after Family Split, Study Says*, N.Y. TIMES, Mar. 2, 1991, at A8. Many observe the permanence of the economic decline following divorce. See MORGAN, *supra* note 2, at 27; Duncan et al., *supra* note 241, at 406; Alfred J. Kahn & Sheila B. Kamerman, *Child Support in the United States: The Problem*, in CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 10, 10 (Alfred J. Kahn & Sheila B. Kamerman eds., 1988); see also Garrison, *Child Support Policy*, *supra* note 2, at 157 & nn.2-3. Researchers note that the economic deprivation children experience at divorce has immediate negative consequences that extend into adulthood. See Scott J. South et al., *Children's Residential Mobility and Neighborhood Environment Following Parental Divorce and Remarriage*, 77 SOC. FORCES 667, 667-68 (1998).

243. See Blumberg, *supra* note 2, at 42 & n.5; Brooks-Gunn et al., *supra* note 241, at 4; DeParle, *supra* note 242 (discussing a study by Suzanne Bianchi and Edith McArthur that found children to be twice as likely to live in poverty after a divorce than before; specifically, the percentage of impoverished children increased from 19% to 36% within four months of divorce); Garrison, *Child Support Policy*, *supra* note 2, at 157; see also, e.g., ARENDELL, *supra* note 2, at 153-57; CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 23, 25 (1991) (showing that approximately one in five children in the United States lives in poverty; one in two children living in a female-headed, one-parent home lives in poverty; and that approximately one in 10 children living with both parents lives in poverty). Approximately one-half of mother-only families in the United States live in poverty. See Sara S. McLanahan, *Parent Absence or Poverty: Which Matters More?*, in CONSEQUENCES OF GROWING UP POOR *supra* note 241, at 35. Approximately 65% of single-parent families result from marital separation or divorce. See U.S. BUREAU OF THE CENSUS, U.S. DEPT' OF COMMERCE, CURRENT

fifty percent of our children will experience the divorce of their parents²⁴⁴ and the economic consequences that follow.²⁴⁵

Inadequate food,²⁴⁶ housing,²⁴⁷ and medical care,²⁴⁸ threaten divorced children's physical health.²⁴⁹ The financial deprivation

POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS 79 (1987). And, approximately 90% of divorced children live with a single-parent mother. See Hetherington et al., *supra* note 94, at 305.

244. See, e.g., WEITZMAN, *supra* note 2, at 352; Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, in *THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE* 29, 35 (Richard E. Behrman ed., 1994); Kahn & Kamerman, *supra* note 242, at 10; McLanahan, *supra* note 243, at 35.

245. After reviewing several studies that address the relation between family income and divorced children's well-being, McLanahan concludes that income affects nearly every measure of divorced children's well-being, but that income does not explain completely the negative effects of divorce on children. See McLanahan, *supra* note 243, at 45-47 & tbl.3.3. She further explains:

Does family structure matter more than income? The answer is also ambiguous. The twelve studies show that although family structure is related to poverty, the two are not proxies for one another. In most instances, coming from a nonintact family reduces a child's chances of success, even after low income is taken into account. In some instances, the net effect of family structure is larger than the net effect of poverty: on others, it is smaller. Based on these studies, I suspect that family structure is more important than poverty in determining behavioral and psychological problems, whereas poverty is more important than family structure in determining educational attainment.

Id. at 47-48. She concludes:

The fact that parental absence still matters after taking income into account does not imply that policy makers should not try to minimize the economic distress of single mothers. Indeed, based on what is known to date, reducing the economic insecurity of families headed by single mothers is probably the most effective tool for protecting children from the negative consequences of family disruption. Reducing poverty might also mitigate some of the negative effects of living in a stepfamily. If single mothers were more economically secure, they might take more time in selecting a new partner, which, in turn, might make remarriage more beneficial to children.

Id. at 48.

246. Consider, for example, the voices of mothers in Weitzman's study:

We ate macaroni and cheese five nights a week. There was a Safeway special for 39 cents a box. We could eat seven dinners for \$3.00 a week. . . . I think that's all we ate for months. I applied for welfare. . . . It was the worst experience of my life. . . . I never dreamed that I, a middle class housewife, would ever be in a position like that. It was humiliating. . . . they make you feel it. . . . But we were desperate, and I *had* to feed my kids. You name it, I tried it—food stamps, soup kitchens, shelters. It just about killed me to have the kids live like that. . . . I finally called my parents and said we were coming. . . . we couldn't have survived without them.

WEITZMAN, *supra* note 2, at 339. Weitzman observes of other mothers:

In addition to scaled-down budgets for food ("We learned to love chicken backs") and clothing ("At Christmas I splurged at the Salvation Army—the only "new clothes they got all year"), many spoke of cutting down on their children's school lunches ("I used to plan a nourishing lunch with fruit and juice; now she's lucky if we have a slice of ham for a sandwich") and school supplies and after-school activities ("he had to quit the Little League and get a job as a delivery boy").

Id. at 340.

247. See Williams, *supra* note 19, at 2233-34.

248. See ARENDELL, *supra* note 2, at 17, 40; PETER J. CUNNINGHAM & BETH A. HAHN, 4 *THE FUTURE OF CHILDREN: CRITICAL HEALTH ISSUES FOR CHILDREN AND YOUTH* 24 (1994).

249. See Sanders Korenman & Jane E. Miller, *Effects of Long-Term Poverty on Physical*

divorced children experience inhibits their academic, social, and psychological development.²⁵⁰ In a two-year study of a random nationwide sample of 699 elementary grade children, Guidubaldi and Perry found that divorced children performed more poorly on nine of thirty mental health measures than children from intact families.²⁵¹ When these researchers controlled for income level of custodial households, the group of divorced children scored differently on only two mental health measures.²⁵² Divorced children living in families with inadequate income have high levels of anxiety and depression²⁵³ and perform more poorly at school.²⁵⁴ Research on the early

Health of Children in the National Longitudinal Survey of Youth, in CONSEQUENCES OF GROWING UP POOR, supra note 243, at 70, 71, 92 (noting that poverty during the prenatal period or during early childhood proves particularly detrimental to the health and development of children).

250. See Garrison, *Child Support Policy, supra note 2, at 157*. The negative effects of divorce on children prove unrelated to the child's age or stage of development at the time of divorce, with marital disruptions in adolescence proving as harmful as disruptions in early childhood. See McLanahan, *supra note 243, at 37*. Moreover, the time children spend in a single-parent household is not significantly related to children's well-being, and remarriage of the custodial parent does not mitigate the negative consequences for children of having lived in a single-parent household. See *id.*

251. See John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children: A Two-Year Follow-Up of a Nationwide Sample*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531, 533-44 (1985). Divorced children evidenced higher frequencies of dependency, irrelevant talk, withdrawal, blaming, inattention, decreased work effort, inappropriate behavior, unhappiness, and maladaptive symptoms. See *id.*

252. See *id.* Boys from divorced homes, however, performed lower on four mental health measures than boys from intact families. The only difference remaining between girls from divorced homes and girls from intact families concerned internal locus of control, a self-esteem measure. Girls from divorced households actually exhibited higher internal locus of control than did girls from intact families. See *id.* One mother illustrates how diminished financial status can affect a child's self-esteem:

I had \$950 a month, and the house payment was \$760, so there was hardly anything left over. So there we were: my son qualified for free lunches at school. We'd been living on over \$4,000 a month, and there we were. That's so humiliating. What that does to the self-esteem of even a child is absolutely unbelievable. And it isn't hidden; everybody knows the situation. They knew at his school that he was the kid with the free lunch coupons. . . . My son is real tall and growing. I really didn't have the money to buy him clothes, and attorneys don't think school clothes are essential. So he was wearing these sweatshirts that were too small for him. Then one day he didn't want to go to school because the kids had been calling him Frankenstein because his arms and legs were hanging out of his clothes—they were too short. That does terrible things to a kid, it really does. We just weren't equipped to cope with it.

ARENDELL, *supra note 2, at 49*.

253. See Greg J. Duncan et al., *supra note 241, at 407 (1998)*; William F. Hodges et al., *The Cumulative Effect of Stress on Preschool Children of Divorced and Intact Families*, 46 J. MARRIAGE & FAM. 611, 614 (1984) (explaining that children of divorced families with inadequate income had substantially higher levels of anxiety-depression); see also WEITZMAN, *supra note 2, at 354*.

254. Downey found that children in single-mother and single-father households performed equally well in school, but that both groups performed more poorly than did children from intact families. Economic deprivation explained the poor performance of children in single-mother households, whereas interpersonal deprivation explained the poor performance of

cognitive and physical development of children suggests that family income during the first five years of life correlates strongly with developmental outcomes in early and middle childhood.²⁵⁵ Family income in early childhood also exerts a strong influence on achievement and completed years of schooling.²⁵⁶ Family income also affects the academic achievement of adolescents.²⁵⁷ Moreover, the economic pressures experienced by low-income families frequently compromise the quality of the mother's parenting,²⁵⁸ which in turn undermines the self-confidence and achievement of adolescent children.²⁵⁹

children in single-father households. See Douglas B. Downey, *The School Performance of Children from Single-Mother and Single-Father Families*, 15 J. FAM. ISSUES 129, 144-45 (1994); see also McLanahan, *supra* note 243, at 37 (noting that income explains 50% of the difference in educational achievement of children raised in one- and two-parent families); Sara McLanahan, *Family Structure and the Reproduction of Poverty*, 90 AM. J. SOC. 873, 888-89, 897 (1985) (finding that the economic deprivation of white children living in single-mother households substantially diminished the children's success in school).

255. See Duncan et al., *supra* note 241, at 407. Low family income in early childhood negatively affects intelligence and verbal test scores and promotes behavior problems such as aggression, tantrums, anxiety, and moodiness. See Brooks-Gunn et al., *supra* note 241, at 10; see also Judith R. Smith et al., *Consequences of Living in Poverty for Young Children's Cognitive and Verbal Ability and Early School Achievement*, in CONSEQUENCES OF GROWING UP POOR, *supra* note 241, at 132, 164. The longer the child lives in poverty, the more detrimental are poverty's affects upon the child. See Brooks-Gunn et al., *supra* note 241, at 12; Smith et al., *supra*.

256. See Duncan et al., *supra* note 241, at 420; Garrison, *Child Support Policy*, *supra* note 2, at 157 & n.4; McLanahan, *supra* note 243, at 41; see also Jean M. Gerard & Cheryl Buehler, *Multiple Risk Factors in the Family Environment and Youth Problem Behaviors*, 61 J. MARRIAGE & FAM. 343, 356 (1999) (explaining that the association between poverty and youth problem behaviors may result from the lack of educational resources in the home, promoting academic failure that triggers misbehavior or emotional distress in school).

257. See Greg J. Duncan et al., *supra* note 241, at 409; Rand D. Conger et al., *Family Economic Hardship and Adolescent Adjustment: Mediating and Moderating Processes*, in CONSEQUENCES OF GROWING UP POOR, *supra* note 241, at 288, 307-10. Divorced children generally attain lower levels of education and economic achievement than children raised in intact families. See DOWD, *supra* note 6, at 25-26; WALLERSTEIN & BLAKESLEE, *supra* note 51, at 160 (noting that divorce chills the hopes, aspirations, and achievements of children); see also Paul R. Amato & Bruce Keith, *Separation from a Parent During Childhood and Adult Socioeconomic Attainment*, 70 SOC. FORCES 187, 193-98, 200, 202-03 (1991); Verna M. Keith & Barbara Finlay, *The Impact of Parental Divorce on Children's Educational Attainment, Marital Timing, and Likelihood of Divorce*, 50 J. MARRIAGE & FAM. 797, 798-99 (1988); Sheila Fitzgerald Krein & Andrea H. Beller, *Educational Attainment of Children from Single-Parent Families: Differences by Exposure, Gender, and Race*, 25 DEMOGRAPHY 221, 222-24 (1988).

258. Many divorced children live with financially and logistically stressed single parents who become less available to the children than before the divorce. See, e.g., ARENDELL, *supra* note 2, at 61-68, 155-56; DOWD, *supra* note 6, at 26; Amato & Partridge, *supra* note 184, at 316; Colletta, *supra* note 182, at 23-27; David H. Demo, *Parent-Child Relations: Assessing Recent Changes*, 54 J. MARRIAGE & FAM. 104, 110-11 (1992); Hetherington et al., *supra* note 94; Richards & Schmiede, *supra* note 219, at 280 fig.6. Not only must these children adjust to less contact with noncustodial parents, they also must cope with the diminished capacity and availability of custodial parents. See Bryan, *supra* note 3, at 1162-63 & nn.38-40.

259. See Duncan et al., *supra* note 241, at 409.

Growing up in a family with limited financial resources²⁶⁰ or in a family headed by a single parent²⁶¹ increases the risk of unemployment as young adults transition into the workforce.²⁶² Unemployment for Western youths produces many negative consequences, such as psychosocial and economic problems.²⁶³ Moreover, unemployed persons experience more conflict within their families, commit more crime, and suffer more mental health and psychological problems than do employed persons.²⁶⁴

Single-parent families move more frequently than do two-parent families,²⁶⁵ especially immediately after a divorce.²⁶⁶ Residential mobility negatively affects children's academic achievement, their behavior, and their educational attainment.²⁶⁷ Some explain that residential mobility lessens the "social capital" of children and adolescents. The social connections children and adolescents develop in their families and their communities encourage their cognitive and social development. Divorce can lessen the child's social capital by disrupting family relations and by precipitating a residential move that severs the child's bonds to the community.²⁶⁸ High degrees of environmental change also correlate with children's depression, social withdrawal, aggression, and delinquency.²⁶⁹

Residential mobility at divorce also can negatively affect a child if the child moves to a poorer neighborhood. Recent research suggests that children who remain with their mothers after divorce

260. See Avshalom Caspi et al., *Early Failure in the Labor Market: Childhood and Adolescent Predictors of Unemployment in the Transition to Adulthood*, 63 AM. SOC. REV. 424, 426, 438, 443 (1998).

261. See *id.* at 428, 438, 443.

262. Other factors also predict unemployment. Lack of a school certificate (the equivalent of an American high school diploma), low reading scores, family conflict, weak parental attachment, maleness, delinquent behavior, and poor physical health all play a role, see *id.* at 438, 443, so too do low intelligence, behavior problems during ages seven to nine, see *id.* at 439, 443, and difficult temperament during ages three to five. See *id.* at 440. Consequently, personal and family characteristics contribute to the employment potential of young adults long before they enter the labor force. See *id.* at 443.

263. See *id.* at 430-31.

264. See *id.* at 424.

265. See South et al., *supra* note 242, at 668.

266. See *id.* Multiple moves, undertaken for economic reasons, deprive children of familiar peers, neighborhoods, and schools. See DOWD, *supra* note 6, at 26; see also JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 183 (1980); Seltzer, *supra* note 93, at 245.

267. See South et al., *supra* note 242, at 669.

268. *Id.*; see also DOWD, *supra* note 6, at 26; WALLERSTEIN & KELLY, *supra* note 266, at 183; Seltzer, *supra* note 93, at 245.

269. See Lawrence A. Kurdek, *An Integrative Perspective on Children's Divorce Adjustment*, 36 AM. PSYCHOL. 856, 858 (1981).

experience a higher residential mobility rate than children in intact families,²⁷⁰ especially if their parents owned rather than rented the family home.²⁷¹ Moreover, these children frequently move to neighborhoods of lower economic status.²⁷² The negative impact of divorce on the child's family income largely explains the move to neighborhoods of lower economic status.²⁷³ Studies also indicate that the presence of poor neighbors, or the absence of affluent neighbors, correlates positively with children's lower educational attainment, school performance, and cognitive development.²⁷⁴

Conger et al. distill the argument embedded in the above paragraphs: "Financial security, independently of parental functioning, appears to influence children's ability to think effectively and perform well in an academic setting. To place children in seriously deprived economic circumstances creates enormous social risks by threatening to reduce the human capital necessary to maintain a globally competitive, modern society."²⁷⁵

Another compelling argument involves the social and financial expenditures states inevitably must make to respond to the consequences of divorce. Living in a poorer neighborhood decreases maternal warmth and increases the likelihood that a child will engage in early sexual activity and/or bear a child.²⁷⁶ Children living in poorer neighborhoods also engage in more delinquent behavior.²⁷⁷ An

270. See South et al., *supra* note 242, at 676, 686. The residential mobility rate for children who remain with their fathers after divorce, however, is slightly higher than for children who remain with their mothers. See *id.* at 677, 680. Moreover, divorced children who move with their custodial fathers tend to move to neighborhoods of lesser economic status than children who move with their custodial mothers. See *id.* at 677.

271. See *id.* at 669-70, 684-85, 686.

272. See *id.* at 682. Black children appear more vulnerable than white children to downward neighborhood mobility. See *id.* at 684.

273. See *id.* at 684, 686.

274. See *id.* at 669-70. Researchers consistently find that divorced children attain lower levels of educational and economic achievement than children raised in intact families. See DOWD, *supra* note 6, at 25-26; WALLERSTEIN & BLAKESLEE, *supra* note 51, at 160 (noting that divorce chills the hopes, aspirations, and achievements of children); see also Amato & Keith, *supra* note 257, at 193-98, 200, 202-03; Keith & Finlay, *supra* note 257, at 798-99; Krein & Beller, *supra* note 257, at 222-24.

275. Conger et al., *supra* note 257, at 309. Moir notes that if Wallerstein and Kelly are correct that more than one-third of divorced children are chronically impaired, and if one-half of our children experience the divorce of their parents, then one-sixth of our population will face a disabled adulthood because of divorce. See Donald S. Moir, *No Fault Divorce and the Best Interests of Children*, 69 DENV. U. L. REV. 663, 672 (1992).

276. See South et al., *supra* note 242, at 670.

277. See *id.*; see also DOWD, *supra* note 6, at 25-26 (noting that poverty in single-parent families correlates with children's criminal activity); Demo, *supra* note 258, at 110; Seltzer, *supra* note 93, at 238. Melton notes that "poverty accounts for the greatest portion of variance in

emphasis on the costs associated with the laws governing divorce might prove more attractive to male legislators than the equal rights of women.

I suggest a change in rhetoric, not in substance. Many feminist divorce reforms benefit children “and” women. A custody standard that rewards caretaking and encourages parental involvement with children benefits children as well as women. It would place the child with the parent who has shown a prior willingness to put the interests of the child before his or her own, and it would provide the needed continuity and stability in the child’s relationship with her caretakers.²⁷⁸ The standard also would encourage parental investment in children during marriage, because the law would protect that investment at divorce. Any financial reform that benefits divorced mothers also benefits the children for whom they care—as well as our collective good.

Changing feminist rhetoric from women’s rights and equality to collective good conflates women’s concerns with those of children and poses the risks identified above. Yet the pain and degradation so many women experience at divorce warrants some compromise. Conflating women’s concerns with those of children for purposes of divorce reform does not preclude feminists from promoting women’s rights and women’s equality to men. A different political strategy might promote these very concerns on the ground—if not in theory.

To effectuate reform, feminists must lobby legislators, and the task is not easy.²⁷⁹ Fathers’ rights groups bring formidable resources and political savvy to the legislative arena. They also speak to a sympathetic constituency of male legislators, some of whom identify strongly with their message. Yet if feminists mobilized the women

community rates of delinquency and child maltreatment, neighborhood quality accounts for much of the remainder.” Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2003 (1993) (citations omitted).

278. See Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 902-10 (1984); Jacobs, *supra* note 67, at 884-85.

279. Recent developments in West Virginia custody law illustrates that feminist legal academics can, at least, avert disaster. Recently, the West Virginia legislature rejected the primary caretaker presumption that the West Virginia Supreme Court established in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See Levy, *supra* note 134, at 558 n.54. Although they could not convince the legislature to retain the primary caretaker standard, several women legal academics at the University of West Virginia College of Law helped convince the legislature to abandon its preference for a presumption in favor of joint custody. Instead, the legislature adopted a version of the American Law Institute’s recommendations regarding custody standards.

and sympathetic men in their communities,²⁸⁰ disseminated information on how individual legislators voted, and put their collective political power behind reforms, legislators might feel compelled, even if reluctant, to respond. One purpose of this Essay is to convince feminists, especially feminist legal academics, that divorce issues warrant such an investment.²⁸¹

One more external obstacle requires mention. Judges as well as legislators influence the evolution of divorce law. Judicial bias and incompetence present a barrier to implementation of feminist reforms. Judges must receive specialized education on family issues, and only judges committed to family law should address divorce cases.

Because of the importance of divorce issues, the proposal that only qualified and committed judicial personnel should address them hardly seems arguable. But, of course, it is. Feminists must pressure legislatures and state supreme courts to reform their divorce courts, and to finance those reforms.

CONCLUSION

I do not here list every reform feminists must support or every barrier they must storm. Rather, I seek only to persuade feminists to overcome their theoretical differences, to recognize the importance of divorce issues to women and to the feminist movement, and to develop political and legal agendas that respond to women's narratives about divorce. Certainly feminists have effectively mobilized in other areas important to women.²⁸² I argue only that political and legal action in this area also deserves their collective effort. A woman's right to keep her child at divorce commands as

280. Even this task may prove difficult. Many women do not understand, until they live the experience, their vulnerability at divorce. Denial and false consciousness remain a problem for feminists to confront.

281. I do not mean to suggest that feminists have failed totally to lobby legislatures, but some efforts have resulted in laws insensitive to the needs of women. For instance, Fineman criticizes the middle- and upper-class professional women who helped persuade the Wisconsin legislature to enact an equal distribution property statute because the statute treated poor and working-class wives unfairly. See Fineman, *supra* note 108. Moreover, this Essay addresses feminist legal academics, not all feminists generally. Although undoubtedly some feminist legal academics have testified before legislatures on divorce issues, their political activism should intensify and more individuals should participate.

282. See, e.g., Littleton, *supra* note 147, at 23 n.34 (crediting Wendy Williams of Georgetown University Law School for her role in inducing Congress to amend the Family and Medical Leave Act to declare that discrimination on the basis of the bearing of and the birthing of children constituted discrimination on the basis of sex).

much or more respect as a woman's right to choose to abort.²⁸³

283. See Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW*, *supra* note 67, at 43, 43-44, 59-62 (noting the considerable feminist effort exerted on abortion issues); see also Bartlett, *supra* note 1, at 488-94 (discussing feminist contributions to reproductive rights).

